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Mah Sau Cheong v Wee Len @ Wai Shiang Liang

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCvC-800–03 OF 2022
ROZ MAWAR JC
22 MARCH 2023

C *Civil Procedure — Judgment — Foreign judgment — Enforcement of foreign judgment — Plaintiff applied for enforcement of Shanghai judgments due to non-compliance of defendant — Whether Shanghai Courts were courts of competent jurisdiction — Whether defence of public policy was unsustainable — Whether Shanghai judgments could be admitted as evidence*

D

Both the plaintiff and defendant were Malaysians residing in Kuala Lumpur, Malaysia. The defendant who was an employee of the plaintiff requested a loan which was given by the plaintiff the sum of RMB14m. The loan was paid by way of multiple instalments vide cash and bank transfers from the plaintiff through his companies ie Shanghai Xuanding Management Consulting Co Ltd and Shanghai Maoliqu Management Consulting Co Ltd to the defendant's personal bank accounts. A loan agreement was executed between the parties whereby: (a) the defendant to repay the loan to the plaintiff within two years; and (b) the forum and governing jurisdiction for dispute resolution was the court in Putuo District Shanghai, China. When the defendant failed to pay the loan, the plaintiff commenced a suit at the People's Court of Putuo District where it was ruled in favour of the plaintiff. Dissatisfied, the defendant lodged an appeal but the Second Intermediate People's Court of Shanghai, China ('the Shanghai Appellate Court') affirmed the finding and decision of the People's Court of Putuo District ('the Shanghai judgments'). The defendant had subsequently failed and/or refused to comply with the Shanghai judgments. Accordingly, the plaintiff filed this application for an enforcement of the Shanghai judgments in Malaysia. The plaintiff contended that the defendant resided in Kuala Lumpur and to the plaintiff's knowledge, there were no known assets of the defendants within the local jurisdiction of the courts in China. However, the plaintiff believed that the defendant had assets within the Malaysian jurisdiction. The defendant contested the application on the premise that the Reciprocal Enforcement of Judgments Act 1958 ('the REJA') did not apply to judgments by the Shanghai Courts; that the courts in China were not of competent jurisdiction accepted under the Malaysian common law.

Held, dismissing the application:

(1) The parties both agreed to contractually submit to the jurisdiction of the courts in Shanghai and for the laws there in China to govern their contract. Thus, the proper forum to adjudicate disputes that arose between them was indeed the Shanghai Courts. The defendant had not shown any vitiating factors like duress, undue influence, or misrepresentation in relation to the jurisdiction clause that could impugn its validity and enforceability. No exceptional circumstances had been established by the defendant. The mere fact that the Shanghai Courts may apply different procedures than a Malaysian court was not a sufficient basis to refuse to enforce a judgment from an agreed upon jurisdiction. Nor was the lack of reciprocal enforcement arrangements between China and Malaysia fatal, as common law allowed recognition of foreign judgments even in the absence of reciprocity. Systemic differences alone did not mean a court in China could never be considered a court of competent jurisdiction under common law principles, if it otherwise had valid jurisdiction over the specific case before it by reason of statute or residence of the parties of contractual submission. The defendant could not renegade his agreement and the whole process of legal proceedings already undertaken when the result was not in his favour (see paras 22, 24 & 26).

(2) The defendant's public policy contentions did not meet the high threshold required to refuse the enforcement of foreign judgment. The alleged prejudice that arose from different legal systems did not amount to breaches of natural justice. The defendant had a fair opportunity to present his case and thereafter his appeal before the Shanghai Courts. He had exercised his rights and the courts in Malaysia ought not reopen the merits of the dispute already determined by the Shanghai Courts. The defendant had failed to show dthe substantial justice required to engage public policy. Next, there was no evidence that the plaintiff was in the business of moneylending. The failure by the defendant to show that the plaintiff was in such a business led to the conclusion that the said contention was without basis. Lastly, the interest rates awarded by the Shanghai Courts did not sufficiently offend public policy to warrant refusal of enforcement of the Shanghai judgments. The Shanghai judgments were also not obtained by fraud. Nor were there any breach(es) of natural justice. The defendant was given a fair opportunity to present his case in the Shanghai Courts. Any procedural differences between the system in China and Malaysia did not amount to a denial of substantial justice. The proceedings at the Shanghai Courts did not violate the rules of natural justice. There did not seem to have occurred any irregularity of proceedings and the defendant had not managed to show it. Therefore, the defendant had not managed to raise any defences in s 5 of the REJA (see paras 28–31, 33 & 35–38).

(3) For the Shanghai judgments which were copies before the court to be admitted into evidence, and used by the court, s 78 of the Evidence Act 1950 ('the EA') must be adhered to. Or in the alternative, s 86 of the EA must be fulfilled. However, the Shanghai judgments did not comply with either s 78(1)(f) or s86 of the EA. The Shanghai judgments were barren of either of the legal requirements. Therefore, in the absence of the Shanghai judgments, the application could not be allowed (see paras 46–47 & 49).

[Bahasa Malaysia summary

Kedua-dua plaintif dan defendan adalah rakyat Malaysia yang menetap di Kuala Lumpur, Malaysia. Defendan yang merupakan pekerja plaintif meminta pinjaman yang diberikan oleh plaintif sejumlah RMB14 juta. Pinjaman itu dibayar melalui beberapa ansuran melalui tunai dan pindahan bank daripada plaintif melalui syarikatnya iaitu Shanghai Xuanding Management Consulting Co Ltd dan Shanghai Maoliqu Management Consulting Co Ltd ke akaun bank peribadi defendan. Perjanjian pinjaman telah dilaksanakan antara pihak-pihak di mana: (a) defendan membayar balik pinjaman kepada plaintif dalam tempoh dua tahun; dan (b) forum dan bidang kuasa mentadbir untuk penyelesaian pertikaian ialah mahkamah di Daerah Putuo Shanghai, China. Apabila defendan gagal membayar pinjaman, plaintif memulakan saman di Mahkamah Rakyat Daerah Putuo di mana ia telah diputuskan memihak kepada plaintif. Tidak berpuas hati, defendan membuat rayuan tetapi Mahkamah Rakyat Pertengahan Kedua Shanghai, China ('Mahkamah Rayuan Shanghai') mengesahkan dapatan dan keputusan Mahkamah Rakyat Daerah Putuo ('penghakiman Shanghai'). Defendan kemudiannya gagal dan/atau enggan mematuhi penghakiman Shanghai. Sehubungan itu, plaintif memfailkan permohonan ini untuk penguatkuasaan penghakiman Shanghai di Malaysia. Plaintif berhujah bahawa defendan menetap di Kuala Lumpur dan berdasarkan pengetahuan plaintif, tiada aset defendan yang diketahui dalam bidang kuasa tempatan mahkamah di China. Walau bagaimanapun, plaintif percaya defendan mempunyai aset dalam bidang kuasa Malaysia. Defendan membantah permohonan itu atas premis bahawa Akta Penguatkuasaan Penghakiman Bersaling 1958 ('APPB') tidak terpakai kepada penghakiman oleh Mahkamah Shanghai; bahawa mahkamah di China tidak mempunyai bidang kuasa kompeten yang diterima di bawah undang-undang am Malaysia.

Diputuskan, menolak permohonan:

(1) Kedua-dua pihak bersetuju untuk terikat secara kontrak kepada bidang kuasa mahkamah di Shanghai dan undang-undang di China untuk menentukan kontrak mereka. Oleh itu, forum yang sesuai untuk menyelesaikan pertikaian yang timbul antara mereka adalah mahkamah Shanghai. Defendan tidak menunjukkan sebarang faktor membatalkan seperti paksaan, pengaruh yang tidak wajar atau salah nyata berkaitan

klausa bidang kuasa yang boleh menafikan kesahihan dan kebolehkuatkuasaannya. Tiada keadaan luar biasa telah dibuktikan oleh defendan. Fakta bahawa mahkamah Shanghai mungkin menggunakan prosedur yang berbeza daripada mahkamah Malaysia bukanlah asas yang mencukupi untuk menolak untuk pelaksanaan penghakiman daripada bidang kuasa yang dipersetujui. Ketiadaan peraturan penguatkuasaan timbal balik antara China dan Malaysia juga tidak memudaratkan, kerana undang-undang am membenarkan pengiktirafan penghakiman asing walaupun tanpa timbal balik. Perbezaan sistemik sahaja tidak bermakna mahkamah di China tidak boleh dianggap sebagai mahkamah yang mempunyai bidang kuasa kompeten di bawah prinsip undang-undang am, jika sebaliknya mempunyai bidang kuasa yang sah ke atas kes tertentu di hadapannya berdasarkan undang-undang atau kedudukan pihak-pihak yang bersetuju. Defendan tidak boleh membatalkan persetujuannya dan keseluruhan proses prosiding undang-undang telah dijalankan apabila keputusannya tidak memihak kepadanya (lihat perenggan 22, 24 & 26).

(2) Pertikaian dasar awam defendan tidak memenuhi ambang tinggi yang diperlukan untuk menolak penguatkuasaan penghakiman asing. Prejudis yang didakwa yang timbul daripada sistem perundangan yang berbeza tidak dianggap sebagai pelanggaran keadilan semula jadi. Defendan telah diberikan peluang yang adil untuk mengemukakan kesnya dan kemudiannya rayuannya di hadapan mahkamah Shanghai. Dia telah melaksanakan haknya dan mahkamah di Malaysia tidak seharusnya membuka kembali merit pertikaian yang telah diputuskan oleh mahkamah Shanghai. Defendan telah gagal menunjukkan keadilan besar yang diperlukan untuk melibatkan dasar awam. Selanjutnya, tiada keterangan yang menunjukkan bahawa plaintif terlibat dalam perniagaan pinjaman wang. Kegagalan defendan untuk menunjukkan bahawa plaintif terlibat dalam perniagaan tersebut membawa kepada kesimpulan bahawa pertikaian itu tidak berasas. Akhir sekali, kadar faedah yang diberikan oleh mahkamah Shanghai tidak cukup melanggar dasar awam untuk membenarkan penolakan penguatkuasaan keputusan mahkamah Shanghai. Keputusan mahkamah Shanghai juga tidak diperolehi melalui penipuan. Dan tiada pelanggaran keadilan semula jadi berlaku. Defendan telah diberikan peluang yang adil untuk mengemukakan kesnya di mahkamah Shanghai. Sebarang perbezaan prosedur antara sistem di China dan Malaysia tidak dianggap sebagai penafian keadilan ketara. Prosiding di mahkamah Shanghai tidak melanggar peraturan keadilan semula jadi. Tidak kelihatan ada sebarang ketidakaturan dalam prosiding dan defendan tidak berjaya menunjukkan perkara tersebut. Oleh itu, tertuduh tidak berjaya membangkitkan sebarang pembelaan di bawah s 5 APPB (lihat perenggan 28–31, 33 & 35–38).

(3) Untuk keputusan mahkamah Shanghai yang merupakan salinan sebelum mahkamah diterima sebagai keterangan dan digunakan oleh mahkamah, s 78 Akta Keterangan 1950 ('AK') mesti dipatuhi. Atau sebagai alternatif, s 86 AK mesti dipenuhi. Namun, keputusan mahkamah Shanghai tidak mematuhi sama ada s 78(1)(f) atau s 86 AK. Keputusan mahkamah Shanghai tidak memenuhi mana-mana keperluan undang-undang. Oleh itu, tanpa keputusan mahkamah Shanghai, permohonan tidak dapat dibenarkan (lihat perenggan 46– 47 & 49).]

Cases referred to

Adams and others v Cape Industries plc and another [1991] 1 All ER 929; [1990] Ch 433; [1990] 2 WLR 657, Ch D (refd)

Hebei Huaneng Industrial Development Co Ltd v Shi [2022] 1 LRC 519; [2023] NZHC 2501, HC (refd)

Jasmine International Corp Ltd v Mexna Corp [2015] 8 CLJ 784, CA (refd)

MTU Services (Malaysia) Sdn Bhd v Boustead Naval Shipyard Sdn Bhd [2021] MLJU 3075; [2019] 1 LNS 1301, HC (refd)

Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9; [1979] 1 MLRA 313, FC (refd)

Pembinaan SPK Sdn Bhd & Anor v Conaire Engineering Sdn Bhd-LLC [2022] 2 MLJ 659; [2022] 3 MLRA 101, CA (folld)

Pendaftar Muallaf Wilayah Persekutuan v Lee Chang Yong & Ors and another appeal [2022] 1 MLJ 653; [2022] 2 MLRA 167, CA (refd)

PNG Oxygen Ltd v Lim Kok Chuan [2018] MLJU 283; [2018] 3 MLRH 343, HC (refd)

PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd [2021] MLJU 1063; [2021] MLRHU 763, HC (refd)

Royal Transport & Building Const Co LLC v Tidalmarine Engineering Sdn Bhd [2018] MLJU 1476; [2020] MLRHU 2217, HC (refd)

See Hua Daily News Bhd v Tan Thien Chin & Ors [1986] 2 MLJ 107; [1985] 1 MLRA 436, SC (refd)

World Triathlon Corp v SRS Sports Centre Sdn Bhd [2019] 4 MLJ 394; [2018] 5 MLRA 80, CA (refd)

Wynn Resorts (Macau) SA v Poh Yang Hong [2019] MLJU 2003, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 16(1)
Evidence Act 1950 ss 74(a)(iii), 78, 78(1)(f), 86, Chapter V
Moneylenders Act 1951 s 2
Reciprocal Enforcement of Judgments Act 1958 First Schedule

Ashok Kandiah (with Celine Teh) (Ashok Kandiah & Celine) for the plaintiff.
Justin Voon (with Tan Ko Xin and Lee Chooi Peng) (Justin Voon Chooi & Wing) for the defendant.

Roz Mawar JC:

ENFORCEMENT OF JUDGMENTS FROM SHANGHAI, THE PEOPLE'S REPUBLIC OF CHINA (CHINA)

[1] This originating summons (OS) is a consequence to the plaintiff's success in obtaining court judgments from a jurisdiction that both the plaintiff and the defendant had agreed on, which was to enforce the said judgments here on our shores.

[2] On 30 November 2020 the plaintiff obtained a final judgment from the Second Intermediate People's Court of Shanghai, China (the Shanghai Appellate Court) which is an appellate court in Shanghai, that affirmed the finding and decision of The People's Court of Putuo District, Shanghai, China dated 27 March 2019 (both of them collectively referred to as the 'Shanghai judgments'). Pursuant to the Shanghai judgments the defendant was ordered to repay the loan granted by the plaintiff in the sum of RMB14m with interest and case acceptance fees of RMB110,840 for each court respectively.

[3] Subsequent to the pronouncement of the Shanghai judgments, the defendant had failed and/or refused to comply with the Shanghai judgments until today. Accordingly, the plaintiff has sought this court for an enforcement of the Shanghai judgments.

[4] Both parties are Malaysians, both residing in Kuala Lumpur, Malaysia. The defendant was an employee of the plaintiff at the material time. In January 2011, the defendant requested a loan which was given by the plaintiff the sum of RMB14m from 17 January 2011 to 25 October 2013.

[5] The loan was paid by way of multiple instalments vide cash and bank transfers from the plaintiff through his companies (Shanghai Xuanding Management Consulting Co Ltd and Shanghai Maoliqu Management Consulting Co Ltd) to the defendant's personal bank accounts. The receipt of the loan given by the plaintiff to the defendant was not challenged.

[6] There was a loan agreement executed between the parties on 25 October 2013 ('first agreement') whereby the defendant agreed to repay the whole loan amount to the plaintiff before 25 October 2015 which was a time period of two years. Both parties had agreed that the forum and governing jurisdiction for dispute resolution between them if they could not settle any dispute amicably was to bring a suit to court in Putuo District Shanghai, China.

[7] When the defendant failed to pay as agreement by 24 October 2015, the plaintiffs solicitors drafted a second agreement ('second agreement') that

contained the purpose for the loan which was for the defendant to purchase a house for his son-in-law. The defendant's wife, daughter and son-in-law were also required to sign the second agreement of 26 February 2016. So, upon signing four copies of the second agreement, the defendant brought three copies to the family members to sign. One copy was left with the plaintiff. The defendant's family members had not signed the second agreement. The loan given by the plaintiff remained unpaid by the defendant.

[8] The plaintiff commenced a suit for which The People's Court of Putuo District, Shanghai, China found that the loan was valid, the first and second agreements were evidence of the RMB14m loan by the plaintiff to the defendant. It was found that there was no proof that the moneys were for the plaintiff's investment/advanced payment for Xianda (the defendant's defence).

[9] The defendant was to pay to the plaintiff the said sum within ten days from the date of the judgment which would be 6 April 2019. It was also ordered that the defendant pay within those ten days, to the plaintiff the outstanding interest on the loan at the lending rate of the Bank of China calculated from 25 October 2016 until the date of settlement. The case acceptance fees of RMB110,840 paid by the plaintiff shall also be borne by the defendant. Dissatisfied, the defendant lodged an appeal.

[10] The defendant's appeal was dismissed on 30 November 2020 when the Shanghai Appellate Court upheld the order and directed the defendant to pay the judgment sum of RMB14m. The defendant was also required to pay the outstanding interest on the loan at the base lending rate issued by the Interbank Financing Centre empowered by the People's Bank of China calculated from 25 October 2016 until the date of settlement. The case acceptance fees of RMB110,840 paid by the plaintiff shall also be borne by the defendant.

THE PLAINTIFF'S CONTENTION

[11] Failure by the defendant to pay the adjudged sum led to the plaintiff to apply to this court to enforce the Shanghai judgments here in Malaysia. In seeking that the defendant pay RMB14,221,680 as per the Shanghai judgments, the plaintiff averred that there were no further appeals by the defendant. He further averred that the Shanghai judgments are final, conclusive and enforceable in China. The plaintiff contended that the defendant had since left China and resides in Kuala Lumpur Malaysia (this was not disputed). To the plaintiff's knowledge, there are no known assets of the defendants within the local jurisdiction of the courts in China. However, the plaintiff believed that the defendant has assets within the Malaysian jurisdiction.

[12] The basis of the plaintiff's application to enforce the Shanghai judgments here in Malaysia included:

(a) the Shanghai judgments is final foreign monetary judgment given on merits by courts of competent jurisdiction;

(b) the Shanghai judgments were not obtained by fraud;

(c) the Shanghai judgments were not contrary to public policy; and

(d) the proceedings that resulted in the Shanghai judgments were not contrary to natural justice.

[13] Ultimately the plaintiff relied on cl 7 of the first agreement where the governing jurisdiction and forum for disputes is 'Putuo District Shanghai, People's Republic of China' and the Chinese laws shall apply. As both parties had agreed so, it was the plaintiff's submissions that the Shanghai Courts had proper jurisdiction to adjudicate the claims and disputes under the agreement.

THE DEFENDANT'S OBJECTION

[14] The defendant contested the application on the premise that the Reciprocal Enforcement of Judgments Act 1958 ('the REJA') does not apply to judgments by the Shanghai Courts; that the courts in China are not of competent jurisdiction accepted under the Malaysian common law. The defendant contended that the non-inclusion of the courts in China indicated the non-compatibility. It was highlighted to this court that there is no bilateral agreement between China and Malaysia on reciprocal recognition and enforcement of judgments. It was submitted that Malaysian judgments are generally not recognised and enforced in China save for some family and divorce matters limited to recognising the dissolution of marriage itself. The defendant implored this court that it would be inappropriate and without good basis for judgments from China to be recognised within Malaysia's jurisdiction.

[15] The defendant further argued that the justice systems are starkly different where in China it is inquisitorial based on the civil laws whilst in Malaysia it is the adversarial system based on common law. The defendant had also claimed that he was prejudiced as his defence was based mainly on oral evidence and he was not able to cross-examine the plaintiff and other witnesses. The defendant claimed that the trial judge was not able to consider the demeanour and/or credibility of witnesses.

[16] The defendant contended that the first and second agreements were shams and not genuine documents. There were representations made by the plaintiff that required oral testimony. Thus, the oral testimony of the plaintiff in court was critical. The defendant had further complained that his legal

counsel had informed him that the Shanghai Courts had only considered and decided his case based on the documentary evidence.

[17] In his objection to the plaintiff's OS, the defendant had procured an expert report from a lawyer who had six years' experience as a practising lawyer here before practising in China for the past 15 years. The defendant's expert was willing to testify in this court through the online platform 'Zoom' should this court requires so.

[18] It was the contention of the defendant that the Vice President of the Shanghai Appellate Court was investigated for contravening the laws, abuse of power and disciplinary issues. On that basis the defendant submitted that it involved fraud where there arose concerns in the Shanghai judgments being enforced in Malaysia.

[19] It was the defendant's complaint that the amount was grossly inflated and that the interest rates imposed were exorbitant. He prayed for the plaintiff's application be dismissed on the grounds of public policy or in the alternative, to convert this application which was made by way of originating summons into a writ action.

THIS COURT'S ASSESSMENT

[20] Appreciation must be accorded to both learned counsels for the parties. The arguments took over a considerable period. Through the lengthy submissions that witnessed the rallies of intellectual banter between them, they were always respectful and candid. As China is not listed in the First Schedule of REJA , this court embarked on the assessment of whether the Shanghai judgments may be enforced here in Malaysia by way of common law.

[21] Guided by the Court of Appeal's decision in *Pembinaan SPK Sdn Bhd & Anor v Conaire Engineering Sdn Bhd-LLC* [2022] 2 MLJ 659; [2022] 3 MLRA 101, this court acknowledged that the Shanghai judgments were orders for the payment of specific sum of money that was definite and final. The next assessment was whether the Shanghai judgments were issued by court of competent jurisdiction recognised under the Malaysian common law, in light of the arguments that the legal systems in China and Malaysia are incompatible and there was no reciprocity in recognition of judgments between the two countries. In other words, were the Shanghai Courts considered courts of competent jurisdiction.

Shanghai Courts were courts of competent jurisdiction

[22] The parties are Malaysians. Yet they both agreed to contractually submit to the jurisdiction of the courts in Putuo District, Shanghai and for the laws there in China to govern their contract. It was expressed in cl 7 of the first agreement which was also signed in China. Thus, the proper forum to adjudicate disputes that arose between them was indeed the Shanghai Courts. The defendant had not shown any vitiating factors like duress, undue influence, or misrepresentation in relation to the jurisdiction clause that could impugn its validity and enforceability.

[23] The Court of Appeal's decision in *World Triathlon Corp v SRS Sports Centre Sdn Bhd* [2019] 4 MLJ 394; [2018] 5 MLRA 80 ruled that generally our courts here in Malaysia would hold parties to their contractual bargain on choice of jurisdiction and governing law, unless there are exceptional circumstances amounting to strong cause to warrant otherwise. At p 402 of its judgment it was held:

> In the present appeal, just like the *American Express* case, the parties here had agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/USA. Now, the law in relation to exclusive jurisdiction or forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed (see *Flobus Shipping & Trading Co (Pte) Ltd v Taiping Textiles Berhad* [1976] 2 MLJ 154). Disregarding such a clause would effectively mean the courts condoning a breach of the agreement.
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> ...
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> So, to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction (see also the *Asian Plutus; Owners of Cargo Lately Laden On Board The Ship or Vessel Asian Plutus' v Owners and Other Persons Interested in The ship or Vessel Asian Plutus'* [1990] 2 MLJ 449 *The Vishva Apurva; Owners of and Other Persons Interested In the Ship or Vessel 'Kalidas' v Owners of Cargo Lately Laden On Board The Ship or Vessel Vishva Apurva'* [1992] 2 SLR 175; [1992] SGCA 32; *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322; *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; *and Nutri Milk Products Sdn Bhd v CMA CGM Malaysia Sdn Bhd & Anor* [2013] 8 MLJ 377).

[24] This court found no such exceptional circumstances had been established by the defendant. The mere fact that the Shanghai Courts may apply different procedures than a Malaysian court is not a sufficient basis to refuse to enforce a judgment from an agreed upon jurisdiction. Nor is the lack of reciprocal enforcement arrangements between China and Malaysia fatal, as the common law allows recognition of foreign judgments even in the absence

of reciprocity. The defendant's expert evidence indicated some concerning features of the judicial system in China compared to Malaysia's, such as the influence of the Chinese Communist Party and the lack of judicial independence. However, these systemic differences alone did not mean a court in China can never be considered a court of competent jurisdiction under common law principles, if it otherwise had valid jurisdiction over the specific case before it by reason of statute or residence of the parties of contractual submission. The defendant did not adduce clear evidence that the particular Shanghai Courts which heard this matter were in fact not competent due to political interference or lack of judicial independence in this specific case.

[25] The New Zealand High Court case of *Hebei Huaneng Industrial Development Co Ltd v Shi* [2022] 1 LRC 519; [2023] NZHC 2501 relied upon by the defendant is distinguishable. The expert evidence there indicated that the specific judgment in question had been improperly decided by a secret 'Judicial Committee' influenced by political considerations, rather that the judges who heard the case. Here, bi such direct impropriety has been shown in relation to the Shanghai judgments. Abstract allegations of lack of judicial independence in China as a whole carry less weight than evidence of actual irregularities in the specific court proceedings.

[26] It is this court's considered view that the defendant cannot renegade his agreement and the whole process of legal proceedings already undertaken when the result was not in his favour. He did not raise any objection for the commencement of the suit when the plaintiff had pursued it in The People's Court of Putuo District, Shanghai, China.

Because the Shanghai Courts were contractually agreed upon courts of competent jurisdiction for the said dispute between the parties, the Shanghai Courts are courts of competent jurisdiction. The general jurisdictional challenge mounted by the defendant after the fact, based on systemic differences between the legal systems in China and Malaysia is insufficient to refuse the enforcement of the Shanghai judgments in the absence of evidence of impropriety or irregularity in the specific proceedings.

The defence of public policy was unsustainable

[27] This court considered the three grounds that the defendant had highlighted were contrary to public policy. As observed above, firstly, the defendant contended that he was prejudiced in presenting his defences due to the procedural differences between the inquisitorial system used in China by the Shanghai Courts and the adversarial system applied here in Malaysia. Secondly, the defendant submitted that the loan agreements which formed the basis of the Shanghai judgments were in fact illegal moneylending transactions

when viewed under Malaysian law. Thirdly, the defendant claimed the interest rates imposed by the Shanghai Courts were exorbitant and exceeded the maximum rate allowed in Malaysia under s 16(1) of the Courts of Judicature Act 1964.

[28] The submissions by the plaintiff are accepted whereby the public policy contentions did not meet the high threshold required to refuse the enforcement of foreign judgment. This court is minded that the public policy ground must be construed narrowly and is only engaged where enforcement would *shock the conscience* or be *clearly injurious to the public good* — see *PT Sandipala Arthaputra v Muehlbauer Technologies Sdn Bhd* [2021] MLJU 1063; [2021] MLRHU 763.

[29] The alleged prejudice that arose from different legal systems did not amount to breaches of natural justice. The English Court of Appeal in *Adams and others v Cape Industries plc and another* [1991] 1 All ER 929; [1990] Ch 433; [1990] 2 WLR 657 made clear that a foreign judgment is not impeachable because the foreign court followed a procedure different from what is used in Malaysia. Even if the Shanghai Courts admitted evidence that would not be admissible in Malaysia, or the evaluation of evidence by the Shanghai Courts was questionable and led to a manifestly wrong conclusion, this does not trigger the public policy. The defendant had a fair opportunity to present his case and thereafter his appeal before the Shanghai Courts. He had exercised his rights and the courts in Malaysia ought not reopen the merits of the dispute already determined by the Shanghai Courts. The defendant had failed to show this court the substantial justice required to engage public policy.

[30] There was no evidence that the plaintiff was in the business of moneylending. The definition of moneylender under s 2 of the Moneylenders Act 1951 requires *the person to carry on or advertise or announce himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business.* The defendant could not avail to this when he had no evidence that the plaintiff was not in the business of moneylending. The loans given to the defendant were one-off loans at zero interest, as stated in their agreements. The Federal Court in *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9; [1979] 1 MLRA 313 held that not every moneylending transaction is illegal — it is only the business of moneylending that requires a licence. The failure by the defendant to show that the plaintiff was in such a business led to the conclusion that the said contention was without basis.

[31] On the alleged exorbitant interest rates, while the rates imposed by the Shanghai Court of around 10%pa after the judgment may seem high, this in itself is insufficient to refuse enforcement on public policy grounds. The Court of Appeal had enforced a Thai judgment with a 15% interest rate in *Jasmine*

International Corp Ltd v Mexna Corp [2015] 8 CLJ 784 holding that it did not violate public policy. Other cases such as *Wynn Resorts (Macau) SA v Poh Yang Hong* [2019] MLJU 2003 have permitted enforcement of foreign judgments with interest rates beyond what Malaysian laws allows. The interest rates in the present case were not so much higher than these precedents that it would shock the conscience of the court — see *Royal Transport & Building Const Co LLC v Tidalmarine Engineering Sdn Bhd* [2018] MLJU 1476; [2020] MLRHU 2217. This court viewed that the interest rates awarded by the Shanghai Courts did not sufficiently offend public policy to warrant refusal of enforcement of the Shanghai judgments.

[32] The defendant had not discharged the heavy burden of showing that this was one of those exceptional cases where enforcement of a foreign judgment should be denied for public policy reasons. The enforcement of the Shanghai judgments would not be contrary to the Malaysian public policy. The defendant's objections to the plaintiff's application on these grounds are overruled. Furthermore, they did not merit a conversion of the plaintiff's OS into a writ action.

[33] This court was additionally satisfied that the Shanghai judgments were not obtained by fraud. Nor were there any breach(es) of natural justice. All issues raised by the defendant were noted and considered — at both levels in both courts. The argument of the defendant that the contended investigation of the Vice President of the Shanghai Appellate Court had somehow rather tainted the Shanghai judgments is untenable and without merit. Aside from a mention of it, there is nothing to show the connection to sustain the defendant's suggestion. Such conjecture is dangerous to put forth. See *PNG Oxygen Ltd v Lim Kok Chuan* [2018] MLJU 283; [2018] 3 MLRH 343.

[34] Two points were raised by the defendant on the issue of alleged breaches of natural justice — one is the argument that the defendant was unable to properly present oral evidence and witness testimony to support his defences; he claimed that the loan agreements were a sham and there was an oral collateral agreement with the plaintiff. The defendant submitted that the inquisitorial procedure in the Shanghai Courts did not allow for an oral examination of witnesses, unlike the adversarial system in Malaysia, and that it prejudiced his ability to prove his defences. The second was that he alleged that the Shanghai Courts had failed to properly consider the evidence he had in fact submitted. He claimed there were discrepancies between the judgment at first instance and the appeal on whether new evidence had been adduced.

[35] Taking into account the facts averred, this court is in agreement with the plaintiff that the defendant was given a fair opportunity to present his case in the Shanghai Courts. Any procedural differences between the system in China

and here did not amount to a denial of substantial justice. Factually, there were no breaches of natural justice in the proceedings at the Shanghai Courts. It is well established that the defence of breach of natural justice in a foreign judgment enforcement action is a narrow one. This court is only concerned with the procedural fairness of the proceedings, not the substantive merits of the decision. The question is whether the defendant had a fair opportunity to present its case, not whether the foreign court — in this case the Shanghai Courts — came to the correct decision (see *MTU Services (Malaysia) Sdn Bhd v Boustead Naval Shipyard Sdn Bhd* [2021] MLJU 3075; [2019] 1 LNS 1301).

[36] Judged by this standard, this court is satisfied that the proceedings at the Shanghai Courts did not violate the rules of natural justice. Whilst the defendant claimed that he was prejudiced with his inability to call oral evidence and examine witnesses, the material before this court indicates that he did have the opportunity to present his defence and supporting evidence to the Shanghai Courts. The defendant exhibited various documents to the Shanghai Courts to support his case that the loan agreements were a sham, including the purported collateral agreement, correspondences between the parties, and evidence of the wider context of their joint investment in the project, these exhibits ran into hundreds of pages, covering the key aspects of the defendant's arguments.

[37] The fact that the defendant could not adduce evidence in the manner that a Malaysian court would have allowed, through oral testimony, did not mean that he was denied a fair opportunity to be heard. The voluminous evidence submitted by the defendant to the Shanghai Courts demonstrated that he had that opportunity. As with the findings in *PT Sandipala Arthaputra*, this court too find that there was no failure to observe natural justice by the Shanghai Courts. There does not seem to have occurred any irregularity of proceedings and the defendant has not managed to show it. Para 47 of *PT Sandipala Arthaputra* held:

> With regard to the defendant's counsel's complaints (ii) and (iv), this court is of the considered view that they do not go to the failure to observe the rule of natural justice. They are rather a criticism of the manner which the foreign court's judgment was presented. Again, the complaint (ii), touch on the evidence of the proceedings which is off limit for this court to consider.

[38] As at this point, the defendant had not managed to raise any defences in s5 REJA or those as held by the Supreme Court in *See Hua Daily News Bhd v Tan Thien Chin & Ors* [1986] 2 MLJ 107; [1985] 1 MLRA 436 were stated at p 109 (MLJ):

> In an action on the judgment at common law, one or more of the following defences may be raised — (1) that the foreign court had no jurisdiction; (2) that the

judgment was obtained by fraud; (3) that the judgment would be contrary to public policy, and (4) that the proceedings in which the judgment was obtained were opposed to natural justice.

Proof of Shanghai judgments

[39] The plaintiff had filed this OS in March 2022. At that time, the binding authority that guided this application was the Court of Appeal's decision in *Pembinaan SPK Sdn Bhd & Anor*. Thus, as expressed earlier in this court's grounds of decision above, where parties did not dispute the existence nor the contents of the Shanghai judgments, they can be admitted as evidence of the foreign judgments. Then in February 2023 the Federal Court, upon hearing the appeal of *Pembinaan SPK Sdn Bhd & Anor* had decided to overturn the judgments of the Court of Appeal and the High Court. The Federal Court's decision is published in *Pembinaan SPK Sdn Bhd & Anor v Conaire Engineering Sdn Bhd-LLC* [2022] 2 MLJ 659; [2022] 3 MLRA 101. Submissions at that point time were on-going and the learned counsel for the defendant had then raised this legal issue.

[40] There were no grounds of judgment by the Federal Court produced at that point in time. The learned counsel for the applicant submitted that in that case, the judgment itself was heavily disputed, which was not the case here. The plaintiff resisted the interpretation by the defendant of Federal Court's decision. Submissions were to be continued in August 2023 but a week before the hearing the plaintiff filed in an application for leave to admit a further affidavit that attached to it the original Shanghai judgments (with red seals evident) via encl 45. This court and the defendant were put on notice that the plaintiff may seek leave to file further evidence. Pertaining encl 45, the defendant objected to the application for leave to file in further affidavit to the OS. The defendant's submissions that the plaintiff's OS did not meet the legal criteria that included procedural requirements were not met had already been advocated at length and in depth to this court. The defendant had emphasised to this court that no legal force can be granted on copies not certified. Arguments on the main application/the plaintiff's OS were naturally stalled and focus was directed to encl 45. This court was tasked to decide on encl 45.

[41] This court deliberated the submissions of both parties and considered the timing of when the application was made. The plaintiff did not file it immediately after the pronunciation of the Federal Court's decision. He had taken the position that his application was proper and in order on the reason that the Shanghai judgments were not disputed by the defendant. It was repeatedly brought to the attention of this court by the defendant that as of March 2023 when submissions began, all parties had agreed that there were to be no more affidavits filed. Additionally, the defendant's protest to the

plaintiff's OS included that it was not the proper mode and that there was procedural non-compliance. After a careful consideration, prior to delivering its decision, this court questioned the plaintiff whether he would instead withdraw the entire OS and file the suit afresh. The answer was in the negative. This illustrated that the plaintiff was ready to proceed with his OS with or without the original Shanghai judgments. To ensure fairness, this court did not allow the plaintiff's application. It was only filed after much ado about it was made by the defendant. The grouse of the defendant depended on the Federal Court's decision that held at p 325:

> The Abu Dhabi judgment satisfied s 74 of the EA in being a public document. But for it to be admitted into evidence by the courts here, either an original copy of the judgment had to be produced or, if a copy was relied upon, then that copy had to be certified in accordance with s 78(1)(f) of the EA together with proof of the character of the document according to the law of the foreign country, in this case, of Abu Dhabi. Alternatively, the Abu Dhabi judgment was admissible if the requirements of s 86 of the EA were satisfied (see paras 23–26).

[42] Thus, this court opined that to allow the introduction of new evidence which was the original Shanghai judgments at that stage of proceedings, would be to allow the plaintiff to steal the march from the defendant. In this circumstance, whereby it was him who had flown the flag of procedural non-compliance, the defendant could not be robbed of that ammunition to proceed with his arguments. It would not be fair to proffer the plaintiff a gained advantage in the circumstances. Enclosure 45 was dismissed with costs of RM3,000.

[43] Hence, what remained before this court in terms of the Shanghai judgments were as exhibited in the plaintiff's affidavit in support of encl 2. They are copies in Mandarin with Chinese characters or Hanzi and translations into the National Language and the English Language. The said translations were carried out by one Ong Siew Kee, a retired interpreter of the Session and Magistrates Courts of Malaysia, Petaling Jaya.

[44] The Shanghai judgments are public documents under s 74(a)(iii) of the Evidence Act 1950 ('the EA'). For the purposes of the plaintiff's OS, the law now requires him to prove the Shanghai judgments which he could do by way of adducing the original or certified in the manner commonly use in that country for the certification of copies of judicial records — s 86 of the EA. The Shanghai judgments are sealed. This court noted that the seals are akin to the seals on the courts' judgments and orders in Malaysia. It is pertinent to note that there is no dispute of the Shanghai judgments and their contents. The plaintiff's legal action that resulted in the Shanghai judgments was mounted for a definite sum. All parties confirmed that the proceedings took place and

A the Shanghai judgments were meted after trial and appeal, not obtained in default.

[45] However, the recent decision by the Court of Appeal in *Pendaftar Muallaf Wilayah Persekutuan v Lee Chang Yong & Ors and another appeal* [2022] 1 MLJ 653; [2022] 2 MLRA 167 reminded vital doctrine of stare decisis at p 661 (MLJ):

> In determining the issue at hand, it is instructive to make reference to the trite principle of stare decisis and its application. There is a plethora of cases on this doctrine and the oft-quoted case is the Federal Court case of *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577, where Mohd Ghazali Yusoff FCJ lucidly explained the principle as follows:
>
> > [50] A precedent can be defined as a judicial decision which serves as a rule for future determinations in similar or analogous cases. A precedent or authority is a legal case establishing a principle or rule that a court or other judicial body adopts when deciding in subsequent cases with similar issues or facts. A precedent that must be applied or followed is known as a binding precedent. I would think that this court must follow its own proclamations of law made earlier on other cases and honour these rulings. After all, this court is the highest court in the country. The doctrine of precedent, a fundamental principle of English law, is a form of reasoning and decision making formed by case law. Precedents not only have persuasive authority but also must be followed when similar circumstances arise. Any principle announced by a higher court must be followed in later cases. In short, the courts are bound within prescribed limits by prior decisions of superior courts. Judges are also obliged to obey the set up precedents established by prior decisions. This legal principle is called stare decisis. Adherence to precedent helps to maintain a system of stable laws. Judicial precedent means the process whereby judges follow previously decided cases where the facts are of sufficient similarity. The doctrine of judicial precedent involves an application of the principle of stare decisis, ie, to stand by the decided. In practice, this means that inferior courts are bound to apply the legal principles set down by superior courts in earlier cases. This provides consistency and predictability in the law.

[46] This meant that for the Shanghai judgments which are copies before this court to be admitted into evidence, and used by this court here, s 78 of the EA must be adhered to. The provision of s 78(1)(f) of the EA is reproduced herein:

> public documents of any other class in a foreign country — by the original or by a copy certified by the lawful keeper thereof, with a certificate under the seal if a notary public or of a consular of Malaysia that the copy is duly certified by the officer having the lawful custody of the original and upon proof of the character of the document according to the law of the foreign country.

[47] Or in the alternative the Federal Court had held that s 86 of the EA

must be fulfilled, which is also reproduced herein for easy reference:

> Presumption as to certified copies of foreign judicial records The court may presume that any document purporting to be a certified copy of any judicial record of any country not being a part of the Commonwealth is genuine and accurate if the document purports to be certified in any manner which is certified by any representative of the Yang di-Pertuan Agong in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

[48] At the Federal Court, two of the six questions of law that were granted leave were answered in the negative. The result of which the other questions did not necessitate to be addressed. The other questions dealt with the defences posed in the case. With the case unproved, those questions pertaining to the said defences raised did not arise. The two said questions that were answered in the negative were:

(a) whether a foreign judgment is enforceable by a common law action in Malaysia (the foreign country not being a First Schedule country under the Reciprocal Enforcement of Foreign Judgment Act 1958 ('the REJA') if the judgment is not proved as a foreign judgment or order in accordance with the Evidence Act 1950; and

(b) in a common law action to enforce a foreign judgment not being a First Schedule country under REJA, without the foreign judgment being proved in accordance with Chapter V of the EA 1950 , whether there is a sustainable cause of action for other evidence to be admitted and weighed.

[49] Unfortunately for the plaintiff, the Shanghai judgments which were copies did not comply with either s 78(1)(f) or s 86 of the EA. The Shanghai judgments were barren of either of the legal requirements. They form the primary basis of the plaintiff's OS. Therefore, it must be ruled that in the absence of the Shanghai judgments, this application cannot be allowed.

THIS COURT'S ORDERS

[50] As it is imperative that the Shanghai judgments were proven in the manner prescribed, the plaintiffs application is dismissed. This court had considered whether it ought to grant the defendant's alternative prayer to convert the plaintiffs OS into a writ action. But as reasoned earlier, this court found that there were no triable issues. Prior to the Federal Court's decision, this court would have accepted the Shanghai judgments, even though the original copies were not exhibited. Now, the original Shanghai judgments must be produced. In the alternative the copies must comply with the relevant provisions of the EA.

[51] This court would have also accepted the translation of the Shanghai judgments. They are speaking judgments. The body of the judgments iterated the facts of the case and the arguments, including the defendant's arguments for his defence to the plaintiff's claim. The Shanghai Courts had considered, investigated the evidence and analysed with the conclusion that the moneys disbursed by the plaintiff (personally and through his companies) were a loan given to the defendant of which the defendant had not repaid. The defendant's allegation that the agreements were not genuine but shams have been accordingly dealt with. Therefore, the contention that the defendant was prejudiced with the justice system in China was without merits. So, there are no basis for any conversion of the plaintiff's OS into a writ action. The absence of the Shanghai judgments before this court results in the dismissal of the plaintiff's OS.

[52] In meting out justice, this court will not grant high costs for this case although the hearing of this OS was prolonged than the usual affair. This court is mindful that the award of costs is discretionary. The dismissal of the plaintiff's OS is due to the procedural irregularities as decided by the Federal Court in its decision recently pronounced. As observed, the Shanghai judgments were not denied and the plaintiff is still out of pocket trying to recoup the moneys he had loaned to the defendant. It has been five years since the date of the first judgment obtained in Shanghai China. In the circumstances, costs of RM3,000 which is deemed reasonable is awarded to the defendant.

Application dismissed.

Reported by Nabilah Syahida Abdullah Salleh