

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No. BVIHC (COM) 2022/0016

BETWEEN:

**(1) NAM TAI PROPERTY INC.
(a company incorporated in the British Virgin Islands)
(2) NAM TAI GROUP LIMITED
(a company incorporated in the Cayman Islands)
(3) NAM TAI INVESTMENT (SHENZHEN) CO LTD
(a company incorporated in the People's Republic of China)**

Claimants

-and-

**GREATER SAIL LIMITED
(a company incorporated in the British Virgin Islands)**

Defendant

Appearances:

Mr. Edward Davies QC, with him Mr. Nicholas Burkill of Ogier for the Claimants
Mr. Gerard Clarke, with him Mr. Andrew Emery of Emery Cooke for the Defendant

2022 March 1
March 14

JUDGMENT

[1] **JACK, J [Ag.]**: On 3rd March 2021 I gave judgment¹ after trial in a claim brought by an investment fund, IsZo Capital LP ("IsZo") against the current claimant ("Nam Tai"), a BVI company listed on the New York Stock Exchange. The other active defendant at the trial was the current defendant ("Greater Sale"), also a BVI company. I found that Nam Tai had been since 2017 in the *de facto* control of Kaisa Group Holdings Ltd ("Kaisa").

¹ IsZo Capital LP v Nam Tai Property Inc [2021] ECSCJ No 478, BVIHC (COM) 2020/0165) (3rd March 2021) (appeal dismissed [2021] ECSCJ No 714, BVIHMAP 2021/0010, 4th October 2021; stay pending appeal to the Privy Council refused 8th November 2021 [2021] ECSCJ No 754)

- [2] IsZo had served a requisition on Nam Tai to hold a shareholders' meeting. Instead of calling the meeting, the board of Nam Tai issued to Greater Sail, which was a wholly owned subsidiary of Kaisa, and to another company, further shares in Nam Tai under what is known as a PIPE, a private investment in public equity. The effect was to dilute the shares of the dissident shareholders, so that the change of directors sought by the requisition was very likely to fail.
- [3] I held that the PIPE was void. I ordered that Nam Tai hold a meeting of shareholders.
- [4] Following that judgment and an unsuccessful appeal to the Court of Appeal, Nam Tai did on 30th November 2021 hold a meeting of shareholders where the board was changed. All the Kaisa-affiliated directors were replaced with directors proposed by IsZo. In turn Nam Tai replaced the directors of its wholly-owned Cayman subsidiary, the second claimant ("NTG"). After that occurred, NTG changed the directors of its PRC subsidiary, the third claimant ("NTI"). It also dismissed Mr. Wang Jiabiao ("Mr. Wang") and Zhang Yu ("Ms. Zhang"), who had been senior executives of Nam Tai. Both were Kaisa affiliated.
- [5] What then occurred I can take from the summary in the claimants' skeleton for 31st January 2022:

"On 1 December 2021, the day immediately following the Special Meeting, [Greater Sail's] lawyers wrote on its behalf to the Bao'an Branch of Shenzhen Administration for Market Regulation ('the AMR') requesting it not to approve any changes with respect to its shares, legal representative and senior managers. The request was said to be needed to prevent any transfer of property and personnel by NTI before the proper resolution of the dispute which was said to arise out of the fact that NTI was involved in BVI proceedings and an HKIAC arbitration in which a provisional preservation order had been made and the Hong Kong Court had granted an injunction against NTP and in respect of which the letter complained a capital increase had been received by NTI.

On 9 December 2021, NTP made a public announcement that Mr. Yu had been appointed as the executive director, legal representative and signatory of NTI with effect from 1 December 2021.

On the same date, Mr. Yu and others representing NTI attended at NTI's premises in Shenzhen in order to secure the company's seals (or chops) and other assets and to take control of its premises and operations. Mr. Yu presented to Mr. Wang the materials showing the changes to the boards and management of NTP, NTG and NTI and also the letters of dismissal removing Mr. Wang and Ms. Zhang from their positions.

However, Mr. Wang refused to acknowledge the legitimacy of those documents, supposedly on the basis that they did not contain the corporate seals of the relevant companies. The reason that they did not contain the corporate seals was, of course, because they could not as Mr. Wang or others within NTI's former management had control of the seals and had not provided them to NTI's new management.

In the event, Mr. Wang refused to allow Mr. Yu and the other members of NTI's new management into NTI's offices or to conduct any hand over the assets and affairs of NTI.

Following this, a mediation took place at the Bao'an Branch of the Shenzhen Police Bureau. There Ms. Zhang sought to justify Mr. Wang's position by reference to an outdated copy of NTI's business licence which had not been updated to reflect the changes in the status of NTI's management, including the dismissal of Mr. Wang as the legal representative. The mediation concluded with an agreement by Ms. Zhang for there to be a further meeting with Mr. Yu on 13 December 2021. However, neither Mr. Wang nor Ms. Zhang attended the meeting on 13 December and no explanation for this failure to attend was (or has since been) given.

On 20 December 2021, [Greater Sail] applied to the Shenzhen Intermediate Court for freezing orders over certain of NTI's and NTG's assets, namely equity in NTI held by NTG representing a USD \$45m capital contribution and equity in Zastron Shenzhen held by NTI representing a RMB \$50 million capital. The Shenzhen Intermediate Court granted the relief sought by [Greater Sail] on 21 December 2021.

NTP's lawyers, JunHe, submitted an application for reconsideration to the Shenzhen Intermediate Court on 30 December 2021, but this was rejected by the Court on the basis that NTI's company seal had not been affixed to the document (which it could not have been whilst Mr. Wang and Ms. Zhang wrongly retained the seals) and that Mr. Yu's position as legal representative of NTI had not been registered with the AMR and so could not be verified (which registration [Greater Sail] and Mr. Wang had themselves objected to).

An attempt was made by NTI's new management to register the corporate changes in respect of NTI at the AMR on 24 December 2021. It was on

that occasion that they learned about [Greater Sail's] letter of 1 December 2021 asking the AMR not to register any changes in respect of NTI (referred to above) and also that the AMR had received a separate letter from Mr. Wang purportedly on behalf of NTI, stating that NTI's official seal and business license were appropriately kept by special personnel of NTI and the AMR should not permit the processing of any registration of NTI without his approval.

Neither Mr. Yu nor any other duly-appointed representative of the Claimants has seen the letter apparently sent to the AMR by Mr. Wang purportedly on behalf of NTI. However, if it makes the statements reported as having been made, it would be misrepresenting the position and constitute evidence of yet further efforts by Mr. Wang to frustrate the transfer of control to the New Board."

- [6] On those facts, I considered that the claimants had shown a sufficient case that Mr. Wang, Ms. Zhang and Greater Sail were all involved with a conspiracy orchestrated by Kaisa to prevent the new board of Nam Tai taking operational control of the PRC subsidiaries. The situation to date is that Mr. Wang and Ms. Zhang have still prevented the new board taking physical possession of NTI's premises in Shenzhen. NTI cannot defend itself in the Shenzhen proceedings brought by Greater Sail, because it still does not have access to the chops.
- [7] Mr. Clarke submits that the current actions should be stayed, because China is the more appropriate forum. The leading authority on *forum conveniens* in this jurisdiction is **IPOC International Growth Fund Ltd v LV Finance Group Ltd and others**,² where Gordon JA held:

"This jurisdiction has frequently had to deal with the principles that a trial judge should apply in exercising a discretion whether to stay proceedings on the grounds of *forum non conveniens*. As always the starting point is **Spiliada Maritime Corporation v Cansulex Ltd**,³ a decision of the House of Lords, the learning within which has on more than one occasion been accepted by this Court. In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord:

² [2006] ECSCJ No 4.

³ [1987] 1 AC 460.

(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.

(ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that 'where there can be pointers to a number of different jurisdictions' there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii) When considering whether to grant a stay or not, the court will look to what is the 'natural forum' as was described by Lord Keith of Kinkel in **The Abidin Daver**,⁴ 'that with which the action has the most real and substantial connection.' In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

(iv) If the court determines that there is some other available and *prima facie* more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the **Abidin Daver** made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement."

⁴ [1984] AC 398.

[8] When this matter was before me last week, I indicated to Mr. Carrington QC, who was then appearing on behalf of Greater Sail, that the evidence Greater Sail had adduced as to the cause of action relied on by Greater Sail in the Shenzhen proceedings was deficient. As a result, a further opinion dated 28th February 2022 was obtained from a Chinese law firm, Guangdong Shentianping. This says:

“Greater Sail Company considers, in the situation of Nam Tai Property’s additional share issuance act in Greater Sail Company being confirmed as invalid, Nam Tai Property intentionally applied USD 45 millions out of the shares’ Consideration, through Nam Tai Group’s capital increase, to pay to Nam Tai Investment, and Nam Tai Investment, through capital increase, to pay RMB 50 million out of the same to Zastron Electronic [another subsidiary], the abovementioned acts of Nam Tai Property, Nam Tai Investment and Zastron Electronic have seriously harmed the legitimate rights and interests of Greater Sail Company.

Article 985 of the **Civil Code of the People’s Republic of China** provides, “Where a person is unjustly enriched without a legal basis, the person who thus suffers a loss is entitled to request the enriched person to return the benefit, unless under any of the following circumstances: (1) the payment is made for performing a moral obligation; (2) the payment is made to satisfy an obligation not yet due; or (3) the payment is made to an obligation knowing that there is no obligation to pay”.

In the case that the BVI High Court has confirmed that the additional issuance of shares by Nam Tai Property to Greater Sail Company is invalid, the shares’ Consideration should be returned to Greater Sail Company; the act of Nam Tai Property, Nam Tai Investment and Zastron Electronic transferring Greater Sail Company’s shares’ Consideration has harmed the legitimate rights and interests of Greater Sail Company.”

[9] There is no analysis in these passages of how an unjust enrichment claim lies against NTI or Zastron. The payment of monies to Nam Tai under the PIPE transferred beneficial ownership of those monies to Nam Tai. The fact that Nam Tai subsequently invested the money in NTI and Zastron could not, as a matter of BVI law, give rise to an unjust enrichment claim against those two companies. How an unjust enrichment claim would lie as a matter of Chinese law is left unexplained by Guangdong Shentianping. Neither NTI nor Zastron have been unjustly enriched. Their share capital has increased, but with it a correlated obligation to the shareholder in each company. In my judgment, Greater Sail have failed to show an

arguable case in Chinese law against NTI or against Zastron in Shenzhen. Greater Sail have no claim against Nam Tai, because that claim is subject to a Hong Kong arbitration agreement and is currently being arbitrated.

- [10] Mr. Clarke submitted that all this was irrelevant. It was for the Shenzhen court to determine whether the claim brought by Greater Sail was a good one or a bad one. I agree that, if Greater Sail had an arguable claim, then this would be a potentially good argument. However, if the claim is unarguable, then all of Mr. Clarke's points about all the witnesses being in China, the relevant documents being in Chinese, the Chinese courts being better suited to determine issue about chops etc fall by the wayside.
- [11] In my judgment, Mr. Davies QC's two points are well made. Firstly, China is not an available forum. Because Mr. Wang (seemingly at Kaisa's behest as part of the arguable conspiracy to which Greater Sail was a party) is not releasing the chops, NTI cannot issue proceedings in China or defend itself in the existing Shenzhen action. That in itself is sufficient to determine the forum application adversely to Greater Sail.
- [12] Secondly, the current action is brought in support of the orders which I made in the **IsZo** action, as upheld on appeal. That is a very important consideration. This Court will protect the integrity of its own proceedings. Although Greater Sail did not initially comply with the order I made on 31st January 2022 that it serve a letter on the AMR, once the consequences of disobedience were brought forcibly to its attention, it did agree to comply. Mr. Clarke says on instructions that Greater Sail has now complied.
- [13] In my judgment this Court is the "natural forum" for ensuring that there is a proper handover of control from the old board of Nam Tai to the new board. On this ground too, I dismiss the forum application.

[14] I will hear the parties on costs and any consequential orders on 11th March 2022, when the contempt proceedings are listed.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar