PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited and Another [2001] SGCA 4

Case Number : CA 64/2000

Decision Date : 20 January 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Dr Lai Tze Chang Stanley and Koh Oi Leen Melissa (Lee & Lee) for the appellants; Koh Kok Wah and Chua Ju Lee Felicia (Wong & Leow) for the respondents

Parties : PT Hutan Domas Raya — Yue Xiu Enterprises (Holdings) Limited; Another

Conflict of Laws – Natural forum – Stay of proceedings – Applicable principles- Whether plaintiff having a personal or juridical advantage in Singapore a decisive factor- Whether prospect of conflicting decisions in different jurisdictions decisive- Question of convenience and expense

(delivering the judgment of the court): The present appeal raises the question of forum non conveniens and, in particular, as to the circumstances where the court, having determined that there is prima facie another forum which is more appropriate to hear the case, could nevertheless grant a stay of the action.

The facts

By Suit 1459/98, Yue Xiu Enterprises (`Yue Xiu`) and Linkeen Industries Ltd (`Linkeen`) brought an action against PT Hutan Domas Raya (`PT Hutan`) and Kho Teng Kwee [commat] Alex Korompis (`Kho`) in relation to the recovery of certain debts.

Yue Xiu and Linkeen are related companies, both incorporated in Hong Kong. PT Hutan is a company incorporated in Indonesia and is involved in the timber industry. Kho, an Indonesian citizen with Singapore permanent resident status, is the president and chief executive of PT Hutan. Kho is not involved in this appeal.

The facts giving rise to the action are largely not in dispute. By a memorandum dated 27 August 1992 and executed in Indonesia, PT Hutan acknowledged its indebtedness to Yue Xiu in the sum of US$9.23m and agreed to pay the same, plus interest, in monthly instalments stretching over some seven years from January 1993 to December 1999. By another memorandum of the same date, PT Hutan agreed to pay Linkeen the sum of US$68,750 per month for 84 months, commencing April 1989 in consideration of the continuing supply of logging equipment by Linkeen to PT Hutan. Both memoranda were signed by Kho on behalf of PT Hutan.

Furthermore, on the same day, as part of the same understanding, Kho executed two personal guarantees in favour of the respondents in respect of the sums which PT Hutan undertook to pay Yue Xiu and Linkeen under the two memoranda. The guarantees were expressed to be governed by Indonesian law.

Yue Xiu and Linkeen instituted the action on 26 August 1998 because they claimed that PT Hutan only made partial payments under the two memoranda and were thus in breach. They stated that, as of 1 August 1998, US$15,300,000 was outstanding from PT Hutan to Yue Xiu and US$2,976,623.52 to Linkeen. Kho is being sued as a guarantor.

Yue Xiu and Linkeen had no difficulty in serving the writ on Kho in Singapore. An appearance was duly entered by him. He did not apply for a stay of the action, which is now at the post-discovery stage, pending trial. However, service on PT Hutan was more problematic. Leave was obtained to serve the writ out of jurisdiction. The service was, however, set aside because it was not done through the Indonesian judicial authorities. A default judgment was also set aside.

On 21 February 2000, Yue Xiu and Linkeen re-served the writ on PT Hutan in Indonesia. The latter subsequently applied to set aside the service on the ground that PT Hutan had a good defence to the claim; alternatively, it asked for a stay of action on the ground of forum non conveniens.

In support of the application for a stay, Sofia Korompis [commat] Kho Sok Peng (`Sofia`), the Vice President of PT Hutan, who is also the daughter of Kho and a permanent resident of Singapore, stated in her affidavit that the two memoranda, which she asserted are governed by Indonesian law, are illegal and unenforceable under that law, because Kho had failed to obtain the consent of the Commissioner of PT Hutan before signing the documents on behalf of PT Hutan, as was required under that law. Furthermore, the memoranda did not specify the events of default and the procedure required to constitute default. However, she did not deny PT Hutan`s indebtedness to Yue Xiu and Linkeen under the terms of the memoranda. It should be mentioned that Kho adopted a similar stance in his defence besides contending that the guarantees were also unenforceable under Indonesian law.

Yue Xiu and Linkeen objected to any stay on the following main grounds: (i) the witnesses required for the defence will be the same as those required to testify on behalf of Kho. The witnesses will be here in connection with the action against Kho. Sofia was herself involved in procuring the performance of PT Hutan`s obligations under the two memoranda. Both she and her father (Kho) have extensive businesses in Singapore; (ii) there will be duplicity of proceedings and increased costs if the action against PT Hutan is tried separately from the action against Kho as the issues are substantially the same and will involve the same witnesses.

The assistant registrar made no order on the application to set aside the service out of jurisdiction. However, she granted a stay of the action against PT Hutan. On appeal by Yue Xiu and Linkeen, the decision of the assistant registrar was reversed and the stay order was discharged.

In coming to her decision, Judith Prakash J applied the principles enumerated in **The Spiliada; Spiliada Maritime Corp v Cansulex** [1986] AC 460. She took into account the following connecting factors,

(a) PT Hutan was incorporated, and carry on business, in Indonesia and does not maintain any presence in Singapore;

(b) the witnesses for Yue Xiu and Linkeen are not based in Singapore as they are Hong Kong companies;

(c) the memoranda relied upon by Yue Xiu and Linkeen were executed in Jakarta and governed by the laws of Indonesia;

(d) the claim in the action had no connection, let alone any real and/or substantial connection, with Singapore,in reaching the conclusion that Singapore could not be considered to be the natural forum for the disposal of the case, as the case has only a `slender` connection with Singapore. In this regard the judge recognised that, in terms of availability of witnesses, they would have to travel regardless of whether the trial was to be heard in Singapore or Indonesia. The witnesses of Yue Xiu and Linkeen are in Hong Kong but at least two of PT Hutan`s witnesses are resident in Singapore.

However, notwithstanding that she thought the factors enumerated showed that Indonesia is the more appropriate forum, she nevertheless concluded that it would be wrong to stay the action against PT Hutan on the following broad grounds:

(i) The proceeding in Singapore of the action against Kho is now at an advanced stage. There are similarities of issues between that action and the action against PT Hutan, and any stay would give rise to a real prospect of conflicting outcomes in courts in Singapore and Indonesia on the main issue of whether the memoranda are illegal and unenforceable under Indonesian law. This would be highly undesirable. In the circumstances, the interests of justice would require that the actions against PT Hutan and Kho should be heard in the same forum.

(ii) As the witnesses required to defend the action on behalf of PT Hutan will be largely the same as those against Kho, there will be no undue inconvenience or expense. In fact, two of their witnesses, Kho and Sofia, will be in Singapore. As regards expert witnesses, they can testify for Kho as well as for PT Hutan.

Appellants` case

In its submission before us, PT Hutan argued that the judge erred in her decision to refuse a stay, for these reasons:

(i) she failed to give sufficient consideration to the factors which pointed to Indonesia as the forum conveniens, particularly the fact that Indonesian law governed the two memoranda as well as the guarantees;

(ii) she failed to investigate whether a stay would deprive Yue Xiu and Linkeen of some advantage which they would obtain from a trial in Singapore;

(iii) she placed too much weight on the possibility of conflicting decisions from two jurisdictions;

(iv) she placed too much emphasis on the convenience to the parties, in terms of availability of witnesses, of having the claim against PT Hutan heard in Singapore;

(v) the fact that Kho did not challenge the jurisdiction of the Singapore court should not prejudice the position of PT Hutan.

The law

The authority which enunciated the principles governing a stay on the ground of forum non conveniens is **The Spiliada** [1987] AC 461. This court has in three recent cases the occasion to examine that authority and affirmed the principles declared therein: **Brinkerhoff Maritime Drilling Corp & Anor v PT Airfast Services Indonesia & Anor** [1992] 2 SLR 776 ; **Eng Liat Kiang v Eng Bak Hern** [1995] 3 SLR 97 and **Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd** [1998] 1 SLR 253 .

The Spiliada was a case concerning the granting of leave under O 11 r 1(1) of the Rules of the Supreme Court to serve proceedings out of the jurisdiction. But the House of Lords held that the principles governing the grant of such leave were the same as those applicable to a stay of English proceedings. The main judgment there was delivered by Lord Goff. The correct approach which a

court should take in such a case is as follows. The first stage is for the court to determine whether, prima facie, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action. The legal burden of showing that rests on the defendant. In determining that issue the court will look to see what factors there are which point in the direction of another forum as being the forum with which the action has the most real and substantial connection, eg availability of witnesses, the convenience or expenses of having a trial in a particular forum, the law governing the transaction and the places where the parties reside or carry on business. Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of Lord Goff, `there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions` (hereinafter referred to as `the unless question` or `unless proviso` as may be appropriate in the context). One such factor which would warrant a refusal of stay would be if it can be established by objective cogent evidence that the plaintiff will not obtain justice in the foreign jurisdiction. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceedings in Singapore is not decisive; regard must be had to the interests of all the parties and the ends of justice. We would emphasis that in determining the `unless question` all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.

Whether we consider the process contemplated by Lord Goff in ***The Spiliada*** to be a two-stage process or a one-stage process, telescoping two into one, as was suggested in the case **Charm Maritime Inc v Kyriakou** [1987] 1 Lloyd`s Rep 433 at 447, does not really matter. The ultimate question remains the same: where should the case be suitably tried having regard to the interest of the parties and the ends of justice.

We note that in PT Hutan`s submission it was stated that where `there are strong factors favouring Indonesia as the appropriate forum for trial then the Singapore court will order a stay of proceedings, in the absence of circumstances which militate against the grant of a stay.` It seems to us that was precisely the approach taken by the judge. First, she examined the relevant connecting factors to determine which jurisdiction would be more appropriate. Having come to the conclusion that Indonesia would be the more appropriate forum, she then went into the second inquiry to examine whether there were any circumstances which would make it wrong to grant the stay.

Personal or juridical advantage

What PT Hutan seems to be saying is that to determine the `unless question` in favour of the plaintiffs-respondents they must show that they would be deprived of some advantages which they would have otherwise obtained from a trial in Singapore, or, putting it in the reverse, that they would suffer an undue disadvantage if there is a stay and the trial held in the foreign jurisdiction. This, the respondents have not done. Instead, the judge seems to have concentrated on whether a trial in Singapore would inconvenience the parties. PT Hutan further submitted that even if having a trial in Singapore would give the respondents some legitimate personal or juridical advantage, this is not decisive.

PT Hutan also contended that the expression `circumstances by reason of which justice requires that a stay should nevertheless not be granted` in Lord Goff`s speech has been qualified by this court in ***Oriental Insurance*** (supra) to mean `taking into account a legitimate personal or juridical advantage accruing to the plaintiffs together with considering the interests of all the parties and the ends of

justice.`

It is true that this court had in ***Oriental Insurance*** remarked that the expression of Lord Goff was sometimes referred to as meaning a `legitimate personal or juridical advantage.` But we do not think it was intended thereby to curtail the full import of this expression. We must bear in mind what Lord Goff said in ***The Spiliada*** was that the fact that the plaintiff could show that he has a legitimate personal or juridical advantage in proceedings in UK (in our case, in Singapore), is not decisive. It does not mean from this that in order to persuade a court to rule in favour of a plaintiff on the `unless question` the plaintiff must show that he will obtain a personal or juridical advantage in having the proceedings heard in Singapore. One does not follow from the other. Lord Goff did not say that `personal or juridical advantage` is the only factor to be considered in the inquiry on the `unless question`. What he said is clear: `the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions.` There are no words of limitation in what he said. Illustrations should not be construed or mistaken to have a limiting effect. A circumstance which Lord Goff identified, and which would be compelling to warrant a refusal of a stay, is if the plaintiff could clearly show that he will not be able to obtain justice in that foreign jurisdiction. In any event, as would be apparent later, the respondents have, in fact, shown by the circumstances in this case, that they would have a personal or juridical advantage if the trial of the action against PT Hutan is to be held in Singapore.

Conflict of decisions

The main reason for the judge deciding against a stay was the prospect of a conflict of judgments if the action against PT Hutan is to be heard in Indonesia and that against Kho in Singapore. On this PT Hutan argued that Yue Xiu and Linkeen could sue Kho for payment under the guarantees without claiming for repayment from PT Hutan under the two memoranda. While that may well be true, to succeed even against Kho under the guarantees there will be a need to show that the two memoranda are valid and enforceable and it is on this question that there could be a conflict if the claim against PT Hutan is to be heard in Indonesia. In this regard we note PT Hutan`s contention that the prospects of conflicting decisions would be low as the defence raised by the parties on the memoranda relates substantially to procedural requirements. We doubt if one could seriously argue that just because an issue is procedural that it is any less likely to give rise to a difference of opinion. We do not think one could generalise based on such a distinction.

Convenience and expense

As regards the point on convenience and expense which the judge took into account, namely, that the same witnesses/experts could testify for both Kho and PT Hutan, while PT Hutan recognised that, it nevertheless argued that it should be allowed the flexibility to call other witnesses from Indonesia. It is not obliged to call the same experts as those called by Kho. While theoretically that is true, but practically, we very much doubt if there is really anything in that argument. The point regarding the validity and enforceability of the two memoranda, which is crucial, will be canvassed in the action against Kho as well as that against PT Hutan. There is no good reason why different sets of witnesses/experts should be called for the two actions in so far as they relate to the same issues. Indeed, on issues of fact, there could be no question of an alternative set of witnesses. Witnesses of fact must be those who were directly involved in the transaction and knew the facts.

Our conclusion

Having examined the grounds of judgment of the court below it is clear that the judge had not erred in principle. She had correctly applied the two-stage approach enunciated by Lord Goff in ***The Spiliada*** . While recognising that prima facie Indonesia is the more appropriate forum, she nevertheless for good reasons felt that this was a case where a stay should still be refused. Her main reason was a possibility of conflict of decisions if the two actions, which are so closely related, are to be tried in different jurisdictions and her secondary reason was that it would be convenient and less expensive if both actions were to be tried in the same forum. There are thus personal and juridical advantages to the plaintiffs-respondents in having both actions tried in Singapore.

The conclusion reached by Prakash J is wholly in line with the opinion expressed by the authors of ***Dicey & Morris, The Conflict of Laws*** Vol 1 (13th Ed, 2000) at [para] 12-027:

> *The case for a stay may also be overcome if to grant it would adversely affect the efficient conduct of litigation: in a case with multiple defendants,* ***if the result of one defendant`s obtaining a stay would be to force the claimant to bring his claim in two separate sets of proceedings, with the possible further consequence of inconsistent conclusions being reached by the two courts, it will not generally serve the interests of justice to order a stay****. [Emphasis added.]*

In **The El Amria** [1981] 2 Lloyd`s Rep 119 at 128, Brandon LJ put it in even stronger terms as to the undesirability of two actions raising common issues being tried in two jurisdictions:

> *I do not regard it merely as convenient that two actions, in which many of the same issues fall to be determined, should be tried together;* ***rather that I regard it as a potential disaster from a legal point of view if they were not, because of risk inherent in separate trials, one in Egypt and the other in England, that the same issues might be determined differently in the two countries****. [Emphasis added.]*

It is clear to us that in exercising her discretion to refuse a stay, the judge had taken into consideration all relevant circumstances, including the fact that the two memoranda and the two guarantees are governed by Indonesian law. She recognised that `as a rule, Singapore courts prefer not to rule on issues of foreign law.` But having weighed the special circumstances of this case, she felt the ends of justice would be better served if the actions against PT Hutan and Kho could be disposed of in the same forum. There would be no new issues to be disposed of in Indonesia. As the judge had not erred in principle, there is no basis for us to interfere in the exercise of her discretion. Indeed, we would have decided the same way.

In this regard, we have carefully considered the contention of PT Hutan that it should not be prejudiced by the position taken by Kho in not challenging the jurisdiction of the Singapore courts. But here, we must emphasise that there is a close relationship between Kho (and his daughter, Sofia) and PT Hutan. At all relevant times, as mentioned before, Kho and Sofia were the minds behind PT Hutan, Kho being the President and Sofia, the Vice-President. It seems to us that they were making it as difficult as possible for the respondents to serve the writ on PT Hutan. Sofia was involved from the beginning. She filed the affidavit in support of PT Hutan`s first application to set aside the service. No issue on jurisdiction was taken. After the writ was eventually re-served they then raised the jurisdictional point. But by then the action against Kho had moved on to a pretty advanced stage. If PT Hutan and/or Kho had seriously wanted a trial in Indonesia, they would have appointed solicitors to

accept service on behalf of PT Hutan and applied straightaway to have the action stayed on the ground of forum non conveniens.

PT Hutan placed considerable emphasis on an unreported decision of Amarjeet Singh JC in **Itochu Steel Asia Pte Ltd v CV Wira Mustika Indah & Ors** [2001] 1 SLR 98 where the action against the second defendant was stayed and that against the third defendant proceeded with, to contend that in our case there should similarly be a stay. The judge there gave `weighty consideration` to the fact that the transaction was governed by Indonesian law. But there, he was also satisfied that the second defendant genuinely desired a trial in Indonesia and was not seeking any procedural advantage. While there are similarities between the present case and Itochu Steel, it is important to note the differences. This was highlighted by the judge in ***Itochu Steel*** as follows:

> *However, I noted that the evidence required to establish a case against the second defendant and the issues were very different from those required to establish liability against the third defendant. The plaintiffs` case against the third defendant was largely based on the agreement made by him to pay for the goods through issue of bills of exchange against delivery of the bills of lading. On the other hand, the plaintiffs` case against the secondary liability of the second defendant depended not only on the third defendant`s liability being established and his defence rejected that he was only a conduit, a paying agent of the first defendants but also on the construction to be placed on the guarantees he issued in the light of his defences questioning the validity or enforcement of the guarantees as a result of the Indonesian matrimonial law provision and force majeure impacting on the guarantees.*
>
> *Plaintiffs` counsel`s further fear that in the event that the plaintiffs obtained judgment in Singapore against the third defendant, the plaintiffs would have to prove this aspect of the case again in Indonesia if and when the action was brought there against the second defendant was unfounded.* ***The second defendant had on affirmation in his affidavit undertaken or given his assurance that he would not challenge any judgment in proceedings in Indonesia which was obtained in Singapore against the third defendant. The plaintiffs` further fear that an Indonesian court was not bound to accept the Singapore court`s decision against the third defendant and may require the facts to be proved afresh concerning the liability of the third defendant was also unwarranted****. I concurred with the rational submission and opinion put forward by Laode, the second defendant`s expert witness that there would neither be probity nor any good reason for an Indonesian court not to accept the findings of fact and the judgment obtained against the third defendant in Singapore. The second defendant could also not contradict his affidavit made in Indonesia before Indonesian solicitors. His answers would have the effect of estoppel or in the nature of an estoppel. [Emphasis added.]*

It will be noted that in ***Itochu Steel*** the second defendant gave an undertaking that he would not challenge any judgment obtained in Singapore against the third defendant in proceedings in Indonesia. The undertaking no doubt played an important part in the determination of the court. The circumstances there were less compelling.

In the result, the appeal is dismissed with costs, with the usual consequential orders.

Outcome:

Appeal dismissed.