Bayerische Landesbank Girozentrale v Kong Kok Keong and another action [2002] SGHC 51

Case Number : Suit 948/2001, 947/2001, RA 250/2001, 249/2001

Decision Date : 19 March 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Lawrence Quahe (Harry Elias Partnership) for the defendants/appellants; Hri Kumar and Vinod Sabnani (Drew & Napier LLC) for the plaintiffs/respondents

Parties : Bayerische Landesbank Girozentrale — Kong Kok Keong

Conflict of Laws – Natural forum – Stay of proceedings on ground of forum non conveniens – Singapore law the governing law of agreement – Non-exclusive jurisdiction of Singapore courts – Application for stay – Whether court has discretion to grant stay in such circumstances – Circumstances where court will grant stay – Whether court has residual discretion to grant stay even where another forum more appropriate

: On 27 July 2001, the plaintiffs (`the bank`) commenced six actions against various defendants in Suits 942/2001, 943/2001, 944/2001, 946/2001, 947/2001 and 948/2001, claiming against each of them under loan contracts. Between 19 September and 29 October 2001, the six defendants in those suits filed applications to stay proceedings on the ground that the High Court of Malaysia sitting in Kota Kinabalu, Sabah, is the more appropriate forum to determine all issues between the parties.

All the parties involved in these six actions had agreed to be bound by the outcome of the application in Suit 948/2001. I shall hereafter concern myself with that suit, which pertains to the appeal in RA 250/2001. In that action the bank is claiming against the defendant (`Kong`) for the sum of US$4,301,135.74. This is the amount outstanding under a Multi-Currency Revolving Credit Facility (`the facility`) granted by the bank to Kong on or about 24 April 1997, together with all interest accrued thereon.

In SIC 2248/2001, Kong applied to stay the present proceedings on the ground of forum non conveniens. On 7 December 2001 the assistant registrar dismissed the application with costs fixed at $500 and Kong filed the present appeal. On 24 January 2002, I heard the appeal and dismissed it with costs. Kong has filed a notice of appeal to the Court of Appeal against the whole of my decision on 22 February 2002 and I now give my grounds of decision. The defendant in Suit 947/2001 has also filed a notice of appeal and the grounds in Kong`s appeal would apply, mutatis mutandis to that appeal.

Background

On 24 April 1997, Kong entered into a written agreement (`the agreement`) with the bank under which he was granted the facility, which was denominated in Malaysian Ringgit. On 27 October 1998 the facility was redenominated from Ringgit to US Dollar. On 8 January 1999, the bank`s solicitors wrote to Kong to say that the bank had decided to terminate the facility and demanded repayment by 22 January 1999 of the sum of US$3,525,602 outstanding on the facility as at 11 December 1998 plus interest and costs. No payment was made and on 3 July 2001 the bank`s solicitors wrote to Kong to demand payment of the sum of US$4,301,135,74 outstanding on the facility as at 30 April 2001, together with all interest accrued thereon. Again no payment was made and on 27 July 2001, the bank commenced this action.

In his defence, Kong pleaded that he had entered into the agreement as the agent or nominee of one Joseph Ambrose Lee (`Lee`). He said that the transaction was part of a scheme devised by Lee to raise cash from shares that he held in The North Borneo Timbers Bhd (`TNBT`). Under this scheme, Lee would sell 6m shares in TNBT to Kong at RM17 per share, amounting to RM103m. One condition of the sale was that Lee would grant Kong a put option over the shares, (ie an option to require Lee to purchase the shares from Kong) at RM21.25 within six months. Lee would be responsible for securing the funds for the transaction. Kong said that the agreement in respect of this scheme was governed by Malaysian law and the Malaysian courts have jurisdiction over all disputes that would arise.

In his affidavit, Kong said that one James Wong Teck Long (`Wong`), an employee of the bank at the material time, had assisted Lee in carrying out the scheme by arranging for Kong to obtain the facility from the bank. However, because the sum of RM103m was too large for a single borrower, Wong had suggested that Kong procure a number of persons who would enter into separate loan agreements with the bank. This would ensure that the bank`s exposure to each individual was within the bank`s limit. Pursuant to this, Kong enlisted various individuals, among them the defendants in the other five suits, to enter into loan agreements with the bank. Kong deposed that the loan was granted for the benefit of Lee and that it was subsequently disbursed and applied in Malaysia. He had pledged shares in various Malaysian companies as security for the facility.

The law

The bank`s position is that it is an express term of the agreement that the governing law is Singapore law and the courts here have non-exclusive jurisdiction. This is stated in condition 20 of the standard terms, which provides as follows:

> *Governing Law*
>
> *This agreement shall be construed and have effect in all respects in accordance with the laws of Singapore, and [Kong] hereby submits to the jurisdiction of the Singapore courts, but such submission shall not be construed so as to limit the right of the [bank] to commence proceedings in the courts of any other country ...*

Kong had alleged that he was not given a copy of the bank`s standard conditions in which condition 20 appears. However for the purpose of this appeal, Kong did not pursue this point without prejudice to his right to challenge it in any subsequent trial. Mr Quahe, counsel for Kong, expressed the issue in this appeal in this manner:

> *Whether in all the circumstances of the [case], this court should exercise its discretion and order a stay of proceedings notwithstanding the jurisdiction clause contained in clause 20 of the plaintiffs` standard terms and conditions ...*

In view of this, I shall proceed on the basis that condition 20 governs the agreement.

The law in respect of an application by a defendant to stay proceedings on the grounds of forum non

conveniens in breach of an agreement to submit to the jurisdiction of the courts of Singapore is set out in the Court of Appeal decision of **Bambang Sutrisno v Bali International Finance** [1999] 3 SLR 140 . The Court of Appeal stated at [para]9:

> *Where ... a defendant in breach of an agreement applies for a stay of proceedings on the ground of forum non conveniens or other similar ground, the court is not bound to refuse a stay but has a discretion whether to refuse a stay or not. The court in exercising its discretion should refuse a stay, and give effect to the agreement between the parties unless strong cause is shown by the defendant for a stay. In other words, the defendant must show exceptional circumstances amounting to strong cause for him to succeed in support of the application for a stay. In exercising its discretion the court should take into account all the circumstances of the particular case.*

In ***Bambang Sutrisno*** `s case the Court of Appeal granted a stay in view of the exceptional circumstances of the case, which showed that the Indonesian court was clearly and distinctly the more appropriate forum. There, the nine plaintiffs had sued the defendant under a personal guarantee in respect of a loan by the plaintiffs to eight companies. It contained a clause in which the defendant waived all objections `on the ground of venue or forum non conveniens` should the plaintiffs elect to sue him in any jurisdiction. The court viewed the following facts as relevant to their decision:

(1) Of the nine plaintiffs, two were Indonesian companies and seven were Hong Kong companies. None of them was resident or carrying on any business in Singapore.

(2) The defendant was an Indonesian whose only connection with Singapore was the fact that he was a permanent resident and had assets here.

(3) The subject matter of the claim had no connection with Singapore apart from the fact that the personal guarantee was executed by the defendant in Singapore.

(4) However the guarantee was expressed to be governed by Indonesian law with a submission to the non-exclusive jurisdiction of the District Court of Central Jakarta. Although jurisdiction was non-exclusive, its existence created a strong prima facie case that it was the appropriate one.

(5) There was the issue of the validity of the guarantee. It was given without the consent of the defendant`s wife and there was considerable dispute between the parties as to the effect of this on its validity under Indonesian law. If a stay were not granted, the Singapore court would have had to decide on complex issues of Indonesian law.

Mr Quahe submitted that the present case was not a simple loan recovery action and that an underlying transaction existed that made it inequitable for the plaintiff to seek to recover the monies in question from the defendant. He pointed out the circumstances of the case which strongly supported this contention and, for purpose of the present application, I am quite prepared to accept that there was such an underlying transaction. However, whether this affects the bank`s right to recover the sums claimed against Kong is a question for the court to determine. The crucial question is whether, in the circumstances of the case, there is another forum that is clearly and distinctly the more appropriate one for such adjudication.

Mr Quahe said that in order for Kong to prove his defence he would need to call Lee as a witness. However, Lee had been adjudged bankrupt in Malaysia and he would not be able to travel to Singapore to give evidence in a Singapore trial. Nor would he be a willing witness on Kong`s behalf. Kong would also require to call the defendants in the other suits as witnesses to prove that Wong had not sent the standard terms and conditions to them at the time when the facility letter was signed and that Wong had led Kong to believe that Malaysian courts had jurisdiction as the underlying transaction was inextricably linked to Kota Kinabalu. Kong and the other defendants had commenced proceedings in the High Court at Kota Kinabalu in order to resolve all the issues between the parties.

Mr Quahe also asserted that should the bank be successful in its claim in this suit, enforcement would have to be performed in Kota Kinabalu where the defendant was resident and therefore it would be more efficient to deal with all the matters of liability and enforcement at one and the same forum.

I did not think that the grounds submitted by Mr Quahe, nor the overall circumstances of the case, justified a finding that the Malaysian court was the more convenient forum. As concerns the calling of Lee as a witness it is for Kong to prove his defence and this is only one factor to be considered. On the other hand the bank had pointed out that Wong`s evidence was even more important to Kong than it was to the bank. Wong was no longer in the employ of the bank and if the trial were held in Sabah, it would be just as difficult to secure his attendance there. As for the defendants in the other suits, it was for Kong to secure their attendance and there did not seem to be any impediment to this apart from cost. And as to execution, it was a problem that would be faced by the bank; if the bank chose to sue in a jurisdiction that made enforcement more difficult, it is rather surprising that Kong should be the one to complain.

The transaction involves a bank operating in Singapore. The letter of offer by the bank specifically states that it is offered by the Singapore branch of the bank. Its address in Singapore is displayed on the letterhead, as well as the head office address in Germany. No Malaysian address is displayed. I cannot see how Kong could have obtained the impression that the agreement was governed by Malaysian law. If at all there was any doubt, it ought to have been dispelled by the last para at p 4 of the letter, in which there is a specific reference to a Singapore statute and which states as follows:

> *To enable us to conform to the requirements of the Banking (Amendment) Act 1993 (Cap 19) s 47, we are required to obtain the written consent of all customers to the disclosure by us to our head office ... .*

Clearly, Singapore is the most appropriate forum for the litigation in the present case. The primary factor is the fact that this case is governed by Singapore law and the parties had expressly submitted to the jurisdiction. In my opinion the circumstances do not justify exercising the discretion in his favour.

In **Eng Liat Kiang v Eng Bak Hern** [1995] 3 SLR 97 , the Court of Appeal held that even if the other forum were clearly the more appropriate one, the court still had a residual discretion to refuse the stay. The court said (at p 103G):

> *If, however, the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. The court in this respect will consider all the circumstances of the case.*

In the circumstances of the present case, justice clearly requires that the plaintiffs be permitted to proceed with the action in Singapore as the defendants had agreed that they are entitled so to do.

Outcome:

Appeal dismissed.

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