OCM Opportunities Fund II, LP and Others v Pt Indah Kiat Pulp & Paper Corporation and Another
[2008] SGHC 73

Case Number	: Suit 279/2006, 632/2004, RA 91/2008, 92/2008
Decision Date	: 15 May 2008
Tribunal/Court	: High Court
Coram	: Andrew Ang J
Counsel Name(s)	: Chong Chi Chuin Christopher and Teo Kelvin (Legal Solutions LLC) for the appellants/plaintiffs; Tan Gim Hai Adrian and Kwek Choon Yeow Julian (Drew & Napier LLC) for the first defendant; Pan Edric and Ng Hui Min (Rodyk & Davidson) and Lim Chong Boon (PKWA Law Practice LLC) for the second defendant
Parties	: OCM Opportunities Fund II, LP; OCM Opportunities Fund III, LP; Columbia/HCA Master Retirement Trust; Gramercy Emerging Markets Fund — Pt Indah Kiat Pulp & Paper Corporation; Indah Kiat International Finance Company BV

Conflict of Laws

15 May 2008

Andrew Ang J:

1 On the first defendant's application in Summons No 5034 of 2007 for specific discovery, an assistant registrar ("AR") ordered that the plaintiffs do, within 21 days, file and serve on the first defendant, *inter alia*, "all correspondence and communications between the plaintiffs in relation to the Bengkalis Action (hereinafter defined) and/or all proceedings and/or appeals in relation thereto". At the same hearing, the AR also dismissed the plaintiffs' application against the first and second defendants in Summons No 5425 of 2007 for specific discovery of all documents pertaining to the issuance of various notes and indentures. The plaintiffs appealed against both decisions made by the AR.

The factual background

2 The plaintiffs are judgment creditors and the defendants are judgment debtors under two judgments by the Supreme Court of the State of New York ("the New York Judgments"). The plaintiffs are seeking in Suit No 632 of 2004 and Suit No 279 of 2006 (consolidated pursuant to an Order of Court) ("the Consolidated Suits") to enforce the New York Judgments in Singapore. The subject matter of the disputes that resulted in the New York Judgments was debt notes ("the Indah Kiat Notes") issued by the second defendant which were in turn guaranteed by its parent company, the first defendant, and indentures ("the Indah Kiat Indentures") also issued by the second defendant.

3 Earlier, the plaintiffs sought to foreclose on the collateral in Indonesia in respect of the Indah Kiat Notes. In response, the defendants commenced an action in the District Court of Bengkalis ("the "Bengkalis Action") to invalidate the Notes. Subsequently, the District Court of Bengkalis declared, *inter alia*, that the Indah Kiat Notes were illegal and null and void. This was affirmed by the High Court of Riau and thereafter by the Supreme Court of Indonesia, which held, *inter alia*, that:

(a) the Indah Kiat Notes, Indah Kiat Indebtures and the collateral documents securing the Indah Kiat Notes were designed to evade tax obligations under Indonesian law; and

(b) the Indah Kiat Notes, Indah Kiat Indentures and the collateral documents securing the Indah Kiat Notes therefore violate the public policy and laws of Indonesia and, pursuant to Art 1320 of the Indonesian Civil Code, are illegal and null and void.

4 In the Consolidated Suits, the defendants are relying on, among other things, the Judgment of the Indonesian Supreme Court to oppose the enforcement of the New York Judgments in Singapore. In this regard, both defendants stated in their defences (Amendment No 1) at paras 32 and 33 that:

> 32 The enforcement and/or recognition of the New York Judgment would be and the Plaintiffs' claim is contrary to public policy since the object and intent of the Indah Kiat Notes and Indah Kiat Indentures breached and/or were designed to breach and/or evaded and/or were designed to evade the laws of Indonesia, which is a foreign and friendly state.
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> 33 Further and/or, alternatively, the plaintiffs and Gryphon agreed and/or accepted that the New York Judgment and/or the claim in the New York Proceedings and/or any dispute relating to the Indah Kiat Notes and/or Indah Kiat Indenture would be subject to re-examination in an Indonesian court and that they would be bound by the judgment and findings of the Indonesian courts and/or would be estopped from relying on the New York Judgment in the face of that judgment or finding of the Indonesian courts …

Registrar's Appeal No 91 of 2008

5 The subject matter of Registrar's Appeal No 91 of 2008 was the plaintiffs' application for specific discovery of:

> 1. All documents pertaining to the issurance of the Indah Kiat 02 Notes, Indah Kiat 06 Notes, Indah Kiat 02 Indentures and Indah Kiat 06 Indentures including but not limited to:
>
> a. All correspondence and communications exchanged between any of the following parties (collectively the "Relevant Parties"):
>
> i. P.T. Indah Kiat Pulp & Paper Corporation ("PTIK") (and/or their agents);
>
> ii. Indah Kiat International Finance Company B.V. ("IKBV") (and/or their agents);
>
> iii. Bank America National Trust Company (and/or their agents);
>
> iv. P.T. Fuji Bank International Indonesia (and/or their agents); and
>
> v. Morgan Stanley & Co. Incorporated (and/or their agents).
>
> b. All correspondence and communications between and of the Relevant Parties (and/or their agents) and the United States Securities and Exchange Commission ("SEC") and all documents filed and/or submitted by any of the Relevant Parties (and/or their agents) to the SEC.
>
> c. All legal opinions disclosed or provided by PTIK (and/or their agents) and IKBV (and/or their agents) to other parties.
>
> d. All correspondence and communications exchanged between the Relevant Parties and any third party or parties.

The aforesaid application for specific discovery was disallowed by the AR below.

6 The plaintiffs' position was that the documents sought by them would be relevant to the defendants' illegality defence and would shed light on the defendants' pleaded defence that "the object and intent of the Indah Kiat Notes and Indah Kiat Indentures breached and/or were designed to breach and/or evaded and/or were designed to evade the laws of Indonesia".

7 Before me, the first defendant argued that the Indonesian Supreme Court had already pronounced that the issuance of the Indah Kiat Notes was designed to evade Indonesian tax laws and violated the public policy and laws of Indonesia. That being the case, it made no sense for the plaintiff to re-open in the Consolidated Suits the issue of illegality under Indonesian law. Further, it was argued that the Singapore courts should not revisit an issue of Indonesian law and procedure, which had been dealt with under the Indonesian judicial system, and come to a different finding.

8 On the other hand, the plaintiffs submitted that a judgment of a foreign court did not automatically have a *res judicata* effect on a Singapore court; it may have such effect only if it was given recognition by a Singapore court. In support of this contention, the plaintiffs cited the following extract from Dicey, Morris & Collins, *The Conflict of Laws* vol 1 (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey & Morris*") at pp 579–580:

> A foreign judgment may be relied on in English proceedings otherwise than for the purpose of its enforcement. A claimant who has brought proceedings abroad and lost may seek to bring a similar claim in England; or in proceedings on a different claim an issue may be raised which has been decided abroad. In such cases a foreign judgment entitled to recognition may give rise to *res judicata*, i.e. to a cause of action estoppel, which prevents a party to proceedings from asserting or denying, as against the other party, the existence of a cause of action, the nonexistence or existence of which has been determined by the foreign court, or to an issue estoppel, which will prevent a matter of fact or law necessarily decided by a foreign court from being re-litigated in England.

9 In *Murakami Takako v Wiryadi Louise Maria* [2007] 1 SLR 1119, it was held at [40] that a foreign judgment entitled to recognition may give rise to *res judicata* or to an issue estoppel. Thus, the question of whether the Indonesian Supreme Court's Judgment was entitled to recognition by the Singapore courts would be critical in determining whether the issues of illegality and intent to evade Indonesian laws could be re-litigated in the Singapore courts. The difficulty here was that this issue of entitlement to recognition was not argued before me. In this connection, it should be noted that the fact that the defendants were not seeking to enforce the Indonesian Supreme Court's Judgment in Singapore was neither here nor there, given that the applicable test was entitlement to recognition as opposed to actual recognition or enforcement. In view of the foregoing, I am of the view that it would be premature for me to take a position on whether the Indonesian Supreme Court's Judgment gave rise to *res judicata* or an issue estoppel.

10 As it has yet to be established that the Indonesian Supreme Court Judgment (presently under review) raised an issue estoppel, I had little alternative but to assume, at least for the purposes of this appeal, that the issues of illegality as well as intent and design to circumvent Indonesian tax laws could be re-looked at by the High Court. In the premises, I agreed that some of the documents sought by the plaintiffs would be both relevant and necessary to the fair disposal of the matter, given that they could be essential to either refuting or confirming the defendants' pleaded defence that the Indah Kiat Notes were intended and designed to breach or evade Indonesian laws. I therefore allowed the plaintiffs' appeal in Registrar's Appeal No 91 of 2008 but limited the documents sought to be discovered to only those relevant to the issue of the legality or otherwise under Indonesian law of the

Notes and Indentures referred to in [5] above or any of them.

Registrar's Appeal No 92 of 2008

11 The subject matter of Registrar's Appeal No 92 of 2008 was the first defendant's application for specific discovery of "all correspondence and communications between the Plaintiffs in relation to the Bengkalis Action and/or all proceedings and/or appeals in relation thereto". The application was allowed by the AR at first instance.

12 The first defendant's position on this issue was that the documents would be needed to determine the extent of the plaintiffs' participation in the Bengkalis Action or whether the plaintiffs had submitted to the jurisdiction of the District Court of Bengkalis. Further, it was argued that the documents would be relevant to the plaintiffs' knowledge of the legal proceedings in Indonesia and their deliberate conduct in ignoring it. In Edwin Budi Laksono's fourth affidavit filed on 5 December 2007, he deposed on behalf of the first defendant that the communications between the plaintiffs could show whether there was a tactical decision made by the plaintiffs to evade and/or circumvent the decision of the District Court of Bengkalis by agreeing to deploy only the second plaintiff in the Bengkalis Action as a "test case". Counsel for the first defendant also stated in his written submissions that "the Plaintiffs' calculated conduct in evading the Indonesian proceedings and commencing the Singapore action to enforce the New York Judgment while arguing that the Indonesian proceedings lack jurisdiction is unconscionable and an abuse of process".

13 The plaintiff's position was that the first defendant's request for the documents was unnecessary as the plaintiffs had already agreed to provide discovery of documents and/or corporate records relating to the alleged service of the summons for the Bengkalis Action. Second, Todd Molz, deposing on behalf of the plaintiffs, had confirmed in his second affidavit filed on 3 January 2008 that the plaintiffs accepted that they had knowledge of the Bengkalis Action. Third, it was contended that there was no authority under Singapore or English law for the proposition that the appropriate test for the recognition and enforcement of foreign judgment *in personam* was the real and substantial connection test.

14 In *Dicey & Morris* at p 581, the learned authors noted, by way of footnote, that:

> But it may be an abuse of the process to attempt to relitigate in England an issue decided by a foreign court against one, but not both, of the parties to the English action: *Rayner v Bank für Gemeinwirtschaft AG* [1983] 1 Lloyd's Rep. 462 (CA). In *House of Spring Gardens Ltd v Waite* [1991] 1 Q.B. 241 (CA) it was held that an Irish judgment was enforceable against a judgment creditor, who (unlike his co-defendants) had not applied in Ireland to set aside the judgment for fraud. Since he was aware of the proceedings, he would be regarded as "privy" to them, and was bound by the determination of the Irish court that there had been no fraud in the absence of fresh evidence. Even if he were not estopped it would be an abuse of process and contrary to justice and public policy for the issue of fraud to be relitigated in England after the issue had been decided by the foreign court.

15 Thus, in my view, the above category of documents sought by the first defendant could potentially show that there was a general agreement among the plaintiffs to deploy only the second plaintiff in the Indonesian proceedings as a "test case". They could or would be relied upon to bolster the first defendant's case that the plaintiffs' avoidance of the proceedings in Indonesia was a calculated tactical manoeuvre and an abuse of process, and that the High Court should therefore disallow a relitigation of the issues raised in the Indonesian proceedings. It followed that the documents sought by the first defendant were relevant and necessary to the fair disposal of the

proceedings. In the circumstances, I dismissed the plaintiffs' appeal in Registrar's Appeal No 92 of 2008.

Conclusion

16 As the plaintiffs succeeded in Registrar's Appeal No 91 of 2008 but lost the appeal in Registrar's Appeal No 92 of 2008, the costs as between the plaintiffs and the first defendant here and below were netted off by consent. I allowed the plaintiffs costs against the second defendant in the appeal in Registrar's Appeal No 91 of 2008 in the sum of $1,500 and set aside the AR's costs order below.