OCBC Capital Investment Asia Ltd *v* Wong Hua Choon
[2010] SGHC 219

Case Number : Suit No 63 of 2010 (Registrar's Appeal No 151 of 2009)

Decision Date : 04 August 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : K Muralitherapany and Pey Jin Jie (Joseph Tan Jude Benny LLP) for the defendant/appellant; Edwin Tong and Tay Wei Wen Joseph (Allen & Gledhill LLP) for the plaintiff/respondent.

Parties : OCBC Capital Investment Asia Ltd — Wong Hua Choon

Conflict of Laws

4 August 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 This is an appeal by Wong Hua Choon ("the defendant") against the decision of the learned assistant registrar ("AR") in Summons No 749 of 2010, in which the latter declined to order a stay of the present proceedings commenced by OCBC Capital Investment Asia Ltd ("OCIA") against the defendant in favour of the courts of Malaysia.

Background

2 OCIA is an investment company incorporated in Hong Kong. It is part of the Oversea-Chinese Banking Corporation group of companies ("the OCBC Group") and has business operations in Singapore and Malaysia, *inter alia*.

3 The defendant is a Singapore permanent resident and was, at all material times, a substantial shareholder, president and chief executive officer of Frontken Corporation Berhad ("Frontken"). Frontken is a public company incorporated in Malaysia and its shares are listed on the Main Board of Bursa Malaysia Securities Berhad.

4 In June 2007, the defendant approached OCIA to participate in a placement exercise in respect of new shares in Frontken. To induce OCIA to do so, the defendant entered into a Risk Participation Agreement ("RPA") in his personal capacity with OCIA whereby he undertook to underwrite the downside risk of any fluctuation in the value of the Frontken shares placed out to OCIA.

5 The effect of the RPA was that if OCIA sold any of its shares in Frontken within a stipulated six-month period ("the Risk Participation Period") at a price that was below a stipulated "floor price", the defendant would be liable to OCIA in respect of such shortfall ("the Risk Participation").

6 OCIA invested approximately RM15m in the placement exercise and received a total of 27,630 shares in Frontken. The original Risk Participation Period was to be from 10 February 2009 to 10 August 2009.

7 In or around February 2009 (long before the RPA was due to expire), OCIA decided to dispose of all its Frontken shares and to look to the defendant for Risk Participation pursuant to the terms of the RPA. This intention was verbally communicated to the defendant during a meeting on 10 February 2009. OCIA also asked the defendant whether he would buy the shares since he had a right of first refusal to the same under the RPA.

8 The parties discussed a proposed purchase by the defendant of part of the Frontken shares held by OCIA, coupled with an extension of the Risk Participation Period in respect of any remaining shares that were not sold to the defendant.

9 On 16 June 2009, OCIA forwarded a term sheet setting out those proposals to the defendant and arranged for a meeting in Singapore on 23 June 2009 to discuss the same. At the meeting with the defendant, which was also attended by the defendant's assistant Nicholas Ng, the defendant gave his verbal acceptance of the terms thereof and his acceptance was further confirmed in an e-mail sent out the following day by the said Nicholas Ng.

10 In reliance on the defendant's acceptance of the term sheet, OCIA refrained from selling its shares in Frontken within the original Risk Participation Period and claiming the resulting Risk Participation from the defendant. This was because the term sheet placed a moratorium on OCIA claiming any Risk Participation before 1 July 2010 whilst extending the Risk Participation Period indefinitely for as long as OCIA held any of the placement shares.

11 However, after all the relevant formal documentation had been prepared, the defendant refused to follow through with signing of the agreement. Repeated requests to the defendant to execute the agreement were futile. OCIA therefore instituted Suit No 63 of 2010 ("Suit No 63") against the defendant on 29 January 2010.

OCIA's claim

12 By its action in Suit No 63, OCIA asserted:

(a) that a binding oral agreement on the terms of the term sheet had been reached between the parties pursuant to the meeting held on 23 June 2009 in Singapore; and

(b) alternatively, that the parties had a common understanding that the Risk Participation Period would be extended until the formal documentation in respect of the term sheet was executed, and that the defendant was estopped from asserting otherwise.

OCIA therefore sought declaratory relief to that effect and further consequential orders.

Defendant's stay application

13 On 19 February 2010, the defendant filed Summons No 749 of 2010 applying for a stay of the present action in favour of the courts of Malaysia. This was heard by the AR on 7 April 2010 and the stay of proceedings was subsequently refused. The defendant's appeal against the AR's decision then came before me.

The applicable clause of the RPA in relation to the substantive dispute

14 Clause 9.5 of the RPA provides as follows:

(a) This Agreement and the rights and duties of the parties hereunder shall be governed by, and construed and interpreted in accordance with, the laws of Malaysia and in relation to any legal action or proceedings arising out of or in connection with this Agreement ('Proceedings'), the parties irrevocably submits [*sic*] to the non-exclusive jurisdiction of the courts of Malaysia, and waive any objections to Proceedings in any court on the grounds that the Proceedings have been brought in an inconvenient forum.

(b) Such submission shall however not affect the right of OCIA to take Proceedings in any other jurisdiction nor shall the taking of Proceedings in any jurisdiction preclude OCIA from taking Proceedings in any other jurisdiction and OCIA shall be at liberty to initiate and take actions or Proceedings or otherwise against [the defendant] in Malaysia and/or elsewhere as OCIA may deem fit.

15 The defendant submits that a stay ought to be granted in the circumstances of this case in favour of the courts of Malaysia on the ground that the Singapore court is *forum non conveniens*.

The interpretation of cl 9.5

16 On behalf of OCIA, it was argued that, although under cl 9.5(a) the parties submitted to the non-exclusive jurisdiction of the courts of Malaysia, under cl 9.5(b) OCIA had the right to commence proceedings in any other jurisdiction. On a plain reading, this much was indisputable.

17 Counsel for OCIA then further argued that the waiver of objection in cl 9.5(a) was not limited to the Malaysian courts' jurisdiction but applied with respect to the jurisdiction of any court in which proceedings were brought by either party. On that basis OCIA applied the reasoning of the Court of Appeal in *Bambang Sutrisno v Bali International Finance Ltd* [1999] 2 SLR(R) 632 ("*Bambang*").

18 In *Bambang*, the parties had entered into an agreement to submit to the non-exclusive jurisdiction of the Indonesian courts and the agreement further contained a waiver of objection on the ground of venue or *forum non conveniens*. The waiver of objection clause was interpreted widely to cover objections on the ground of *forum non conveniens* with respect to any court, and not just those of Indonesia. Accordingly, the Court of Appeal held that the appellant was in breach of that agreement by having applied for a stay of proceedings on the ground of *forum non conveniens* and that, therefore, the court would refuse a stay and give effect to the agreement between the parties unless exceptional circumstances amounting to strong cause was shown by the defendant for a stay.

19 Counsel for OCIA contended that similarly in the present circumstances, the defendant was required to show exceptional circumstances amounting to "strong cause" why the stay of the Singapore proceedings ought to be granted.

20 On the other hand, the defendant's contention was that the waiver of objection in cl 9.5(a) applied only with respect to the jurisdiction of the Malaysian courts. It followed that there was no agreement precluding the defendant from objecting to OCIA's choice of Singapore jurisdiction on the ground of *forum non conveniens*.

21 I favour the latter interpretation for the following reasons:

(a) The juxtaposition of the waiver of objection in the very sentence in cl 9.5(a) by which the parties agree to the non-exclusive jurisdiction of the courts of Malaysia strongly suggests that it applies only to cl 9.5(a) and not to cl9.5(b).

(b) Although OCIA argued that the phrase "Proceedings in any court" in cl 9.5(a) meant that the waiver could apply to proceedings in any *jurisdiction*, the phrase more likely means "Proceedings in any *court" in Malaysia*. Had the parties intended the waiver to apply to Proceedings in any "jurisdiction", they would have used that word instead of "court". Significantly, in cl 9.5(b) the expression employed is "Proceedings in any other jurisdiction" lending support to the view that the word "court" was used advisedly in cl 9.5(a).

It follows that although OCIA had the right under cl 9.5(b) to take proceedings in Singapore, the defendant did not waive the right to object to the Singapore court's jurisdiction on the ground of *forum non conveniens*. In seeking to object to the Singapore court's jurisdiction, it would not be acting in breach of any waiver of objection. Accordingly, the test is not whether the defendant has shown strong cause for a stay as in *Bambang* ([17] *supra*), but whether, according to *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), the defendant has shown that the Malaysian court is clearly or distinctly more appropriate than the Singapore court for the trial of the action.

The appropriate test in determining *forum non conveniens*

22 Prior to *Spiliada*, the basic principle appeared to be that a stay would only be granted on the ground of *forum non conveniens* where the court was satisfied that there was some other available forum, having competent jurisdiction, which was the appropriate forum for the trial of the action, *ie*, in which the case might be tried more suitably for the interests of all the parties and the ends of justice. However the House of Lords in *Spiliada* decided that that principle gave too large a prominence to the "legitimate personal or juridical advantage" to the plaintiff in the continuance of the proceedings (see: Dicey, Morris and Collins on *The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) at para 12–010 ("*Dicey, Morris and Collins"*)).

23 Lord Goff of Chieveley in *Spiliada* held that the burden resting on the defendant is not just to show that the present forum is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the present forum (see *Spiliada* at 477).

24 Thus the test which is elucidated in *Spiliada* is twofold:

(a) the defendant must show that there is another court with competent jurisdiction which is clearly or distinctly more appropriate than the present forum for the trial of the action; and that

(b) it is not unjust that the plaintiff be deprived of the right to trial in the present forum.

(See rule 31(2) in *Dicey, Morris and Collins* at para 12R–001.)

25 The test as laid down directed the enquiry into whether a particular court was clearly more appropriate than another, and not to a search for the "natural forum" as such (see *Dicey, Morris and Collins*, at para 12–005).

26 The key question is not one of convenience but, rather, is of the suitability or appropriateness of the relevant jurisdiction (see *Spiliada* at 474). It was decided in *Clements v Macaulay* [1866] 4 Macph 583 Scot that the true object of the doctrine was to find the forum which was the most suitable for the ends of justice and was preferable because pursuit of the litigation in that forum was more likely to secure those ends.

27 Under the first limb of the test, the defendant would need to show factors which point to another forum that is clearly more appropriate for the trial of the action. This would be a forum with which the action had "the most real and substantial connection" (*Spiliada* at 478).

28 Factors such as those affecting convenience or expense, governing law, as well as the places where the parties respectively reside or carry on business would be of assistance.

Whether the defendant should be allowed a stay of proceedings

29 On a balance of factors, it is thus necessary to decide if the defendant has discharged his burden of proving that Malaysia is *prima facie* clearly and distinctly a more appropriate forum for the action to take place.

30 It should be noted that in weighing the balance of convenience under the doctrine of *forum non conveniens*, the process should not be a mechanical one (see *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377) and this was elucidated by V K Rajah J in *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 where at [20] he held:

> A court has to take into account an entire multitude of factors in balancing the competing interests. The weightage accorded to a particular factor varies in different cases and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix. Copious citations of precedents and *dicta* are usually of little assistance and may in reality serve to cloud rather than elucidate the applicable principles.

31 Further, in the case of *Andre Ravindran S Arul v Tunku Ibrahim Ismail bin Sultan Iskandar Al-Haj* [2001] SGHC 209, Choo Han Teck JC held that the determination of the appropriate forum is not an exercise carried out merely by adding the sum total of all the relevant connecting factors and that the court has to apportion a value to each factor and consider its place in the overall picture.

32 The defendant submits that his strongest grounds as to why Malaysia has a closer and more substantial connection to the action, and therefore is a more appropriate forum, are as follows:

(a) the governing law is that of Malaysia;

(b) there was an express choice of Malaysia as a non-exclusive jurisdiction; and

(c) the witnesses are mostly in Malaysia.

I shall now look at these factors in turn.

Governing law

33 It is undisputed that the RPA stipulates the governing law as that of Malaysia and that the basic rule is that a contract is governed by the law chosen by the parties (see *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583). Nevertheless, *Dicey, Morris & Collins* at p 478, para 12–029 states that where legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance (see *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK* [2004] 1 Lloyd's Rep 594 at [36] and *Navigators Insurance Co Ltd v Atlantic Methanol Production Co LLC* [2004] Lloyd's Rep IR 418 at [48] where this statement of principle was accepted by David Steel J.

34 Further, in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977–1978] SLR(R) 112, it was stated that there was no evidence before the court that Indonesian law differed from Singapore law in any significant respect concerning matters relating to the claim or that there was likely to be any serious dispute on the application of Indonesian law to the issues in the case. In addition, it was highlighted that there was no material to show that a Singapore court would have any difficulty in applying Indonesian law should the need arise, and thus that the court would attach little weight to this factor. This was also reiterated in the case of *CIMB Bank Bhd v Dresdner Keinwort Ltd* [2008] 4 SLR(R) 543 ("*Dresdner*").

35 In addition, in *Malayan Banking Berhad v Measurex Engineering Pte Ltd* [2001] SGHC 5 ("*Malayan Banking Berhad*"), it was decided that there was no material difference between Malaysian law and Singapore law on guarantees and contracts, and that even if there was such a difference, there was no reason why the Singapore courts would not be able to apply Malaysian law. Thus, the chosen applicable law had little significance.

36 It could be said that Malaysian and Singapore law are ultimately very much similar in respect of the subject matter which arises in the present case, namely:

(a) whether a binding contract had been formed between OCIA and the defendant as per the terms of the term sheet and the effect of the same on the defendant; and

(b) whether the defendant was estopped in the circumstances from denying that the Risk Participation Period had been extended.

37 Further, the opinion of a Malaysian counsel, furnished as expert evidence by OCIA, was that with respect to the issues in question, the law in Malaysia followed principles of English common law as (I note) does Singapore law. In such a situation, the Singapore court would be able to apply Malaysian law without the aid of foreign experts and there would neither be unnecessary expense nor inconvenience. Therefore, following the same reasoning as in *Malayan Banking Berhad*, the choice of Malaysian law as the governing law in the present instance would be of little significance.

38 The defendant's counsel argued that this reasoning should only apply where there was already a preponderance of factors (except for the governing law) in favour of the jurisdiction where the action was commenced.

39 I find no merit in this argument. The reasoning was brought up in *Dresdner* ([34] *supra*) as a counter to the applicable law factor, rather than merely as a tipping point added on to a preponderance of factors in the application of the *Spiliada* test.

Choice of non-exclusive jurisdiction of the Malaysian courts

40 In the case of *Bambang* ([17] *supra*), it was held that the court should give some weight to the non-exclusive jurisdiction clause in favour of the Indonesian court even though it was not exclusive and gave a right to the parties to institute proceedings in any other jurisdiction they may deem fit. This was so as it indicated that the parties considered the Indonesian court to be an appropriate forum for the hearing of their dispute.

41 The Court of Appeal approved a statement by Lai Siu Chiu J in *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 ("*Guthrie*") in which the learned judge held at [64]:

> ... in my opinion, the presence of a non-exclusive jurisdiction clause specifically choosing Indonesia as a forum for trial of the action showed that, *prima facie*, the parties had agreed that Indonesia would be an appropriate forum for the trial of the action than elsewhere. Jurisdiction agreements, though they may be non-exclusive in nature, should be respected and, when possible, upheld. Of course, there may be other fori in which an action concerning a breach of the 1st JVA may be brought, but Indonesia would clearly be an appropriate forum for the trial of an action arising out of a breach of the 1st JVA. So the parties have agreed. **The plaintiffs should not be heard to argue that Indonesia would not be appropriate forum for the trial of this action**. ... [emphasis in bold]

The learned judge had relied on two passages in the judgment of Hobhouse J in *S & W Berisford Plc v New Hampshire Insurance Co* [1990] 2 QB 631. In that case, Hobhouse J said at 638:

> ... I conclude that this clause is not an exclusive jurisdiction clause. As I pointed out in *Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd* [[1989] BCLC 660; 5 BCC 207] such a conclusion does not mean that the cause ceases to be relevant in relation to an application such as that which is being made by the defendants on this summons. If the contract says that the assured is entitled to sue the underwriter in the English courts, then **it requires a strong case for the courts of this country to say that that right shall not be recognised and that he must sue elsewhere**. ... [emphasis in bold]

He later said at 646:

> [A]s pointed out in *Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd*, 11 July 1989, the fact that the parties have agreed in their contract that the English courts shall have jurisdiction (albeit a non-exclusive jurisdiction) creates a strong *prima facie* case that that jurisdiction is an appropriate one; **it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate**; they have both implicitly agreed that it is appropriate. [emphasis in bold]

42 It will be observed that in each of the authorities, the court was merely saying that where the parties had agreed that a particular forum was to have non-exclusive jurisdiction, one party cannot be heard to argue that that forum was inappropriate. Thus in *Guthrie*, the key sentence in the passage quoted from Lai J's judgment was: "The plaintiffs should not be heard to argue that Indonesia would not be appropriate forum for the trial of this action."

43 Likewise, in Hobhouse J's judgment, the key sentence is that in which the learned judge said at 646:

> ... the fact that the parties have agreed in their contract that the English courts shall have jurisdiction (albeit a non-exclusive jurisdiction) creates a strong *prima facie* case that that jurisdiction is an appropriate one; **it should in principle be a jurisdiction to which neither party to the contract can object as inappropriate**; they have both implicitly agreed that it is appropriate. [emphasis in bold]

These were the statements the Court of Appeal was expressly or implicitly agreeing to when it said that some weight had to be accorded to the selection of the Indonesian court as the forum for the determination of the dispute.

44 However, there is no dispute in the present matter that the Malaysian court would be an appropriate forum. Rather, the question is whether it would be clearly or distinctly a *more* appropriate

forum than the Singapore court for hearing the matter. While the parties submitted to the non-exclusive jurisdiction of the Malaysian court in cl 9.5(a), the legal consequence would merely be that the Malaysian court is *an* appropriate forum, rather than *the* only appropriate forum.

45 Clause 9.5(a) has to be read in the light of cl 9.5(b) which expressly allows OCIA to commence proceedings in any other jurisdiction. Malaysia, therefore, could be one of several appropriate jurisdictions.

Witnesses

46 In the case of *Q&M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494, despite the fact that the witnesses were mostly in Malaysia, it was noted that it was not the mere literal or factual geographical connections that were important, but that there had to be a legal significance so that the mere number of geographical connections *per se* was not conclusive by any means.

47 In addition, in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192, it was held that the fact that the majority of likely witnesses resided in Singapore was also not a critical factor since Malaysia and Singapore were neighbouring states.

48 In the present case, the three key factual witnesses to the substantive dispute are:

(a) Chua Choon Kiang ("Chua") of the plaintiff;

(b) the defendant himself; and

(c) Nicholas Ng ("Ng") referred to earlier.

These are the three individuals who were present at the meeting of 23 June 2009 at which the defendant is alleged to have agreed to the terms set out in the term sheet. Chua is primarily based in Singapore. The defendant is a permanent resident of Singapore, having business interests and a place of residence in Singapore. Ng resides in Malaysia. The defendant has not suggested that Ng's attendance cannot be secured for a trial in Singapore. Neither has it been suggested by either party that the attendance of any other witnesses could not be secured for a trial either in Singapore or Malaysia.

Conclusion

49 As the factors appear to be somewhat evenly balanced, the defendant would not be able to discharge his burden to prove that there is another forum which is clearly or distinctly more appropriate than Singapore.

50 In the absence of any concrete factors weighing in favour of the courts of Malaysia, it is in the interests of the parties and the ends of justice that the stay be refused. (It certainly has not been suggested that the defendant would be prejudiced in any way should the proceedings be continued in Singapore.) Given my decision to refuse a stay, it would be unnecessary to discuss the second limb of the *Spiliada* test (see [24] above).

51 For the reasons above, as the defendant has failed to discharge his burden to show that Malaysia would be clearly or distinctly the more appropriate jurisdiction for the action to be heard, the appeal is dismissed. I will hear parties on costs.