DATO' HO SENG CHUAN v RABOBANK ASIA LTD [2002] MLJU 216

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HIGH COURT (KUALA LUMPUR)

VINCENT NG KIM KHOAY J

GUAMAN SIVIL NO D1–22–1357–2000

8 March 2002

Case Summary

Civil Procedure — Jurisdiction — Forum conveniens — Foreign cause of action — Whether Malaysian courts had prerequisite jurisdiction to try the action — Singapore deemed exclusive jurisdiction in resolving disputes between parties — Whether plaintiff was estopped from invoking Malaysian jurisdiction

Benjamin John Dawson (M/s. Nik Hussain & Partners), D. Paramalingam (M/s. ***Krish Maniam*** & ***Co***)

JUDGMENT

This is the defendant's appeal against the decision of the learned Senior Assistant Registrar (SAR) on the 16.2.01, dismissing the defendant's application dated 10.10.00 (Enclosure 7) to set aside or alternatively to strike out the writ of summons and statement of claim dated 24.7.00. The defendant's application was made under Order 12 rule 7 and under Order 18 rule 19 of the Rules of the High Court 1980. The plaintiff's claim against the defendant bank is based on matters arising from a Loan Facility Letter dated 27.8.96 pertaining to a sum of USD10 million ('the Loan Facility Letter'). A determination of whether the SAR should have held that the [*2]
plaintiff's claim is plainly or evidently or obviously unsustainable in law and should have allowed the application (vide Enclosure 7) to strike out or set aside the action in limine, involves quite simply a resolution of two questions, namely: even on the assumption that the averments in the statement of claim are true, whether Malaysian Courts lack prerequisite jurisdiction to try the action (the first question); and, even if our Courts are seised with jurisdiction, whether it ought to decline jurisdiction (the second question). To

answer this question it is essential here to set out a summary of the averments in the plaintiff's statement of claim, and clause 25 of the Loan Facility Letter.

Statement of claim		***The gist of facts averred***
(i)	Paragraph 2	The defendant is a company incorporated under the Company's Act 1967 in Singapore and having a registered address No. 9, Raffles Place 60-01, Republic Plaza, Singapore 048619.
(ii)	Paragraphs 3 to 27	The borrower, who is the plaintiff herein, sets out his complaints against the bank on matters arising from the Loan Facility Letter dated

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Statement of claim		***The gist of facts averred***
		27.8.96 pertaining to a sum of of USD10 million ('the Loan Facility Letter').
(iii)	Paragraph 28	The Singapore Suit No. 244/1998 was filed against the plaintiff/borrower (plaintiff). It was based on the Loan Facility Letter.
(iv)	Paragraph 29	Upon hearing the bank's application for summary judgment, the Singapore Court granted the plaintiff

Statement of claim		***The gist of facts averred***
		conditional leave to defend and held that the issues raised by the plaintiff ought to be ventilated at the trial of the Singapore suit, provided a bank guarantee is furnished.
(v)	Paragraph 30	The plaintiff failed to comply with the Singapore Order in not furnishing the bank guarantee. And, judgment was thereby entered against the plaintiff.
(vi)	Paragraph 31	The plaintiff asserts that the Singapore judgment was unfair because he was not given the opportunity to defend himself.

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Statement of claim		***The gist of facts averred***
(vii)	Paragraph 32	Because of that, he files this Action.

Clause 25 of the Loan Facility Letter stipulates as follows:

> "All business relationship between the Merchant Bank and the Account Holder shall be governed by *Singapore Law*. The place of performance,... as well as the exclusive place of jurisdiction *for all proceedings brought by the Account Holder against the Merchant Bank shall be at the location of the office of the Merchant Bank in Singapore*where the business relationship between the Merchant Bank and the Account holder is maintained". (emphasis added)

From the factual matrix above it is crystal clear and beyond question that: (a) the defendant resides and has its place of business in Singapore - a foreign country (see paragraph 2 of the statement of claim); and (b) paragraphs 28 to 32 of the plaintiff's statement of claim

establishes the fact this action was filed as the result of the plaintiff's unsuccessful defence of the Singapore suit. Indeed, the averments in the plaintiff's action herein is an exact reproduction of the contents [*5]
of his affidavit in resisting the defendant's application for summary judgment in the Singapore suit.

The Material Facts and Chronology of Events

The defendant is a merchant bank with its registered office and place of business in Singapore. The defendant granted a US10 million dollars banking facility to the plaintiff pursuant to a Loan Facility Letter dated 27.8.1996. The account is maintained in Singapore. The plaintiff was in default under the banking facility. Whereupon the bank commenced Suit No. 244 of 1998 in Singapore ('the Singapore suit') against the plaintiff. After hearing the merits of the case, both the Registrar and the High Court Judge ordered the plaintiff to furnish a bank guarantee in the sum of RM8,878,793.91 before being entitled to defend the defendant's claim ('the Singapore judgment'). The plaintiff failed to furnish the bank guarantee and also failed to appeal to the Singapore Court of Appeal in time. The Singapore judgment was registered in the Malaysian High Court on the 1.12.1999 which has the full force of a Malaysian judgment. The plaintiff's application to set aside the order for registration of the Singapore judgment was dismissed by the Malaysian High Court on the 6.7.2000. The present action was filed by the plaintiff on the 24.7.2000. [*6]

The First Question

In dealing with the first question, it is necessary to first examine the cause of action set out in the statement of claim. The plaintiff alleges that sometime in 1997, in view of the depreciation of the Malaysian Ringgit (RM) to US Dollar, he had given instruction to the bank (defendant herein) to convert his US Dollar loan currency to RM. He further alleges that the bank had effected the conversion as instructed but only for a brief period before wrongfully reverting the loan currency back to US Dollar. Arising from these facts the plaintiff's complaints are as follows:

(i) The bank had neglected and omitted to fully carry out his instructions, namely to convert the US Dollar loan currency and as a result of the subsequent depreciation of RM, he incurred substantial losses.

(ii) The bank had manipulated his account thereby also causing him losses. [*7]

(iii) The bank had a fiduciary duty to comply with his instruction and was in breach of that duty when it failed to do so.

(Vide paragraphs 8, 9, 11, 12, 19 and 21 of the statement of claim.)

In this regard it is essential to apply the provisions of Section 23 of the Courts of Judicature Act 1964 ('the Act'). Section 23(1) of the Act provides:

"... the High Court shall have jurisdiction to try all civil proceedings where -

(a) the cause of action arose, or

(b) the defendant or one of several defendants resides or has his place of business, or

(c) the facts on which the proceedings are based exist or are alleged to have occurred, or [*8]

(d) any land the ownership of which is disputed is situated."

I think it would be useful to state the following observations, which would set the tone for this appeal:

Firstly , the defendant in this case is not only a foreigner but is also beyond the territory of the Federation. He is being asked to answer to certain allegations of the plaintiff in this Court to whom he owes no allegiance (see *Canstrans Services (1965) Ltd v Clifford*[1974] 1 MLJ 141 FC at page 32).

Secondly , a concomitant principle to be borne in mind is that the primary jurisdiction of our Courts is limited to those within its territory (per Lord Diplock in *Siskina (Owners of Cargo Lately Laden on Board & Ors) v Distos Compania Naviera S.A.* [1979] AC 210 at page 8). Any extension of that jurisdiction to a foreigner beyond its territory is described by Lord Diplock in ***Siskina*** as an exercise of its "exorbitant

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jurisdiction" and they have the tendency of encroaching the sovereignty of another nation.

In my view the underlying jurisprudence for the above propositions lies in the desire of a person to be tried by the society or community to which he belongs to and not by a society alien or foreign to him. Indeed, it is manifestly just that it should be so.

It is immediately apparent that the provisions of Section 23(1)(b) and (d) of the Act are not attracted on the facts of present case. It will also be seen, shortly on a careful reading of the authorities, that neither are the provisions of Section 23 (1)(a) and (c).

Where did the cause of action arise?

The highly authoritative decision of the Privy Council in *Distillers Co. (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 lays down the following decisive test: What is the act on the part of the defendant which gives the plaintiff his cause of complaint? In order to fully appreciate the instructive approach of the Privy Council in *Distiller Co. (Biochemicals) [*10]*
Ltd v Laura Anne Thompson, we reproduced herein the illuminating words of Lord Reid:

> "It is manifestly just and reasonable that a defendant should have to answer for his wrongdoing in the country where he did the wrong. It is at any rate not manifestly just or reasonable that the defendant should have to answer for his wrongdoing in any country in the world to which the plaintiff (or the plaintiff's mother in a case such as this) may have happened to go before the damage occurred.It is not the right approach to say that, because there was no complete tort until the damage occurred, therefore the cause of action arose wherever the damage happened to occur. *The right approach is, when the tort is complete, to look back over the series of events, constituting it and ask the question, where in substance did this cause of action arise? Theory no. (iii) is that the cause of action arose within the jurisdiction if the act on the part of the defendant, which gives the plaintiff his cause of complaint has occurred within the jurisdiction.* That is the rule laid down in *Jackson v Spittal* (1870) L.R. 5 C.P. 542, which is an authoritative case, and the rule is *inherently reasonable, as the defendant is called [*11]*
> *upon to answer for his wrong in the courts of the country where he did the wrong* ". (emphasis added)

The decision in ***Distiller*** has been applied in *Castree v E.R. Squibb & Sons Ltd & Anor* [1980] 1 WLR 1248 and *Lam Kok Trading Co. (Pte.) Ltd. & Anor. v Yorkshire Switchgear & Engineering Co. Ltd.* [1976] 1 MLJ 239.

Reverting to the facts of our present case, the alleged act on the part of the bank which gives the plaintiff his cause(s) of complaint are (i) that the bank failed and/or neglected to convert his US currency loan to RM and (ii) the bank manipulated his account. Plainly these alleged wrongdoings (if any) occurred in Singapore where the account is maintained.

Where the plaintiff happens to be or even resides is an irrelevant consideration under Section 23 (1) of the Act. Likewise, where the plaintiff happens to be when he allegedly gave instructions to the bank is not of any significance. It is of no more significant than if he were in London or New York when allegedly giving instructions. The giving of instructions is not the plaintiff's cause of complaint. [*12]

Thus, clearly the bank has not done any wrong in our jurisdiction to be answerable to our Courts.

It is important to note that limb (c) of Section 23(1) states "the facts on which the proceedings are based" and not "any facts on which the proceedings are based". Abdul Hamid J (as he then was) emphasised in ***Lam Kok Trading*** (supra - at page 240 paragraph A-B) that limb (c) requires the existence of "the whole of the ingredients leading to, indeed the whole of the circumstances surrounding the termination of the contract..." (see also the history with regard to this issue in ***Distiller***(supra - at page 458 paragraph F to page 467 paragraph C)).

Perhaps, the following illustration typifies limb (c): B, a Singaporean comes over to Malaysia. He negligently drives his car, collides into A and injures him. B then goes back to Singapore. Although B is a foreigner and is out of the our territorial jurisdiction at the commencement of legal action by A, the Malaysian Court has nonetheless the jurisdiction to deal with the matter. This is no less an application of the primary territorial jurisdiction because all the facts occurred within the territorial jurisdiction of the Federation, and if B removes himself from our country whether to evade the writ or otherwise, [*13]
this does not detract the Court's jurisdiction. The Malaysian Court has the closest connection since all the facts on which the proceeding is based occurred here.

In the instant case, the receipt of alleged instruction, the failure to convert the currency and the alleged manipulation of the plaintiff's account all took place in Singapore. And, most importantly, on the question of negligence, the bank has to be judged by the standard of the reasonable banker in Singapore having regard to the custom usage etc there.

It is plain that none of the limbs of Section 23 of the Act is met. Consequently the jurisdiction of this Court is not attracted. If there is any doubt in the matter, it should be resolved in favour of the bank (see ***Canstrans Services***(supra) at page 142).

A further consideration that comes to mind is that a collateral attack by a litigant in the same or another jurisdiction by changing the form of the proceedings should be deplored by the Courts. The plaintiff himself has conceded that he mounted the present action because he could not afford to furnish the bank guarantee in the Singapore suit (vide paragraphs 30 to 32 [*14]
of his statement of claim). In *Tractors Malaysia Bhd v Charles An Yong* [1982] CLJ 152 the Federal Court adopted and applied the decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1981] 3 WLR 906.There Lord Diplock said, at page 914:

> "My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by

changing the form of the proceedings to set up the same case again."

It is wholly consistent with nationalism for a Court to jealously guard its sovereign jurisdiction. But it cannot be gainsaid that should such collateral attack be entertained against a final decision of a foreign Court of competent jurisdiction it may not only entail conflict of laws which is a recognised feature of jurisprudence - but also conflict of jurisdictions, which is recognised only in the annals of the follies of man. [*15]

All the high authorities have cautioned against the invocation of the Court's jurisdiction over a foreigner who owes no allegiance here and the exercise of such exorbitant jurisdiction, being an encroachment on the sovereignty of other nations (see *Canstrans Services v Clifford*(supra - Federal Court), ***Siskina*** (supra - House of Lords) and *Tyne Improvement Commissioners v Armement Anversois S/A (The Brabo)* [1949] AC 326 PC (House of Lords - at page 350). In *Sirdar Gurdyal Singh v The Rajah of Faridkote* [1894] AC 671 PC to the Earl of Selbourne delivering the advice of the Privy Council said:

"Under these circumstances there was in their Lordships' opinion, nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit; which... 'lie at the root of all international, and of most domestic, jurisprudence on this matter'. All *jurisdiction is properly territorial...*". (emphasis added)

Thus, clearly, in the light of the above high authorities, I have to conclude that this Court lacks jurisdiction to try the current action. [*16]

Second Question

On the second question considered in the context of clause 25 of the Loan Facility Letter, I would with respect readily adopt that ratio in *The Asian Plutus; Owners of Cargo lately laden on board the Ship or Vessel 'Asian Plutus' v Owners and other persons interested in the Ship or Vessel 'Asian Plutus'* [1990] 2 MLJ 449.There, Yong J held that:

"Prima facie, where there is a foreign jurisdiction clause, effect should be given to it. The parties must be deemed to have agreed to the jurisdiction of the foreign court, presumably with knowledge of how it works and what it can or cannot do.... While it may be that a court in Singapore, working in English, will not be precluded from deciding questions of Japanese law, it need hardly be said that it is very much more satisfactory for the law of Japan to be decided by the courts of that country, with a view to ensuring that justice is done."

And, in *Mackender & Ors v Feldia & Ors* [1967] 2 QB 590 at 591, this is what Diplock LJ had to say: [*17]

"The prima facie rule of English conflict of laws is that the proper law of a contract is that system of law which the parties have agreed shall regulate the legally enforceable rights and duties to which their agreement gives rise. Here the parties expressly agreed that the proper law of the policy should be Belgian law."

(See also *Cantrans Services (1965) Ltd v Clifford* (supra).)

Hence, in view of the clear expression of the parties in the instant case in clause 25 aforesaid, I would hold that the plaintiff is estopped from invoking our jurisdiction and also that this Court ought to decline jurisdiction.

Conclusion

The avowed object of this action being initiated by the plaintiff is solely as a result of him being unsuccessful in defending himself in the Singapore suit - a la having two bites at the proverbial cherry.The plaintiff ought not to be permitted to use (or rather to abuse) the privilege of the Malaysian Court's process to reverse or attack or denude the Singapore order and judgment, emanating from proceedings which he actively participated. It is circuitous in nature. This action is [*18]
manifestly an attempt by the plaintiff to extricate and to release himself from his failure to furnish the bank guarantee as ordered by the Singapore Court. This action is plainly an attempt by the plaintiff to overreach and circumvent the effects of the order of the 6.7.98 (vide Exhibit 'F' of Enclosure 6) and affirmed on the 19.8.98 (vide Exhibit 'G' of Enclosure 6) issued by the Singapore Court, permitting him to ventilate his case against the defendant at the trial of the Singapore suit only upon furnishing the bank guarantee.

In these circumstances, it is unconscionable for the plaintiff to "hop" to another jurisdiction and change the form of his case so as to side-step, circumvent and even to defy the Singapore order and judgment. The opportunity and forum for him to litigate his case against the bank was in the Singapore suit. That was precisely his stance and what his counsel sought for and argued at the Order 14 proceeding Singapore suit.

The plaintiff fought his case, placed his stakes in the Singapore suit and lost. In particular he defaulted in furnishing the bank guarantee. Can there be any doubt at all that this action is an unconscionable devise to extricate himself from the [*19]
Singapore suit and judgment? *Tractors Malaysia Bhd v Charles Au Yong* [1982] CLJ 152 FC is a good case in point where the Federal Court easily detected such manoeuvring and unhesitatingly struck out the action there on the ground of abuse of process. Indeed in the present case, the plaintiff has not only defied the Singapore order but has also blatantly disregarded clause 25, a contractual provision in the Loan Facility Letter.

The words of Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 is so strikingly apposite and in a similar situation, that it is appropriate to reproduce them here:

> "They agree with the High Court judge that the New Action 'is nothing but a new twist to overcome (the respondent's) difficulty in raising the loan and to delay the execution of judgment against him'."

(See also *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637.)

Guided by the principles enunciated by the above-cited authorities adverted above, I hold that the defendant is [*20]
perfectly entitled to move this Court to set aside this action in limine. This action should not be allowed to remain a moment longer, and the appeal is allowed with costs.
