Lanna Resources Public Co Ltd *v* Tan Beng Phiau Dick and another [2010] SGHC 287

Case Number : Suit No 50 of 2010 (Registrar's Appeal No 253 of 2010)

Decision Date : 28 September 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Ng Kim Beng (Rajah & Tann LLP) for the plaintiff; Sujatha Bhargavan (Toh Tan LLP) for the defendants.

Parties : Lanna Resources Public Co Ltd — Tan Beng Phiau Dick and another

Civil Procedure

28 September 2010

Judith Prakash J:

1 In May 2010, the defendants filed a Summons-in-Chambers seeking the following reliefs:

(a) An order that all further proceedings in the plaintiff's action herein against the defendants be stayed on the ground of *forum non conveniens* and/or *lis alibi pendens*.

(b) Alternatively, an order that all further proceedings in the plaintiff's action herein against the defendants be stayed pending and until the final determination and resolution of the arbitration proceedings in the Singapore International Arbitration Centre ("SIAC") in Case No ARB055/09/MM ("the arbitration proceedings") commenced by the plaintiff against Saraburi Resources Pte Ltd ("SRL") and PT Saraburi Batu Hitam ("SBH") in relation to an advance of US$2m paid by the plaintiff to SRL.

2 The defendants' application was dismissed by Assistant Registrar Then Ling ("the AR") on 18 June 2010. The defendants appealed against that dismissal. I heard the appeal on 29 July 2010 and was not persuaded that the decision below was wrong. Accordingly, I dismissed the appeal.

Background

3 The plaintiff is a company incorporated in the Kingdom of Thailand and is in the business of the sale and distribution of coal. The first defendant is an Indonesian national and the second defendant is a Thai national. The defendants are both directors of SRL, a company incorporated in Singapore, and are also the beneficial owners of this company. The third company involved in the matter is SBH, a company incorporated in Indonesia, which has rights to carry out coal mining activities in a particular area in Indonesia.

4 The plaintiff's case in this action appears from the averments in the statement of claim endorsed on the writ herein which was filed on 25 January 2010.

5 On 25 April 2008, an agreement entitled "Memorandum of Agreement" ("the MOA") was entered into between the plaintiff, SRL and SBH. By the MOA, the plaintiff agreed to lend SRL up to US$4m ("the loan") for the construction of a coal port and jetty and other infrastructural items to facilitate

delivery of coal mined from SBH's mines. The MOA provided that SRL would be in default of the loan if it failed to comply with certain documents which were described as the "Coal Supply Contracts". Upon such default, the loan plus interest at a specified rate would become due and payable on demand.

6 Paragraph 8 of the statement of claim averred that in consideration of the plaintiff making or continuing to make the loan to SRL, the first and second defendants agreed to guarantee all sums of money owing or remaining unpaid by SRL to the plaintiff under the MOA and to pay to the plaintiff on demand, as principal debtors, all sums of money which were owing on the date of such demand. It referred to the written guarantee dated 25 April 2008 ("the guarantee") signed by the plaintiff and the defendants.

7 According to para 10 of the MOA, the plaintiff paid the first advance of the loan in the sum of US$2m to SRL on 6 May 2008. Subsequently, SRL did not perform the Coal Supply Contracts and on 25 March 2009, the plaintiff issued a written demand to SRL for the repayment of US$2,115,150 being the principal of the loan advanced and interest thereon at the agreed rate. SRL failed or refused to pay the said sum or any part thereof to the plaintiff.

8 By two letters dated 27 April 2009 [(para 16 of the statement of claim)], the plaintiff made a written demand on the defendants to fulfil their obligations under the guarantee and make payment of the sum of US$2,120,750 to the plaintiff (this being the amount outstanding as at 16 April 2009). No payment was made and this action was started against the defendants on 25 January 2010.

9 In the meantime, pursuant to a clause in the MOA which provided for disputes to be submitted to arbitration according to the rules of the SIAC, the plaintiff submitted its claim against SRL for arbitration by two arbitrators appointed by the chairman of the SIAC. This resulted in the arbitration proceedings. SRL disputed the plaintiff's claim and filed a substantive defence in the arbitration proceedings in which it alleged, *inter alia*, that the US$2m advanced by the plaintiff was not a loan but was an advance payment to SRL for the supply of Indonesian steam coal in bulk under the Coal Supply Agreements. It also alleged that the plaintiff was the party in breach of the MOA and filed a counterclaim against SRL in the arbitration proceedings. At the time I heard the defendants' appeal, the arbitration proceedings were still in progress and had not been concluded.

10 The defendants entered a joint appearance to this action on 29 January 2010. They filed their defence on 26 February 2010. Substantive assertions were made in the defence among which were:

(a) The payment of US$2m to SRL was not a loan but an advance payment under the Coal Supply Agreements.

(b) The MOA did not apply because no loan was or could have been made since Bank of Thailand approval for the loan had not been obtained.

(c) The MOA breached the exchange control regulations of Thailand.

(d) The plaintiff had wrongfully failed to disburse the second tranche of the loan and SRL was therefore unable to meet scheduled payments for infrastructure and had suffered loss and damage.

Basically, the defendants' stand was that SRL was not liable to pay US$2m or any interest thereon to the plaintiff and, in turn, the defendants were not liable to the plaintiff under the guarantee.

11 The defendants also relied on the clause in the MOA providing that all disputes were to be

referred to and resolved by arbitration. They contended that the guarantee was given pursuant to the MOA and formed part of the agreement between the plaintiff and SRL. Therefore, the plaintiff's claim against the defendants based on the guarantee was also made pursuant to the MOA and should also be resolved by arbitration. The defendants asserted that the action should be dismissed and the dispute should be submitted to arbitration under cl 7.3 of the MOA.

The arguments on appeal

12 The defendants made the following submissions in support of their appeal:

(a) The plaintiff's claim in the arbitration proceedings and its claim in this action were both based on cl 1 of the MOA. Both SRL in the arbitration proceedings and the defendants herein disputed that the payment of US$2m to SRL was made by the plaintiff pursuant to cl 1 of the MOA. Both the defendants and SRL had good defences against the plaintiff's claim. Thus, the arbitration proceedings and this action centred on the same issues and same facts.

(b) Not only had the plaintiff commenced the arbitration proceedings against SRL but it had also commenced this action against the defendants and another action, Originating Summons No 276 of 2010 ("the OS") against the defendants and the first defendant's wife to enforce certain security provided for SRL's obligations under the MOA.

(c) There were multiplicity of suits and a real danger of conflicting decisions. This action should be stayed because otherwise there would be duplication and a lot of time and resources would be wasted by different tribunals in hearing the same issues and overlapping matters.

(d) If this action was to proceed, the issue as to whether SRL was in breach of the MOA was a material one and that was an issue which had to be determined before it could be decided whether the security given by the guarantee was available to answer the claim.

(e) The main agreement, *ie*, the MOA, provided for arbitration and the parties had contemplated that their disputes would be arbitrated before the SIAC. The AR had failed to appreciate that the main issue involved in this action was the same as that in the arbitration proceedings. The AR had taken a simplified approach in holding that the parties to the MOA were the plaintiff and SRL and not the defendants, and that this action was based on the defendants' obligations under the guarantee. The fact that the guarantee was a security for the advance under the MOA was not fully appreciated. If no loan was made by the plaintiff to SRL under the MOA, there would be no repayment due from the defendants under the guarantee. The issue of the validity of the loan had to be determined first in the arbitration and justice and fairness required that the plaintiff's case against SRL be heard together with the plaintiff's case against the defendants.

13 Accordingly, it would appear that the defendants' grounds were that the court proceedings should be stayed because:

(a) There was a purported agreement to arbitrate.

(b) The court was not the appropriate forum for the dispute between the plaintiff and the defendants.

(c) There was multiplicity of proceedings and the plaintiff should not be allowed to carry on concurrent proceedings in different forums.

(d) Justice and fairness required that the cases brought by the plaintiff against SRL and the defendants be heard by the same forum.

It should be noted that under para 9 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), the court has discretionary power to stay proceedings where:

(a) the matter in question is *res judicata* between the parties;

(b) there is multiplicity of proceedings in any court or courts; or

(c) a court in Singapore is not the appropriate forum.

14 The first ground can be easily dealt with. The guarantee does not contain an arbitration clause. Instead, cl 27(a) provides that the guarantee shall be governed by and construed in accordance with the laws of Singapore and that it is subject to the non-exclusive jurisdiction of the courts of Singapore. The defendants as the guarantors further agree that if court action is taken in Singapore, they will submit to the jurisdiction of the courts of Singapore. The guarantee is a contract which is separate and independent from the MOA and must be construed in accordance with its own terms and not in accordance with the terms of the MOA. There is nothing in the guarantee which expressly, or even impliedly, incorporates the arbitration clause in the MOA. Indeed, by providing for the guarantors' submission to the jurisdiction of courts of Singapore, the guarantee has clearly rejected any such possibility. Further, if the defendants had wished to contest the jurisdiction of the Singapore courts, they should have filed their application shortly after entering appearance. Instead, they filed a substantive defence and did not put in their application for a stay until some two months thereafter.

15 As for the suggestion that the Singapore court is not the appropriate forum for the dispute, this is again contrary to the provisions of the guarantee. First, the guarantee is governed by Singapore law and no court is better to interpret Singapore law than the courts of Singapore. Secondly, the guarantors agreed to submit themselves to Singapore jurisdiction if the plaintiff started action here. In addition, the defendants did not suggest any other court that was more appropriate to hear the dispute in respect of the guarantee. Their stand was that the dispute should be settled by arbitration. However, there was no basis for this: in view of the absence of any agreement to arbitrate, the plaintiff is not bound to submit disputes to resolution by arbitration rather than by court proceedings.

16 The next ground dealt with multiplicity of proceedings (or lis alibi pendens) and the assertion that the plaintiff was carrying on concurrent proceedings in different forums. Where the plaintiff has commenced more than one action in more than one jurisdiction, the proceedings will not be considered to be concurrent proceedings unless all parties to both sets of proceedings are the same, the issues being decided in the proceedings are the same, the reliefs claimed are the same and they arise from the same transaction. In this case, the parties to the arbitration proceedings are the plaintiff, SRL and SBH whilst the parties to this suit are the plaintiff and the defendants. Secondly, whilst the claims in the arbitration and herein may arise out of the same transaction, ie, the moneys paid to SRL pursuant to the MOA, not all the issues in both proceedings can be the same since the governing documents are different and there are questions which arise under the guarantee which would not arise under the MOA. I agreed with the AR that this was not a situation of multiplicity of

proceedings even though the issue as to whether the US$2m paid to SRL was a loan or an advance payment might have to be litigated in both proceedings.

17 In the summons, the defendants adverted to the doctrine of *forum non conveniens*. I agreed with the submissions made by the plaintiff that this doctrine does not apply in the present case. The basic principle which was established in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. The defendants have not identified any other available forum with competent jurisdiction which is more appropriate than the Singapore courts to resolve the dispute under the guarantee. The only alternative they put forward is an arbitral tribunal. An arbitral tribunal which has not been constituted and cannot be constituted because of the lack of an agreement to arbitrate cannot by any stretch of language be considered an "available forum" with "competent jurisdiction".

18 The plaintiff's final argument invoked the question of fairness. The plaintiff argued that even if the claim under the guarantee could not be arbitrated, this action should be stayed pending the arbitration between the plaintiff and the principal debtors. This would avoid the spectre of conflicting decisions on the common issues. Whilst it is generally undesirable to have conflicting decisions on common issues of fact and law, sometimes such a result cannot be prevented. The parties have provided in their documentation for two different regimes to govern disputes under the MOA and under the guarantee. The defendants were legally advised at the material time and, indeed, the guarantee was drafted by their own legal advisers. The defendants had an opportunity to provide for disputes under the guarantee to be governed by arbitration or for liability under the guarantee not to arise until liability under the MOA had been legally established. Yet, the guarantee does not contain such provisions. The courts must hold parties to their contractual bargains. The parties' bargain was for claims under the guarantee to be settled in court. I did not consider that there would be any fundamental unfairness in requiring the claim under the guarantee to be litigated in court at the same time as the claim under the MOA is being litigated in arbitration since this was a situation contemplated by the parties' own contractual arrangements.

19 In this connection, the English case of *Etri Fans Ltd. v N.M.B. (U.K.) Ltd*. [1987] 1 WLR 1110 provided some assistance. In that case, the English Court of Appeal had to consider whether to grant a stay of legal proceedings to an applicant who had taken steps in the proceedings and was seeking to rely on an arbitration agreement to which he was not a party. The court refused to exercise its inherent jurisdiction to grant a stay and observed (at [1114]):

> In particular, in order to protect itself in relation to attempts to abuse the process of the court, the court has undoubtedly very wide powers of staying proceedings. However, as Mr Boyd concedes, because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant as [*sic*] stay under its inherent jurisdiction in situations dealt with by the statutory provisions, but where it could or would not do so in exercise of its statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions.

20 In the present case, there was no question of abuse of process of the court. The plaintiff was entitled under the guarantee to commence its action against the defendants in the High Court. I agreed that the Singapore court's inherent discretionary power to order a stay is a residual one and should be exercised only rarely and in exceptional cases when the application for a stay does not fall within established statutory jurisdiction or legal principles. I did not consider the circumstances before

me to be exceptional such that they justified the grant of a stay under the inherent powers of the court.

21 For the above reasons, I dismissed the defendants' appeal.