Strandore Invest A/S and others *v* Soh Kim Wat
[2010] SGHC 174

Case Number : Originating Summons No 19 of 2010

Decision Date : 10 June 2010

Tribunal/Court : High Court

Coram : Quentin Loh J

Counsel Name(s) : See Tow Soo Ling (Colin Ng & Partners) for the Applicants; Leo Cheng Suan (Infinitus Law Corporation) for the Respondent

Parties : Strandore Invest A/S and others — Soh Kim Wat

Arbitration

10 June 2010

Quentin Loh J:

Introduction

1 The applicants in this Originating Summons are Danish companies; Strandore Invest A/S ("Strandore), LKE Electric Europe A/S ("LKE Europe") and MS Invest Odense A/S ("Odense") (collectively, the "Applicants"). The Applicants filed these proceedings to enforce an arbitration award ("the Final Award") against the respondent, Soh Kim Wat ("Soh"). The Final Award, in favour of the Applicants, dated 30 April 2008, was made by a 3-member arbitral tribunal and issued out of the Danish Institute of Arbitrators ("DIA").

2 On 9 April 2010, Soh applied to:

(a) stay this Originating Summons No 19 of 2010 ("OS 19/2010"), pending the resolution of Suit No 968 of 2009 (S 968/2009"), in which Soh challenges the Final Award or alternatively that OS 19/2010 be converted into a Writ action pursuant to O 28 r 9 of the Rules of Court (Cap 322, R5, 2006 Rev Ed)("Rules"), and consolidated and heard together with S 968/2009; and

(b) set aside the *Mareva* injunction issued on 8 January 2010 against him (the "*Mareva* injunction").

3 I dismissed Soh's applications and proceeded to hear the Applicants' application in OS 19/2010 for leave to enforce the Final Award pursuant to ss 19 and 29 of the International Arbitration Act (Cap 143A, 2002 Rev Ed)("IAA"). After hearing the parties, I granted the Applicants leave to enforce their Final Award. Soh appealed against my decision on 13 April 2010 and I issued my written grounds on 14 May 2010 (the "14 May 2010 Decision") (see Strandore Invest A/S and others v Soh Kim Wat [2010] SGHC 151).

4 Soh then applied for a stay of execution pending appeal. I heard the parties on 17 May 2010 and refused Soh's application for a stay of execution. Soh appealed against my decision on 20 May 2010 and I now set out my grounds for refusing a stay.

5 In essence, the Applicants, shareholders in LKE Electric (M) Sdn Bhd, (the "Company"), entered

into share sale and purchase agreements, (the "Agreements"; the first two Agreements dated 22 March 2003 and the third dated 10 December 2004), to sell their shares to Soh, who is also a shareholder and director of the Company. The Applicants alleged that Soh breached the Agreements and failed to complete the purchase.

6 The full facts of the case and grounds for my decision have been set out in the 14 May 2010 Decision and it is not necessary to set them out here, except insofar as they are relevant to my decision to refuse a stay pending the appeal.

Principles Applicable for Stay of Execution Pending Appeal

7 The principles governing a stay of execution pending appeal are well settled and have been authoritatively set out in a number of decisions, including the decision of the Court of Appeal in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 1 SLR(R) 1053. They are as follows:

(a) While the court has the power to grant a stay, and this is entirely at the discretion of the court, the discretion must be exercised judicially, *ie*, in accordance with well-established principles.

(b) The first principle is that, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which he is *prima facie* entitled, pending an appeal. There is no difference whether the judgment appealed against was made on a summary basis or after a full trial.

(c) This is balanced by the second principle. When a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory. Thus a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting them back if the appeal succeeds.

(d) The third principle follows, and is an elaboration of the second principle, that an appellant must show special circumstances before the court will grant a stay.

All other rules follow and are derived from the application of these three principles to the individual circumstances and facts of each case. For example, the likelihood of success is not by itself sufficient, and a bald assertion of the likelihood of success in an affidavit is inadequate. Otherwise, a stay would be granted in every case because every appellant must expect that his appeal will succeed. Finally, it is neither possible, nor desirable, to give a catalogue of all the circumstances that would qualify to be considered as special. The court in every case will have to examine the facts to see if special circumstances justifying the grant of a stay of execution exist based upon the application of the three principles.

Application of the Law to the Facts and Circumstances of this case

8 Having weighed the competing factors and circumstances of this case. I was of the view that the first principle weighed heavily against the grant of a stay.

(a) The Applicants alleged that Soh was in breach of the Agreements by not making payment for the shares. On 4 January 2006, their solicitor sent Soh a letter of demand for payment of the shares under the Agreements. Soh's Malaysian solicitors replied on 23 January 2006 pointing to the governing law and arbitration clause in all the Agreements requiring all disputes to be resolved through Copenhagen arbitration, and stated that Soh was prepared to proceed with Copenhagen

arbitration in accordance with the terms of the Agreements. The Applicants subsequently filed Suit No 55 of 2006 ("S 55/2006"), effected service on Soh on 21 February 2006 and Soh succeeded, pursuant to s 6 IAA, in obtaining an order for a stay of S 55/2006 on 10 May 2006.

(b) The Applicants then commenced arbitration in Copenhagen by filing their Requests for Arbitration before the DIA on 23 June 2006. Soh however did not nominate or appoint his arbitrator as required under the DIA Rules although he was requested to do so a number of times by the DIA (the detailed facts of the course of the arbitration in Copenhagen are set out in the 14 May 2010 Decision). Soh sent various communications challenging the validity of the Request for Arbitration, the service on him, contending that the documents were not in order, raising a number of technicalities and protesting, *inter alia*, that the Agreements were never meant to be enforced and were for a collateral purpose of showing them to another third party to assist the Applicants. Soh did not file any defence or otherwise participate in the arbitration hearing. As noted above, the Final Award was issued on 30 April 2008.

(c) The Applicants then commenced enforcement proceedings back in Singapore in Originating Summons No 999 of 2008, ("OS 999/2008") on 29 July 2008, and leave to enforce the Final Award was granted on 31 July 2008.

(d) Meanwhile, on 30 July 2008, Soh challenged the Final Award by filing challenge proceedings in the City Court, Denmark (the "Danish City Court") (Case No 1-1389/2008).

(e) Soh then successfully set aside all orders obtained in OS 999/2008, including the leave to enforce the Final Award (and an Order for Examination of Judgment Debtor obtained by the Applicants on 24 September 2008) on 20 February 2009 on the basis that he was challenging the validity of the Final Award before the Danish City Court. The Applicants were ordered to pay costs of $2,500 plus reasonable disbursements.

(f) Soh's challenge was dismissed by the Danish City Court on 25 June 2009.

(g) Soh proceeded to file an appeal against the judgment of the Danish City Court in the High Court of Denmark on 13 July 2009.

(h) On the 19 November 2009, Soh's appeal to the High Court of Denmark was dismissed, not on the merits, but because Soh had not paid the court fees for the appeal.

(i) On 12 November 2009, 7 days before the High Court of Denmark dismissed his appeal, Soh commenced another action in Singapore, S 968/2009, against the Applicants, to raise challenges against the Final Award. In his Statement of Claim, Soh contended, *inter alia*, that the Agreements are unenforceable, were never meant to be enforced having been made for the purpose of showing a third party, that there would be unjust enrichment to the Applicants as the shares could not be transferred to Soh even if he paid for them because of the Articles of Association of the Company and the resistance thereto by other directors, the disputes were not capable of settlement by arbitration, *etc*. All of these grounds were already raised in his earlier communications to the DIA and the Applicants, except it was with more details and in the form of pleadings. Additionally, Soh now alleges fraud and fraudulent misrepresentation and asks for various declaratory reliefs.

(j) On 7 January 2010, the Applicants filed this OS 19/2010 for leave to enforce the Final Award. It was heard on 9 April 2010 and leave was granted to the Applicants to enforce their Final Award which was issued almost 2 years earlier. As noted above, that the first letter of

demand was sent as far back as January 2006.

(k) It will be seen from the foregoing that Soh had taken every possible procedural step, defence and technicality, in an attempt to defeat and delay the Applicants' claims against him. He had taken the stand, in an affidavit affirmed on 11 March 2006 in S 55/2006, that he was at all material times willing and ready to have the disputes arbitrated pursuant to the Agreements, through arbitration in Copenhagen. Yet, as noted above, after obtaining a stay of S 55/2006, Soh did not nominate or appoint his arbitrator as required under the DIA rules and despite being given a number of opportunities to do so, he did not file a defence and allowed the arbitration proceedings to go by default. He had challenged, without success, the arbitration award at the seat. He had gained more time, by setting aside previous enforcement proceedings in OS 999/2008 and by filing an appeal before the High Court of Denmark. He was not, by his own evidence (given when he challenging the need for a *Mareva* injunction), a person of little means. The inescapable conclusion for his non-payment of the Danish High Court fees was that the appeal was filed to gain time and not to genuinely dispute or challenge the Final Award.

(l) In these proceedings, Soh has come back before the Singapore Courts, and asks that the enforcement proceedings be stayed, or alternatively, consolidated and tried together with S 968/2009, so that he can litigate his defences to the Applicants' claims in Court. Pleadings have yet to be filed as S 968/2009 is currently in the process of being served on the Applicants in Denmark. Upon being served, I daresay the Applicants will be taking appropriate action to deal with that action.

As far as this case and these Applicants are concerned, the epithet "the fruits of his litigation" in the first principle can be aptly re-cast as: "…the hard won fruits of their litigation…" The Applicants have been trying to enforce their claim since 4 January 2006. Their arbitration award was obtained on 30 April 2008. It is now June 2010. The words originally used for the first principle derive from an old English Court of Appeal authority in 1886, The Annot Lyle (1886) 1 P.D.114 where at 116 they are set out as follows: the court does not "…make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled..." pending an appeal. This was applied in Lee Sian Hee v Oh Kheng Soon [1991] 2 SLR(R) 869.

9 Are there any special circumstances that warrant a stay to be granted? I can see none.

10 In applying the above principles, it has been said time and again that the fact that there are strong grounds for appeal is not by itself a reason for granting a stay, see *eg, Lee Kuan Yew v Jeyaretnam J B* [1990] 1 SLR(R) 772, *Denis Matthew Harte v Dr Tan Hun Hoe & Gleneagles Hospital Ltd* [2001] SGHC 19. The special circumstances must be circumstances which go to the enforcement of the judgment and not to its validity or correctness, see *Che Wan Development Sdn Bhd v Cooperative Central Bank Bhd* [1989] 3 MLJ 40 at 44 and Dr *Kok Chee Min v Kan Choy Yoong & Ors* [1994] 3 MLJ 210 at 217. However the converse is not necessarily true. If there is little merit in the appeal, it is a relevant circumstance that a Court can take into account. Many an appellant will harbour sanguine views on their prospects of appeal, but if a Court is able to assess objectively that there is little merit, that must be a relevant consideration to put into the balance. It is usually not the only factor, but there can be circumstances where it can be a major factor.

11 In this case, Soh does not have the untrammelled rights of a normal appellant before the appellate court. He is attempting to resist enforcement of an international arbitration award and his grounds are limited to those set out in the IAA. That is capable of objective assessment and that must be put in the balance when considering the first principle.

12 Mr Leo, counsel for Soh, also submitted that the second principle should weigh more heavily in granting a stay because once Soh pays the money over to the Applicants, he has to go to Denmark and pursue them in the event he succeeds in his appeal. I agree that in the normal case, this is a factor that has to be taken into consideration by the court, and I have done so. The normal instance where this is the predominant factor lies in cases where there are many plaintiffs, especially beneficiaries, some of whom are not of great means or outside the jurisdiction, hence once payment is made to them, recovering these monies will be next to impossible in the event the defendant succeeds in his appeal. The same holds true where in execution of a judgment the respondents are actively pursing winding-up of the appellant, which obviously, if successful would render the appeal nugatory.

13 However, in this case, I did not consider that the second principle should outweigh the first principle for two reasons. First, there was no evidence before me that these Applicants were not good for any judgment given against them, nor was there any suggestion that they are impecunious such that any money paid over to them will be irrecoverable. Secondly, Soh did not appear to have had great difficulty instructing Danish lawyers to pursue his remedies before the Danish Courts. He only complained that it is expensive to do so. Neither was it suggested that there are any peculiarities of Danish law that would prevent his recovery of monies paid over in the event that his appeal succeeds. The mere fact that the Applicants resided out of the jurisdiction or are foreign companies and it would be inconvenient or expensive to seek recovery outside the jurisdiction was not, of itself, a special circumstance warranting a stay, see Chan Seng Onn JC (as he then was), in *Denis Matthew Harte v Dr Tan Hun Hoe & Gleneagles Hospital Ltd* [2001] SGHC 19.

14 The issues being pleaded by Soh in S 968/2009 were, save for the new allegations of fraud and fraudulent misrepresentation, similar to those he had already raised in his correspondence with the Applicants and the DIA. He should have raised those defences in the arbitration in Copenhagen. The raising of fraud in S 968/2009 at this late stage is noteworthy as are Soh's emails dated 19 April 2005 and 3 March 2003 exhibited in the affidavit of Kaare Vagner Jensen filed on 5 March 2010, where Soh apologises for not being "able to pay according to the agreement due to very very tight cash flow" and not that the Agreements were for show to a third party and were never meant to be enforced.

15 Mr Leo accepted that he could only succeed if he brought his case within the narrow grounds set out in the IAA and the Model Law. Mr Leo's main arguments were that (a) the subject matter of the Final Award was not capable of settlement by arbitration under the laws of Singapore, and (b) that the enforcement of the Final Award was contrary to the public policy of Singapore. For the reasons set out in my earlier judgment of 14 May 2010, I did not accept those arguments.

16 In Far Eastern Shipping Co v AKP Sovcomflot [1995] 1 Lloyd's Rep 520, a case with many similarities to the present, the plaintiff claimed for monies due to them from the defendant under a loan agreement where the plaintiff had, at the request of the defendant, made payments to Japanese banks in connection with the construction of certain vessels by Japanese shipyards which were ordered by the defendant but were for acquisition by the plaintiff. The plaintiff secured a New York Convention award, made by the Maritime Arbitrators Commission (MAC) of the Chamber of Trade and Industry of the Russian Federation, in their favour on 4 February 1993 against the defendant. The MAC award came into force in Russia on 20 August 1993. The plaintiff's efforts to enforce the award in Russia were unsuccessful and they applied to the English Courts to enforce the award under the 1975 English Arbitration Act. The plaintiffs were awarded leave to enforce their award as a judgment on 26 May 1994 together with a Mareva injunction over the defendant's assets in England and other ancillary relief. On 5 July 1994, by consent, execution of the judgment (on the award) was stayed upon the defendant's undertaking to take out challenge proceedings against the award before the Russian Supreme Court with due despatch and the Mareva injunction was discharged upon the

defendant's payment of security. On 29 July 1994 the Russian Supreme Court rejected the defendant's challenge to the award and the defendant made no further attempts in Russia to challenge the award. The defendant thereupon applied for a renewal of the stay of the execution of the judgment. The court ruled that by electing to convert its award into a judgment under the 1975 Arbitration Act, the plaintiff had, on principle, to accept the same procedural rules and conditions as generally applied to the enforcement of judgments in England and the Arbitration Act did not have any provisions that indicated otherwise. Therefore the Court had, in principle, the jurisdiction to grant a stay. Potter J however went on to add (at p 524), that it would rarely, if ever, be appropriate to order a stay in respect of a Convention award, when by definition under the Convention, the time for enforcement had arrived:

> …I envisage that the Court will rarely, if ever, regard it as appropriate to make such an order in respect of a Convention award, when, by definition, under the [1958 New York] Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], the time for enforcement has arrived. Plainly the rationale of the Convention is aimed at the enforcement of foreign arbitral awards unless either the unsuccessful party is seeking to have it set aside in the country where the award was made (in which case an adjournment of the enforcement proceedings under s 5(5) may be appropriate) or there is some fundamental ground of objection on grounds provided for in s 5(2)-(4). I do not venture to speculate on what circumstance if any, might induce a court in another case to grant a stay in respect of a judgment upon a Convention award properly obtained. I am satisfied that none such exists in this case.

17 I respectfully agree with those observations and like Potter J, I was satisfied that no valid grounds exist in this case for the grant of a stay pending appeal. I accordingly dismissed the application.