

Industrial & Commercial Bank Limited v Banco Ambrosiano Veneto S.P.A.
[2000] SGHC 188

Case Number : Suit 600167/2000, RA 600236/2000
Decision Date : 16 September 2000
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Davinder Singh SC with Hri Kumar (Drew & Napier) for the plaintiff; Yang Ing Loong (Allen & Gledhill) for the defendant
Parties : Industrial & Commercial Bank Limited — Banco Ambrosiano Veneto S.P.A.

JUDGMENT:

Grounds of Decision

1. This was another application for stay of proceedings on the ground of forum non-conveniens. The original application was made by the defendant, a bank incorporated in Italy, before the learned Assistant Registrar, Tan Wen Shan. She dismissed it. The defendant then appealed. I heard the appeal and agreed with the decision below. The defendant is now appealing to the Court of Appeal.

Facts

2. Both parties are banks. The plaintiff is a bank incorporated in Singapore. It has brought this suit against the defendant in order to enforce payment under two standby letters of credit ('the SBLCs') which the defendant had issued in its favour in June and September 1999 respectively.

3. The SBLCs were issued to procure the plaintiff to grant banking facilities to a Singapore company now called Global Trade and Consultancy Pte Ltd ('Global') and one Amarendra Nath Ghosh ('Ghosh'). At all material times, Ghosh was a customer of the defendant.

4. It was a term of the facilities that an event of default would occur if, in the plaintiff's opinion, there was any change or threatened change in the circumstances which would adversely affect any security held by the plaintiff or the borrowers' abilities to perform their obligations under the facilities. In January and February 2000, the defendant sent the plaintiff faxes alleging that:

(a) Ghosh was suspected of perpetrating a fraud on the defendant through the use of various accounts with the plaintiff, including Global's account, maintained and/or controlled by Ghosh; and

(b) the SBLCs were issued fraudulently and were null and void.

5. The plaintiff then declared an event of default and demanded payment of all sums owing to it by Global and Ghosh. The plaintiff also made demands on the SBLCs. The defendant did not meet the demands and on 16 February 2000, the plaintiff filed this action against the defendant. Six days later, on 22 February, the defendant commenced proceedings in Udine, Italy, against the plaintiff and others in which it sought a declaration that the SBLCs were null and void. This application to stay the proceedings in favour of the Italian courts was first made on 18 April 2000.

6. It appears from the affidavits filed by the defendant that it is resisting the plaintiff's claim on the basis that the SBLCs were fraudulently issued, in fraud of the defendant, by one Philip Pigozzo, an ex-employee of the defendant. The defendant also

alleges that the fraudulent issue of the SBLCs was part of a highly sophisticated banking fraud involving at least two other persons, to wit, Ghosh and one Samuel Lee, an ex-employee of the plaintiff.

7. As far as the action proper is concerned, the main issue is whether the SBLCs are void and consequently unenforceable. It is the defendant who has the burden of establishing the nullity of the SBLCs. To do so, it will not only have to show that the SBLCs were fraudulently issued by its employee but also that Samuel Lee was a participant in the fraud and had notice of Pigozzo's fraud and thirdly, that Samuel Lee's fraud r knowledge of Pigozzo's fraud is attributable to the plaintiff.

8. As far as the application and appeal were concerned, the issue was whether the defendant could show that Singapore was not the appropriate forum for the trial of the action but that the Italian court would be clearly and distinctly the more appropriate forum for the trial.

Factors in favour of Italy

9. The defendant submitted that a substantial portion of the facts arose in Italy. The defendant is resident in Italy, the SBLCs were issued in Italy, Pigozz's fraud was committed in Italy, the payment obligations of the SBLCs were in Italy in the sense that funds were in Italy, the scope of Pigozz's authority has to be determined by hearing witnesses and perusing documents in Italy, there are pending Italian criminal and civil proceedings, the Italian criminal court has issued a decree of preventive seizure, the place of expiry of one SBLC is in Italy and the principle witnesses regarding Pigozz's fraud (including the police investigators) are in Italy.

10. The evidence that the defendant needs to support the allegation of fraud is in Italy. It will not be possible for a Singapore court to compel disclosure from the police in Italy regarding the evidence of Pigozzo's or anyone else's fraud. The defendant could not compel either an Italian police officer or Pigozzo to attend the trial in Singapore and would therefore be deprived of key evidence. If the trial took place in Italy, the defendant would be able to adduce evidence from Pigozzo that he had acted fraudulently in issuing the SBLCs and that he was also involved in a larger fraud. It would also be able to adduce evidence from Pigozzo regarding Samuel Lee's involvement in the fraud.

Connecting factors in Singapore

11. The defendant submitted that the plaintiff had only two connecting factors to point to. The first was that Samuel Lee is resident in Singapore and the second is that the SBLCs are stated to be subject to Singapore law and the non-exclusive jurisdiction of the Singapore courts. That was not quite correct. The plaintiff is resident here. All its evidence is here and the place of performance under the SBLCs is Singapore in the sense that the plaintiff has the power to direct where payment is to be made.

Reasoning

12. I was of the view that although there were some factors pointing towards the Italian courts as appropriate for the trial of the action, those factors did not outweigh the factors which pointed to Singapore as the more appropriate forum. Even if the factors had been evenly balanced, the defendant would not have been able to discharge its burden and the application would have failed. But this was not an evenly balanced case: the weight of the factors clearly fell in favour of Singapore.

13. First, the SBLCs are expressly governed by Singapore law. If the action were to be heard in Italy, legal experts from Singapore would have to be produced there to give evidence. This would not be satisfactory: there would be language difficulties and also differences in approach between the Italian civil law system and the Singapore common law system. Singapore law is best

expounded by Singapore courts. This was a very powerful factor pointing towards Singapore.

14. The SBLCs also contained a non-exclusive jurisdiction in favour of the Singapore courts. In *Bambang Sutrisno v Bali International Finance Ltd* [1999] 3 SLR 140, the Court of Appeal held that the court should give weight to this clause even though it is non-exclusive and gives a right to the parties to institute proceedings in any other jurisdiction they may deem fit. A clause of this nature, even though non-exclusive, indicates that the parties consider Singapore to be an appropriate forum for the hearing of their dispute.

15. The defendant argued that weight should not be given to either the governing law or the non-exclusive jurisdiction clause because the SBLCs had been procured by fraud and were therefore void. I could not accept this argument. The SBLCs have not yet been established to be void. It is their status that is at issue in the case and the court cannot determine an interlocutory application on the basis of an allegation that has not been proved. In this regard, I adopt, with respect, the following view expressed by the Court of Appeal of the Supreme Court of Ontario in *Ash v Corporation of Lloyds* [1992] 9 OR (3d) 755:

'The plaintiffs argue that the exclusive jurisdiction clauses should be ignored because if there has been fraud in the circumstances surrounding the procurement of the contracts then the contracts are void ab initio and the clauses relating to forum are of no effect. I agree with McKeown J, and with the authorities he cites, to the effect that an allegation that a contract is void ab initio does not make it so until a final judgment of the court. If the plaintiffs can commence an action with an allegation of fraud which would void the contract and thus vitiate a choice of jurisdiction clause from the outset, then they may succeed on the merits while enjoying their own choice of jurisdiction or fail on the merits while depriving the defendant of the contracted choice. These clauses are too important in international commerce to permit that anomalous result to flow.' (per Carthy JA at p 758)

The above passage was quoted in the Australian case of *Fai General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association Ltd* [case 50135 of 1996, Supreme Court, New South Wales, unreported] where the court held that the provisions for exclusive jurisdiction of the English courts in certain contracts it was considering, would survive the avoidance ab initio of the contracts so as to direct determination of the disputes over avoidance to the English courts.

16. It is only logical that the governing law and jurisdiction clauses in this case are considered to be valid for the purposes of this application notwithstanding the challenge mounted to the SBLCs by the defendant. Applications for a stay, like this, are usually heard before the defence is filed and before any trial on the merits. If the defendant's argument were accepted it would mean allowing the defendant to neutralise the effect of the jurisdiction clause simply by alleging fraud on the part of the plaintiff.

17. Further, in this case the SBLCs are prima facie valid documents. They were issued by the defendant bank and sent to the plaintiff via authenticated SWIFT. The plaintiff was entitled to treat the issue of the documents as having been properly authorised by the defendant. It is only if the defendant is able to prove that an employee of the plaintiff was aware that the SBLCs were issued without authority as part of the fraud, and that that employee's knowledge has to be ascribed to the plaintiff, that the defendant will be able to avoid the documents. Otherwise, notwithstanding Pigozzo's fraud, the defendant would be bound by the SBLCs. When a document is sent by one bank to another through the authenticated SWIFT system, the recipient bank is relieved of making enquiries as to the validity of the document or the authority of the sender. Thus, the plaintiff's rights under the SBLCs, including its right to rely on the jurisdiction clause, cannot be prejudiced at an interlocutory stage by a mere allegation of fraud.

18. The defendant's strongest point was that much of its evidence was in Italy. Its witnesses are Italian speaking and its documents in the Italian language. Also the police investigators are in Italy. This factor had, however, to be balanced against the fact that the plaintiff's witnesses are here. They do not speak Italian and their documents are in English. Wherever the trial is held one set of witnesses will have to travel and one set of documents would have to be translated. On balance therefore this

was a neutral factor.

19. The defendant sought to add weight to this factor by stating it would not be able to bring Pigozzo to Singapore. Pigozzo's evidence can, however, be adduced in Singapore by video conferencing. Even if that route were not possible, the defendant would be able to prove Pigozzo's fraud by the testimony of his colleagues and superiors as to his authority and as to the unauthorised actions which their investigations revealed. As the plaintiff submitted, it is not necessary in order to prove a fraud that the evidence of the fraudster himself be adduced. The fraud can be as well proved by testimony from investigators and others with knowledge of the books and procedures of the defendant and the powers delegated to Pigozzo. Not even the police are necessary.

20. The plaintiff has a similar difficulty. Most of its witnesses could travel to Italy if necessary. The plaintiff would not, however, be able to ensure Samuel Lee's presence at a trial in Italy since first, he is no longer their employee and secondly, he is likely to be reluctant to go to a country where he may be arrested like Pigozzo was. Whilst Pigozzo's evidence would be helpful to the defendant, it is not essential. Samuel Lee's testimony would, however, be essential in determining the extent of the fraud and the plaintiff's knowledge, if any, of it since the defendant claims that he conspired with or assisted Pigozzo in the fraud. It should be noted that at this stage Pigozzo has not implicated Lee but if he does so in a trial in Italy the plaintiff would have great difficulty in challenging that evidence in the absence of Lee.

21. The defendant named others apart from Lee and Pigozzo who were or were suspected of being involved in the fraud. Apart from Pigozzo, none of these have any connection with Italy. The whereabouts of two, Ghosh and one Ante Devic, a Yugoslavian, are unknown. On the other hand, one Ng Yean Kiat is a Singaporean and the defendant has also mentioned 'some other high level officials' of the plaintiff as being involved and these must be in Singapore. Overall, the evidence necessary to prove two-thirds of the defendant's case (Samuel Lee's participation and the plaintiff's knowledge) is to be found in Singapore rather than Italy.

22. The defendant also relied on a decree of preventive seizure made by the Italian court. This decree it said was issued at the request of the public prosecutor and was not within the control of either party. As a result of the decree, if the plaintiff were to succeed in an action in Singapore, the defendant would be in contempt of the Italian court if it sought to satisfy the Singapore judgment. It would be in an invidious position because it would be faced with two contradictory court orders.

23. In this regard, I accepted the plaintiff's submission that the argument was misconceived. First, the purpose of the decree was to prevent further fraud from being perpetrated through the use of the SBLCs. It cannot logically relieve the defendant from honouring its legal obligations. If the defendant were right, it would be relieved from paying from the SBLCs even if the Italian civil courts rule in the plaintiff's favour on the SBLCs. That cannot be so. Further, the plaintiff's expert witness, Professor Mazzoni, stated in his affidavit that if a court of competent jurisdiction rules in favour of the plaintiff on the SBLCs, an application might be made to the criminal courts to allow payment. The defendant did not deny that that could be done. Secondly, in any event, the decree presents no difficulty for the defendant. If the defendant is correct, the decree excuses it from paying on any judgment against it and therefore it is the plaintiff who will be disadvantaged by the decree not the defendant.

24. Having considered the factors that connected the action with Italy and those that connected it with Singapore, I was not able to conclude that Italy was clearly and distinctly the more appropriate forum. I therefore dismissed the appeal.

Judith Prakash

Judge

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