The "Hyundai Fortune"
[2004] SGCA 41

Case Number : CA 138/2003

Decision Date : 09 September 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Bazul Ashhab and Karnan Thirupathy (T S Oon and Bazul) for appellants; Liew Teck Huat (Niru and Co) for respondents

Parties : —

Civil Procedure – Stay of proceedings – Respondents bringing action in Singapore in breach of exclusive jurisdiction clause – Appellants applying for stay of proceedings in favour of contractual forum – Whether court should refuse to grant stay of proceedings – Factors to be considered

9 September 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against the decision of Belinda Ang Saw Ean J who refused the defendant-appellant's application for a stay of proceedings despite the existence of an exclusive jurisdiction clause (reported at [2004] 2 SLR 213). We heard the appeal on 27 July 2004 and dismissed it for the reasons that follow.

The facts

2 On 3 July 2002, 1473 cartons of hami-melons ("the cargo") bought by the plaintiffs-respondents were packed, at Shenzhen, China, into a reefer container provided by the appellants, the owners of the vessel *Hyundai Fortune* ("the vessel"). On arrival in Hong Kong, the reefer container was loaded onto the vessel which was destined for Singapore. On arrival here on 7 July 2002 it was discovered that 1232 cartons of the cargo were badly damaged.

3 In the bill of lading dated 5 July 2002 ("the B/L"), it was stated that the journey was from Shenzhen, China to Singapore *via* Hong Kong. The B/L also stated that the cargo was to be stowed in a reefer container at the requisite temperature of 3°C.

4 An *in rem* action was instituted by the respondents, who were wholesale fruit merchants, to recover their loss.

5 On 9 July 2002, a joint survey was carried out by surveyors appointed by the respondents and the appellants respectively. Each surveyor produced his own report. The respondents' surveyor reported the cause of damage as follows:

> Based on the findings of survey, we were of the opinion that the damage was basically of deterioration and partial decomposition of fruit brought about by Bacterial Rot and Lasiodiplodia Fruit Rot which may have been accelerated by the exposure of the melons to adverse/high temperature after stowage in the container for shipment and damage was sustained whilst the cargo was under due care and custody of the Carrier and/or their agents.

6 Following this report, on 21 August 2002, the respondents made a claim of US$8,396.92 against the appellants in respect of their loss. There was no response. On 7 December 2002 the

respondents' solicitors made another demand for the same, with an indication that unless the claim was met, proceedings would be instituted against the appellants in Singapore. Again, there was stone silence. A further reminder by the respondents' solicitors in March 2003 also failed to elicit any answer.

7 Therefore, on 2 July 2003, shortly before the expiry of the limitation period of one year, the respondents' solicitors instituted the present *in rem* action against the appellants, followed by the arrest of the vessel on 19 July 2003. Subsequently, through the provision of security, the vessel was released.

8 On 20 August 2003, the appellants applied to have the action stayed on the ground that under cl 30 of the B/L, the parties had agreed that claims arising from the B/L "shall be brought … in Korea." The clause reads:

> The claims arising from or in connection with or relating to this Bill of Lading shall be exclusively governed by the law of Korea except otherwise provided in this Bill of Lading. Any and all action concerning custody or carriage under this Bill of Lading whether based on breach of contract, tort or otherwise shall be brought before the Seoul Civil District Court in Korea.

9 The appellants' basic point of contention was that the damage to the cargo occurred before it came on board the vessel. The appellants relied on the report of their surveyor which stated that the cause of damage was:

> … likely due to post harvest disorder aggravated by the unfavourable storage in high carrying temperature for 3 consecutive days commencing from 3-7-2002 to 6-7-2002, whilst in stowage of the 40ft reefer container …

10 In the appellants' surveyor's report, reference was made to the voyage Partlow chart which showed the following readings:

Date	Temperature Readings
4-7-2002	Commenced at +3 degree C but rose to +25 degree C and dropped to +22.5 degree C.
5-7-2002	Temperature dropped further to +17 degree C.
6-7-2002	Temperature rose to +25 degree C but dropped to +3 degree C.
7-7-2002) to) 9-7-2002)	Temperature constantly maintained at +3 degree C.

The surveyor's report further contained the following explanatory note as to how the Partlow chart (on the question of dates) should be read:

> The partlow chart has been placed 1 day ahead of its actual date on the temperature recording housing. Hence, the recorded temperature should be read backwards by 1 day to reflect its correct date.

11 It would be noted that for a period of two to three days, from 3 to 5 July 2002, while the reefer container with the cargo was being moved from Shenzhen to Hong Kong, the temperature in

the container was set at an unusually high level instead of the prescribed 3°C. The appellants did not challenge the readings of the Partlow chart. There was a clear breach of this obligation on the part of the appellants.

12 The appellants also averred that it was under no duty to respond to the respondents' letters of demand in relation to the damaged cargo.

13 The senior assistant registrar allowed the application. However, her decision was reversed by Ang J. The judge held that there were exceptional circumstances amounting to strong cause warranting the refusal of a stay. In coming to her view, she took into consideration the following factors:

(a) there was really no defence on the merits to the claim;

(b) no trial would be held in Korea as the action had become time barred there;

(c) the connecting factors of the case were all related to Singapore; and

(d) the overall justice of the case was with the respondents.

Having come to the view that these circumstances constituted strong cause, the judge also noted that the claim was for a very small sum.

Appeal

14 Being dissatisfied with the ruling of the judge, an appeal was lodged to the Court of Appeal. Very much the same arguments were canvassed before us. Effectively, what the appellants were saying was that the judge failed to properly evaluate the facts and had thus incorrectly applied the law to the facts.

The law

15 The parties were in agreement that despite an exclusive jurisdiction clause, the court could refuse a stay of proceedings if exceptional circumstances amounting to strong cause were shown.

16 It would appear that the first case which dealt with the question in a comprehensive manner was *The Eleftheria* [1969] 1 Lloyd's Rep 237 where Brandon J held that the plaintiff had the burden of proving strong cause. While the court should, in coming to its decision, take into account all the circumstances of the case, the following were identified by Brandon J to be matters pertinent to have regard to:

(a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.

(c) With what country either party is connected, and, if so, how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking

procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time bar not applicable here; or

(iv) for political, racial, religious or other reasons, be unlikely to get a fair trial.

17 These principles were approved and adopted by numerous subsequent English cases (*eg*, *The El Amria* [1981] 2 Lloyd's Rep 119), as well as by this court in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975–1977] SLR 258 and other later cases. In *The Vishva Apurva* [1992] 2 SLR 175, this court further reiterated the point that where the case involved an exclusive jurisdiction clause, the discretion of the court should not be exercised "just by balancing the conveniences." Thus, in dealing with this question, the court should not approach it as if it were dealing with a case of *forum non conveniens.*

18 In more recent years, this court had, in a trilogy of cases, namely, *The Jian He* [2000] 1 SLR 8, *The Hung Vuong-2* [2001] 3 SLR 146 and *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6, the occasion to determine how the test for a stay should be applied where there was effectively no defence to the claim.

19 In *The Jian He*, goods carried on board the vessel were wrongly delivered against a false bill of lading. On 24 July 1996 the carrier was unable to deliver the goods to the rightful consignee. There was an exclusive jurisdiction clause in favour of China in the bill of lading. On 14 June 1997, the plaintiff instituted an action *in rem*. It was amended on 17 July 1997 and the amended writ was served on the defendant owner on 28 August 1997. Appearance was filed the next day. A year later the plaintiff applied for summary judgment. The hearing of the application was twice postponed. The defendant had yet to file their show cause affidavits. It was only on 4 November 1998 that the defendant applied to stay all further proceedings in Singapore on the ground that there was an exclusive jurisdiction clause. China had a limitation period of one year and it was then too late for the plaintiff to commence any action there. The critical point which made this court decide to refuse a stay was that the defendant had no real defence to the claim and there was nothing to proceed to trial in China. Following from that, it held that the defendant was not really interested in a trial but was only seeking a procedural advantage as limitation had set in in China.

20 In *The Hung Vuong-2*, a cargo of raw sugar was shipped on board *The Hung Vuong-3* from Bangkok to be discharged at "the main port of South China". The carrier eventually delivered the cargo to a party who did not present the bill of lading. The holder of the bill sued in Singapore. The carrier applied to have the proceedings stayed on the ground of an exclusive jurisdiction clause. It would appear that at the time, limitation had not yet set in in Vietnam. Again, this court, having ruled that there was no defence to the claim, refused a stay which would only result in unnecessary delay.

21 In *Golden Shore Transportation Pte Ltd v UCO Bank* (see [18] *supra*), it was a case of the shipowner issuing a second set of bills of lading without ensuring that the original set of bills of lading was returned. The person holding the second set of bills of lading used it to obtain the cargo. The original set was with the plaintiff which sued in Singapore for its loss. The plaintiff did not issue a

protective writ in the contractual forum, *ie*, India, and the time bar had set in in that forum. This notwithstanding, as there was no real defence to the claim, and all factors favoured an action in Singapore, except for the time bar defence which had arisen in India, the High Court refused a stay of the Singapore proceedings. This decision was upheld on appeal by this court. With reference to the time bar defence having arisen in the contractual forum, it said (at [52]):

> In a case where the plaintiff could satisfactorily explain why he did not institute a protective writ in the contractual forum, this factor would assist the plaintiff in establishing strong cause. But if he could not, this factor would not assist him. However, this did not mean that the plaintiff could not rely on other factors to show strong cause. As for the defendant, where the plaintiff could not explain the failure to institute a protective writ within time in the contractual forum, the "benefit" to the defendant would be that the plaintiff could not rely on it.

Our consideration

22 It was settled law that in refusing a stay of proceedings, the judge was exercising a discretion and unless it was shown that the judge had wrongly applied the law, or had wrongly appreciated the facts, or that her decision was plainly wrong, the appellate court should not interfere in the exercise of his or her discretion: see *The Vishva Apurva* (see [17] *supra*) at [16].

23 It was clear to us that the judge had not erred in any manner. She correctly set out the principle which should apply in a case of this nature, *ie*, exceptional circumstances amounting to strong cause. She also held that the burden of showing such strong cause rested with the party who sought to have the action continued in Singapore. Having considered the facts which I have outlined above, including the following:

(a) the fact that the reefer container was not maintained at the prescribed temperature of 3°C during the journey from Shenzhen to Hong Kong as shown by the Partlow chart;

(b) the fact that on the documents it would appear that at the time the cargo was placed in the reefer container at Shenzhen, it was in apparent good order and condition;

(c) the fact that the higher the temperature at which fruits like the hami-melon here were stored, the greater the likelihood of rot or disease developing; and

(d) the fact that the appellants failed to give any reply whatsoever to the respondents' claim,

the judge came to the conclusion that there was really no issue of liability to be tried in Korea. Moreover, in view of the fact that the time bar had set in in Korea and the appellant was not prepared to waive the limitation defence, there could be no trial in Korea. In addition, the case had strong connecting factors with Singapore. Though the B/L was to be governed by Korean law, there was no evidence before the court to show that Korean law was any different from Singapore law in that regard. In the judge's opinion, the overall justice of the case did not favour having the action here stayed.

24 With respect to every such application, the weight to be given to each of the relevant factors is not something that is amenable to precise definition. While this court had in *Golden Shore Transportation*, with reference to certain connecting factors favouring Singapore, stated that the weight to be given to those factors would be "limited" or "not … as great" as if this were a *forum non conveniens* case, they must still be placed in the basket together with other factors to see if, in their

totality, they would add up to "strong cause". We were mindful of what this court said in *The Hung Vuong-2* (see [18] *supra*) at [21]:

> The weight which the court should accord to each factor is a matter of judgment in the light of the nature of the claim and the surrounding circumstances. However, the exercise is not just a numbers game. It does not follow that because a greater number of factors favour one approach, that approach would necessarily be adopted by the court.

25 In relation to the present appeal, two factors were crucial. The first concerned the question whether there was a defence to the claim, which, in turn, could be translated into the question whether the appellants seriously wanted a trial in Korea. It is common knowledge that the shelf life of fruits depends very much on the condition of storage. The warmer the environment, the more rapid the deterioration. Thus, the respondents' surveyor in its report stated that the deterioration of the hami-melons was probably aggravated or accelerated by the high temperature in the reefer container. That was why the parties had, by contract, prescribed that the temperature in the reefer container should at all times be maintained at 3°C. There was a breach of this requirement. Even the appellants' surveyor in its report stated that the cause of the damage was:

> … likely due to post harvest disorder aggravated by the unfavourable storage in high carrying temperature for 3 consecutive days commencing from 3-7-2002 to 6-7-2002 whilst in stowage of the 40ft refeer container …

26 This fact, coupled with the further fact that the appellants totally ignored the respondents' claim for a period of almost a year and was not able in its affidavits to identify the defences which the appellants would be relying on with an indication of the evidence in support (see *The Atlantic Song* [1983] 2 Lloyd's Rep 394), was clear evidence that the appellants had no defence to the claim. In this connection, the appellants argued that they were under no duty to answer the respondents' claim. However, as Sheen J said in *The Frank Pais* [1986] 1 Lloyd's Rep 529 at 533:

> I do not understand why it is inappropriate to discuss the merits of a claim if this can be done, thereby saving the cost of litigation. If the defendants have an answer to the claim put forward by the plaintiffs, I can see no reason why they should not say what that answer is.

27 Accordingly, it would be reasonable to infer that, had the appellants thought that they had a defence, they would have responded. The fact that they did nothing until one year had elapsed from the date the action first accrued, and then applied for a stay of the present proceedings, suggested that they were waiting for time to lapse so as to seek a procedural advantage. They did not seriously want a trial in the contractual forum.

28 We now turn to the second question as to whether it was reasonable for the respondents not to have instituted a protective writ in Korea before the limitation period had set in in that forum. Here, we noted that in the respondents' solicitors' letter of 7 December 2002, it was expressly stated that unless the claim was met, proceedings would be instituted in Singapore. Bearing in mind that there was a joint survey on 9 July 2002, and that the appellants' surveyor would have submitted his report to the appellants, it would not be unreasonable for the respondents to have assumed that the appellants had adopted the stonewalling approach, without even acknowledging the receipt of the claim, because they really had no answer to the claim. In our opinion, it did not appear unreasonable for the respondents in the circumstances here not to have taken out a protective writ in Korea. The fact that the appellants were not willing to waive the time bar defence and have the security furnished here transferred to Korea, lent further weight to the point that the appellants did not desire a trial in Korea. Their aim was clear. They wanted to obtain a tactical advantage.

29 Thus, when we weighed these factors, together with the other connecting factors which favoured a hearing in Singapore, not only were we satisfied that the appellants had not shown that the judge had exercised her discretion wrongly, we were of the view that exceptional circumstances amounting to strong cause had, in fact, been established. Accordingly, we dismissed the appeal, with the usual consequential orders.

30 The appellants seemed to suggest that the decision of the court below undermined the sanctity of contractual terms; it seemed to sanction forum shopping. We would like to reiterate that forum shopping is a strategy which is strongly frowned upon by this court. Having said that, an exercise in determining strong cause, which will necessarily involve an evaluation of the differing factors, cannot be the subject of rigid rules or classification. It is simply not possible. We had in *Golden Shore Transportation* held that matters of foreseeable convenience should be given "limited" weight or "not as great" a weight as unforeseeable factors. Whichever label is used, what was intended to be conveyed was that foreseeable factors, which were within contemplation of the contract, should not be accorded the same weight as the unforeseeable factors. This is only fair and in accordance with common sense. In that case, we further pronounced that if the plaintiff was not able to explain why it did not institute a protective writ in the contractual forum, it could not rely on the fact that the action was time barred in the contractual forum as a factor favouring the refusal of a stay. Here, for the reasons already given, we did not think that the respondents had acted unreasonably in not taking out a protective writ in Korea. Ultimately, the court must come to the conclusion that, collectively, the factors advanced against a stay constitute "strong cause", before rejecting the defendant's application. The court below did that. So did we.