Golden Shore Transportation Pte Ltd v UCO Bank and Another Appeal
[2003] SGCA 43

Case Number : CA 53/2003, 55/2003

Decision Date : 23 October 2003

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Toh Kian Sing, John Seow and Aileen Boey (Rajah & Tann) for appellants; Sarjit Singh SC and Dylan Lee (Shook Lin & Bok) for respondents

Parties : Golden Shore Transportation Pte Ltd — UCO Bank

Civil Procedure – Stay of proceedings – Choice of jurisdiction – Plaintiff bringing action in breach of exclusive jurisdiction clause – Defendant applying for stay of proceedings in favour of contractual forum – Whether court should refuse to order stay of proceedings – Factors to be considered

Conflict of Laws – Choice of jurisdiction – Exclusive – Stay of proceedings – Clause providing that "Any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only" – Whether clause an exclusive jurisdiction clause – Whether court should refuse to order stay of proceedings

Delivered by Chao Hick Tin JA

1 These are two appeals which raised before us an identical issue, namely, whether each of the two separate actions instituted in Singapore by the respondent, UCO Bank ("UCO"), against two shipowners, the appellants in the two appeals, for their wrongful delivery of cargo without the production of the relevant bills of lading (B/L), should be stayed on the ground that there is an exclusive jurisdiction clause in the B/Ls in favour of India.

2 Except in one respect which we need not go into, the facts surrounding the two actions are similar. Accordingly, the parties have argued before us on the basis that the ruling in Civil Appeal 55/2003 will apply to Civil Appeal 53/2003.

The background

3 UCO is an Indian bank carrying on business here through a local branch. One of its customers was SOM International Pte Ltd ("SOM"), a Singapore incorporated company. SOM was controlled by Mr Som Nath Sood ("Sood"). SOM arranged for cargoes to be shipped from various East Malaysian ports to the Port of Kandla in India. One set of cargo was loaded on board the *"Asean Pioneer"* owned by Golden Shore Transportation Pte Ltd ("Golden Shore"), the appellants in CA 55/2003. The appropriate B/Ls were issued for the shipment ("original bills"). Each B/L expressly stated on the front page that it is governed by the law of Singapore and the consignee is "to the order of UCO Bank". The parties to be notified were SOM and UCO.

4 Pursuant to the application of SOM, letters of credit were issued by UCO to the sellers of the cargo. UCO eventually became the holders of the B/Ls. However, around the same time, SOM procured the issuance of a second set of B/Ls ("switched bills") by promising to the shipowner, Golden Shore, that the original bills would be returned to them. In the switched bills, SOM was named as the shipper, instead of SOM's suppliers. However, the original bills, which were held by UCO, were never returned to Golden Shore as promised by SOM. SOM never paid UCO to obtain the original bills.

5 The present action of UCO against Golden Shore is based entirely on the original bills which are still in their possession.

6 The switched bills were transferred by SOM to buyers in India. The vessel, *Asean Pioneer,* arrived at its destination on 15 January 2001 and the cargo was, between 15 and 25 January 2001, delivered to Indian receivers upon presentation of the switched bills.

7 After some six months, Golden Shore asked for the return of the original bills but UCO refused. UCO did not at any time, prior to this request for the return of the original bills, enquire about the shipment or ask for the delivery of the cargo. At the same time, UCO repeatedly asked SOM for repayment of the loan. On 20 December 2001, UCO, as holders of the B/L, instituted the present action.

8 On 11 January 2002, Golden Shore applied to have the action stayed on the ground that clause 17 of the B/L, which is an exclusive jurisdiction clause, required that any dispute between the parties has to be adjudicated upon at the port of delivery. The application first came before the Assistant Registrar, who ordered a stay. On appeal, the judge-in-chambers ("the Judge"), reversed that order and refused a stay.

Decision below

9 Before the High Court, two main issues arose for consideration. The first was whether clause 17 is, in fact, an exclusive jurisdiction clause. The second was, if the answer to the first issue was in the affirmative, whether there are exceptional circumstances indicating "strong cause", such that the court should exercise its discretion in UCO's favour and assist them in breaching the exclusive jurisdiction clause. The Judge answered both issues in the affirmative and refused to order a stay of the present proceeding.

Jurisdictional Clause

10 Before us, the same two issues were canvassed and we shall deal with each in turn. As the question on the scope of clause 17 is one of construction, it is necessary that we set it out in full in order that its effect could be appreciated:-

> Claims. Any claims that may arise hereunder must be made at the port of delivery *for determination* and settlement at that port only. The Carrier's liability in case of loss or damage to goods for which they are responsible within the limits of this Bill of Lading to be calculated on and in no case to exceed the net invoice cost and disbursement or pro rata on that basis in the event of partial loss or damage. Unless *notice of loss or damage* and the general nature of such loss or damage be given in writing to the Carrier or their agents at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or if, the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the Carrier of the goods as described in the Bill of Lading. In any event, the Carrier shall be discharged from all liability in respect of loss or damage unless *suit* is brought within one year after delivery of the goods or the date when the goods should have been delivered.
>
> In no circumstances shall liability exceed the actual loss or damage sustained, the carrier shall not be liable for any consequential or special damages and shall have the option of replacing any lost or damaged goods. Any sum paid to or recovered by Customs Authorities under any Bond for exportation given by the shippers or owners of goods shall not be considered to form part of any actual loss or damage sustained by or in connection with such goods for which the carrier is or shall be liable. If the ship comes into collision with another ship as a result of the negligence of the other ship or object and any act, neglect or default of the master, mariner, pilot or the

servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or object or the owners in so far as such loss or liability represents loss of, or damage to, any *claim* whatsoever of the owners of said goods, paid or payable by the other non-carrying ship or object or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or object or her owners as part of their claim against the carrying ship or Carrier. At any port where, in accordance with Customs regulations, the goods have to be landed into the charge of the Customs or other Authorities no *claims* for shortage or damage will be considered by the Carrier, beyond that noted by the Authorities at the time of receiving the goods into their charge.

In the case of any actual or apprehended loss or damage, the Carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods. The carrier shall not be liable to pay any compensation if the nature or the value of the goods has been wilfully mistated. The above includes *claims* in the nature of General Average.

This clause in its entirety shall also apply in any cause of loss sustained as a result of mis-delivery, non-delivery, wrongful delivery or delivery to any person whomsoever not entitled to the goods. (Emphasis added).

11 It is true that this clause is unlike some other jurisdiction clauses which we see in other cases. As an example, in *The Jian He* [2000] 1 SLR, a case which featured very prominently in the arguments of both parties, the jurisdiction clause read:-

"Jurisdiction: This Bill of Lading is governed by the laws of the People's Republic of China. All disputes arising under or in connection with this Bill … shall be determined by the laws of the People's Republic of China and any action against the carrier shall be brought before the Maritime Court in Guangzhou or Shanghai or Tianjin or Qingdao or Dalian where the principal place of business of the relevant company is situated."

It cannot be denied that this clause in *The Jian He* is more explicit and there it was not really in dispute that the clause was an exclusive jurisdictional clause.

12 Similarly, in *The Asian Plutus* [1990] SLR 543, the jurisdiction clause was also very explicit and it read:-

"The contract evidenced by or contained in this bill of lading shall be governed by Japanese law, except as may be otherwise provided for herein and any action against the carrier thereunder shall be brought before the Tokyo District Court in Japan."

13 However, it does not therefore follow that, just because the clause here is worded differently, it could not be such an exclusive jurisdiction clause. It is still necessary to construe the clause in its entirety to determine its real import.

Contentions of UCO

14 The main argument of UCO is that, looking at the clause as a whole, what it provides for is the place for "the notification and making of a claim for the purposes of the owner's consideration and settlement." In this regard, UCO relied on the opening words of the clause "claims … must be made at the port of delivery for determination and settlement at that port only."

15 UCO also relied upon the word "suit" which appear later in the same paragraph of clause 17 to contend that the word "claim" in the opening sentence of that clause could not have been intended to mean "suit". They submitted that it is a canon of construction that where different words are used in a document, they could not be construed to mean the same thing; a "suit" would connote a legal process and a "claim" does not necessarily connote that. It is entirely in line with common sense and practicality for a claim to be notified at the port of delivery. UCO argued that it is altogether another thing to say that just because a claim must be made at the port of delivery, an action must also be instituted at the same place. One does not necessarily follow from the other.

16 Moreover, UCO argued that if indeed "claim" means "suit" and if we were to substitute the word "suit" for the word "claim" in the clause, it will not make sense in some places. UCO took, *inter alia*, the example of the phrase "no claims for shortage or damage will be considered by the carrier" and argue that if the word "claims" were to be substituted by "suits", the phrase would not make sense.

17 UCO also referred to clause 6 to argue that clause 17 does not relate to the institution of proceedings. Clause 6 provides that "… claims for services by other vessels belonging to the carrier, wherever rendered, may be adjudicated upon in the Singapore Court whose decisions shall bind the owners of the goods …" In contrast, clause 17 does not mention courts or adjudication. Thus, clause 17 could not be a jurisdiction clause. "Claims" means nothing more than notification of loss or damage and the entire clause deals with notification and consideration of claims. It has nothing to do with the institution of legal proceedings. In any event if there is any ambiguity as to the scope of clause 17, the *contra proferentum rule* should apply.

Arguments of Shipowners

18 Golden Shore adopted the interpretation accepted by the judge below, that the word "claims" in the first sentence of clause 17 includes "suits". But they explained that not every reference to "claim" in clause 17 would necessarily include a suit; much would depend on the context. Golden Shore referred to the sentence "no claims for shortage or damage will be considered by the carrier." The word "claims" in that context could not mean "suits".

19 Golden Shore argued that sufficient regard must be given to the two key words in the first sentence of clause 17: "claims" and "determination". The word "determination" means "adjudication". That sentence required all suits under the B/L to be determined at the port of delivery only.

The authorities

20 Golden Shore relied upon the case of *Maharani Woollen Mills Co v Anchor Line* [1927] 29 Lloyd's Rep 169 *("Maharani")* in support of its construction of clause 17. There the clause in question provided that "All claims arising shall be determined at the port of destination according to British laws." The goods were carried from Liverpool to Bombay. The plaintiff brought an action in England. But the shipowners asserted that the action must be instituted in Bombay and sought a stay. The High Court ordered a stay, which order was affirmed by the Court of Appeal. Scrutton LJ, the illustrious shipping law judge, in a short judgment, construed this clause to mean that "disputes as to the condition of the goods and the damage done to them shall be settled where the goods … are." He said that he did not see any difficulty with the jurisdiction clause and it was reasonable to hold the plaintiff to his contractual term. He construed the word "claims" to include "disputes".

21 In contrast, UCO relied upon the Malaysian case of *The Sinar Mas* [1982] 1 MLJ 279 for the construction of clause 17. There the clause was very similar to the present clause 17 and it read:

"Claims. Any claims that may arise hereunder must be made at the port of delivery for determination and settlement at that port only …" The High Court construed this clause to have nothing to do with jurisdiction and its reasoning was as follows:-

> "In *Shorter Oxford Dictionary*, "claims" means a demand for something as due; an assertion of a right to something. In my view, a claim in the context of Clause 17 does not amount to a litigation which, according to the same dictionary, means the action of carrying on a suit in law or equity; legal proceedings; and disputation. Having regard to the judgments in *The Fehmarn* and *The Adolf Warski*, I think there is a distinction between "claims" and "disputes". Clause 17 does not envisage any dispute on litigation. It is confined to "claims" pure and simple as, for example, where a consignee wishes to claim for the goods under the Bill of Lading, then it must be done only in Kuching, which is the port of delivery. I am, therefore, of the view that Clause 17 is not a jurisdiction clause or even a forum clause. The court should not import extra words into Clause 17 so as to give it new meaning with regard to the intention of the contracting parties."

22 As pointed out by the Judge, the court in *The Sinar Mas* did not give consideration to the word "determination" in that clause. Furthermore, it is not clear why the court in *The Sinar Mas* relied upon *The Fehmarn* [1958] 1 All ER 333 and *The Adolf Warski* [1976] 1 Lloyd's Rep 107. In *The Fehmarn,* the relevant condition was:-

> "All claims and disputes arising under and in connexion with the bills of exchange shall be judged in the USSR."

The dispute was in relation to short delivery and contamination. The Court of Appeal there did not examine the two words "claims" and "disputes". What can be said about that clause is that the parties there had expressly used both terms.

23 Similarly, in *The Adolf Warski*, Brandon J was in no sense construing the two words "claim" and "dispute". The case concerned two jurisdiction clauses in two different bills of lading. The first provided that "Any claim … shall at the option of the carriers be settled direct with the carriers in Poland according to the Polich law to the exclusion of proceedings in the courts of any other country". The second provided that "any dispute … to be decided in Poland according to Polish law except as provided elsewhere." There was no doubt that these two clauses were jurisdiction clauses.

24 We are unable to see how these two cases, *The Fehmarn* and *The Adolf Warski*, were germane to the interpretation of the jurisdiction clause in *The Sinar Mas*. While it is clear that the word "claim" and the word "dispute" are different, what each word means must depend on its context. For example, in the clause "any claim … shall … be settled direct with the carriers in Poland according to the Polish law to the exclusion of proceedings in the courts of any other country" in *The Adolf Warski*, the word "claim" would surely include "dispute".

25 We would observe that the result reached in *The Sinar Mas* would also have been the same even if the court were to have held that the clause was an exclusive jurisdiction clause. This is because, as the judge there noted, the clause could not be invoked in the circumstances of the case. The contention there was that the action should have been filed in the Kuching High Court instead of the Kuala Lumpur High Court. The judge effectively ruled there was no difference. He said (at 279):-

> "The carriage by sea was from Penang to Kuching. Both ports are in Malaysia … The High Courts in Borneo and States of Malaya have similar jurisdiction and adopt the same admiralty practice. I am inclined to the view that a jurisdiction or forum clause does not apply to a litigation

commenced in another court of similar jurisdiction and situated in the same country as the court envisaged by the parties to the contract."

26 Another case which has been referred to by the parties is *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253, a decision of this Court. We do not think this case is helpful either. There two adjacent clauses in an insurance policy read: "Claims are payable in India or Singapore in US dollars" and "In the event of loss or damages which may involve a claim under this insurance, immediate notice thereof and application for survey should be given to: (agents in India)" The court rejected the suggestion that the first clause amounted to a jurisdiction clause. The wording there is clearly different from that in the first sentence of our clause 17. Moreover, in relation to an insurance claim, notification to the insurer is a standard feature to enable the insurer to conduct investigations. While we recognise that it is just as important for a carrier to conduct investigation into a claim for loss or damage to cargo, there is no compelling reason why the carrier must be notified at the port of delivery.

27 Another case Golden Shore relied upon is *The Media* [1931] 41 Lloyd's Rep 80, where the clause read:-

> "All claims arising under this bill of lading shall be determined at the port of destination of the goods according to British law, or, at the shipowners' option, they shall be determined in the UK, and to the exclusion of the jurisdiction of any other country."

There was no dispute in the case that that was an exclusive jurisdiction clause, with only one exception, that the shipowner would have the option to have any dispute determined in the UK. What is of interest about the clause is that its first half is similar to the first sentence of clause 17 in the present case. However, we recognise the last limb of the clause in *The Media* removed any possible doubt that it was a jurisdiction clause.

Our opinion

28 Though the clauses in *Maharani* and *The Media* are not identical with clause 17, as there is no reference in clause 17 itself to governing law, or the exclusion of the jurisdiction of another country, they are similar in significant respects. In both *Maharani* and *The Media*, the word "claims" was effectively held to encompass "suits" or "disputes". A "claim" means a demand for something as due or an assertion of a right to something. A claim can be manifested in various forms. It can take the form of a letter or an action. There is no reason why a claim in the form of an action or suit could not come within the meaning of the first sentence.

29 Another word of importance in the first sentence is "determination". To suggest that the sentence only imports the concepts of "notification" and "investigation" is to ignore the plain words there and give no sense at all to it.

30 Turning to the argument on the last sentence of the first paragraph of clause 17 where the word "suit" appeared, we would say it reinforces the view that the scope of the first sentence is much wider than just "notification" and "investigation". At this juncture, it may be instructive to see what the second and third sentences in the paragraph say. The second sentence puts a cap as to the carrier's liability for loss or damage. The third sentence deems the goods delivered in proper condition unless notification was given at the time of delivery or within three days (if the loss or damage be not apparent). We should think that with this sentence there would have been no need to have the first sentence if all that the first sentence means is to give "notification". The fourth sentence (which is also the last sentence) of the paragraph prescribes a limitation period of one

year. As the Judge rightly found, the word "suit" was more appropriate in the context of that last sentence. Indeed the second, third and fourth sentences were adopted from clause 6 of the Hague Rules. The three sentences either cap or qualify the liability of the carrier.

31 As for clause 6 of the B/L, while it is true that there there is an express reference to adjudication by the Singapore courts, what is of interest to note is that the clause also uses the word "claims" and in the context the word "claims" would encompass "actions" or "disputes", precisely the sort of meaning which UCO sought to place on the word "claims" in clause 17.

32 Thus, we agree with the trial judge that the word "claims" in the first sentence should be construed to include "suits", and in our opinion even "disputes". A claim which is not met becomes a dispute which would require determination. We would reiterate that if the first sentence is only meant to provide for notification, as contended by UCO, why have it at all when the third sentence clearly provides for notification. Moreover, that contention would have disregarded the word "determination". Accordingly, we hold that the first sentence is an exclusive jurisdiction clause.

Whether a stay should be ordered

33 It is settled law that where a party seeks to bring an action in a Singapore court in breach of an exclusive jurisdiction clause, he must show exceptional circumstances amounting to "strong cause" why the court should exercise its discretion in his favour and assist him in breaching his promise to bring the action in the contractual forum: see *The Jian He* [2000] 1 SLR 8. The burden to show such strong cause obviously rests with the plaintiff, because *prima facie* he should be held to his contractual commitment. The factors which a court will take into account in determining whether there is a "strong cause" were elaborated in *The El Amria* [1981] 2 Lloyd's Rep 119 and adopted by this court in *Amerco Timbers Pte Ltd v Chatworth Timber Corp Pte Ltd* [1977] 2 MLJ 181. They are:-

(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.

34 The burden here is more than just establishing that Singapore is the more convenient forum to hear the case. The principles applicable to a case involving an exclusive jurisdiction clause are different from those applicable to determining *forum non conveniens*: see *Citi-March Ltd v Neptune Orient Lines Ltd* [1997] 1 Lloyd's Rep 72 at 76 per Colman J. As this Court noted in *The Vishva Apurva* [1992] 2 SLR 175 at 182:-

> "In a case involving an exclusive jurisdiction clause, the discretion of the court should not be exercised just by balancing the conveniences."

35 In this case, the factors which the judge took into account in coming to his conclusion that there is strong cause for refusing a stay are –

(i) that both parties were more closely connected with Singapore;

(ii) that Singapore law is the governing law under the B/L;

(iii) that in respect of the main issue as to whether UCO had consented or acquiesced in the switching of the B/L such as to preclude them from relying on the original bills, the evidence is primarily to be found in Singapore; and

(iv) that Golden Shore did not genuinely desire trial in India

We should add that another factor which the judge had considered, but ruled that it is neutral, is the fact that the action has become time-barred in India.

3 6 Golden Shore, in reliance on, *inter alia*, *British Aerospace v Dee Howard* [1993] 1 Lloyd's Rep 368, *Import Export Metro Ltd v Compania Sud Americana de Vapores* [2003] 1 Lloyd's Rep 405 and *Ace v Zurich Insurance* [2001] 1 Lloyd's Rep 618, argued that many of the factors considered by the judge relating to matters of convenience should not carry much weight as they are not exceptional; indeed they were all foreseeable. Here, counsel for Golden Shore relied upon the words of Rix LJ in *Ace* (at 630):-

> "If a party agrees to submit to the jurisdiction of the courts of a state, it does not easily lie in its mouth to complain that it is inconvenient to conduct its litigation there …"

37 Golden Shore also submitted that there was no basis for the judge to hold that it has no genuine desire for a trial in India. It has raised several defences to UCO's claim among which is the defence that UCO consented or acquiesced to the switching of the original bills.

Our analysis

38 As far as the first and second factors mentioned in ¶35 above are concerned, namely, that the parties are more connected with Singapore and the governing law of the B/L was Singapore law, while these two factors would favour a trial in Singapore, we recognise that they are not exceptional matters. Accordingly, the weight to be given to these two factors would have to be limited as they were known to the parties at the time of the contract and notwithstanding such knowledge, they had nevertheless provided in the B/L that the contractual forum should be India.

39 As regards the third factor, it is on balance true that the evidence relating to the main defence

of consent is to be found more in Singapore. We note that physically two witnesses will be in India. One is Mr S Srinivasan, UCO's then Manager for Credit Sanction, who is now there. But UCO have undertaken to bring him to Singapore for the trial. So Mr Srinivasan must effectively be treated as being in Singapore. The other is the Managing Director of SOM, Sood, who is now residing in India. He dealt with UCO. Golden Shore submitted that if the trial were to be held in Singapore, they would not be able to compel Sood to attend the trial here. But his evidence may still be obtainable in India pursuant to Order 39 of the Rules of Court. Of course, the Judge did not think much of the importance of Sood, as Golden Shore is not even able to indicate what evidence Sood will be able to give. It is not known whether Sood will be saying that UCO knew and consented to the switch.

40 As for the other witnesses of UCO, they will be in Singapore. So will the bank documents relating to the transaction. While evidence as to the market price of the cargo will be in India, there should not be any great difficulty in obtaining such evidence. Thus, the factor relating to witnesses and other evidence would favour a trial in Singapore. But for the same reasons as for the first two factors, the weight to be given to this factor would not be as great as if this were a *forum non conveniens* case.

41 Turning to the fourth factor, whether Golden Shore genuinely desire a trial in India, there are a few matters we need to consider. Golden Shore have raised a number of defences but the only one which merits any consideration at all is that of consent/acquiescence. On this, Golden Shore relied on two circumstances. First is the delay by UCO in seeking delivery of the goods and its total absence of inquiry with regard thereto. Second, is the fact that UCO negotiated the switched bills. As the details relating to the cargo on the original bills and the switched bills are identical, Golden Shore contended that UCO would thus have known of the switch or, in the alternative, it confirms that UCO had consented to the same.

42 Like the Judge, we are unable to see why it would be reasonable to infer consent or knowledge on UCO's part just because there was some delay in UCO making a claim or inquiries relating to the cargo. In fact UCO was told that there was delay because of an earthquake at the port of destination. Moreover, UCO was negotiating with SOM. As mentioned before, there is no indication as to what Sood would say on the matter. There is nothing on which it can reasonably be inferred that UCO consented to the switch. Neither has it been alleged that Golden Shore had checked with UCO before issuing the switched bills, bearing in mind that the original bills were stated "to the order of UCO" and UCO was also the notify party on the original bills.

43 As regards the negotiation by UCO of the switched bills, here again there was nothing to indicate to UCO that the switched bills related to the same cargo as the original bills. The "shipper" stated on the switched bills was different from that on the original bills even though the cargo described was the same in the generic sense. No reasonable banker would think that the switched bills related to the "same" cargo as it would have been unimaginable that a carrier would issue another B/L for the same cargo without withdrawing the earlier B/L. Thus, the entire defence of consent/acquiescence is highly speculative. Even if it could be shown that the bank officers were careless in scrutinizing the switched bills, that could in no way suggest consent, which requires actual knowledge.

44 It is on these four factors that the Judge ruled that a strong cause has been established that the case should be allowed to proceed in Singapore. In refusing to order a stay, the Judge was exercising a discretion and in order for this court to upset that determination it must be shown that the Judge had erred on principles or had reached a conclusion which is plainly wrong. On all the four factors above, they, in varying degrees, favour the continuation of the case in Singapore. There is, therefore, no basis for us to hold that the Judge was wrong in coming to the conclusion that strong

cause has been shown and a stay should be refused. In refusing a stay the Judge was exercising a discretion, and there is no way in which we can say that he was plainly wrong.

Time-bar

45 Considerable arguments were advanced by the parties, particularly by Golden Shore, on the facts that the defence of time-bar has accrued in India. If on other grounds a plaintiff, having reviewed the situation, thinks that he is entitled to bring an action in a forum other than the contractual forum and does not institute a protective action in the contractual forum, giving rise to a time-bar defence from arising, this factor should not be taken against the plaintiff. Here, we would quote the words of Colman J in *Citi-March* (at 75) for the rationale:-

> " … if, notwithstanding the foreign jurisdiction clause, there are factors … in the interests of justice and all the parties, provide strong cause for treating the English Courts as the appropriate forum, the plaintiff's omission to protect time in the contractual forum will not condemn him to a stay of the English action. In such a case his self-induced prejudice, or putting it obversely, the defendants' accrued defence, is merely a consequence of the plaintiff having given effect by his own conduct to the principles which underly the exercise by the Court of its own discretion. For the Court to take into account against a plaintiff a time bar arising in such circumstances would involve an inconsistency of approach which cannot be justified in principle."

46 In *Amerco,* where the situation is similar to the present and where the action was time-barred in Indonesia, the accrual of this defence in favour of the defendant was not taken into account in refusing a stay. Indeed, in that case, where there was an indication that under Indonesian law it was not open to the defendant to waive the time-bar, the court said that it would either attach no weight to this factor or, adopting the views of Brandon J in *The Adolf Warski*, refuse a stay.

47 Reverting to the present case, there is also an indication that under Indian law, the limitation cannot be waived, even though Mr Toh for Golden Shore said that his clients would be willing to waive the point. The Indian law allows the court a discretion to extend the limitation period by three months and nothing more and this extended three month period had long expired. Applying the approach of this Court in *Amerco* to the fact-situation here, the application for a stay would also have to be refused.

48 Now we would like to turn to the argument of Golden Shore that as the Judge had found that UCO had acted unreasonably in failing to institute a protective writ in India, the factor of time-bar should work in their favour. It should not be treated to be a neutral point as the Judge did.

49 It is no doubt true that UCO could have instituted a protective writ in India to prevent limitation from setting in. But even if UCO had done so, it would not have helped to determine whether in all the circumstances, a strong cause had been established that the case should be allowed to continue in Singapore. As we have held that by the other factors UCO had shown a strong cause, their failure to institute a protective writ in India is inconsequential. It is in this sense that the court in *The Jian He* had held that the failure of the plaintiffs to institute an action in China to be a neutral point.

50 In *The Jian He*, where time-bar had also set in in the contractual forum, the court having reviewed the cases of *Citi-March v Neptune* (supra), *The MC Pearl* [1997] 1 Lloyd's Rep 566 and *The K H Enterprise* [1994] 1 Lloyd's Rep 593, made the following general proposition (at 21):-

> "the mere fact that the action would be time-barred in China is not of itself a sufficient ground

for the court to exercise its discretion in favour of a plaintiff. It is really a neutral point, as refusing a stay would deprive the defendants of their accrued rights and granting a stay would defeat the plaintiffs' claim altogether."

51 The court then went on to consider how a plaintiff could turn the factor in his favour (at 21):-

"The plaintiffs must justify their conduct in allowing limitation to arise in the contractual forum. They must show that they did not act unreasonably in failing to commence proceedings within time in the contractual forum, such as, by issuing a protective writ: see also *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 and *The El Amria* [1981] 2 Lloyds Rep 119. They must explain fully and fairly to the court why they allowed time to lapse in the contractual forum: *The Bergen* [1997] 2 Lloyd's Rep 710. Therefore, the factor of time-bar in the contractual forum is a two-edged sword, depending very much on the reasons given".

52 The court next considered whether the plaintiffs in *The Jian He* had shown that they had acted reasonably in not taking out a protective writ in the contractual forum. It came to the view that the plaintiffs had not shown that and therefore the time-bar factor remained a neutral factor, i.e., it could not assist the plaintiffs to show strong cause. Here we would like to make a clarification on the reference in *The Jian He* to the factor of time-bar in the contractual forum being a two-edged sword. That perhaps is not an entirely happy description. 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.

53 At the end of the day, it is the overall justice of the case that is going to be decisive. In the words of Colman J in *Citi-March* (at 77):-

"At the end of the day the Court must consider whether in the interests of justice it is more appropriate to permit a plaintiff to proceed in England, although he has omitted to preserve time in the contractual forum, and although England is not clearly the more appropriate forum than to deprive him of all opportunity of pursuing his claim in any forum."

54 In a sense this observation of Colman J went further than the facts of the present case necessitate because here, as we have determined earlier, Singapore is the more appropriate forum for the case. We shall leave this aspect of the matter to another case on another day.

Judgment

55 In the result, we would agree with the Judge that strong cause had been shown that both the actions (in respect of which Civil Appeal 53/2002 and Civil Appeal 55/2003 arose) should continue in Singapore. Accordingly, the two appeals are dismissed with costs. The security for costs in relation to both appeals, together with any accrued interest, shall be released to the respondents, to account of costs.

56 There shall only be one set of costs for the respondents, except with regard to disbursements.