IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 24

Civil Appeal No 90 of 2016

Between

(1) Rotary Engineering Limited
(2) Roger Chia Kim Piow
(3) Chia Kim Hung

… *Appellants*

And

(1) Kioumji & Eslim Law Firm
(2) Yahya Lutfi Khader

… *Respondents*

Civil Appeal No 167 of 2016

Between

(1) Kioumji & Eslim Law Firm
(2) Yahya Lutfi Khader

… *Appellants*

And

(1) Rotary Engineering Limited
(2) Roger Chia Kim Piow
(3) Chia Kim Hung

… *Respondents*

Civil Appeals Nos 90 and 167 of 2016 (Summons No 7 of 2017)

Between

(1) Kioumji Eslim Law Firm
(2) Yahya Lutfi Khader

… *Applicants*

And

(1) Rotary Engineering Limited
(2) Roger Chia Kim Piow
(3) Chia Kim Hung

… *Respondents*

Civil Appeal No 167 of 2016 (Summons No 102 of 2016)

Between

(1) Kioumji Eslim Law Firm
(2) Yahya Lutfi Khader

… *Applicants*

And

(1) Rotary Engineering Limited
(2) Roger Chia Kim Piow
(3) Chia Kim Hung

… *Respondents*

EX TEMPORE **JUDGMENT**

[Conflict of laws] — [Natural forum] — [Stay of proceedings]

Rotary Engineering Ltd and others
v
Kioumji & Eslim Law Firm and another and another appeal and other matters

[2017] SGCA 24

Court of Appeal — Civil Appeal Nos 90 and 167 of 2016; Summons Nos 7 of 2017 and 102 of 2016
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
21 March 2017

Sundaresh Menon CJ (delivering the judgment of the court *ex tempore*):

1 The appeals before us arise out of an application for a stay of proceedings on the ground of *forum non conveniens* in favour of the courts of Saudi Arabia. There is no doubt that the dispute in question has many significant points of connection with that jurisdiction, but the Judicial Commissioner ("the Judge") hearing the application took the view that there were also sufficient points in favour of Singapore so that it could not be said that Saudi Arabia was clearly the more appropriate forum. Having considered the oral and written arguments of the parties, we respectfully disagree with the learned Judge and order that the proceedings be stayed.

The appeals and applications before us

2 The grounds of the Judge's decision can be found in *Kioumji & Eslim Law Firm and another v Rotary Engineering Ltd and others* [2016] SGHC 218

("the GD"). Civil Appeal No 90 of 2016 ("CA 90/2016") is an appeal by the defendants against the Judge's decision not to grant a stay. Civil Appeal No 167 of 2016 ("CA 167/2016") was filed by the plaintiffs and is a cross-appeal against the part of the Judge's decision which stated that if Saudi Arabia had been shown to be the clearly more appropriate forum, the Judge would have seen no reason to refuse to grant a stay. Before us as well are two applications by the defendants for the admission of fresh evidence, Summons No 102 of 2016 ("SUM 102/2016") and Summons No 7 of 2017 ("SUM 7/2017").

3 For the avoidance of doubt, we note that the plaintiffs need not have filed a cross-appeal in CA 167/2016, but could instead have challenged that aspect of the Judge's decision as part of their arguments concerning CA 90/2016, pursuant to O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed): see our recent decision in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312 at [65]. Of course, this would not have been apparent to the parties at the time given that that decision, which clarified an uncertainty in the law, was handed down only after the cross-appeal had been filed.

The facts

4 The first plaintiff, Kioumji & Eslim Law Firm ("KEL"), is a law firm established in the Kingdom of Bahrain. The second plaintiff, Yahya Lutfi Khader ("Yahya"), is a client of KEL. Yahya is a citizen of the United States of America. He used to reside in Saudi Arabia, but no longer does following the events that gave rise to this dispute.

5 The first defendant, Rotary Engineering Limited ("REL"), is a Singaporean company. REL has two Saudi Arabian subsidiaries, one of which is Rotary Arabia Co Ltd ("RACL"). Two of the directors of REL are the second and third defendants ("Roger" and "Tommy" respectively). Roger and Tommy, who are brothers, are both Singapore citizens. Since about August 2014, Tommy has mainly resided in Saudi Arabia in order to oversee REL's Saudi Arabian operations.

6 Yahya first met with Roger and Tommy in Saudi Arabia on 27 August 2014. The introduction was arranged by one Abdulellah Jazzar, one Abdulrhman Al-Mutlaq ("Abdulrhman"), and one Mohamed Al-Mutlaq ("Mohamed"). Mohamed is the Director-General of the Eastern Province Principality Office of Saudi Arabia ("the Governor's Office"). Abdulrhman is Mohamed's son and is the Managing Director of Ingress Partners ("Ingress"), a Saudi international business development firm. The parties dispute various facts concerning the meeting, but they are in agreement that the matters discussed involved the possibility of Yahya and/or Ingress assisting REL to negotiate the resolution of certain outstanding claims which REL's two Saudi Arabian subsidiaries had against an unrelated Saudi Arabian company called Saudi Aramco Total Refining Petrochemical Company ("SATORP"). The possibility of undertaking some sort of joint venture was also mooted at this meeting.

7 After further meetings, REL and KEL concluded an agreement ("the Proxy Agreement") under which KEL was to negotiate and settle REL's claims against SATORP. In return, REL agreed to pay to KEL professional fees which would be a percentage of the recovered sum. Crucially, the Proxy Agreement included an express choice of Saudi law.

8 In or about September 2014, Yahya travelled to Singapore with his brother, Ibrahim, where they met Tommy, Roger, and other key personnel of REL. The REL personnel briefed Yahya and Ibrahim on the claims against SATORP. The parties dispute the nature and extent of work done by Yahya and Ibrahim following that briefing.

9 On 3 October 2014, during that same trip to Singapore, Yahya and Ibrahim met with Tommy and Roger to further discuss the possible joint venture. The plaintiffs' pleaded case is that a binding agreement was concluded under which Yahya would receive 49% of RACL's shares, Yahya and Ibrahim would assume the positions of Chief Executive Officer and Chief Operating Officer respectively, and the two of them, along with the rest of Yahya's team, would work to develop RACL's business in Saudi Arabia. To fund RACL's activities, the sum recovered from SATORP, less KEL's fees due under the Proxy Agreement, was to be injected as capital into RACL. In contrast, the defendants deny that any binding agreement was concluded at this meeting, and assert that in any event, REL had only ever contemplated a possible joint venture with Ingress and/or Abdulrhman, not with Yahya. In this judgment, we shall refer to this alleged agreement simply as "the Joint Venture Agreement", without intending to imply any conclusion as to the existence or non-existence of the alleged agreement.

10 Shortly after these events, the relationship between Yahya and the defendants deteriorated rapidly. On 23 October 2014, Tommy sent Yahya and Ibrahim an email on behalf of REL informing them that REL had decided not to enter into a joint venture with them. REL then refused to transfer the RACL shares to Yahya. Additionally, REL excluded Yahya, Ibrahim and KEL from further involvement in negotiations

with SATORP and refused to pay any professional fees to KEL pursuant to the Proxy Agreement, even after REL received payment from SATORP.

11 In the course of their disagreements, Tommy lodged a complaint through his Saudi lawyers with the Governor's Office, alleging that Yahya had forged Tommy's signature on a certain document which Tommy claimed not to have signed. The Governor's Office referred this complaint to the Bureau of Investigation and Public Prosecution, which opened an investigation into Yahya. According to Tommy, it later turned out that he had merely forgotten that he *had* signed the document. Tommy asserts that once he realised that he had made a mistake, and that his complaint was therefore baseless, he took immediate steps to communicate this to the Saudi authorities and to withdraw his complaint. Tommy's Saudi lawyers later informed him that to their knowledge, the investigation had been terminated. Yahya, on the other hand, asserts that the complaint has not been withdrawn, that the investigations are ongoing, and that he faces arrest if he returns to Saudi Arabia.

12 On 30 March 2015, the plaintiffs sued the defendants in the High Court of Singapore, relying on the following causes of action:

(a) Breach of the Proxy Agreement, through non-payment of professional fees due to the plaintiffs;

(b) Breach of the Joint Venture Agreement, through failure to transfer 49% of the equity in RACL to the plaintiffs; and

(c) Unlawful means conspiracy among REL, Roger and Tommy to injure the plaintiffs by causing REL to breach the Proxy Agreement and the Joint Venture Agreement.

13 The defendants subsequently applied to stay the proceedings on the ground of *forum non conveniens*. The Judge dismissed the application as he considered the dispute to be more closely connected to Singapore than Saudi Arabia; among other things, he took the view that the Joint Venture Agreement and the claim in conspiracy were both governed by Singapore law (GD at [34] and [41]). However, he also stated that if he had found that Saudi Arabia was the clearly more appropriate forum, there would have been no reason not to grant the stay.

Our decision

The relevant principles

14 This is a matter that falls to be decided in accordance with the well-established principles in *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 ("*Spiliada*"). There are two stages to the inquiry. In broad terms, the inquiry is, at the first stage, whether there is some other available forum that is clearly more appropriate to try the case, and at the second stage, assuming there is another available forum that is more appropriate, whether there are circumstances by reason of which justice requires that a stay should nonetheless not be granted.

15 We touch, in passing, on one point raised by Mr N Sreenivasan SC, the plaintiffs' counsel, which pertains to the second stage. Mr Sreenivasan submitted that even assuming the defendant was able to cross the first stage, it would not be "exceptional" for the court to refuse the stay at the second stage of the enquiry. He therefore submitted that the Judge erred in stating that "somewhat exceptional circumstances" would be required at the second stage to overcome a finding, at the first

stage, that some other forum was clearly more appropriate (GD at [57]). In our judgment, the Judge was not wrong in that where the defendant has crossed the threshold of the first stage, it would be at least unusual for the stay to nonetheless be refused. This is implicit in Lord Goff of Chievely's classic statement in *Spiliada* that with the first stage fulfilled, the court "will *ordinarily* grant a stay unless there are circumstances by reason of which *justice requires* that a stay should nevertheless not be granted" [emphasis added] (at 478). The short point is that it must be shown that there is a real and material risk of injustice if the stay were granted and the parties were forced to go into another forum. Whether one chooses to describe such circumstances as "exceptional" or merely unusual is of little practical consequence to the analysis.

16 We make one further observation on the applicable approach for appellate intervention in a case such as this. As we pointed out in the course of the arguments, this is a case involving the exercise of a discretion. There is no basis for an appellate court to intervene unless it is satisfied that the first instance court erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or made a decision that was plainly wrong: *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [60]. Against the backdrop of those observations, we turn to the case before us.

The first stage of the **Spiliada** *test*

17 Having heard the arguments, we are satisfied that the Judge did commit an error permitting appellate intervention in coming to his finding as to the governing law of the Joint Venture Agreement, and that this error led

him to reach a mistaken conclusion as to the relative appropriateness of Saudi Arabia and Singapore as possible fora for this dispute. Admittedly, our observations in this regard do not bind the court that is ultimately seised of the dispute. Nonetheless, on the strength of the pleadings, it seems to us that the law governing the Joint Venture Agreement is clearly Saudi law rather than Singapore law.

18 An inquiry into the proper law of the contract where this has not been chosen by the parties is an objective enquiry that examines the connections between the law in question and the obligations that have been undertaken under the contract. The place of contracting is not, in itself, determinative. Here:

(a) Yahya was to receive shares in RACL (a Saudi company);

(b) He and his team were to take a management role in RACL in order to develop RACL's business in Saudi Arabia; and

(c) RACL's activities were to be partly funded by an injection of funds acquired from SATORP (also a Saudi company) after negotiations taking place in Saudi Arabia.

19 Against this, the only facts pointing toward Singapore are that Singapore was allegedly the place of contracting; that REL had previously played a significant role in the management of RACL; and that – according to the Judge – it was "likely" that REL, being a Singaporean company, would have had to effect the transfer of the RACL shares in Singapore. That last factual inference may not be a safe one; the share certificates could well be held elsewhere.

20 In our judgment, taking all the relevant connections into consideration, the factors in favour of Saudi Arabia are, by some margin, stronger in the aggregate than those in favour of Singapore. Saudi Arabia is the jurisdiction, and Saudi law the law, with which the contract and the performance to be rendered thereunder have the closest connection; consequently, the proper law of the Joint Venture Agreement is Saudi law. With respect, the Judge in concluding otherwise appears to have failed to take proper account of the relevant factors pointing strongly toward Saudi law.

21 In our judgment, the fact that the governing law of the Joint Venture Agreement is Saudi law is a weighty factor that ultimately leads us to the conclusion that Saudi Arabia is the more appropriate forum. We say this because the central agreements that are in question in this case – namely, the Proxy Agreement which, as we have noted at [7] above, had an express choice of Saudi Law, and the Joint Venture Agreement – are both governed by Saudi law. Furthermore, the unlawful means pleaded as part of the claim in conspiracy is the breach of these two agreements. Taken together with the fact that the loss flowing from the breach of the Joint Venture Agreement, at least, would have been suffered in Saudi Arabia (since Yahya was to receive shares in a Saudi company), it appears to us that the claim in conspiracy, too, is more closely connected to Saudi Arabia. These factors are to be assessed against other considerations such as the location of the witnesses, compellability, and so on, but it seems to us that those other factors are largely neutral and do not displace the central importance, *in this case*, of the governing law of the two contracts that are in issue, both directly and as crucial components of the claim in conspiracy.

The second stage of the* Spiliada *test

22 Turning to the second stage, two main arguments were advanced by Mr Sreenivasan. The first is that by reason of Tommy's false allegation of forgery, Yahya runs the risk of being arrested, and will therefore be unable to appear in and prosecute the proceedings in Saudi Arabia. The second pertained to Saudi Arabia's rules of evidence that discount (or accord less weight to) the evidence of non-Muslim witnesses in relation to Muslim witnesses, and of female witnesses in relation to male witnesses. As to the latter point, counsel for the defendants, Mr Cavinder Bull SC, submitted that these rules of evidence applied in and affected the Saudi Arabian legal system as a whole, and that it would not be appropriate for a court considering the second stage of the *Spiliada* framework to give weight to such generally applicable features of a legal system.

23 The second point is easier to dispose of. We do not entirely agree with Mr Bull's statement of the principle, though we do agree with the conclusion after applying the appropriate analysis to the facts of this case. In our judgment, while it would be possible, in principle, to establish a sufficient risk of injustice in a given case by reason of such considerations as the generally applicable rules of evidence, even if these are features of the legal system as a whole, it nonetheless remains necessary to establish that there is *in fact* such a risk of injustice on the particular facts of the case that is before the court. In this regard, it is not clear to us that the evidence of the witnesses in question that might be adversely affected by the rules in question was sufficiently critical to the case to warrant refusing the stay despite Saudi Arabia being clearly the more appropriate forum. As the Judge noted, there are non-Muslim

witnesses on both sides. Moreover, much of the crucial testimony of the plaintiffs will come from Yahya himself – a Muslim man.

24 We turn to the remaining point, which is the complaint of forgery against Yahya. Before examining the substance of this, we should make one preliminary observation. If the defendant succeeds in a plea of *forum non conveniens*, the consequence is that the action brought here is stayed. A stay is suspensory only, and is conceptually distinct from a dismissal or discontinuance. Consequently, the court granting a stay remains seised of the proceedings and may in principle lift the stay at a later date: *Rofa Sport Management AG v DHL International (UK) Ltd* [1989] 1 WLR 902 at 911. That decision was more recently confirmed in *The Alexandros T* [2013] UKSC 70 at [81]–[83], and we see good practical as well as doctrinal reasons to adopt the same position in Singapore. Thus, in the exceptional circumstance where a premise on which the stay was granted turns out to have been mistaken, the court may be persuaded to exercise its discretion to lift the stay. An example will illustrate the point: the court might assume that another jurisdiction is available, but it might later turn out that that other jurisdiction is not willing to take jurisdiction for some reason. In such a case, it would be open to the plaintiff to come back and seek the lifting of the stay.

25 In the present case, the plaintiffs' concern is that Yahya might face difficulties pursuing his claim in Saudi Arabia because of the danger of arrest that he thinks he faces, and because other reasonable options for taking his evidence from outside Saudi Arabia might not be available. Given that Tommy has repeatedly stated in sworn affidavits (which Yahya could bring to the attention of the Saudi authorities, if necessary) that his complaint against Yahya was baseless and made in

error, that there is some evidence that the complaints have been withdrawn, and that there is no clear evidence that investigations are still ongoing in Saudi Arabia, we do not think that Yahya need be particularly concerned. But if our optimism should turn out to be misplaced, then it would be open to the plaintiffs to return to us and seek the lifting of the stay. We emphasise, however, that the discretion to lift the stay would only be exercised in exceptional circumstances which strike at the very basis on which the stay was granted. Put bluntly, the court's persisting discretion to lift the stay should not be misconstrued as a standing invitation to litigants to re-agitate settled issues in the event that they later encounter mere setbacks or inconveniences in prosecuting their claims.

Conclusion

26 In the circumstances, we allow CA 90/2016 and dismiss CA 167/2016. We make no orders as to SUM 7/2017 and SUM 102/2016, as we do not consider that the evidence sought to be adduced would affect our decision one way or another. Costs for both appeals are fixed in the sum of $30,000, in the aggregate, plus reasonable disbursements to be taxed if not agreed and these are to be paid to the defendants. We also make the usual consequential orders for the payment out of the security.

Sundaresh Menon	Andrew Phang Boon Leong	Judith Prakash
Chief Justice	Judge of Appeal	Judge of Appeal

Cavinder Bull SC, Kong Man Er, Lim May Jean and Wong Joon Wee (Drew & Napier LLC) for the appellants in Civil Appeal No 90 of 2016 and the respondents in Civil Appeal No 167 of 2016; and N Sreenivasan SC, Ang Mei-Ling Valerie Freda and Tan Xin Ya (Straits Law Practice LLC) for the respondents in Civil Appeal No 90 of 2016 and the appellants in Civil Appeal No 167 of 2016.
