Beckkett Pte Ltd *v* Deutsche Bank AG
[2010] SGCA 50

Case Number	: Civil Appeal No 180 of 2010
Decision Date	: 20 December 2010
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Davinder Singh SC, Tan Siew Wei Cheryl, Pardeep Singh Khosa and Lim Mingguan (Drew & Napier LLC) for the appellant; Ang Cheng Hock SC, Ong Boon Hwee William, Loong Tse Chuan, Lim Tao Chung Kenneth and Sylvia Tee (Allen & Gledhill LLP) for the respondent.
Parties	: Beckkett Pte Ltd — Deutsche Bank AG

Civil Procedure

Injunctions

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 284.]

20 December 2010

Chan Sek Keong CJ (delivering the grounds of decision of the court):

Introduction

1 This was an expedited appeal against the decision of the High Court judge ("the Judge") in *Beckkett Pte Ltd v Deutsche Bank AG and another* [2010] SGHC 284 ("the Judgment"). The Judge granted an anti-suit injunction against the appellant, Beckkett Pte Ltd ("Beckkett"), in the terms set out at sub-paras (a) and (b) of [47] of the Judgment. We dismissed the appeal after hearing counsel for Beckkett and said that we would give our reasons later. This, we now do.

Background facts

2 We first set out the relevant factual background, in particular, the extraordinary procedural history of the various legal proceedings leading to this appeal.

3 Beckkett had guaranteed a US$100m loan ("the Loan") granted to its indirect subsidiary by the respondent, Deutsche Bank AG ("DB"). Beckkett had also pledged certain shares owned by it ("the Pledged Shares") as security for the Loan. The Pledged Shares were pledged pursuant to several share pledge agreements, all governed by Indonesian law. Subsequently, there was a default on the Loan, and DB exercised its powers as pledgee to sell the Pledged Shares. To this end, DB obtained, via *ex parte* applications to the South Jakarta District Court, *penetapans* (court orders) authorising the sale of the Pledged Shares, and sold the Pledged Shares pursuant to those *penetapans*. After the sale, DB obtained further *penetapans* declaring that the buyer of the Pledged Shares was their rightful owner. All this was done between December 2001 and February 2002.

4 On 27 April 2004, Beckkett brought Suit No 326 of 2004 ("the Singapore action") in the (Singapore) High Court, claiming essentially for either an order setting aside the sale of the Pledged

Shares or, alternatively, damages for DB's wrongful (so Beckkett alleged) sale of the Pledged Shares at an undervalue. DB counterclaimed for the amount outstanding under the Loan after the sale of the Pledged Shares.

5 On 11 February 2005, Beckkett applied to the Jakarta High Court for both sets of *penetapans* mentioned at [3] above ("the *Penetapans*") to be revoked. On 25 February 2005, the Jakarta High Court ruled that the *Penatapans* were void and should be revoked. DB appealed against that ruling.

6 On 20 February 2006, Kan Ting Chiu J began hearing the trial of the Singapore action. Pertinently, one of the issues raised during the trial was whether the sale of the Pledged Shares was in accordance with Indonesian law, specifically, Arts 1155 and 1156 of the Indonesian Civil Code.

7 On 3 March 2006, the Indonesian Supreme Court affirmed the decision of the Jakarta High Court (see [5] above) that the *Penetapans* were void, and ruled that the parties injured by the issuance of the *Penatapans* could bring claims for relief. This decision was disclosed to Kan J.

8 On 26 January 2007, the trial of the Singapore action ended. Kan J reserved judgment, which he subsequently handed down on 21 September 2007 (see *Beckkett Pte Ltd v Deutsche Bank AG and another* [2008] 2 SLR(R) 189). In his judgment, Kan J dismissed both Beckkett's claim and DB's counterclaim. Both parties appealed to this court: Beckkett, via Civil Appeal No 125 of 2007, and DB, via Civil Appeal No 126 of 2007 (collectively referred to hereafter as "the Singapore appeals"). This court heard the Singapore appeals on 23 April 2008 and reserved judgment at the end of the hearing. Pertinently, the meaning, applicability and effect of Arts 1155 and 1156 of the Indonesian Civil Code were fully argued during the hearing of the Singapore appeals.

9 On 2 May 2008, Beckkett brought Suit No 649 of 2008 ("the Indonesian action") in the South Jakarta District Court against DB and several others, claiming the same reliefs as those sought in the Singapore action and relying on the same grounds as those relied on in the Singapore action. On 8 January 2009, the South Jakarta District Court rejected a jurisdictional challenge brought by DB. DB did not appeal against this ruling and decided, instead, to defend the Indonesian action on the merits. However, DB continued to maintain its jurisdictional objections in its submissions before the South Jakarta District Court. On 8 April 2009, the South Jakarta District Court dismissed Beckkett's claims in the Indonesian action on the merits. Beckkett subsequently appealed to the Jakarta High Court. All these proceedings were not disclosed to this court, which was, at that time, still deliberating on the Singapore appeals.

10 On 27 April 2009, this court handed down its judgment in the Singapore appeals (see *Beckkett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] 3 SLR(R) 452). The appeal by Beckkett against Kan J's rejection of (*inter alia*) its claim for an order setting aside the sale of the Pledged Shares was dismissed. This court also held that the sale of the Pledged Shares had not violated Indonesian law. However, DB was found to have breached its duties as pledgee in failing to take reasonable steps to obtain the proper price for the Pledged Shares when it sold them, and Beckkett was held to be entitled to damages (to be assessed) for this breach of duty. The cross-appeal by DB against Kan J's dismissal of its counterclaim was allowed, but enforcement of the judgment for the outstanding balance of the Loan (and interest thereon) was stayed pending the assessment of the damages to be awarded to Beckkett for DB's breach of duty ("the AD"). Up to this stage of the proceedings in the Singapore appeals, neither Beckkett nor DB saw it fit or thought it necessary to inform this court of the Indonesian action – this court was kept completely in the dark.

11 Between May 2009 and September 2009, the parties' solicitors attended a summons for directions and several pre-trial conferences for the purposes of the AD. During the same period, DB's

solicitors wrote to Beckkett's solicitors requesting that Beckkett desist from prosecuting the Indonesian action. Beckkett, however, declined to do so.

12 On 9 October 2009, DB applied to the High Court for an anti-suit injunction to restrain Beckkett from continuing to prosecute the Indonesian action. The application was heard by an assistant registrar ("the AR"), who reserved judgment at the end of the hearing.

13 On 30 December 2009, the respective parties' solicitors in Indonesia were informed that the Jakarta High Court had dismissed Beckkett's appeal against the South Jakarta District Court's decision in the Indonesian action (see [9] above). Beckkett subsequently appealed to the Indonesian Supreme Court.

14 On 12 February 2010, the AR delivered his decision ordering Beckkett to elect between proceeding with the Indonesian action and proceeding with the AD in the Singapore action (see *Beckkett Pte Ltd v Deutsche Bank AG* [2010] SGHC 55). Beckkett elected to proceed with the Indonesian action. DB appealed against the AR's order. That appeal was heard by the Judge, who reserved judgment. On 24 September 2010, the Judge handed down the Judgment. She set aside the order made by the AR and granted an anti-suit injunction restraining Beckkett from proceeding further with the Indonesian action. Beckkett then filed the present appeal to this court.

15 We heard this appeal on 1 December 2010. During the hearing, counsel for Beckkett informed us that Beckkett's appeal to the Indonesian Supreme Court in relation to the Indonesian action (see [13] above) was still pending.

Beckkett's arguments on appeal

16 Before us, counsel for Beckkett made carefully focused arguments on why Beckkett should be allowed to proceed with the Indonesian action. He began by defending the commencement of the Indonesian action. Beckkett's decision to commence that action was said to be both in accordance with the ruling of the Indonesian Supreme Court on 3 March 2006 that the parties injured by the issuance of the *Penetapans* (which had been granted on an *ex parte* basis) could bring claims for relief, as well as consistent with DB's argument before this court in the Singapore appeals that the legality of the sale of the Pledged Shares under Indonesian law should be litigated in Indonesia. Moreover, Beckkett's counsel pointed out, the affidavits filed on behalf of DB in support of its application for an anti-suit injunction did not protest the *commencement* of the Indonesian action; instead, they only protested the *continuation* of the Indonesian action after this court had handed down its judgment in the Singapore appeals. This, in counsel's view, implied that DB accepted that Beckkett was entitled to bring the Indonesian action.

17 Counsel for Beckkett then proceeded to show how DB had embraced the Indonesian action. In this regard, it was pointed out that DB had not appealed against the dismissal of its challenge to the jurisdiction of the Indonesian courts (see [9] above); neither had it applied for an anti-suit injunction in Singapore with due dispatch after Beckkett commenced the Indonesian action. Instead, counsel pointed out, DB had contested the Indonesian action on the merits. It was only after succeeding at first instance before the South Jakarta District Court that DB had applied in Singapore, on 9 October 2009, for an anti-suit injunction. This was some 17 months after the Indonesian action was commenced. It was also argued that prior to applying for an anti-suit injunction, DB had been dilatory in instructing its solicitors to write to Beckkett's solicitors to request that Beckkett cease pursuing the Indonesian action. Counsel for Beckkett submitted that there was no satisfactory explanation for these delays on DB's part, and invited us to draw the inference that DB had participated in the Indonesian action as a hedge against an adverse judgment by this court in the Singapore appeals.

18 In closing his arguments, Beckkett's counsel submitted that Beckkett should not be deprived of the fruits of its labour in the Indonesian action, especially when all that remained was for the Indonesian Supreme Court to hand down its judgment on Beckkett's appeal against the Jakarta High Court's decision (see [13] above). Counsel also referred to considerations of comity, citing the advanced state of the Indonesian action, which (according to counsel) militated in favour of allowing Beckkett to continue the Indonesian action.

Our decision

Our reasons for dismissing the present appeal

19 In the proceedings below, both the AR and the Judge rendered careful and considered judgments dealing with the arguments raised by both sides. We do not propose to examine their judgments in detail. In our view, the issue was very simply this. As stated by Lord Hobhouse of Woodborough in *Turner v Grovit and others* [2002] 1 WLR 107 at [24] (the facts of that case are not directly relevant), a court may issue an anti-suit injunction to restrain an individual from continuing to prosecute foreign proceedings which amount to an abuse of its (*ie*, the aforesaid court's) process because of their effect on pending litigation in that court. Such abuse is a species of unconscionability and wrongful conduct justifying the grant of an injunction. We should add that once there is an abuse of the court's process, the matter ceases to be a case involving only the competing interests of the parties concerned – the public interest in ensuring that the judicial process is not abused is engaged, and the court must intervene, where it is able to do so, to prevent its process from being abused.

20 In the present case, there was not only an abuse of court process of precisely the kind outlined in the preceding paragraph, but also blatant, opportunistic and egregious abuse, having regard to the fact that Beckkett commenced the Indonesian action after Kan J had dismissed its claim against DB on the merits and after this court had heard (*inter alia*) Beckkett's appeal against Kan J's decision. Even assuming that DB had wholeheartedly embraced the Indonesian action, we could not possibly permit the parties, even by consent, to abuse the process of this court and undermine its authority by stealthily engaging in the Indonesian action after placing (via the Singapore appeals) the substantive merits of the Singapore action before this court. For the same reason, there could be no question of Beckkett being able to elect between proceeding with the Indonesian action and proceeding with the AD in the Singapore action. Even if there was some valid reason why the forum for resolving the parties' dispute should be changed from Singapore to Indonesia, the proper procedure would be for one or both of the parties to inform this court, so that appropriate orders, such as a reference to the Indonesian courts, could be made (in this regard, see, *eg*, *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* [2009] 2 SLR(R) 166, where this court directed the appellant to refer a point of English law to an English court for determination). Since this was not done during the (approximately) 12-month period from 23 April 2008 to 27 April 2009 while this court deliberated on the Singapore appeals, the parties must be content to wait upon this court's deliberations and abide by this court's decision. If any or both of the parties thought that the judgment of this court could be undermined and/or influenced by presenting the court with the *fait accompli* of an advanced Indonesian proceeding (in the form of the Indonesian action) prosecuted in stealth while this court deliberated on the Singapore appeals, they were gravely mistaken.

Our views on Beckkett's arguments

21 The above analysis suffices to explain why we had no hesitation in dismissing the present appeal. In deference to counsel for Beckkett, we shall now briefly address his arguments as set out at

[16]–[18] above.

22 With regard to counsel's point that the affidavits filed on behalf of DB in support of its application for an anti-suit injunction did not raise the *commencement* of the Indonesian action as a ground for granting such an injunction (see [16] above), that fact is undisputed. But, this does not entail that we must therefore accept Beckkett's submission (at [16] above) that DB had impliedly accepted that Beckkett was entitled to commence the Indonesian action. The relevance and significance of DB's failure to raise the commencement of the Indonesian action as a ground for ordering an anti-suit injunction against Beckkett is a question of law on which we are entitled to disagree with counsel for Beckkett, especially since the present appeal concerns (as just mentioned at [20] above) a blatant, opportunistic and egregious abuse of the process of this court. In our view, Beckkett's commencement and pursuit of the Indonesian action not only manifested a cynical disregard for this court, but also amounted to an attempt to undermine the judgment of Kan J, who had already decided the dispute between Beckkett and DB on the merits. No court can countenance such an egregious abuse of its process. Indeed, Beckkett's counsel effectively conceded this point in arguing that DB should have filed its application for an anti-suit injunction against Beckkett earlier, specifically, during the period between 23 April 2008 and 27 April 2009 while this court deliberated on the Singapore appeals. Beckkett's explanation for commencing the Indonesian action (see [16] above) cannot be accepted, given that it was Beckkett itself which had placed the issue of Indonesian law before the Singapore courts. In this connection, Beckkett had also produced expert evidence on Indonesian law before both Kan J (in the Singapore action) and this court (in the Singapore appeals).

23 With regard to DB's conduct in the Indonesian action, we note that DB had challenged the jurisdiction of the Indonesian courts and had maintained its objections even after they were rejected by the South Jakarta District Court (see [9] above). In the absence of any evidence on the judicial process of Indonesia, we cannot form any view on or draw any inference from the decision by DB not to appeal against its failed jurisdictional challenge and to, instead, defend the Indonesian action on the merits whilst reserving its jurisdictional objections. However, we do accept the submission by Beckkett's counsel (at [17] above) that DB had no satisfactory explanation for its undue delay in applying for an anti-suit injunction. DB's conduct in this respect is also to be deplored.

24 As mentioned at [18] above, considerations of comity were raised by counsel for Beckkett. This was despite the fact that it was Beckkett itself which, by bringing the Indonesian action, had raised the spectre of a possible breach of comity in the event of the Indonesian courts reaching a decision which was inconsistent with the decisions of the Singapore courts. As the principle of comity was only lightly touched on by counsel, we shall not enter into a detailed discussion of it. We agree with Lord Goff of Chieveley's comment in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak and Another* [1987] AC 871 (at 892) that the jurisdiction to grant an anti-suit injunction, although technically *in personam* in nature, constitutes an indirect interference with the process of a foreign court and should, therefore, be exercised with circumspection. We also agree with the English Court of Appeal's view in *Royal Bank of Canada v Coöperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] 1 Lloyd's Rep 471 (at [50]) that considerations of comity grow in importance the longer the foreign suit in question has continued, and the more the parties and the foreign court have engaged in its conduct and management. But, we cannot see how these principles assist Beckkett on the facts of this case. Beckkett not only brought the Indonesian action at a time when this court had reserved judgment on (*inter alia*) Beckkett's own appeal against Kan J's decision, but also continued to pursue the Indonesian action even after this court had handed down its judgment in the Singapore appeals. This state of affairs put both the Singapore courts and the Indonesian courts in an unhappy position in so far as comity was concerned: the Indonesian courts might reach a decision contrary to the decision of Kan J (and, later on, that of this court), while the Singapore courts might – and eventually did – have to intrude upon Beckkett's litigation in Indonesia of a dispute that had already been heard

and finally determined by the Singapore courts on the merits. Even if the possibility of a breach of comity were remote (from the viewpoint that the Indonesian Supreme Court might well reach a conclusion on the Indonesian action that is in accord with this court's judgment in the Singapore appeals), that possibility should be nipped in the bud here and now, given Beckkett's cynical abuse of and contemptuous disregard for our judicial process.

25 In the circumstances, we were of the view that, in so far as comity was concerned, the only practical and sensible solution in the present case was to restrain Beckkett from continuing the Indonesian action while the outcome of the Indonesian action (post-the Jakarta High Court's ruling (see [13] above)) and the outcome of the Singapore action (post-this court's ruling in the Singapore appeals (see [10] above)) were, happily, in accord with each other.

Conclusion

26 For the foregoing reasons, we dismissed the appeal. We also awarded the costs of this appeal as well as the costs of the proceedings below to DB on a standard basis, and made the usual consequential orders. We should add that the sole reason why we did not order Beckkett to pay costs on an indemnity basis, despite its blatant attempt to frustrate and/or undermine our judicial process, was that DB's conduct in the entire affair was not beyond reproach either.