RBS Coutts Bank Ltd *v* Brunner Hans-Peter
[2010] SGHC 342

Case Number : Suit No 560 of 2010 (Summons No 4012 of 2010)

Decision Date : 19 November 2010

Tribunal/Court : High Court

Coram : Eunice Chua AR

Counsel Name(s) : Gopinath Pillai and Tan Kian Hong Aloysius (Eldan Law LLP) for the plaintiff; Adrian Wong and Yam Wern-Jhien (Rajah & Tann LLP) for the defendant.

Parties : RBS Coutts Bank Ltd — Brunner Hans-Peter

Civil Procedure

19 November 2010

Eunice Chua AR:

1 The defendant applied for a temporary stay of proceedings pending the resolution of an ongoing action in the Zurich Labour Court ("the Zurich action") between the same parties. The application was based on the existence of a multiplicity of proceedings, without reference to *forum non conveniens* principles. After going through the evidence and hearing the submissions of both parties, I granted the temporary stay. The plaintiff has appealed against my decision.

Factual background

2 The plaintiff is the international private banking arm of the Royal Bank of Scotland Group ("the RBS Group") and was incorporated in Switzerland. The defendant is a Swiss national and was employed by the plaintiff on 1 June 1997 as General Manager of its Singapore branch and Chief Operating Officer, Asia region by a letter of appointment dated 18 April 2007. In 2000, by a letter of appointment dated 29 December 2000, which superseded the terms contained in the earlier letter and provided for Swiss law as the governing law, the defendant returned to Zurich and assumed the position of Chief Executive Officer. Subsequently, with effect from 1 September 2006, the defendant was seconded to the Singapore branch of the plaintiff as Chief Executive Officer, Coutts International, in accordance with the terms of an International Assignment Contract ("the IAC") dated 24 August 2006. The IAC provided that the terms and conditions of the defendant's employment and secondment were those of the "existing home country contract of employment together with those terms and conditions set out in [the IAC]".

3 In 2008, as a result of the financial crisis, the RBS Group implemented a plan ("the Deferral Plan") in which its employees' bonuses would be paid out by way of RBS bonds to be issued in three separate instalments ("the Deferred Award"). In May 2009, the defendant received a letter from the Group Director, Human Resources of the RBS Group certifying that he had been granted an initial Deferred Award of $427,077.00 and stipulating how this amount would be paid out. The first portion of the defendant's Deferred Award was to vest on 18 June 2010, the second on 18 June 2011 and the third and last portion on 18 June 2012. The letter also provided that if the defendant was to leave before part or all of his Deferred Award vested, any outstanding instalments would normally be forfeited and he would receive nothing. However, if he left for "specific 'good leaver' reasons (e.g. redundancy, retirement, ill-health, injury, disability, or disposal of a business)" any outstanding

instalments would vest in line with the normal timetable, subject to any "clawback" that may subsequently be applied.

4 Alongside the Deferral Plan, the RBS Group gave some of its employees the option of applying for a cash advance against the value of their Deferred Award. The defendant took up this opportunity and entered into a loan agreement ("the loan agreement") with the plaintiff on 24 July 2009 whereby he was advanced a sum of $171,022.00. The loan agreement provided that the duration of the loan was the period beginning the day the loan was drawn down and ending no later than 30 days after 18 June 2012. As to repayment, the loan agreement stated, *inter alia*, that:

> In the event that the Deferred Award lapses under the terms on which the Deferred Award is granted, the Borrower will be notified by the Lender that this has happened and the whole Loan and accrued interest thereon will become due and will require to be paid within 30 days from the date of the Lender's notice from the Borrower's own resources.

5 As part of the "loan terms and conditions" comprising the last three pages of the loan agreement, clause 1.15 stipulated that the agreement would be governed by Singapore law and that "[t]he courts of Singapore have exclusive jurisdiction to settle any dispute arising out of or in connection with [the loan agreement] (including a dispute the existence, validity or termination of [the loan agreement])".

6 It was not disputed that the defendant's employment with the plaintiff was terminated on 28 February 2010, before any part of his Deferred Award had vested. The lawfulness of the termination and its effect on the Deferred Award was, however, in dispute and on 7 April 2010, the defendant commenced the Zurich action against the plaintiff claiming that the plaintiff had wrongfully or abusively terminated the defendant's employment under Swiss law. Oral arguments took place on 17 June 2010 in the Zurich Labour Court during which both parties were represented by solicitors.

7 There, the defendant took the position that the plaintiff's John Baines had all along wanted to replace the defendant with John Baines' close friend and had created a situation in which the defendant could be dismissed and his Deferred Award and other bonus payments forfeited. The defendant therefore sought the payment of compensatory damages for his wrongful dismissal. Additionally, the defendant claimed the payment of outstanding bonuses and benefits due him (the Deferred Award included) on the basis that he had effectively been rendered redundant and ought therefore to be regarded as a "good leaver". The reliefs sought by the defendant in the Zurich action totalled CHF 1,197,972.00 (approximately $1,590,335.14).

8 In contrast, the plaintiff took the position that because the defendant had refused to return to Zurich when he had been asked to, his termination was justified. Consequently, the defendant's Deferred Award and other bonus payments were forfeited.

9 The next hearing in the Zurich action has been scheduled for 30 November 2010. Although the plaintiff's Swiss lawyers viewed the Zurich action as only being in its preliminary stages, the defendant's Swiss lawyers explained on affidavit that this upcoming hearing was to explore the possibility of an amicable settlement between the parties, failing which judgment on the defendant's claims would be delivered.

10 Meanwhile, on 29 July 2010, the plaintiff commenced the present action against the defendant to recover the $171,022.00 plus interest it advanced to the defendant under the loan agreement.

Issues

11 The two main issues in the present application were: (1) whether the parallel Zurich action resulted in a multiplicity of proceedings; and (2) if so, whether the court should exercise its discretion to grant a temporary stay given the circumstances of the case, including the existence of the exclusive jurisdiction clause in the loan agreement.

Decision

12 As a preliminary matter, I note that in its written submissions, counsel for the plaintiff argued that *forum non conveniens* principles ought to be applicable in the present stay application. However, it did not (and reasonably so) pursue this point in oral submissions.

13 As recognised by the Court of Appeal in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 ("*Chan Chin Cheung*") at [47], the granting of a limited stay order pending conclusion of foreign proceedings did not require the application of *forum non conveniens* principles because "[u]nder s 18 of the Supreme Court of Judicature Act [(Cap. 322, 2007 Rev Ed)] and para 9 of the First Schedule thereto, or alternatively under the inherent jurisdiction of the court, the court has the full discretion, for sufficient reasons, to stay any proceedings before it until whatever appropriate conditions are met."

14 For ease of reference, s 18 of the Supreme Court of Judicature Act read with para 9 of the First Schedule provides that the High Court has the power "to dismiss or stay proceedings ... where by reason of multiplicity of proceedings in any court or courts ... the proceedings ought not to be continued".

Whether there was a multiplicity of proceedings

15 On the issue of whether there was a multiplicity of proceedings, counsel for the plaintiff characterised the loan agreement as an independent and stand-alone contract – the only relevance of the Singapore proceedings to the Zurich action was that it raised a potential set off to the claims made by the defendant there. Consequently, there was no risk that different courts may come to differing conclusions on the same issues.

16 Counsel for the defendant, however, argued that the issue of whether or not the plaintiff was entitled to payment under the loan agreement (the subject of the present action) was inextricably intertwined with the Zurich action which concerned, in substantial part, the issue of whether or not the defendant was entitled to his bonus payments.

17 I agreed with counsel for the defendant. According to the terms of the loan agreement set out in [4] above, whether or not the loan had become due depended on whether or not the Deferred Award had lapsed. This was in turn governed by the terms of the Deferral Plan and required the Singapore court to determine whether or not the defendant was a "good leaver". This same issue was already before the Swiss courts in the Zurich action.

18 There was therefore a substantial risk that the Singapore courts and the Swiss courts could reach differing conclusions on the issue of the plaintiff's entitlement to the Deferred Award.

Whether the court should exercise its discretion to grant a temporary stay

19 The more contentious issue was whether the court should exercise its discretion to grant a temporary stay.

20 Referring to *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000 ("*Multi-Code*"), which was a case where the same plaintiff was suing the same defendant in multiple jurisdictions, counsel for the plaintiff argued that the threshold for granting a stay would be higher in the present case where the plaintiff was not the plaintiff in the Zurich action.

21 Additionally, on the authority of *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR(R) 6 ("*Golden Shore*"), counsel for the plaintiff argued that a court should exercise its discretion to assist a party in breaching his contractual commitment to an exclusive jurisdiction clause only where there were exceptional circumstances amounting to strong cause, such as where there was a clearly more appropriate forum and permitting reliance on the exclusive jurisdiction clause may unfairly prejudice one party. These exceptional circumstances were, according to the plaintiff, non-existent in the present proceedings.

22 I did not find the reliance on *Multi-Code* ([20] above) persuasive. There (at [33]-[34]), Chan Seng Onn J had distinguished between three different situations involving a multiplicity of proceedings: (1) where the same plaintiff "A" sues the same defendant "B" in two jurisdictions on substantially the same causes of action (*ie* a *lis alibi pendens*); (b) where the plaintiff "A" sues the defendant "B" in Singapore but "A" is the defendant in a suit brought by "B" in a foreign jurisdiction; and (c) where "A" is the defendant in Singapore but is the plaintiff in the suit in the foreign jurisdiction, and "B" is the plaintiff in Singapore but the defendant in the foreign suit. In Chan J's view, the legal principles applicable to situation (a) would be quite different from those applicable to situations (b) and (c). Once the defendants established that the case fell within situation (a) the courts would rarely permit, except in very unusual circumstances, the plaintiff to proceed in two different jurisdictions. However, in all likelihood because he was faced with situation (a), Chan J did not elaborate further on the applicable legal principles in situations (b) and (c). Further, what Chan J had before him was an application for a *permanent* stay rather than a *temporary* one.

23 As apparent from *Chan Chin Cheung* ([13] above), an application for a temporary or limited stay ought to be treated differently from a permanent stay. The facts of *Chan Chin Cheung* were that the plaintiff had commenced a series of related Malaysian suits ("the Malaysian suits") against the defendants over the administration of an estate. However, during the progress of the Malaysian suits, the plaintiff made certain statements about the plaintiff and his conduct of the Malaysian suits. The plaintiff then commenced a defamation action in Singapore against the defendants. The defendants applied for a permanent stay of the defamation action in Singapore. The Assistant Registrar hearing the application refused to grant the stay. However, on appeal, the High Court reversed the Assistant Registrar's decision and granted a limited stay (pending the outcome of the Malaysian suits) instead.

24 The Court of Appeal endorsed the High Court's decision as a sensible and practical one (at [46]), *inter alia*, because it would: (1) minimise the risk of conflicting judgments by enabling the Singapore courts to have the benefit of the findings of the Malaysian court; (2) in doing so promote international comity; and (3) ensure that the work done in relation to the Singapore action would not go to waste. Although these statements were made in the context of its consideration of *forum non conveniens* principles, the Court of Appeal commented (at [47]) that a limited stay based on s 18 of the Supreme Court of Judicature Act and para 9 of the First Schedule, or the inherent jurisdiction of the court, was amply justified.

25 For a more detailed discussion of the principles relating to when a court should exercise its discretion to grant a limited stay on the basis of multiplicity of proceedings, I found the Australian decisions cited to me by counsel for the defendant very helpful.

26 In *Sterling Pharmaceuticals Pty Ltd v Boots & Co (Aust) Pty Ltd* (1992) 34 FCR 287 ("*Sterling*

Pharmaceuticals") at [15], Lockhart J held that as a court of superior record, the Federal Court of Australia had a general power to control its proceedings, which extended to the power to order a temporary stay pending the conclusion of proceedings in another court. The relevant factors to be taken into account in considering such an application were set out at [16] as follows:

- Which proceeding was commenced first.
- Whether the termination of one proceeding is likely to have a material effect on the other.
- The public interest.
- The undesirability of two courts competing to see which of them determines common facts first.
- Consideration of circumstances relating to witnesses.
- Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted.
- The undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.
- How far advanced the proceedings are in each court.
- The law should strive against permitting multiplicity of proceedings in relation to similar issues.
- Generally balancing the advantages and disadvantages to each party.

In that case, the applicant sought a temporary stay of an action in Australia pending the resolution of a similar action in New Zealand. The Australian action was based on a complaint that a statement on the packaging of a drug called Neurofen, that "Neurofen ... is as well tolerated as Paracetamol", was false and misleading in breach of ss 52 and 53 of the Australian Trade Practices Act 1974. The New Zealand action related to the same statement but the complaint was based on contravention of ss 9, 10 and 13 of New Zealand's Fair Trading Act 1986. Although the court found that the issues in both proceedings were not precisely the same, there was substantial identity between them, and in order to avoid duplication in the preparation and conduct of both proceedings, which would likely be especially burdensome to both parties and their expert witnesses, the court held that it was in the interests of justice to order an interim stay of the Australian proceedings, which had been commenced about one year after the New Zealand proceedings.

27 *Sterling Pharmaceuticals* was cited approvingly by the High Court of Australia in *Henry v Henry* (1996) 185 CLR 571 at 590 and in *CSR Ltd v Signa Insurance Australia Ltd* (1997) 189 CLR 345 at 390-398. More recently, in *Bella Products Pty Ltd v Creative Designs International Ltd* [2009] FCA 868 ("*Bella Products*"), the Federal Court of Australia applied the approach in *Sterling Pharmaceuticals* and posited two propositions that summarised the principles stated in that case: first, that for obvious reasons it is undesirable that two courts should determine the same dispute; and second, practical considerations based on common sense and fairness should dictate which action should proceed first.

28 In my view, the considerations taken into account by the Australian courts are consistent with the stance taken by the Court of Appeal in *Chan Chin Cheung*, *ie*, the predominant considerations in applications for a temporary stay of proceedings on the basis of a multiplicity of proceedings would be

practical ones relating to international comity, case management and fairness to the parties.

29 On the facts of this case, I took into account that it was undesirable to have both the Singapore and Swiss courts determine the same issue of whether or not the defendant was entitled to the Deferred Award, that the Zurich action had been commenced before the Singapore proceedings and that the Zurich action was at a more advanced stage, with arguments having already been exchanged. In the present action, the defendants had entered an appearance but had not filed their defence. Permitting the Zurich action to proceed before the Singapore action would minimise the risk of conflicting outcomes, and promote international comity. Further, it would be burdensome and oppressive to the parties and their witnesses for both proceedings to progress concurrently as it is likely that there would be a substantial amount of overlap in the facts and issues traversed. This is particularly so in respect of the defendant who was an individual with limited resources.

30 As for the exclusive jurisdiction clause in favour of Singapore contained in the loan agreement, in my judgment, this was a neutral factor in the analysis of whether or not a temporary stay ought to be granted. The granting of a temporary stay would not amount to the court assisting in a breach of a contractual arrangement, per *Golden Shore* at [21] above, which concerned a *permanent* stay. After the resolution of the Zurich action, the plaintiff could still continue with the present action in Singapore to determine its rights under the loan agreement.

Conclusion

31 For the foregoing reasons, I granted the defendant's application for a stay pending the final determination of the Zurich action with costs to be paid by the plaintiff to the defendant fixed at $2500, excluding reasonable disbursements.