Velstra Pte Ltd (in liquidation) v Dexia Bank Belgium
[2003] SGHC 253

Case Number : OS 1181/2002, RA 335/2003

Decision Date : 21 October 2003

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Vinodh Coomaraswamy and David Chan (Shook Lin & Bok) for the plaintiff; Tan Chuan Thye and Ivan Chia (Allen & Gledhill) for the defendant

Parties : Velstra Pte Ltd (in liquidation) — Dexia Bank Belgium

Civil Procedure – Stay of proceedings – Plaintiffs bringing action to void transaction entered into with defendants – Defendants facing criminal proceedings involving same transaction in foreign forum – Defendants seeking stay of civil proceedings in Singapore – Whether defendants have shown real danger of prejudice to justify granting stay

Introductory

1 This is an appeal by the defendant against an order by the learned Assistant Registrar made on 22 September 2003, refusing the defendant's application for a stay of proceedings of the action herein pending the final determination of criminal proceedings against the defendants in Belgium. The appeal was dismissed with costs. My reasons for dismissing the appeal follow.

Background facts

2 The plaintiff is a company incorporated in Singapore. The defendant is a bank incorporated in Belgium.

3 By an order of court dated 12 April 2002, the plainitff was ordered to be placed in compulsory liquidation.

4 The present action is at the instance of the liquidators of the plaintiff against the defendant for a declaration that a transaction pursuant to which the plaintiff was caused to pay to the defendant a sum of US$20.92 million on or about 4 January 2000 constitutes a transaction at an under value within the meaning of s 98 of the Bankruptcy Act (Cap 20) read with s 329 of the Companies Act (Cap 50) and that the said transaction be declared null and void and of no effect. The other reliefs prayed for by the plaintiff are ancillary and incidental to the main declaration.

5 In this connection, the facts pleaded by the plaintiff in relation to its claim, as appear in paras 7 to 20 of the plaintiff's amended statement of claim, are as follows:

> 7. At all material times, the Plaintiff maintained a bank account with the Shenton Way branch of the Development Bank of Singapore Ltd ("DBS").
>
> 8. At all material times, one Tony Snauwaert was a director of the Plaintiff.
>
> 9. On or about 30 December 1999, the Defendant debited the sum of US$31,000,00 from account number 550-9758000-84 ("the Internal Account"), being an account internal to the Defendant of which the Defendant is the legal and beneficial owner. On the same day, the Defendant credited account number 553-2056900-42 ("the Account") with the sum of US$21,000,000 – which credit was funded from the said debit of US$31,000,000.

10. By so doing, the Defendant discharged a debit balance on the Account using the Defendant's own funds.

11. On or about 5 January 2000 ("the Relevant Date"), the said Tony Snauwaert caused the Plaintiff to instruct DBS to pay the sum of US$20,920,000 ("the Payment") from the Plaintiff's account with DBS to the Defendant.

12. The said Tony Snauwaert in the relevant remittance instructions signed by him in respect of the said payment of US$20,920,000 named the Defendant as the beneficiary of the Payment and gave the Account as the account to be credited.

13. The remittance advice sent to the Plaintiff by DBS and the SWIFT instructions sent by DBS to the Defendant also indicated the beneficiary of the remittance to be the Defendant.

14. On or about 5 January 2000, the sum of US$20,919,991 (being the US$20,920,000 comprised in the Payment less bank and other charges) was credited to the Defendant's account with the Chase Manhattan Bank in New York. On or about the same day, and funded by the Plaintiff's remittance, the Defendant credited the sum of US$21,000,000 to the Internal Account, such sum being comprised in a larger credit of US$31,000,00.

15. On or about 13 January 2000, the Defendant made an adjustment to the Account to reflect the difference between US$21,000,000 (the amount credited to the Account as pleaded in paragraph 9 above) and US$20,919,991 (the amount received in the Defendant's account with Chase Manhattan Bank referred to in paragraph 14 above).

16. By reason of the matters aforesaid, the Defendant was the factual and/or the legal beneficiary of the US$20,920,000 comprised in the Payment.

17. By reason of the matters aforesaid, the Plaintiff by being caused to make the Payment entered into a transaction with the Defendant within the meaning of section 98 of the Bankruptcy Act (Cap. 20, 2000 Ed) read with the definition of "transaction" and "entering into a transaction" set out in section 2(1) thereof.

18. By reason of the matters aforesaid, the Defendant was a party to the said transaction.

19. The Plaintiff received no or no valuable consideration from the Defendant or from any other person in exchange for the Payment.

20. By reason of the matters aforesaid and by reason of the Payment, the Plaintiff was caused to make a gift to the Defendant or otherwise to enter into a transaction with the Defendant on terms that provided for the Plaintiff to receive no consideration within the meaning of section 98(3) (a) of the Bankruptcy Act (Cap 20, 2000 Ed).

6 In essence, the defendant's defence is that it received the said US$20.92 million in the ordinary course of its banking business and credited the sum to the account of its customers in good faith. It further purports to contend (paras 19 to 21 of the defence) that the said transaction does not fall within the purview of the Bankruptcy Act. The defendant's averment at para 9 of its defence, in relation to the plaintiff's allegation in para 9 of the statement of claim is that it will contend that the account number 553-2056900-42 ("the Account") is an account maintained by its customers, Messrs Jo Lernout, Pol Hauspie and Nico Wilaert ("the Customer") with the defendant and that the Customer was on or about 30 December 1999 indebted to the defendant in an amount of

US$20,869,748.

7 The Reply by the plaintiff was filed on 3 March 2003 and the hearing of this action has been scheduled to commence on 13 October 2003 and to end on 23 October 2003.

8 As it happened, the defendant was indicted in Belgium on 23 June 2003 for some criminal offences under the laws of Belgium. Admittedly, the said indictment straddled transactions which are under dispute between the plaintiff and defendant in Singapore. The defendant's counsel cannot, however, indicate to the court as to when the court proceedings will commence in Belgium.

9 In the meantime, solicitors for the plaintiff and the defendant started their discovery process in relation to the present action. In this regard, a letter dated 15 July 2003 from the plaintiff's solicitors addressed to the defendant's solicitors contained the following request:

> Please let us know:
>
> a. Whether your client has in its possession, custody or power or has at any time had in its possession, custody or power a report prepared in or about June 2003 by the Belgian criminal authorities explaining to your client the reasons it has been officially placed under suspicion in connection with its role in the collapse of Lernout & Hauspie Speech Products NV;
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> b. Whether your client has in its possession, custody or power or has at any time had in its possession, custody or power any minutes or other memoranda recording or memoriallzing interviews by the Belgian criminal authorities of your client's past or present employees or officers in connection with their role in the collapse of Lernout & Hauspie Speech Products NV;
>
> c. Whether your client has in its possession, custody or power or has at any time had in its possession, custody or power in any form, physical or electronic, any electronic mail messages, facsimiles or other communications originating from or addressed to your client's current or former employees regarding the establishment and financing of Language Development Companies including but not limited to our client, Vlestra Pte Ltd; and
>
> d. Whether your client has made any requests of the Belgian criminal authorities for the release of documents seized from your client in the course of the criminal investigation into your client's role in the collapse of Lernout & Hauspie Speech Products NV, whether such request relates to documents relevant to the proceedings in Singapore or otherwise.

10 In their reply dated 20 August 2003, the defendant's solicitors said:

> With respect to the issues enumerated as sub-paragraphs (a) to (d) in your letter dated 15 July 2003, our client is of the view that the documents described in sub-paragraphs (a) and (b) are irrelevant to the issues raised in this action.
>
> As for sub-paragraph (c), our client is satisfied that it has disclosed all relevant documents within its possession, custody and power.
>
> As for sub-paragraph (d), our client has, in the course of investigation by the relevant authorities in Belgium, requested the Belgian authorities to release various documents seized from the Bank. The authorities have released some documents relating to facilities extended by the Bank to various companies in the Language Development group of companies. Our client remains of the view that these documents are irrelevant to the issues in the present proceedings.

11 On 22 August 2003, the plaintiff's solicitors wrote to the defendant's solicitors, stating, amongst other things, as follows:

In the meantime, could you please confirm that your client will call each of the following persons as witnesses at the trial of this action:

a. STEVERLYNCK, Phillippe

b. FERRAND, Bart

c. CORDONNIER, Piet

d. RABAEY, Peter

e. JANSSENS, Jacques

f. MINJOUW

g. DIERCKX

It is our view that the evidence of all the aforesaid persons is relevant to the matters in question in this action.

We hereby put you on notice that if your client does not call each of the above persons as witnesses at the trial of this action, we shall adduce and rely upon as evidence against your client secondary evidence of certain statements made by those persons to the Belgian investigating authorities.

This is, of course, without prejudice to identify other witnesses whose evidence is relevant as further information comes to light.

The stay application

12 The application for stay of proceedings was taken out by the defendant on 16 September 2003 and was heard by the Assistant Registrar on 22 August 2003. It would appear from the notes of proceedings before the Assistant Registrar that the stay application was founded on two grounds: (a) the concurrent criminal proceedings in Belgium against the defendant would render the hearing in Singapore unsatisfactory; (b) the trial in Singapore at present would affect the defendant's rights to silence and self-incrimination in the Belgian proceedings. In the event, the Assistant Registrar was not impressed with the arguments advanced on behalf of the defendant and consequently dismissed the application.

The appeal

13 When the appeal was in train before me, defendant's counsel was asked to explain as to why the application for a stay was taken rather late ie, on 16 September 2003, when the parties were in fact notified of the hearing dates as early as April 2003 and the Belgian authorities indicted the defendant in June 2003. The reply from defendant's counsel was that the present stay application came about mainly as a result of an indication in the plaintiff's counsel letter dated 22 August 2003 (*supra*) where it was stated that the plaintiff proposed to adduce secondary evidence at the trial, of certain statements made by the persons mentioned in the said letter.

14 The concerns expressed by defendant's counsel were, in the event, put to rest when plaintiff's counsel came up with an undertaking to the court that the plaintiff would not seek to admit the evidence of a Belgian lawyer who inspected the files of the criminal proceedings in Belgium; nor would the plaintiff seek to admit any secondary evidence of any documents seen or inspected from the Belgian authorities.

15 Since the concerns and fears of the defendant had been fully addressed in the undertaking conveyed to the court by plaintiff's counsel, I upheld the decision of the Assistant Registrar, dismissed the defendant's appeal and awarded costs to the successful plaintiff in the sum of $2,000.

Further arguments

16 The matter did not seem to have rested there. On 4 October 2003, defendant's counsel wrote to the court requesting that the plaintiff be permitted to present further arguments. In that letter the defendant's solicitors said:

> The grounds for our request are set out below.
>
> His Honour will recall that the Defendant's application for stay of proceedings was dismissed upon the Plaintiff's solicitors undertaking that the Plaintiff will not seek to adduce any secondary evidence as to the contents of any documents which any person may have inspected in the files of the investigating judge in the Belgian investigations.
>
> Subsequent to the hearing, we received a letter dated 1.10.03 from M/s Shook Lin & Bok (a copy of which is attached) reserving their client's right to adduce direct or primary evidence given by our client's employees and ex-employees to the Belgian criminal investigators. This has been further confirmed by a letter dated 3.10.03 (a copy of which is also attached). In light of this development, our client continues to be prejudiced by the fact of the concurrent criminal proceedings in Belgium and the use of matters arising therefrom. As it is not disputed that our client does not have access to the full file of the investigating judge in Belgium and has no present right to copies of the documents in the file, it is plain that our client cannot properly defend itself in the present civil proceedings before this Honourable Court.
>
> Moreover, on 3.10.03, M/s Shook Lin & Bok have served on us an affidavit of evidence in chief (made on 26.9.03) which contains secondary evidence of documents in the files of the investigating judge in Belgium and a bundle of documents which includes similar secondary evidence (discovery of which had not been previously given).

17 I heard further arguments on 9 October 2003. Defendant's counsel, this time, seemed to be concerned with even primary evidence which was not the foundation of the original application. It was also significant that counsel was still unable to say as to when the hearing, if any, against the defendant will commence in Belgium. I was indeed mindful of the fact that where there are concurrent criminal proceedings, prejudice may well befall a person who has to defend himself or herself in both civil and criminal proceedings. The court having control of the civil proceedings is therefore vested with certain discretion to stay proceedings if it appears to the court that justice so demanded. However, the burden is on the applicant for the stay to show there was a real danger or prejudice to justify the grant of stay.

18 The traditional view as respects concurrent criminal proceedings was stated in ***Wells v Abrahams*** (1872) LR 7 QB 554 at 557 by Lord Chief Justice Cockburn in the following terms:

'No doubt it has been long established as the law of England, that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted'.

19 A century later the foregoing view was redefined in ***Jefferson Ltd Bhetcha*** [1979] 2 All ER 1108 by the Court of Appeal in England. It was held in that case:

(i) The protection given to a defendant facing a criminal charge (ie the right of silence) did not extend to giving him as a matter of right the same protection in concurrent civil proceedings. The court having control of the civil proceedings could, however, in the exercise of its discretion under s 41 of the Supreme Court of Judicature (Consolidation) Act 1925, stay those proceedings if it appeared to the court that justice so required, having regard to the concurrent criminal proceedings and the defendant's right of silence in relation to those proceedings and the reason for that right. However, the burden was on the defendant in the civil proceedings to show that it was just and convenient that the plaintiff's ordinary rights in respect of the action (ie of having his claim processed, heard and decided) should be interfered with. …

(ii) An important factor to be taken into account by the court in deciding whether to grant a stay (which in the present case would be the appropriate form of relief if the defendant was entitled to any relief) was whether there was a real, and not merely a potential danger, that the disclosure of the defence in the civil action would lead to a potential miscarriage of justice in the criminal proceedings …

20 In my view, the defendant could not even provide a time frame as to when the trial, if any, against the defendant will commence. Secondly, the defendant's concern about the plaintiff adducing secondary evidence of some documents now with the Belgian authorities had been unequivocally addressed and satisfied by the several undertakings by plaintiff's counsel. Having considered all the arguments, I came to conclude that the application by the defendant for the stay lacked merit. Consequently, the defendant's application stood dismissed.

Order acccordingly.

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