Kernel Oil Pte Ltd *v* Iman Djuniardi
[2020] SGHC 52

Case Number : Suit No 281 of 2019 (Registrar's Appeal No 263 of 2019, and Summons No 5712 of 2019)

Decision Date : 23 March 2020

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tang Shangwei and Rachel Lee Pei Hua (WongPartnership LLP) for the plaintiff; Kenny Lau Hui Ming (Providence Law Asia LLC) for the defendant.

Parties : Kernel Oil Pte Ltd — Iman Djuniardi

Civil Procedure – Service

23 March 2020 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is a Singapore-incorporated private limited company engaged in the wholesale of petrochemical products and the trading of crude oil. The defendant is an Indonesian national who is resident in Switzerland, and is described by the plaintiff as a trader of crude oil and other oil products. At the material time, the defendant was the 25% shareholder of a Swiss entity named Kernel Oil (Suisse) SA ("KOSA"), whilst the plaintiff's managing director, Mr Widodo Ratanachaithong, held the remaining 75% of shares. KOSA is not a party to these proceedings, but its relevance to this action will become clear later.

2 In the main Suit No 281 of 2019 (the "Suit"), the plaintiff is suing the defendant for unpaid principal sums, late payment charges, and default annual interest under several loan agreements ("Loan Agreements") that both parties had entered into. This is the plaintiff's appeal against the decision of the assistant registrar ("AR") below to grant the defendant's application in Summons No 2877 of 2019 to, *inter alia*:

(a) set aside a court order granting leave for the plaintiff to serve the writ of summons and statement of claim in the main Suit on the defendant in Switzerland (the "Leave Order"); and

(b) consequently, set aside service of the writ of summons and statement of claim in the Suit ("service") on the defendant.

3 Counsel for the plaintiff, Mr Tang Shangwei, submits that the Leave Order and service on the defendant should not be set aside, because all of the three conditions below (see the Court of Appeal decision in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26]) have been satisfied:

(a) First, there is a good arguable case that the plaintiff's claim falls within one of the jurisdictional grounds in O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").

(b) Second, there is a serious issue to be tried on the merits.

(c) Third, Singapore is the proper forum to hear the dispute.

(respectively, the "first", "second" and "third conditions")

4 The defendant's counsel, Mr Kenny Lau, disagrees entirely. He submits that the failure to fulfil any one condition is in itself an independent ground to set aside the Leave Order and service on the defendant. Further, Mr Lau submits that the said order and service should also be set aside on the independent ground that the plaintiff failed to make full and frank disclosure of all material facts in its original leave application, which was made on an *ex parte* basis. Mr Tang denied that full and frank disclosure of all material facts had not been made, and alternatively, that even if any material facts were undisclosed, they were not so "material" in all the circumstances as to justify the setting aside of the Leave Order.

5 In my view, the AR's decision below should be upheld on the ground that Singapore is not the proper forum to hear the dispute. In reaching this conclusion, I had considered the following:

(a) First, the governing law of the Loan Agreements, as well as the place where the parties reside or carry on business.

(b) Second, the convenience and expense of trial in Singapore.

(c) Third, the availability and compellability of witnesses.

6 First, it is well-established that the law governing the contract is an important consideration in deciding whether Singapore is the proper forum, since it is generally preferable that a case should be tried in the jurisdiction whose law would be applied (*Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2016] 5 SLR 1322 at [113]). Mr Tang submitted that the governing law is Singapore law, while Mr Lau submitted that it is Swiss law. In the present case, the Loan Agreements do not expressly state what the governing law is. Following the Court of Appeal decision in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [36], the issues are therefore:

(a) whether the parties' intentions as to the governing law can be inferred from the circumstances; or

(b) if they cannot, which system of law the contract has its most close and real connection with.

The evidence suggests that it is more likely that the parties never applied their mind to deciding which law should govern the Loan Agreements.

7 The place of residence or business of the parties is only a neutral factor. Although the plaintiff is a company incorporated in Singapore with its business here, and the plaintiff's representatives had signed the Loan Agreements in Singapore, the defendant, on the other hand, is a Swiss resident, and had executed the Loan Agreements in Switzerland. Similarly, although the plaintiff had disbursed the loan monies from its bank account in Singapore, the money was received by the defendant through a Swiss bank account owned by KOSA.

8 To support his contention that the governing law is Singapore law, Mr Tang submitted that the plaintiff, as the lender, "carries out the primary obligation under the Loan Agreements by disbursing funds", and that the place of performance was thus Singapore where the plaintiff is located. To my

mind, Mr Tang's reference to "the primary obligation" under the Loan Agreements is neutralised by the defendant-borrower's "primary obligation" to repay the loan monies, as well as pay late payment charges and interest (where applicable). In the present case, the relevant obligation to be enforced is the defendant's "primary obligation", and not the plaintiff's. I agree with Mr Lau that since the Loan Agreements do not expressly stipulate where repayment of the loan and payment of late charges and interest has to be made, there is no condition that the obligation has to be performed in Singapore. The place of performance is therefore a neutral factor in this analysis.

9 Further, Mr Tang also argued that the location of where "the risks of a contract" falls points towards the law of that jurisdiction being the governing law, and that in this case, the plaintiff, as the lending party, bears the risk of non-payment. But the defendant has to pay late payment charges and default annual interest, which are his risks to take. I do not think that it is useful to compare the nature and degree of the various risks that counterparties in different jurisdictions might bear in respect of any number of events. This may not necessarily apply where all the risks are somehow concentrated in a single jurisdiction (which appears to have been the situation in *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285, a case cited by Mr Tang), such that there is no need for an exercise in evaluation. As far as the present case is concerned, however, I am unable to give any substantial weight to the risk factor.

10 Having found none of the preceding factors to be decisive, I now turn to the crucial factors tilting the balance in favour of Swiss law being the governing law. First, the commercial purpose of the transaction (see *Las Vegas Hilton Corp (trading as Las Vegas Hilton) v Khoo Teng Hock Sunny* [1996] 2 SLR(R) 589 at [39]) was to set up a Swiss entity, KOSA, and to provide its initial working capital. Although this purpose is not expressly stipulated as a term of the Loan Agreements, the plaintiff did not dispute that this was the parties' intentions at the time. Second, the Loan Agreements were denominated in Swiss francs, and the loan monies were disbursed in Swiss francs. This indicates that notwithstanding the separate locations of each party, the Loan Agreements were essentially entered into in furtherance of their common project in Switzerland. I therefore find the governing law of the Loan Agreements to be Swiss law, which clearly points toward Switzerland, and not Singapore, as the proper forum to hear the dispute.

11 Second, the convenience and expense of trial also favour Switzerland over Singapore as the proper forum, given my finding above that Swiss law governs the Loan Agreements. Mr Tang submitted that if this matter is litigated in Switzerland, there will be translation and interpretation costs involved as the medium of language there is French. I agree with Mr Lau, however, that there is no evidence that the mode of Swiss legal proceedings would incur such costs or that the quantum of such costs would be substantially more than if the matter is tried here. Mr Tang's submission that the relevant documentary evidence is likely to be in the plaintiff's offices in Singapore is also not a significant factor. Documents can easily be transported or emailed overseas, and the expense of doing so can be addressed by an appropriate costs order if necessary (*John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 at [40]).

12 Third, as to the availability of witnesses, my view is that, at best, this consideration weighs slightly in favour of Singapore being the proper forum. Whereas the key witnesses here appear to be Mr Widodo and the defendant himself (who are located in Singapore and Switzerland respectively), there are at most, three other potential witnesses who are located in Singapore, whose evidence may be relevant. Two of these potential witnesses appear to still be in the employment of the plaintiff and there is no evidence showing that an issue of compellability would arise even if this matter is litigated in Switzerland. As to the third, Ms Selene Chua, I am unable to accept Mr Tang's bare assertion that she would not be compellable under Swiss law, there being no evidence on the point before me. I thus ascribed little weight to the compellability of witnesses as a consideration.

13 On balance, the importance of Swiss law being the governing law of the contract far outweighs any countervailing considerations, and consequently, I find that Singapore is not the proper forum to hear the dispute. Since that is sufficient to dispose of the present appeal, I will only briefly outline my findings in respect of whether the remaining two conditions in [3] above are made out, and whether the plaintiff had failed to make full and frank disclosure of any material facts so as to warrant the setting aside of the Leave Order.

14 In the appeal before me, counsel for the parties are in full disagreement regarding the standard of proof applicable to the first and second conditions. The AR below had found, among other things, that "the plaintiff has failed to establish that it has a good arguable case on the merits".

15 Mr Tang submitted that this was an error in respect of the second condition, because the AR should have applied the lower standard of whether there is a "serious issue to be tried" on the merits. Mr Lau responded that the AR's finding actually concerned the first condition. He submitted that based on the wording of O 11 r 1(d)(i) of the ROC (which was the jurisdictional ground relied upon by the plaintiff), the first condition required the plaintiff to show that it had a "good arguable case" to "enforce" the Loan Agreements or "recover damages or obtain other relief" in respect of a breach of the same. Essentially, Mr Lau argued that the first condition required the plaintiff to show that it had a "good arguable case" on the merits of the claim, thus subsuming the second condition.

16 In my view, the difference between the two standards of proof is this. A "good arguable case" requires a plaintiff to show that he has reasonable prospects of success, whereas a "serious issue to be tried" merely means that he must raise an issue which needs to be resolved by the court. I agree with Mr Tang's submission that the first and second conditions (to which the two differing standards of proof apply) should remain distinct. A close look at the wording of O 11 r 1(d)(i) of the ROC makes clear that under the first condition, the plaintiff must have a "good arguable case" that:

(a) "*the claim is brought to enforce*…a contract, or to recover damages or obtain other relief in respect of the breach of a contract" (emphasis added); and

(b) the said contract "was made as a result of an essential step being taken in Singapore".

The former component in sub-paragraph (a) only concerns what the claim is, and not its merits. The latter component in sub-paragraph (b) is not disputed by the defendant. In the present case, there is clearly a "good arguable case" that both are made out, and the plaintiff must go on to show separately that the second condition is also fulfilled, in that there is a "serious issue to be tried" on the merits.

17 I should point out that where a plaintiff is relying on other jurisdictional grounds in O 11 r 1 of the ROC, the inquiry for the first condition may overlap with that for the second condition. Under other provisions of O 11 r 1, jurisdiction may be conferred by reference to the merits of the claim – see, for example, sub-rules (f)(i) (*Bradley Lomas Electrolok Ltd and another v Colt Ventilation East Asia and others* [1999] 3 SLR(R) 1156 at [18]-[20]), as well as (f)(ii) and (p) (*IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 at [38]). In such cases, it is obvious that once the plaintiff has satisfied the higher standard of proof that he has a "good arguable case" on the merits, he would also have satisfied the lower standard (*ie*, that there is a "serious issue to be tried").

18 Since all cases differ in their facts, and for any particular case, the same facts are considered together, regardless of whether a court is faced with the situation in [16] or [17] above, I do not think that it will be helpful to draw fine distinctions between the first and second conditions and their

standards of proof on overlapping and common facts. That would only obfuscate the crux of the issue – namely, whether a plaintiff has a reasonable claim against a defendant, such that it should reasonably be allowed to serve a lawsuit on the said defendant outside of Singapore, and have the matter tried in our jurisdiction. Indeed, this is a relevant question as to whether leave for service outside of jurisdiction should be granted or set aside. It would be hard to imagine a case where all three leave conditions are made out, and yet it is not reasonable to grant leave; or conversely, where any one condition is not made out, and yet it is reasonable to grant leave. The three conditions are necessary requirements for establishing the reasonableness for a plaintiff to sue a defendant, who is outside of jurisdiction, in Singapore. In the present case, it is clear to me that it would not be reasonable for the plaintiff to do so, because as explained above, Singapore is not the proper forum to hear the dispute.

19 In respect of the second condition, the emails from the plaintiff's officers allegedly confirming that only CHF$67,250 was outstanding in May 2016, and that full repayment had been made by August 2016, would be a material factor for the court's consideration. And so too, the plaintiff's return in October 2016 of certain alleged excess monies transferred to it by the defendant. But the plaintiff failed to disclose in its original *ex parte* leave application these two matters, as well as the commercial purpose of the transaction. It is clear that any representation by the plaintiff's officers that only a small amount of CHF$67,250 (which amount apparently did not include any late payment charges or default annual interest) was outstanding in May 2016, or that the defendant had fully repaid all the loans by August 2016, would directly contradict the plaintiff's present claim for the unpaid principal sums, late payment charges and interest. Taken together with the foregoing, the plaintiff's return in October 2016 of alleged excess monies to the defendant further undermines its account that there were any outstanding sums at that point. Finally, I have already expressed my opinion that the commercial purpose of the transaction is one of two crucial factors tilting the balance in favour of Swiss law being the governing law (which in turn underlies my finding that Singapore is not the proper forum to hear the dispute). I would therefore also set aside the Leave Order, as well as service of the writ of summons and statement of claim on the defendant in Switzerland, on the independent ground that there was a lack of full and frank disclosure of material facts. Our courts will not assume jurisdiction in such a case unless all the leave conditions are met and the material matters known by the applicant have been fully disclosed. The plaintiff did not comply with those conditions.

20 For the reasons above, I dismiss the appeal, with costs. Prior to the hearing of the present appeal, the plaintiff had filed Summons No 5712 of 2019 to apply for leave to file a further affidavit of fact, and an expert affidavit. I dismissed the application with costs reserved. I now order costs of that application together with reasonable disbursements to be paid by the plaintiff to the defendant. The costs shall be taxed if not agreed.