Malaysian Trustees Bhd *v* Tan Hock Keng

[2021] SGHC 162

Case Number	: Originating Summons No 1113 of 2020 (Registrar's Appeal No 83 of 2021)
Decision Date	: 30 June 2021
Tribunal/Court	: General Division of the High Court
Coram	: Philip Jeyaretnam JC
Counsel Name(s)	: Ng Yeow Khoon, Claudia Marianne Frankie Khoo (Shook Lin & Bok LLP) for the plaintiff; Poon Guokun Nicholas, Tan Zhi Min Ashton (Breakpoint LLC) for the defendant.
Parties	: Malaysian Trustees Bhd — Tan Hock Keng

Civil Procedure – Foreign judgments

30 June 2021

Philip Jeyaretnam JC:

Introduction

1 When a defendant has applied in the original court for an extension of time to make payment under a consent judgment, ought the consent judgment to be registered under Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA")?

2 I decided that the consent judgment should indeed be registered. The defendant has filed an appeal, and these are my grounds of decision for allowing registration of the consent judgment.

Facts

The parties

3 The plaintiff is a Malaysian trust company.[note: 1] The defendant is a director of a Malaysian company called Pilecon Engineering Bhd ("Pilecon").[note: 2] He gave a personal guarantee dated 5 March 2015 to the plaintiff in respect of monies owed to the plaintiff by Pilecon.[note: 3]

Procedural history

4 The plaintiff and defendant have been in a long-running series of disputes in Malaysia that also involved Pilecon.[note: 4] They entered into a consent judgment granted on 8 November 2019 by the High Court of Malaya at Kuala Lumpur (Commercial Division) in respect of Malaysian proceedings brought on the defendant's guarantee (the "consent judgment").[note: 5] The consent judgment was for the sum of RM60m with interest at the rate of 5% per annum from 7 September 2016 to the date of full payment.[note: 6] The consent judgment also recorded that its enforcement would be subject to the terms of settlement recorded in the plaintiff's solicitors' letters dated 30 October 2019 and 6 November 2019.[note: 7] These letters provided for execution to be withheld until 16 July 2020 on certain terms.[note: 8] These terms were not fully performed,[note: 9] and accordingly on 7 August 2020 the plaintiff's solicitors issued a letter of demand to the defendant for payment of the balance sum of RM46,759,886.91.[note: 10]

5 As a necessary preparatory step to these proceedings the plaintiff filed an application to the Malaysian court for certification of a true copy of the consent judgment under the Malaysian Reciprocal Enforcement of Judgment Act 1958.[note: 11] This application was allowed on 13 August 2020.[note: 12]

6 The defendant filed an originating summons in Malaysia on 28 September 2020 ("Malaysian OS 455"), seeking an extension of time to comply with his obligations under the consent judgment.[note: 13] Malaysian OS 455 did not seek to set aside the consent judgment.[note: 14]

7 On 4 November 2020 the plaintiff filed these proceedings to register the consent judgment in Singapore pursuant to RECJA. The consent judgment was registered on 27 November 2020, with liberty to the defendant to apply to set aside the registration within a stipulated period. On 28 December 2020, the defendant applied to set aside the registration and his application was granted by the Assistant Registrar ("AR") on 22 March 2021. The plaintiff appealed and I allowed its appeal on 17 May 2021.

8 In between the hearing before the AR and the hearing before me, Malaysian OS 455 was dismissed by the High Court of Malaya at Kuala Lumpur (Commercial Division) on 6 May 2021.[note: 15] However, the defendant filed an appeal against this dismissal the next day, on 7 May 2021.[note: 16] That appeal is pending.[note: 17]

The defendant's objections to registration of the consent judgment

9 RECJA s 3, read with RECJA s 5(1) and the Reciprocal Enforcement of Commonwealth Judgments (Extension) (Consolidation) Notification (GN No S151/1925) at para 4, permits the court to register a judgment for the payment of a sum of money obtained in a superior court in Malaysia if none of the restrictions on registration listed in RECJA s 3(2) apply, and if the court in all the circumstances of the case thinks it just and convenient that the judgment should be enforced in Singapore.

10 The defendant accepted that the consent judgment is a judgment for the payment of money granted by a superior court. His objections to the registration of the consent judgment were threefold:

(a) The defendant contended that Malaysian OS 455 is an appeal for the purposes of RECJA s 3(2)(*e*), which provides that no judgment shall be registered if "the judgment debtor satisfies the registering court either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment".

(b) The defendant raised a public policy defence under common law to registration, arguing that registration would render Malaysian OS 455 nugatory, and so registration would go against the principle of international comity.

(c) The defendant contended that it would not be just and convenient to register the consent judgment in light of Malaysian OS 455.

11 Before the AR, the defendant alleged non-compliance by the plaintiff with its duty of full and frank disclosure[note: 18] but did not pursue this point in the appeal before me.

12 RECJA remains in force but will be repealed once the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019, which was gazetted on 1 October 2019, comes into force.

Issues to be determined

13 There are three issues, all of which relate to Malaysian OS 455:

(a) Does Malaysian OS 455 amount to an appeal for the purpose of RECJA s 3(2)(*e*)?

(b) Does registering the consent judgment prior to the final disposal of any appeal from Malaysian OS 455 violate public policy?

(c) Does Malaysian OS 455 constitute a circumstance making it unjust or inconvenient to register the consent judgment?

Issue 1: Does Malaysian OS 455 amount to an appeal for the purpose of RECJA s 3(2)(*e*)?

14 The first issue turns on the meaning to be given to the word "appeal" in RECJA s 3(2)(*e*). The word "appeal" is not defined in RECJA. No authorities concerning its construction under RECJA were cited to me. The defendant's argument was that it should be given the same meaning as the statutory definition in the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA").[note: 19] There, the word "appeal" is given an extended definition to include "any proceedings by way of discharging or setting aside a judgment or an application for a new trial or stay of execution" (REFJA s 2(1)). The defendant acknowledged that this extended meaning is broader than the literal meaning of the word "appeal",[note: 20] but contended that the extended meaning fits the principle he said underpins registration of foreign judgments, namely that any judgment to be registered should not be potentially subject to being altered by the original court.[note: 21]

15 The plaintiff contended that the word "appeal" should be limited to appeals proper, but also pointed out that even if Malaysian OS 455 were ultimately successful it would not alter the consent judgment adjudging the defendant's liability to the plaintiff. Accordingly, even if the word "appeal" were given the extended meaning contended for by the defendant, Malaysian OS 455 still did not amount to an appeal. This is because all that it would do, taking it at its highest, would be to give the defendant more time to pay what was due under the consent judgment. The order adjudging the sum payable by the defendant would not be affected.[note: 22]

16 I accepted the argument that Malaysian OS 455 could not amount to an "appeal" even if this word were given an extended meaning for the purpose of RECJA. In truth, Malaysian OS 455 affirmed the validity and binding nature of the consent judgment. Its first prayer was for a declaration that the consent judgment was valid and binding. Its second prayer was for a declaration confirming that the amount due remained as agreed under the consent judgment. Its third prayer did not seek variation of any part of the consent judgment but rather sought "a reasonable extension of time to comply with [his] obligations" thereunder. The fourth prayer sought relief from forfeiture. The fifth prayer was for costs, and the sixth was a sweep-up prayer for any further orders deemed fair and just. Nothing in it sought the setting aside of the consent judgment.[note: 23]

17 That was sufficient to dispose of this argument. However, I add that I also did not accept the premise that the word "appeal" in RECJA s 3(2)(*e*) carries any extended meaning. That one statute expressly defines a word more broadly than another does not mean that the same word used in another statute is also broadened in meaning. RECJA was enacted in 1921, while REFJA was enacted

in 1959. The meaning of the word "appeal" in RECJA did not change because it received a broader definition in a new statute.

18 The question could be put in a subtler and potentially more persuasive way, namely whether the broader definition in REFJA evidences an underlying purpose or rationale, already in existence in 1921, that supports giving the word "appeal" a broader purposive meaning in RECJA. This requires considering the context in which the word "appeal" is used in REFJA. When one does so, this reformulated argument also fails. In fact, there is no equivalent to RECJA s 3(2)(*e*) restricting registration of a judgment that is under appeal. Instead, REFJA provides that for recognised courts of a foreign country to which Part 1 of REFJA has been extended by ministerial order in the Gazette, a judgment of such courts will be eligible for registration so long as it is "final and conclusive as between the parties to it, unless it is an interlocutory judgment": see REFJA s 3(2)(*b*). A judgment is taken to be final and conclusive even though an appeal is pending against it or it may still be subject to appeal in the courts of the country of the original court: see REFJA s 3(5). That a judgment would be regarded as final and conclusive notwithstanding an appeal was the position from first enactment in 1959, as seen from s 3(3) of the Foreign Judgments (Reciprocal Enforcement) Ordinance 1959 (No 29 of 1959):

> (3) For the purposes of this section, a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

19 So, in fact, REFJA provides that once a foreign judgment is eligible for registration, it remains registrable notwithstanding any appeal or possibility of appeal. What REFJA s 6 provides is that the existence of an ongoing or intended appeal (in its expanded meaning that includes a setting aside application) founds a discretion in the registering court either to set aside the registration or to adjourn the application to set aside the registration until disposal of the appeal.

20 Given that this is the case, REFJA's extended definition of "appeal" that includes other possible challenges to a judgment, such as a setting-aside, makes clear that none of those challenges would make a judgment any less "final and conclusive" for the purpose of REFJA. Thus, the extended definition of "appeal" contained in REFJA suggests a more recent legislative policy of permitting enforcement of foreign judgments even if they are under appeal or subject to a setting aside application, while giving the registering court a discretion to set aside the registration or adjourn the setting aside application pending disposal of the appeal.

21 This approach taken in REFJA echoes that taken by the common law to the enforcement of foreign judgments. It is well-established that a foreign judgment may be enforced at common law if it is a money judgment, pronounced by a court of competent jurisdiction and final and conclusive between the parties, so long as it was not procured either by fraud, or in breach of natural justice, and its enforcement in Singapore would not be against public policy. The foreign judgment is treated as creating a new cause of action that is independent of the underlying dispute in relation to which the judgment was given. The test of finality at common law only requires that the judgment be final and conclusive in the *particular* court in which it was pronounced. That a judgment may be altered or varied on appeal would not render it any less final and conclusive. A judgment between parties is *res judicata* until successfully appealed or set aside.

22 Thus, the approach taken by RECJA to pending appeals is distinct from that under REFJA or the common law: RECJA restricts registration where there is an appeal pending, unlike REFJA or common law enforcement. It is more restrictive than the other regimes in this respect. There is nothing in REFJA that supports broadening the restriction on registration under RECJA that does not even exist

under REFJA.

Issue 2: Does registering the consent judgment prior to the final disposal of any appeal from Malaysian OS 455 violate public policy?

23 The defendant's second contention is that registering the consent judgment prior to the final disposal of any appeal from Malaysian OS 455 violates public policy. The public policy identified by the defendant is that of international comity. It is argued that allowing the consent judgment to be registered is assisting the plaintiff to "circumvent the application of Malaysia law and the Malaysia court process".[note: 24]

24 It should be remembered that the public policy provision of RECJA s 3(2)(*f*) restricts registration of a foreign judgment only where "the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court". That restriction was not what the defendant invoked here, as there is no suggestion that the underlying cause of action in this matter contravenes Singapore public policy. Instead, what the defendant sought to rely on was its broader counterpart at common law, whereby a local court will refrain from enforcing a foreign judgment if its enforcement would be contrary to public policy.[note: 25]

25 The defendant thus argued that the common law public policy defence is applicable to registration of foreign judgments under RECJA.[note: 26] This was, however, a step too far. The list of restrictions on registration of judgments under RECJA s 3(2) offers no room for the court to insert any additional, non-statutory restriction.

26 In any case, I did not accept the defendant's contention that registration of the consent judgment would be a breach of international comity and therefore of Singapore's public policy. It was argued that it is disrespectful to the foreign court to recognise or register its judgment when that judgment is under appeal or subject to setting aside under that court's processes. But this argument fails, because there is no reason to say that refusing to recognise and register a final and conclusive judgment of a country (where enforcement is not stayed) because there is an outstanding appeal or setting aside application is more respectful of its law or processes than recognising or registering that judgment, notwithstanding the outstanding appeal or setting aside application.

27 I therefore concluded that international comity does not make it a breach of Singapore public policy to register a foreign judgment that is under appeal or subject to a setting aside application. The court applies the relevant statutory regime, and if that regime mandates registration of a foreign judgment that is under appeal or subject to a setting aside application, then that is the end of the matter.

28 In any event, as I have already noted, Malaysian OS 455 affirms the consent judgment rather than seeking to set it aside.

Issue 3: Does Malaysian OS 455 constitute a circumstance making it unjust or inconvenient to register the consent judgment?

29 Notwithstanding that the existence of Malaysian OS 455 did not restrict the registration of the consent judgment under RECJA s 3(2), I accepted that it might potentially be relevant to the exercise of my discretion under RECJA s 3(1). I asked myself whether it was a circumstance that made it unjust or inconvenient to register the consent judgment. I concluded that Malaysian OS 455 was not

a reason for me to decline to register the consent judgment. Even if the appeal against its dismissal succeeded, it would simply mean that the defendant would have more time to comply with the consent judgment. In the meantime, the plaintiff had a *prima facie* right to the fruits of the consent judgment. I considered that the plaintiff should not be deprived of this right just because the defendant was seeking more time to comply with it. I was fortified in this view by the fact that the defendant had failed to obtain more time from the High Court of Malaya at Kuala Lumpur (Commercial Division), which had dismissed his application before the appeal came up before me.

30 I also considered the issue whether it was appropriate to either stay the registration proceedings or stay enforcement of the registered judgment, pending the final disposal of Malaysian OS 455. I concluded that it was not appropriate. I noted that the consent judgment was not subject to any stay of enforcement in Malaysia.[note: 27] That being the case, there would need to be some additional reason justifying a stay in Singapore. The defendant did not offer any reason distinct from the fact that the defendant had appealed the dismissal of Malaysian OS 455.

31 After I allowed the appeal, the defendant made an oral application for an interim stay of the registered judgment pending the 30-day appeal period. I made no order on this oral application, making clear that the defendant could file a formal application, properly supported by affidavit evidence, that would be considered afresh.

Conclusion

32 I held that the filing of Malaysian OS 455 did not amount to a restriction on registration, nor was it a circumstance making it unjust or inconvenient to register the consent judgment. I also did not consider that it rendered registration of the consent judgment against public policy. As there was therefore no reason for the registration of the consent judgment to be set aside, I allowed the plaintiff's appeal against the AR's decision to set aside the registration of the consent judgment.

33 I ordered that the costs order below be set aside, and ordered costs below of $5,000 all-in to be paid by the defendant to the plaintiff. Costs of the appeal were fixed at $5,000 all-in, to be paid by the defendant to the plaintiff.

[note: 1] 1st affidavit of Tan Hock Keng dated 28 December 2020 ("THK-1") at p 149, para 6.

[note: 2] 1st affidavit of Sharon Chew Mun Hoong dated 25 January 2021 ("SCMH-1") at para 9.

[note: 3] THK-1 at paras 5–6.

[note: 4] SCMH-1 at para 9.

[note: 5] 1st affidavit of Lee Yit Cheng dated 4 November 2020 ("LYC-1") at para 3 and pp 8–13.

[note: 6] LYC-1 at p 12.

[note: 7] LYC-1 at p 12.

[note: 8] LYC-1 at pp 16 and 20.

[note: 9] LYC-1 at para 10.

[note: 10]LYC-1 at pp 66–67.

[note: 11]SCMH-1 at para 9.

[note: 12]SCMH-1 at para 9.

[note: 13]THK-1 at para 36 and pp 105–122.

[note: 14]THK-1 at pp 105–122.

[note: 15]Plaintiff's written submissions dated 12 May 2021 ("PWS") at pp 48–53.

[note: 16]Defendant's written submissions dated 12 May 2021 ("DWS") at para 36.

[note: 17]DWS at para 36.

[note: 18]1st Affidavit of Tan Hock Keng dated 28 December 2020 at paras 60–62.

[note: 19]DWS at paras 10–11.

[note: 20]DWS at para 12.

[note: 21]DWS at para 13.

[note: 22]PWS at paras 18–22.

[note: 23]THK-1 at pp 119–120.

[note: 24]DWS at para 54.

[note: 25]DWS at para 39.

[note: 26]DWS at para 3(c).

[note: 27]Hearing of 17 May 2021.