Malayan Banking Berhad v Measurex Engineering Pte Ltd and Another [2001] SGHC 5

Case Number : Suit 412/2000/V, RA 84/2000

Decision Date : 04 January 2001

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Herman Jeremiah (Helen Yeo & Partners) for the respondent/plaintiff; Stephen Soh and G B Vasu (Arthur Loke Bernard Rada & Lee) for the appellants/defendants

Parties : Malayan Banking Berhad — Measurex Engineering Pte Ltd; Measurex Corporation Berhad

Civil Procedure – Judgments and orders – Consent order – Interpretation of the terms – Relevant principles

JUDGMENT:

Grounds of Decision

1. Malayan Banking Berhad (MBB) is the plaintiff in this action. Its Singapore branch had granted credit facilities to Measurex Engineering Pte Ltd (MEPL), the first defendant in the action. The facilities were secured by a guarantee dated 30 June 1997 (the Guarantee) from the parent company of MEPL, Measurex Corporation Berhad (MCB) which is the second defendant.

2. MBB commenced this action to claim monies due and owing to it by MEPL under the facilities and by MCB under the Guarantee.

3. MBB then obtained a judgment in default of appearance against MCB and subsequently, MCB applied, inter alia, to set aside the default judgment and for the proceedings against it to be dismissed or stayed. The application was heard before the Deputy Registrar. The application to set aside the default judgment was successful but the application for a dismissal or a stay of proceedings was not successful.

4. MCB appealed against the dismissal of its application for proceedings to be dismissed or stayed.

5. After hearing arguments, I dismissed the appeal with costs. MCB has appealed against my decision.

Arguments

6. Clause 24 of the Guarantee states:

> 24. This Guarantee and all rights obligations and liabilities arising hereunder shall be construed and determined under and be enforced in accordance with the laws of Malaysia and we agree that the Courts of Malaysia shall have jurisdiction over all disputes arising under this Guarantee.

7. Clause 28 of the Guarantee states:

> 28. [I/We] shall at all times maintain an agent for services of process in Singapore. Such agent shall be [MEASUREX ENGINEERING PTE TD] and [I/we]

> undertake not to revoke the authority of the above agent and if for any reason such agent no longer serves as [my/our] agent to receive service of process in the manner provided in clause 22 hereof or such other manner provided by law, [I/We] shall appoint another such agent, shall (*sic*) advice you thereof and deliver promptly to you the acceptance by the agent of its appointment.

8. It is clear that the terms of cl 24 of the Guarantee do not specifically state that the jurisdiction of the Malaysian courts is an exclusive one. Neither do they state specifically that it is non-exclusive.

9. Mr Stephen Soh, acting for MCB, submitted that under cl 24, the determination of ones rights and enforcement thereof were separate. The former was to be construed by the governing law and the latter was to be governed by rules of procedure according to the lex fori but in the present case, cl 24 had already stipulated that enforcement was to be in accordance with the laws of Malaysia. According to him, therefore, the governing law and the procedural law was Malaysian law and this could only work if cl 24 is construed such that the parties had agreed that the Malaysian courts have exclusive jurisdiction.

10. Mr Soh also submitted that even though the word exclusive is not found in cl 24, I should nevertheless construe cl 24 as a provision providing for the exclusive jurisdiction of the Malaysian courts. He relied on *Continental Bank NA v Aeokos Cia Naviera SA & others* [1994] 2 All ER 540 for this proposition.

11. The relevant provision in the *Continental Bank* case is cl 21 of the loan agreement. It states:

> 21.01 This agreement shall be governed by and construed in accordance with English law. 21.02 Each of the borrowers hereby irrevocably submits to the jurisdiction of the English courts and hereby irrevocable nominates Messrs Aegis (London) Ltd of 197 Knightsbridge, London SW7, England, to receive service of proceedings in such courts on is behalf but the bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof.

12. Mr Soh pointed out that in that case, the bank had specifically reserved the right to proceed in the courts of another country, whereas in the present case, MBB had not done so.

13. As regards cl 28 of the Guarantee, Mr Soh argued that cl 28 could apply to proceedings commenced in Singapore against MEPL or proceedings commenced in Malaysia against MEPL but to be served on MEPL in Singapore.

14. As there was ambiguity, the two provisions should be construed against MBB such that cl 24 provides for the exclusive jurisdiction of the Malaysian courts and cl 28 only applies if Malaysian proceedings are commenced against MEPL but to be served on MEPL in Singapore.

15. Mr Soh accepted that even if cl 24 were construed as an agreement to let the Malaysian courts have exclusive jurisdiction, MBB could still show why cl 24 should not be applied but the burden was on it to do so.

16. If, however, cl 24 were not an exclusive jurisdiction clause, Mr Soh accepted that the burden was on MCB to show why a stay should be ordered.

17. In that event, Mr Soh argued that I should nevertheless still order a stay of the action against

MCB on the ground of forum non conveniens. On this point, he relied on *The Eleftheria* [1970] P.94.

18. The principles for a stay were summarised by Brandon J in *The Eleftheria* (from p 99 to 100) as follows:

> The principles established by the authorities can, I think, be summarised as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may properly be regarded: - (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts. (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects. (c) With what country either party is connected, and how closely. (d) Whether the defendant genuinely desire trial in the foreign country, or are only seeking procedural advantages. (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would: (i) be deprived of security for their claim; (ii) be unable to enforce any judgment obtained; (iii) be faced with a time-bar not applicable in England; or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

19. Mr Soh sought to persuade me that there was no dispute of fact which required evidence to be given from witnesses in Singapore as the credit facilities and the Guarantee were not in dispute.

20. He also argued that although the loan was made by the Singapore branch of MBB, this did not mean that payment had to be made in Singapore. If MCB had tendered payment in Malaysia, MBB would have accepted such payment. Therefore the breach by MCB in failing to pay could easily have taken place in Malaysia.

21. Mr Soh also submitted that the Guarantee was probably signed in Malaysia and was stamped in Malaysia.

22. Aside from procedural disputes as to whether the claim was sufficiently particularised and whether a judgment against MCB must be broken into various components, the main dispute by MCB was on the default interest claimed by MBB. Mr Soh said as Malaysian law governed, s 75 of the Malaysian Contracts Act of 1950 would apply and this section may prevent MBB from claiming default interest if such interest were to be construed as a penalty or if MBB failed to prove that its loss would amount to the equivalent of the default interest. Although Mr Soh accepted that the Singapore courts were capable of hearing Malaysian expert evidence on this section, he submitted that it was preferable for the Malaysian courts to do so.

23. Mr Soh further argued that there was no suggestion of injustice or detriment to MBB if a stay was ordered.

24. His position, in summary, was that the connecting factors point more to Malaysia than Singapore.

25. Mr Herman Jeremiah, acting for MBB, also relied on the *Continental Bank* case. He said that it supported MBBs position rather than MCBs. He argued that in that case, the provision also stipulated that the borrower nominate someone to receive service of proceedings in the English courts on its behalf, just like cl 28 of the Guarantee and the English court took this into account in concluding that the parties there had agreed to the jurisdiction of the English courts.

26. Mr Jeremiah also submitted that even if cl 24 provides for the exclusive jurisdiction of the Malaysian courts, I was not obliged to order a stay of the present action in Singapore against MCB as a Malaysian court would not have been under a similar obligation. He relied on *Inter Maritime Management Sdn Bhd v Kai Tai Timber Company Ltd, Hong Kong* [1995] 4 CLJ 164.

27. Mr Jeremiah submitted that there were more connecting factors with Singapore.

28. The loan was made by a Singapore branch of MBB to MEPL which is a company incorporated in Singapore.

29. The claims against MEPL and MCB arose because of MEPLs failure to pay the monies due and owing by it to MBB.

30. Payment was to be made in Singapore since the Singapore branch of MBB disbursed the loan, see *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 and *Bank Bumiputra Malaysia Berhad v Melewar Holdings Sdn Bhd & 4 Ors* [1990] 1 CLJ 1246.

31. Action had been commenced against MEPL in Singapore.

32. There is no material difference between Malaysian law and Singapore law on guarantees and contracts and even if there were such a difference, there was no reason why the Singapore courts would not be able to apply Malaysian law.

My grounds

33. I did not agree with Mr Sohs argument that under cl 24 of the Guarantee, both the substantive and procedural law of Malaysia applies. Procedural law is the law as applied by the lex fori, wherever the forum is.

34. The phrase shall be construed and determined under and be enforced in accordance with the laws of Malaysia in cl 24 of the Guarantee means that the substantive law applicable is Malaysian law. It does not mean Malaysian procedural law applies or, for that matter, that enforcement, after judgment, can only be effected in Malaysia.

35. I also did not think that the *Continental Bank* case assisted MCB or MBB very much. The provision there was worded quite differently from cll 24 and 28 of the Guarantee.

36. While it is true that the absence of the word exclusive does not necessarily mean that a provision is a non-exclusive jurisdiction provision, each provision must be construed on its own terms and in the context of the document in which it appears.

37. In my view, cl 24 of the Guarantee does not confer exclusive jurisdiction on the Malaysian courts and this is reinforced by cl 28 thereof.

38. I did not agree with Mr Sohs argument that an alternative interpretation of cl 28 was that it allowed a Malaysian writ against MEPL to be served in Singapore on MEPL.

39. It must be remembered that MEPL is not a party to the Guarantee. Therefore cl 28 cannot apply to service on MEPL of a Malaysian writ against MEPL. Besides, cl 28 clearly provides for MEPL being appointed as agent for MCB for service of process. MEPL is not being appointed to accept service for itself.

40. I also considered whether cl 28 can be construed to mean that if a Malaysian writ were filed against MCB, that writ could be effected against MCB in Singapore by service on MEPL. I did not think this was a tenable construction.

41. If MBB were to file a Malaysian write against MCB, then the Malaysian writ would have been served in Malaysia against MCB which is, after all, a company incorporated in Malaysia. There is no reason for MBB to want to serve a Malaysian writ against a Malaysian defendant in Singapore.

42. I also very much doubt if MBB would have persuaded a Malaysian court to allow it to engage in such a manoevre.

43. I concluded that Mr Sohs alternative interpretation of cl 28 was an attempt to avoid its clear meaning. It clearly envisaged proceedings by MBB against MCB in Singapore and hence for MCB to appoint an agent for service of process in Singapore.

44. As for the connecting factors, I was of the view that the obligation by MCB to pay was to pay in Singapore for the reason advanced by Mr Jeremiah.

45. The loan was by the Singapore branch of MBB to a company incorporated in Singapore and disbursed in Singapore.

46. The obligation of MCB to pay arose because of the default of MEPL.

47. Failure to pay meant that the cause of action arose in Singapore. Mr Soh did not contend otherwise. However he argued that because MCB might have tendered payment in Malaysia and MBB would have accepted payment there, the breach could have occurred there as well.

48. This was a disingenuous argument. First, MCB did not tender payment in Malaysia. If it did and MBB had accepted payment there, then there would have been no reason for MBB to commence action against MCB.

49. Secondly, even if MCB had chosen to tender payment in Malaysia and MBB had chosen to accept such payment, this does not detract from the point that the legal obligation of MCB to pay is to pay in Singapore.

50. The credit facilities were for monies in Singapore currency and the currency of the United States of America.

51. In addition, although Mr Soh sought to persuade me that no evidence was required to be given from witnesses in Singapore, the Defence of MEPL suggested otherwise. I would say no more on this as I do not wish to prejudice the position of MBB or MEPL or MCB in the event that MBB should apply for summary judgment.

52. That the Guarantee was probably executed in Malaysia and stamped in Malaysia and that the governing law thereof was Malaysian law did not outweigh the factors connected with Singapore.

53. I also did not think that a Singapore court would have any particular difficulty in applying s 75 of the Malaysian Contracts Act 1950 as it is not a particularly complex provision and I doubted whether it was so different from the common law concept of penalty.

54. Indeed, in *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461, the Federal Court (Kuala Lumpur) said, at p 470H to I:

> Thus, in construing the effect of the provision of default interest in a contract, such specific provision would still be interpreted according to common law as to whether it is liquidated damages or a penalty, subject to and qualified by provisions of written law in the said s 75, ie the Explanation and the illustration (d) therein which are, by no means from their nature, capable of supplementing in toto the common law on the questions of penalty and liquidated damages.

55. In addition, if I were to order a stay, it would mean that there would be one action by MBB against MEPL in Singapore and another by MBB against MCB in Malaysia. This would not be a satisfactory state of affairs.

56. I was also of the view that MCB did not genuinely desire trial in Malaysia but was engaged in delaying tactics.

57. Accordingly, MCBs appeal was dismissed with costs.

Woo Bih Li

Judicial Commissioner