Good Earth Agricultural Co Ltd v Novus International Pte Ltd
[2008] SGCA 13

Case Number : CA 83/2007

Decision Date : 13 March 2008

Tribunal/Court : Court of Appeal

Coram : Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Mohan Reviendran Pillay and Toh Chen Han (MPillay) for the appellant; Tong Beng Teck Roland (Wong Tan & Molly Lim LLC) for the respondent

Parties : Good Earth Agricultural Co Ltd — Novus International Pte Ltd

Conflict of Laws – Choice of jurisdiction – Spiliada Maritime Corporation v Cansulex Ltd principles for determining whether stay of proceedings should be granted on ground of forum non conveniens – Whether factors such as "judge shopping" that concerned substantive justice should be considered at stage 1 or stage 2 of Spiliada test

Conflict of Laws – Choice of jurisdiction – Stay of proceedings on ground of forum non conveniens – Singapore-incorporated company commencing suit in Singapore after application to file counterclaim in earlier Hong Kong action dismissed because too close to trial date – Whether Hong Kong was proper forum since Singapore suit was continuation of parties' disputes that led to Hong Kong action – Circumstances where court would grant a stay

13 March 2008

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 The respondent, Novus International Pte Ltd ("Novus"), sued the appellant, Good Earth Agricultural Company Limited ("Good Earth"), for breach of fiduciary duty and for recovery of secret profits in the Singapore High Court ("the Singapore action"). Good Earth contended that Hong Kong would be the natural or more appropriate forum to try Novus's claim and applied for a stay of the Singapore action on the ground of *forum non conveniens*. In the proceedings below, the learned assistant registrar dismissed Good Earth's application. Good Earth's subsequent appeal from that decision to the High Court was dismissed by the learned judge ("the Judge") in *Novus International Pte Ltd v Good Earth Agricultural Co Ltd* [2007] 4 SLR 402 ("the GD"). We allowed Good Earth's appeal and now give the reasons for our decision.

Background

2 Good Earth, a Hong Kong-registered company, entered into an oral agreement with Monsanto, an American corporation, in 1978 ("the oral agreement") under which Good Earth was appointed Monsanto's exclusive distributor within South-East Asia for certain animal feed products. In 1991, Novus International Inc ("NII") purchased Monsanto's animal feed business. In the same year, Novus was incorporated in Singapore as a wholly-owned subsidiary of NII to undertake the marketing and sale of the various animal feed products in the region. Pursuant to a variation of the earlier arrangement between Good Earth and Monsanto, Good Earth continued to distribute the animal feed products for Novus.

3 The parties' business relationship broke down over disagreements about the rate of commission paid to Good Earth. By a letter dated 14 January 2002, Novus terminated the distributorship agreement with Good Earth without giving notice. This prompted Good Earth to commence legal proceedings against Novus in the High Court of Hong Kong in late 2002 for wrongful termination of contract ("the Hong Kong action"). Novus submitted to the jurisdiction of the Hong

Kong court and defended the suit accordingly. The trial took place in December 2006. Good Earth prevailed and it was awarded *US$542,594 in damages, plus interest and costs*. Good Earth registered the Hong Kong judgment in Singapore on 1 March 2007 *to recover US$700,467.31, comprising the principal sum of US$542,594 and interest of US$157,873.31.* Novus filed interlocutory applications to resist execution of the Hong Kong judgment, although it appears to have paid the principal amount on the judgment sum to Good Earth (see the GD at [3]).

Novus's claim for secret profits

4 What brought the parties before the Singapore courts is Novus's allegation that Good Earth made secret profits by charging end-customers a higher price than that agreed to between the parties. Under the distributorship agreement, Novus would set a price, say $X, at which Good Earth was required to sell the products to its end-customers. *Good Earth would be paid commission at a rate that was usually 8%; according to Novus, the commission rate was 5% or 3.2% on some occasions.* Novus would bill Good Earth for (100-C)% of $X, where C was the agreed rate of commission, and would be paid that amount. In the Singapore action, Novus claims that Good Earth had wrongfully retained US$1,698,484 of secret profits, in breach of the fiduciary duty it owed to Novus, and Novus is seeking to recover this sum. Even if Good Earth's defence that Novus applied the incorrect exchange rate and overstated its claim by US$428,059.56 was accepted, Novus contends that it was entitled to apply for summary judgment in respect of the remaining sum.

5 Among the bases for Good Earth's assertion that the Novus's claim for secret profits should be heard in Hong Kong is the fact that Novus first introduced its claim for secret profits by way of a counterclaim in the Hong Kong action ("the Hong Kong counterclaim"). This is, in our view, a significant consideration in so far as the present appeal is concerned. It warrants a closer examination of the circumstances under which the Hong Kong counterclaim was filed (unsuccessfully, as we shall see) in the Hong Kong action.

6 In 2004, during the discovery process for the Hong Kong action, Novus learnt – from the invoices that Good Earth disclosed – that the latter had been charging its customers marked up prices of $(X+Y) and not $X as agreed between Novus and Good Earth. Good Earth's explanation was that it had implemented a scheme under which $Y constituted rebates that it returned to its customers. Novus disputed this and filed the Hong Kong counterclaim in February 2005, but the application was subsequently adjourned because Novus was unable to obtain relevant evidence from potential witnesses. In the meantime, both parties corresponded on a "without prejudice" basis regarding the nature of the mark-up.

7 On or about 26 September 2006, Novus applied for leave to file the Hong Kong counterclaim after obtaining a witness statement from Chuah Chong Hin ("Chuah"), Novus's managing director from June 1996 to August 2001. This second application was heard on 24 October 2006 by Stone J, the trial judge in the Hong Kong action. Good Earth objected to the late timing of Novus's application, claiming that it would suffer prejudice. Stone J dismissed the application on the ground that it was too late since trial of the Hong Kong action had been set down to commence on 4 December 2006.

The *Spiliada* test

8 It is now clearly established that the Singapore courts apply the "*Spiliada* principles" laid down by Lord Goff of Chieveley in the seminal House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") to determine when a stay of proceedings should be granted on the ground of *forum non conveniens*: see, for example, the decisions of this court in *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776 ("*Brinkerhoff*"), *Oriental*

Insurance Co Ltd v Bhavani Stores Pte Ltd [1998] 1 SLR 253, *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Limited* [2001] 2 SLR 49 ("*PT Hutan*"), and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw Investments*"). Indeed, Chao Hick Tin J, delivering the judgment of this court in *Brinkerhoff*, observed as follows (*id* at 784, [35]):

> Lord Goff, who delivered the judgment of the House [in the *Spiliada* case], to which the other four Law Lords agreed, restated the law (and in so restating, took into account the Scottish authorities as well) which is summarized in the third cumulative supplement to *Dicey & Morris on Conflict of Laws* (11th Ed) at para 393–395 as follows:
>
> > (a) the basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interest of all the parties and the ends of justice;
> >
> > (b) the legal burden of proof is on the defendant, but the evidential burden will rest on the party who asserts the existence of a relevant factor;
> >
> > (c) the burden is on the defendant to show both that England is not the natural or appropriate forum, and also that there is another available forum which is clearly or distinctly more appropriate than the English forum;
> >
> > (d) the court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection, eg factors affecting convenience or expense (such as availability of witnesses), the law governing the transaction, and the places where the parties reside or carry on business;
> >
> > (e) if at that stage the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay;
> >
> > (f) if there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted, and, in this inquiry the court will consider all the circumstances of the case. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England is not decisive; regard must be had to the interests of all the parties and the ends of justice.

9 And Chao Hick Tin JA, also delivering the judgment of this court in *PT Hutan*, described how the principles are applied in practice (at [16]):

> The first stage is for the court to determine whether, prima facie, there is some other available forum, having competent jurisdiction, which is more appropriate for the trial of the action. The legal burden of showing that rests on the defendant. In determining that issue the court will look to see what factors there are which point in the direction of another forum as being the forum with which the action has the most real and substantial connection, eg availability of witnesses, the convenience or expenses of having a trial in a particular forum, the law governing the transaction and the places where the parties reside or carry on business.Unless there is clearly another more appropriate available forum, a stay will ordinarily be refused. If the court concludes that there is such a more appropriate forum, it will ordinarily grant a stay unless, in the words of

> Lord Goff, 'there are circumstances by reason of which justice requires that a stay should nevertheless not the granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions' … [In the second stage,] all circumstances must be taken into account, including those taken into account in determining the question of the more appropriate forum. However, in this stage of the inquiry the burden shifts to the plaintiff.

10 The main factors that are relevant at the first stage of the *Spiliada* test ("Stage 1") include the following:

(a) general connecting factors;

(b) the jurisdiction in which the tort (or breach of contract) occurred; and

(c) the choice of law (whether the choice of law in the contract was exclusive and if not, which law should be applied in the claims).

11 The Judge held that Good Earth had failed to discharge its burden under Stage 1 and, concomitantly, there was no need to proceed to the second stage of the *Spiliada* test ("Stage 2") (the GD at [27]). The gist of Good Earth's appeal is that the Judge erred by taking into account at Stage 1 factors that were not relevant and factors that should have been considered at Stage 2.

Applying the *Spiliada* test

Stage 1

The Hong Kong counterclaim

12 That Novus first filed a claim for secret profits in Hong Kong is the most compelling factor in favour of Hong Kong as the natural or more appropriate forum. The Singapore action is effectively a continuation of the parties' disputes arising from the termination of the oral agreement and a "revival" of Novus's action for secret profits which could not proceed in Hong Kong because the Hong Kong counterclaim was deemed to have been filed too close to the commencement date of the trial of the Hong Kong action. Indeed, it would appear that the Singapore action is, in substance and effect, the Hong Kong counterclaim in another guise.

13 Novus's counter-argument, however, is that the underlying claim in the Singapore action is not the same claim as that in the Hong Kong counterclaim. For the purposes of the Hong Kong counterclaim, Novus had planned to rely on the invoices that Good Earth had disclosed during the discovery process for the Hong Kong action. Subsequently, Good Earth introduced new evidence during the trial of the Hong Kong action, as follows:

(a) Good Earth's audited financial statements which were made available to Novus on 6 December 2006;

(b) the second supplementary witness statement of Good Earth's marketing manager, Paweenee Mirinda Wuttiattapong ("Mirinda"), which was served on Novus on the same date; and

(c) Mirinda's oral testimony on 12 December 2006, in which she stated that the figures in the audited financial statements and in her second supplementary witness statement were net of returns and discounts, including rebates.

It is these three new pieces of evidence that Novus plans to rely on in the Singapore action. This could explain why the amount of secret profits that Novus is claiming in the Singapore action (US$1,698,484) is smaller than the sum it sought to recover in the Hong Kong counterclaim (US$4,815,952.35, later reduced to US$4,371,925.46 in the second, unsuccessful application).

14 Notwithstanding that different *evidence* is being relied on in Novus's latest claim for the alleged secret profits, the key point for the purposes of the present appeal is that, at bottom, the *nature* of the claim in the Singapore action is (as already alluded to above at [12]) the same as that in the Hong Kong counterclaim. There are, admittedly, other factors. However, as we shall demonstrate below, the location of witnesses provides some support for the conclusion that Novus should continue to pursue its claim for secret profits in Hong Kong, while the location of documents is merely a neutral factor.

15 We do not consider it significant that, at the time of the Hong Kong action, Novus had a presence in Hong Kong in the form of shareholdings in a company, Novus International Nutrition Limited, which has since been liquidated. Novus now argues that as it currently has no assets or business presence in Hong Kong, there is no reason for it to litigate the present claim in Hong Kong. We disagree. On the contrary, Good Earth is a Hong Kong company and its assets are located there, thereby facilitating, in fact, enforcement of the judgment if Novus succeeds in its claim for secret profits in Hong Kong (assuming that Good Earth succeeds in the present appeal). There is no similar connectivity with Singapore.

Non-applicability of the doctrine of res judicata

16 The Judge took Good Earth to task for its "eleventh-hour disclosure of crucial documents" in the Hong Kong action which contributed to Novus's lack of success in filing the Hong Kong counterclaim (the GD at [30]). Without commenting on how Good Earth conducted the Hong Kong action, our main concern is to ensure that Novus will not be precluded or estopped from bringing a new action for secret profits in Hong Kong if the Singapore action is stayed.

17 The Hong Kong counterclaim was disallowed in order to avoid having to vacate the trial of the Hong Kong action to a later date. In other words, the Hong Kong counterclaim has not been decided on its merits. During the hearing before us, we sought and obtained an undertaking from counsel for Good Earth, Mr Mohan Pillay ("Mr Pillay"), that if the Singapore action were stayed in favour of Hong Kong as the appropriate forum, Good Earth would not argue that Stone J's dismissal of Novus's application to file the Hong Kong counterclaim in October 2006 is *res judicata*. As a matter of fairness, Novus deserves a chance to have its claim for secret profits heard and decided in the appropriate forum *on its merits* and Good Earth's undertaking adequately secures, in our view, Novus's interests in this regard. This will ensure that no procedural roadblocks will prevent the merits of the matter from being ultimately adjudicated upon in Hong Kong.

Witnesses and documents

18 The availability of witnesses, which has an impact on the convenience or expense of trial in a particular forum, was expressly mentioned by Lord Goff as falling within the purview of a Stage 1 analysis: see *Spiliada* ([8] *supra*) at 478. This factor could take on greater significance under certain circumstances, for example, when the credibility of witnesses could have a decisive influence on the outcome: *Rickshaw Investments* ([8] *supra*) at [19].

19 Good Earth named four witnesses whom it proposed to call at the trial of Novus's claim for secret profits: (a) its chairman, Mr Q N Wong; (b) its managing director, Mr Edwin Wong; (c) its

deputy managing director, Mr Herbert Tsan Yuen Wong ("Wong"); and (d) Mirinda, all of whom reside in Hong Kong. Novus's key witness would be Chuah, who is resident in Singapore. Chuah, Novus alleged, was not prepared to travel to Hong Kong to testify in the Hong Kong action. Novus expressed concern that he would be similarly unwilling to testify in respect of Novus's claim for secret profits and would not be compellable to do so unless the matter is heard in Singapore.

20 The Judge resolved the issue of location of witnesses by determining that "no witnesses other than Mirinda would be necessary" to testify on behalf of Good Earth because Novus would base its claim on Good Earth's audited financial statements which Good Earth cannot dispute and which need not be formally proved in court (the GD at [32]). The Judge also dismissed the necessity to call the other three proposed witnesses of Good Earth since Wong's affidavit filed on 5 April 2007 did not elaborate on what evidence they would testify to.

21 With respect, we are of the view that the Judge ought not to have pre-determined which witnesses Good Earth should call to the stand. In terms of expense and convenience for the purposes of calling witnesses, Hong Kong would appear to be the natural or more appropriate forum since Good Earth has produced the names of four witnesses that it intends to call in its defence while Novus has only named Chuah as a witness. Counsel for Novus, Mr Roland Tong, has already procured Chuah's agreement to provide a written statement. Chuah could also give evidence by video-link. As V K Rajah J noted in the Singapore High Court decision of *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381 (at [26]), video-linked evidence of "unprecedented clarity and life-like verisimilitude" is now readily available at relatively affordable costs; even cross-examination can be carried out by video-link as long as the court is satisfied that the witness is not being prompted.

22 As for Chuah's compellability, Novus has recourse to the Evidence (Civil Proceedings in other Jurisdictions) Act (Cap 98, 1985 Rev Ed), if necessary. Mr Pillay confirmed during the hearing that Good Earth undertook not to object to the adduction of Chuah's written statement or video-link testimony in a Hong Kong trial of Novus's claim for secret profits.

23 We did not attach any weight to either party's claim about the appropriate forum in terms of the location of documents. As the Judge observed (the GD at [34]), this was a consideration that could be dealt with by an appropriate order for costs and disbursements. We did not see how the location of documents could be a weighty factor when even the location of witnesses overseas would not pose a problem.

Choice of law

24 The oral agreement was silent on the choice of law which is to be applied. Since the court in the Hong Kong action has already applied Hong Kong law in disposing of one aspect of the parties' dispute, it would be preferable for Novus's claim for secret profits to be decided under Hong Kong law as well, notwithstanding that both Singapore and Hong Kong are common law jurisdictions. Indeed, as we have already noted, Novus had, in fact, originally been prepared to vindicate its present claim in Hong Kong via the Hong Kong counterclaim.

Stage 2

25 Under Stage 1 of the *Spiliada* test, therefore, Hong Kong emerges as the natural or more appropriate forum to try Novus's claim for secret profits. Taking all the circumstances into consideration, our view is that under Stage 2, there are no compelling grounds for asserting that notwithstanding that Hong Kong is the *forum conveniens*, the interests of justice require that the Singapore action should not be stayed.

"Judge shopping"

26 The Judge, however, was of the view that Good Earth's application to stay the Singapore action in favour of Hong Kong as the appropriate venue to try Novus's claim for secret profits was primarily motivated by "judge shopping". This is because Wong stated in his affidavit of 5 April 2007 that Good Earth's Hong Kong solicitors had advised him that Stone J is the only dedicated judge in the Hong Kong courts hearing matters in the commercial list. If Novus commences an action for secret profits in Hong Kong, it is likely to be issued in the commercial list, otherwise Good Earth would apply for the proceedings to be transferred to the commercial list. In an affidavit filed on 4 May 2007, Wong clarified that what he meant to say in his earlier affidavit was that Novus's claim could be dealt with more efficiently if it came before Stone J since the learned judge was already familiar with the background facts of the dispute between Novus and Good Earth.

27 The Singapore courts have nothing but unreserved respect for the Hong Kong legal system. Indeed, it is not insignificant to note that English law constitutes the foundation of both legal systems. If Novus's claim for secret profits is heard in Hong Kong, any suggestion centring on the possibility of actual or apparent judicial bias is, in our view, wholly unjustified. Further, this court has in the past emphasised the high regard that it places on the maintenance of international comity. The words of Chao Hick Tin JA, delivering the judgment of this court in *The Hung Vuong-2* [2001] 3 SLR 146 at [27], bear repeating:

> We must point out at once that it is not for this court or any court in Singapore to pass judgment on the competence or independence of the judiciary of another country, all the more so of a friendly country. Comity between nations would be gravely undermined if such a wholly invidious pursuit is embarked upon.

28 In a related vein, in the Singapore High Court decision of *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR 494, it was observed thus (at [25]):

> The importance of international comity cannot be underestimated. The domestic courts of each country must constantly remind themselves of this point – if nothing else, because of the natural tendency towards favouring domestic law over foreign law. In days of yore, the domestic legal system was probably the main – if not sole – focus simply because in those days, jurisdictions on the whole were less interconnected. So it is understandable if the focus was on the domestic law, simply because the law of foreign jurisdictions was, in the nature of things then, rarely raised. This is no longer the case. Nevertheless, it ought to be emphasised that the signal importance of the domestic legal system cannot be gainsaid either. Extreme positions on either side of the legal spectrum ought to be avoided. For example, international comity ought *not* to be accorded if to do so would offend the public policy of the domestic legal system (here, of Singapore). However, that having been said, legal parochialism must also be eschewed. Such tunnel vision is, as I have mentioned, no longer an option. It will only cause the legal system adopting such a limited vision to atrophy, even in the medium-term, not to mention the long-term. This will, of course, have detrimental effects on the broader social structures, of which the law is an integral part. [emphasis in original]

29 We would also like to take this opportunity to clarify that should a factor such as "judge shopping" ever become relevant in future cases, it should be considered at Stage 2 of the *Spiliada* test. A caution set out by the learned authors of a leading textbook in the conflict of laws is instructive: see Sir Peter North & J J Fawcett, *Cheshire and North's Private International Law* (Butterworths, 13th Ed, 1999) ("*Cheshire and North*"). They have noted that a factor that brings into the equation issues of substantive justice may not be easily categorised under Stage 1 or Stage 2

because there are different types of injustice (at p 337):

> One type goes to availability of the alternative forum and is considered at the first stage of the *Spiliada* inquiry; consequently the onus is on the defendant to show that there is no such injustice. The other type does not go to availability and is raised at the second stage of the inquiry; consequently the onus is on the claimant to show circumstances by reason of which justice demands that a stay should not be granted.

30 The learned authors favour the second approach where Stage 1 is only concerned with whether the alternative forum abroad has jurisdiction to try the case on its merits while *issues of substantial justice are left to Stage 2*. This appears to be the position adopted by the House of Lords in *Connelly v RTZ Corporation Plc* [1998] AC 854 ("*Connelly*"), which was cited in *Cheshire and North* (at pp 341–342). In that case, the plaintiff was domiciled in Scotland and worked in Namibia for a Namibian subsidiary of an English company. He commenced proceedings in England against the company and one of its English subsidiaries for negligence. The plaintiff was entitled to financial assistance in England in the form of legal aid or a conditional fee agreement, but no such assistance would be available for proceedings in Namibia. The House of Lords decided that Namibia was the jurisdiction with which the action had the closest connection so *prima facie*, a stay should be granted. It was only at Stage 2 that their Lordships characterised *Connelly* as an "exceptional case" inasmuch as its nature and complexity meant that it could not be tried at all without the benefit of financial assistance, therefore justice required that the stay should be refused.

31 Each case will present different issues of substantive justice and must be judged according to its specific factual matrix. Suffice it to say that in our view, a factor such as "judge shopping" is more appropriately considered at Stage 2 since, by its very nature, it is invoked with the aim of having an impact on the substantive outcome of the case itself.

Conclusion

32 In the premises, we allowed the appeal with costs here and below to Good Earth. The costs in the substantive action will be the costs of the Hong Kong proceedings provided they are commenced before 30 June 2008.

33 We would like to commend both counsel for their professionalism in the conduct of this matter. They advanced their respective clients' cases persuasively without overlooking their (overriding) duty to assist the court.