

Econ Corporation International Limited v Ballast-Nedam International BV
[2002] SGHC 293

Case Number : OS No 1190 of 2002, RA No 258 of 2002

Decision Date : 10 December 2002

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Christopher Lau SC and Cheah Kok Lim (Ang and Partners) for plaintiffs; Felicia Chua and Lam Wei Yaw (Wong and Leow LLC) for defendants

Parties : Econ Corporation International Limited — Ballast-Nedam International BV

Civil Procedure – Service – Whether proper case to grant leave for service out of jurisdiction – Whether substantial relief sought by way of injunction – Whether plaintiffs had a good arguable case – Whether serious issues to be tried – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 11 rr 1(b), (d), (r)

Conflict of Laws – Choice of jurisdiction – Appropriate forum – Whether Singapore courts most appropriate forum for deciding rights under Performance Bond and Advance Payment Guarantees

Judgment

GROUND OF DECISION

1 The plaintiffs commenced these proceedings against the defendants on 28 August 2002. Under these proceedings, the High Court is asked to decide whether the defendants were entitled to call on a Bond and an Advance Payment Guarantee both dated 20 March 2001 and an Advance Payment Guarantee both 3 April 2002 (and the three instruments are referred to hereafter as the Bond and Advance Payment Guarantees) on the terms and language thereof and in the circumstances to which I will briefly refer presently and whether they were entitled to receive the money under the Bond and Advance Payment Guarantees. Two days later, the plaintiffs obtained an Order of Court for leave to serve the Originating Summons out of jurisdiction on the defendants in the Netherlands.

2 By Summons in Chambers entered No. 3621 of 2002 the defendants applied for the following orders, namely: (a) to set aside the Order of Court of 30 August 2002 which granted leave to serve the Originating Summons out of jurisdiction; (b) alternatively, to stay the proceedings pursuant to Section 6(1) of the International Arbitration Act (Cap. 143A); (c) alternatively, to stay the proceedings herein under the inherent powers of the Court to prevent injustice and/or abuse of process under Order 92 Rule 4 of the Rules of Court (1997 Ed); and/or alternatively, to declare that this Court has no jurisdiction over the defendants under Order 12 Rule 7(g) of the Rules of Court.

3 On 2 October 2002, an Assistant Registrar ordered that the Order of Court dated 30 August 2002 which granted leave to serve the Originating Summons out of jurisdiction be set aside. Being dissatisfied with the decision, the plaintiffs appealed to the Judge in Chambers. At the conclusion of the hearing I allowed the appeal. I ruled that leave to serve the Originating Summons out of jurisdiction ought to have been granted, as was ordered initially. I set aside the orders of the Assistant Registrar of 2 October 2002 and ordered the defendants to pay the plaintiffs costs here and below fixed at \$7,500. I now set out the background and the reasons.

The background

4 In the amended Originating Summons the claim is for the following reliefs:-

- (i) a declaration that the defendants shall not be entitled to call or demand payment or otherwise receive payment in respect of the Bond and Advance Payment Guarantees until the final outcome of the arbitration proceedings; and
- (ii) the defendants be restrained from taking any steps to demand or receive payment under the said Bond and Advance Payment Guarantees or otherwise

receiving, encumbering or otherwise dealing with the monies or any part thereof under the Bond and Advance Payment Guarantees.

5 The Bond was issued by American Home Assurance Company ("AHA"), a corporation of the State of New York, out of their branch office in Singapore to secure its performance of a sub-contract which I will describe later. The Bond expressly stated that it was "made in accordance with the laws of Singapore and *subject to the decision of the courts of Singapore*". (emphasis added). The Advance Payment Guarantee of 20 March 2001, which was also furnished by AHA, also expressly provided thus: "This Guarantee is made in accordance with the laws of Singapore and *subject to the decision of the Courts of Singapore*". As security for AHA, the plaintiffs, a Singapore company, had in turn signed counter-indemnities in favour of AHA.

6 The purpose of the Bond and Advance Payment Guarantees arose in the following circumstances in relation to a turnkey project awarded by Petronet LNG Ltd for the engineering procurement, construction and commissioning of a liquefied natural gas receiving storage and re-gasification terminal at Dahej, State of Gujarat, India ("the project"). Petronet LNG Ltd is a limited company incorporated under the laws of India and the defendants is a Dutch company. Together with four other internationally well-known construction companies the defendants were awarded the Main Contract for the Project. The Main Contract provided for inter alia the completion of a detached breakwater to protect the LNG terminal. The deadline for completion was 27 December 2003.

7 On 26 January 2001, the defendants sub-contracted to the plaintiffs the construction of the detached breakwater. The sub-contract, as usual, provided that the defendants may give notice to the plaintiffs to proceed with the Subcontract works with due diligence, failing which the Subcontract may be terminated. By sub-clause 21.1 it was provided that any dispute arising between the plaintiffs and the defendants arising out of the execution of the Subcontract works shall be finally settled by arbitration in accordance with the rules of arbitration as laid down in the Main Contract. The place of arbitration, the procedural law applicable to the arbitration, the law applicable to the substance of the dispute, the language of the arbitral proceedings and the number of arbitrators shall be as specified in the Main Contract. Under the Main Contract, any dispute arising out of or relating to the contract or with respect to the breach, termination or invalidity thereof shall be settled exclusively and finally by arbitration. Arbitration shall be conducted in accordance with the Indian Arbitration and Conciliation Act. It was provided that the place of arbitration shall be in New Delhi, India and that the governing law of the Main Contract shall be the laws of the Republic of India.

8 The plaintiffs' application for leave to serve the Amended Originating Summons out of jurisdiction was based on Order 11 r 1(b), (c), (d)(iii) and (iv) and (r) of the Rules of Court. Rule 11 r 1(c) was not relied on at the hearing before me.

9 Order 11 r 1(b) of the Rules of Court permits service out of jurisdiction with leave where in an action "an injunction is sought ordering the defendant to do or refrain from doing anything in Singapore (whether or not damages are also claimed in respect of a failure to do or the doing of that thing)." Under Order 11 r 1 (d)(iii) and (iv) such service out of jurisdiction is permitted where the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which under paragraph (iii) is by its terms, or by implication, governed by the law of Singapore or under paragraph (iv) the contract contains a term to the effect that that Court shall have jurisdiction to hear and determine any action in respect of the contract. Under Order 11 r 1(r) such service out of jurisdiction is also permitted with leave where 'the claim is in respect of matters in which the defendants has submitted or agreed to submit to the jurisdiction of the court.'

10 As to jurisdiction, it is relevant to refer to section 16 of the Supreme Court of Judicature Act (Cap. 322) which provides as follows:

"16(1) The High Court shall have jurisdiction to hear and try any action in personam where-

(a) the defendant is served with a writ or other originating process-

(i) in Singapore in the manner prescribed by Rules of Court; or

(ii) outside Singapore in circumstances authorized

by and in the manner prescribed by Rules of Court; or

(b) the defendant submits to the jurisdiction of the High Court.

(2) Without prejudice to the generality of subsection (1), the High Court shall have jurisdiction as is vested in it by any other written law."

11 In relation to the plaintiffs' application for leave, the 'other written law' under subsection 16(2) refers to the International Arbitration Act (Cap 143A, 1995 Ed.).

Principles governing leave to serve out of jurisdiction

12 A court in granting leave to serve a writ or originating process out of jurisdiction has to consider, first, whether jurisdiction under Order 11 rule 1 of the Rules of Court has been sufficiently established on the basis of a good and arguable case: *Bradley Lomas Electroluk Ltd & Another v Colt Ventilation East Asia Pte Ltd & Ors* [2000] 1 SLR 673. A mere statement by a deponent that he believed the matter fell within a particular limb was insufficient. On the other hand, it was noted by the Court of Appeal in the same case that a court on such an application was not called upon to try the action or express a premature opinion on its merits. The Court of Appeal further ruled that it was only when jurisdiction was so shown to exist that the court would proceed to determine whether it should exercise its discretion to grant leave and for this purpose the plaintiff need only show merits on the claim up to the level of a serious issue to be tried. In these principles *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438 was followed.

The Circumstances in this case

13 In the present case, the plaintiffs alleged that the defendants have been in breach in many respects and that it would be conscionable for them to call upon the Bond and the Advance Payment Guarantees. These were denied by the defendants who asserted counter allegations in extenso. Both sides relied on a substantial body of contemporaneous documents. Suffice it to say that the plaintiffs have established a good arguable case to ground jurisdiction. By this Originating Summons they seek for an interim preservation order pending the arbitration. Further, the court has power to grant interim injunctions as provided by section 12(1)(g) and (6) of the International Arbitration Act ("the IAA"). As set out in Article 9 of the Model Law in the First Schedule of the IAA, it is "not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for the court to grant such measure": see *PT Garuda Indonesia v Bergen Air* [2002] 1 SLR 393, 398 at para 21. The plaintiffs are not asking the court to finally determine the rights of the parties in respect of the Subcontract or in respect of the termination of the appointment of the plaintiffs under the Subcontract. In my view, that would not be possible in view of the reliefs sought by the plaintiffs which are set out above.

14 It was pointed out at the appeal that the plaintiffs had given notice of arbitration on 10 September 2002 and the matters included in the arbitral reference included disputes regarding the call on the Bond and Advance Payment Guarantees. But counsel for the plaintiffs stressed that there was some urgency in the matter because under clause 21.2 of the Subcontract it was provided that "no recourse to arbitration shall be made unless and until an attempt has first been made to settle amicably" and that "a period of 90 days after either party has served written notice on the other of their intention to refer the dispute to arbitration shall be allowed for amicable settlement." Without the interim injunctive relief, it was pointed out that payment might be made and it was not likely that the monies would be destined for India to meet any arbitral award in favour of the plaintiffs.

15 The central argument of the defendants in the appeal was that the dispute between the parties was whether the defendants were entitled to terminate the Subcontract and that the subject-matter of the dispute is in substance the Subcontract and not the Bond and the Advance Payment Guarantees. The governing laws of the Subcontract is the law of India and the defendants did not agree to the law of Singapore nor submit to the jurisdiction of the courts of Singapore. In my view, this argument does not address the unalterable fact that so far as the Bond and the Advance Payment Guarantees are concerned, the parties thereto, namely the AHA and the defendants had expressly agreed that the governing law of it is the law of Singapore and that they submit to the jurisdiction of our courts. A third party like the plaintiffs, having given the counter indemnities, is interested in the dispute in respect of the enforceability of those documents.

16 It was argued by the defendants that *Mercedes-Benz AG v Leiduck* [1995] 3 All ER 803 is against the grant of leave to serve out of

jurisdiction under Order 11 rule 1 (b) of the Rules of Court. It was argued that there is no substantive relief sought in these proceedings. Para 11/1/10 of Supreme Court Practice 1997 Vol. 1 summarised the case thus: "Even though proceedings may technically fall within this sub-rule, the discretion to grant leave will not be exercised unless: (i) an injunction is a genuine part of the relief sought and has not been claimed merely to bring the case within the rule...and (ii) there is a reasonable prospect of an injunction (itself a discretionary remedy) being granted." A mareva injunction was obtained and served on the defendant pursuant to the leave granted to serve the writ out of jurisdiction. Only the relief of mareva injunction was prayed in the action. The majority of the Judicial Committee of the Privy Council, with Lord Nicholls of Birkenhead dissenting, ruled that a mareva injunction was *sui generis* in that, unlike other forms of injunction, it did not decide any substantive rights, and did not call into existence any process upon which they could work. Counsel for the plaintiffs argued that in *Mercedes-Benz AG* the relief prayed for was not anything like the injunction prayed for in this case. It was more in the nature of an attachment of the assets of the defendant pending the determination of proceedings in another jurisdiction, which came to pass, and on the basis of that judgment the plaintiffs obtained attachment orders against shares of the defendant held in a Hong Kong company. I agreed with counsel in this case the injunction sought by the plaintiffs is a substantive relief and it determines the rights of the defendants under the Bond and the Advance Payment Guarantees as to his entitlement to monies thereunder and the amount payable. Further, I also agreed that in Singapore we have the IAA and Article 9 of Model Law.

17 On the evidence, I concluded that the plaintiffs had made out a good arguable case as to why it would be unconscionable on the part of the defendants to receive monies under the Bond and the Advance Payments Guarantees. I further concluded that there were serious questions to be tried on the various claims and counterclaims of the parties. As parties had agreed that Singapore law govern the three instruments and had submitted to the jurisdiction of the Singapore Courts in relation to any disputes arising out of those instruments I came to the view that Singapore was the more appropriate forum, bearing in mind that the proper law of the Bond and the Advance Payment Guarantee being Singapore law was "the predominating factor" as explained by Kerr J (as he then was) in *B.P. Exploration v Hunt* [1976] 1 Q.B. (Com. Ct) 471, 482 lhc. There were not present in this case other considerations of overwhelming weight which militate against the Singapore Courts. I therefore concluded that the appropriate forum for deciding the rights of the plaintiffs and the defendants under the Bond and the Advance Payment Guarantees were the Courts of Singapore.

18 For these reasons I allowed the appeal and affirmed the leave granted to serve the Originating Summons out of jurisdiction.

Sgd:

Lai Kew Chai

Judge