NEW RULES ON *FORUM CONVENIENS*

Spiliada Maritime Corporation v. *Cansulex Limited*[1]

Introduction

IN 1973, the House of Lords in *The Atlantic Star*[2] relaxed the strict formulation of rules governing stay of action cases laid down in 1936 by Scott L.J. in *St. Pierre* v. *South American Stores (Gath and Chaves) Ltd.*[3] Their Lordships, however, refused to incorporate in English law the doctrine of *forum non conveniens,* a doctrine which was considerably developed in both the Scottish and American jurisdictions.[4] By 1984, the rules governing stay of actions had developed to such an extent in England that Lord Diplock was able to say in *The Abidin Dover*[5] that English and Scottish law in this area had now become indistinguishable.[6]

Spiliada Maritime Corporation v. *Cansulex Ltd.* comes at an opportune time and confirms this dramatic development in English law. The purpose of this case commentary is to examine a number of points raised by the House of Lords decision and to note their significance to the law in Singapore.

Facts

The appellants, a Liberian corporation, were the owners of the bulk carrier the "Spiliada". Under a voyage charterparty, the vessel was chartered to the Minerals and Metals Trading Corporation of India (M.M.T.C.). Pursuant to this charterparty, the respondents who carried on a business of exporting sulphur in British Columbia, loaded a cargo of sulphur on board the vessel in Vancouver bound for ports in India. Bills of lading issued to the respondents, who were named as shippers, provided that "no matter where issued, English law was to be the governing law".

The case arose as a result of allegations made by the appellants that the cargo of sulphur was wet when it was loaded and thereby caused severe corrosion to the vessel. They obtained leave from the English court to serve a writ outside the jurisdiction on the respondents under R.S.C., Ord. 11 r.(l)(f)(iii), that is, to recover damages in respect of a contract governed by English law. The respondents issued a summons under R.S.C., Ord. 12 r.8 on the grounds that this was not a proper case for service out of the jurisdiction since it was Canada (in particular, British Columbia) and not England which was the proper forum for trying the action.

1 [1986] 3 W.L.R. 972.
2 [1974] A.C. 436.
3 [1936] 1 K.B. 382.
4 *Supra* note 2 at 454, 464, 473 and 475.
5 [1984] A.C. 398.
6 *Supra* note 5 at 411.

The Decision

In the High Court, Staughton J. was satisfied that this was a proper case for service out of the jurisdiction and rejected the respondents' application. The appeal against this decision was heard in the Court of Appeal before Neill and Oliver L.JJ.[7] This Court reversed the decision of Staughton J. and allowed the respondents' appeal.

The case went on further appeal before the House of Lords, and Lord Goff, delivering the leading judgment commented that it was opportune to review the law on this subject. Their Lordships then proceeded to lay down principles by which the appropriate forum is to be determined in cases where a stay of action is asked for. Applying these principles in the instant case, the House of Lords considered five factors which made England a better forum than British Columbia to try the action and found in favour of the appellants.[8]

The first factor was that the balance of convenience with respect to all the witnesses was slightly tilted in England's favour. Secondly, the House of Lords felt that it would be in the interest of justice if the shipowner's claim against M.M.T.C. and the respondents and M.M.T.C.'s claim against the respondents could all be included in the same proceedings rather than having separate arbitration proceedings in London as provided for in the charterparty and the bills of lading.

The third and most important factor was that of the *Cambridgeshire* action. This was an English case before Staughton J. which involved owners of the vessel, the "Cambridgeshire", bringing an action against Cansulex for damages caused in loading sulphur on board the vessel. Counsel for both the parties in the present case were the same as in the *Cambridgeshire.* The House of Lords felt that since a tremendous amount of effort had already been put in by counsel for both sides in the *Cambridgeshire,* the *Spiliada* should also be tried in England since it involved very similar issues. The two other factors were that the law governing the contract was English law and the fact that the solicitors for the owners of the vessels in both the actions were instructed by the same English insurers. On a consideration of all these factors, their Lordships decided in favour of the appellants and allowed the action to proceed in England.

1. *Laying down new fundamental principles*

In his judgment, Lord Goff stated that in deciding whether or not to stay an action, one had to consider "the suitability or the appropriateness of the relevant jurisdiction".[9] He then spelt out what he called "the law at present" by which the appropriate forum is to be determined in cases where the jurisdiction has been founded as of right, *ie.* in cases where the defendant has been served with the writ within the jurisdiction.[10] Briefly it is as follows:

7 [1985] 2 Lloyd's Rep. 116.

8 *Supra* note 1 at 993.

9 *Supra* note 1 at 984.

10 This must strictly be considered *obiter dicta* since *The Spiliada* itself concerned an Order 11 situation. However the principles are the same for Order 11 and non-Order 11 cases, see *supra* note 1 at 989 and 990, except that the burden of proof would differ: see *infra* section 4.

(1) An English court will only grant a stay of an action in England if there is another forum which is the appropriate forum for the trial.

(2) This appropriate forum is to be determined by examining with which country the action has the most real and substantial connection.

(3) The defendant bears the burden of proving to the court that there is another such forum and that it is clearly or distinctly more appropriate than the English forum.

(4) If the court does decide that there is another appropriate forum, then it is up to the plaintiff to prove to the court that justice nevertheless requires that the action be heard in England.

2. *A wider test*

An obvious consequence of the decision is that an English court can now, in addition to the factors of convenience and expense, consider any other factor which has a bearing on the action.[11] This approach considerably expands on the factors which a trial judge can look at before deciding on the appropriate forum and is indeed a welcome one, since the choice of an appropriate forum should be made only after a consideration of all the relevant factors and upon weighing their respective merits.

There will however be some initial uncertainty as to the ambit of these new principles and this will continue until later cases resolve questions such as the factors which a court should consider relevant and the weight to be attached to the various relevant factors.

3. *Personal or juridical advantage*

Another consequence is that the effect of the plaintiffs personal or juridical advantage has been minimised.[12] Lord Goff in his judgment makes it abundantly clear that "the mere fact that the plaintiff has such an advantage in proceedings in England cannot be decisive" and in all cases the question must be as to the place where the case may be tried "suitably for the interest of all the parties and for the ends of justice".[13] This is a laudable development because an advantage which the plaintiff has in a jurisdiction will normally be a disadvantage to the defendant and it would not be just to require a defendant to be sued in England simply because the plaintiff has an advantage there and the defendant a corresponding disadvantage.

In addition, this development reduces forum shopping to a certain extent. Previously, a plaintiff having a choice of a number of jurisdictions and having an advantage by suing in the English courts could choose the English forum despite the fact that England might not be the most appropriate forum for trying the case. This was because the English courts considered the plaintiffs advantage as an important factor in allowing him to proceed in the English courts. Now however, for the action to be heard in an English court, England would have to be the appropriate forum for trying the action.

[11] Under the previous test in *MacShannon* v. *Rockware Glass Ltd.* [1978] A.C. 795, 812, only two factors were stated by the House of Lords as relevant considerations. One was the consideration of convenience and expense. The other was the juridical advantage which the plaintiff gains by suing in England.

[12] See *supra* note 11.

[13] *Supra* note 1 at 991.

4. *Distinction between Order 11 and non-Order 11 cases*

In this decision, a clear distinction between Order 11 and non-Order cases has been made for the first time. In the non-Order 11 cases, *i.e.* in cases where jurisdiction has been founded as of right, the principles are as stated earlier; the defendant must show the existence of a more appropriate forum in order to obtain a stay of the English action.

In the Order 11 cases, the same principles as above apply, except that it is now the plaintiff who has to show the court that England is the appropriate forum for trying the action and the defendant, who is outside the jurisdiction, should therefore be served with the writ. This is made abundantly clear by Lord Goff in his judgment when he states that the burden of proof is not merely to persuade the court that England is the appropriate forum for the trial but to prove that it is clearly so.[14] This distinction has the effect of clarifying questions of burden of proof in stay of action cases.

5. *Discretion exercised by the trial judge*

The final consequence of this decision is that a court sitting on an appeal from stay of action proceedings would now be reluctant to disturb the findings of the trial judge. This is especially so since the test for deciding *the forum conveniens* is now no longer a question of law but one of fact.[15] As was pointed out by Lord Templeman, the "solution of disputes about the relative merits of trial in England and trial abroad is pre-eminently a matter for the trial judge and an appeal should be rare and the appellate court should be slow to interfere."[16]

This comment is indeed a welcome one for in far too many stay of action cases, the parties not having accepted the decision of the court of first instance have appealed; in many instances all the way to the House of Lords.[17] Considering the fact that the dispute at this stage is only as to the place where the action is to be tried and not as to the actual merits of the case itself, it does seem to be a waste, both in terms of time and money.

6. *Effect of this decision in Singapore*

In 1974, the case of *Sea Breeze Navigation Co. S.A. v. Owners of Ship "Hsing An"*[18] came before the Singapore High Court. The plaintiffs in that case, who were from Panama, brought an *in rem* action against the defendants, from Taiwan, claiming that they were the owners of the vessel the "Hsing An" and asked the court to transfer to them the legal title to the vessel. The defendants disputed the claim on two grounds. Their first ground of dispute was that the plaintiffs did not have a reasonable cause of action to claim ownership of the vessel. Their second ground of dispute, which

14 *Supra* note 1 at 990.

15 Whether a factor could be a legitimate personal and juridical advantage to the plaintiff was inevitably a question of law. Under the new test a trial judge only looks at all the relevant facts and their respective merits before deciding on an appropriate forum.

16 *Supra* note 1 at 975.

17 There have been at least seven cases which have gone on appeal to the House of Lords since *The Atlantic Star.* Eleven cases have been heard before the Court of Appeal and leave to appeal to the House of Lords was refused in eight of the eleven cases.

18 [1974] 1 M.L.J. 45.

is the relevant one for our purposes, was that the proceedings commenced in Singapore should be stayed on the ground that it was vexatious and oppressive to them and an abuse of the process of the court.

On this point, the defendants argued that the balance of convenience was overwhelmingly in favour of Taiwan and that it should therefore be the appropriate forum to try the action. To support their interpretation of "vexatious and oppressive", the defendants relied on the then recent House of Lords decision of *The Atlantic Star.*[19] Chua J. after extensively reviewing the principles enumerated by the House of Lords decision came to the conclusion that "these are the principles to be applied to the present case".[20] However, on the facts of the case he decided that the defendants had not satisfied the court that the action would be oppressive and vexatious to them and dismissed their application. It can therefore be said with some authority that the House of Lords decision of *The Atlantic Star* is applicable in Singapore.

The only other relevant local case on this area is that of the *Blue Fruit*[21]. In that case, Singapore ship repairers brought an action against the defendants who were the owners of the vessel the "Blue Fruit". The repairers alleged that they had not been paid money due to them for the repair of the vessel in Singapore and caused the sister ship of the "Blue Fruit" to be arrested in Japan. After security was deposited in the Japanese court by the defendants, the vessel was released. The plaintiffs then rearrested the Blue Fruit in Singapore and commenced an *in rem* action here. The defendants argued, *inter alia,* that the Singapore action should be discontinued because of a similar action pending before the Japanese courts and that by rearresting the vessel the defendants had acted vexatiously and contrary to good faith and that this amounted to an abuse of the process of the court. The plaintiffs' however, argued that the Singapore court was the appropriate forum for deciding the case and gave an undertaking that they would discontinue the action before the Japanese courts if they were allowed to continue with their action here. In light of the considerations raised by the plaintiffs, the Court of Appeal decided that the Singapore court was the *forum conveniens* and refused to stay the action.

In arriving at this conclusion, the Singapore Court of Appeal did not refer to any English cases on *forum conveniens* or explain what it meant by *forum conveniens* and how such a forum was to be determined. Significantly, the Court of Appeal did not refer to the earlier decision of *Sea Breeze Navigation Co. S.A.* v. *Owners of Ship "Hsing An"* nor to the test in *The Atlantic Star.* The court instead considered a series of wide ranging interests such as the law governing the transaction, the place where the transaction was concluded, the place of business of the plaintiff and the defendant, the convenience with respect to witnesses and all the records, the fact that the plaintiffs might not be able to sustain their claim in a Japanese court under Japanese law and procedure (the other alternate forum) and, most significantly, that Singapore was the country with the most substantial connection with the case. It would seem from this decision that the court was already determining *the forum conveniens* on the basis of a set of wide

[19] *Supra* note 2.
[20] *Supra* note 18 at 49
[21] [1979] 2 M.L.J. 279

ranging interests similar to the principles laid down by the House of Lords in *The Spiliada* rather than following the widening of the "vexatious and oppressive" test in *The Atlantic Star.*

This has given rise to a situation which could pose difficulties for the District and Magistrate courts in Singapore. These courts are faced with a High Court decision as well as a Court of Appeal decision which are both binding on them. However, in determining *the forum conveniens,* the Court of Appeal does not adopt the same test as the High Court, nor does it expressly overrule the earlier case. Thus, are these courts bound by the High Court decision which incorporates the test in *The Atlantic Star* or can they now determine *the forum conveniens* on the basis of a set of wide ranging interests as was decided by the Court of Appeal in *The Blue Fruit?* Although the point remains unsettled, the argument could be made that the later Court of Appeal case has impliedly overruled the earlier High Court case. This would then justify the lower courts in following the later Court of Appeal case in preference to the earlier High Court decision.

In any case, are the principles enunciated in *The Spiliada* applicable in Singapore? In the Privy Council decision of *de Lasala* v. *de Lasala*[22], it was pointed out that English House of Lords decisions on an area of common law are not *ipso facto* binding but are of great persuasive value in jurisdictions which have a common law tradition and which apply English law. The exception is a decision in a field of law where the circumstances of the place or the people make it inappropriate that the common law in that field should develop on the same lines as in England.[23]

Therefore, *The Spiliada* does not automatically apply in Singapore and the local courts have a choice in deciding whether to apply the decision locally. This would depend on whether the decision is a good one and applicable to the local circumstances. It is suggested that *The Spiliada* is indeed a good decision and should be applicable here.

In *The Blue Fruit,* the Court of Appeal was already determining the *forum conveniens* by looking at a variety of factors similar to what the House of Lords decided in *The Spiliada.* No argument can therefore be made that the decision is inapplicable to our local circumstances. Besides, after the decision in *The Blue Fruit,* our local judges would be inclined towards the application of *The Spiliada* in Singapore.

Furthermore, the test for determining the *forum conveniens* is now a fairer one since it takes into consideration all the relevant factors before the appropriate forum is decided. Forum shopping will be curtailed to a certain extent and unwillingness to disturb the findings of trial judges has been expressed, which will thereby reduce the number of appeals.

In addition, the distinction made by the House of Lords as to the difference in burden of proof between Order 11 and non-Order 11 cases is applicable here. In Singapore, the jurisdiction of the court is defined and sec-

22 [1980] A.C. 546. Although this was a case on appeal from Hong Kong, this comment made by the Privy Council is equally applicable in Singapore.

23 *Supra* note 22 at 558.

tion 16 of the Supreme Court of Judicature Act[24] provides an exhaustive list of all the instances where the Singapore High Court has jurisdiction to try an action.[25] This is the concept of limited jurisdiction. This differs significantly from England where the service of the writ is sufficient to give the court jurisdiction to hear a particular case. This difference, however, does not affect the distinction made by the House of Lords as to the different burdens of proof in Order 11 and non-Order 11 cases. In fact, it is suggested that this distinction should be applicable here, since it clarifies the question of who bears the burden of proof in such a situation.

In conclusion, although the decision of the Singapore Court of Appeal in *The Blue Fruit* provides a fair method of determining *the forum conveniens,* the case does not provide good supporting reasoning for reaching such a decision. It is therefore suggested that the Singapore courts should adopt, as applicable in Singapore, the principles as well as the reasoning laid down by Lord Goff in *The Spiliada* since it is both a good decision and applicable to local circumstances.

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[24] Cap. 322, 1985 (Rev. Ed.)

[25] See Mohan Gopal, "The Original Civil Jurisdiction of the Singapore High Court: Some Issues" [1983] 2 M.L.J. Ixiv; Peter Gabriel, "Has The 'Blue Fruit' Turned the Law Red" Law Times 1980, p. 14; Rajah Vijayakumar, "Civil Jurisdiction: A Brief Examination of the English and Singapore Positions" Law Times 1982, p. 2 and the judgment of Abdul Hamid J. in *Lam Kok Trading Co. (Pte) Ltd.* v. *Yorkshire Switchgear & Engineering Co. Ltd* [1976] 1 M.L.J. 239.

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