RESTRAINING FOREIGN PROCEEDINGS; A RETURN TO THE LAW OF "VEXATION AND OPPRESSION"

Societe Nationale Industrielle Aerospatiale v. Lee Kui Jak[1]

Introduction

THIS case, which arose in the Brunei courts, was primarily concerned with the issue of restraint of foreign proceedings. In its decision, the Privy Council restated the rules to be applied by a judge in such a situation and it is the purpose of this casenote to examine this decision and its relationship with some earlier House of Lords' decisions.

Facts

This case arose as a result of the various actions commenced by the plaintiffs, the widow and the administrator of the estate of Yong Joon San, who had died in a helicopter crash in Brunei. The helicopter had been manufactured by Societe Nationale Industrielle Aerospatiale (S. N. I. A. S.), a French company and was owned by an English company, the British and Commonwealth Shipping Co. (Aviation) Ltd. It was however operated and serviced by Bristow Helicopters Malaysia Sdn. Bhd. and at all material times was under a contract to Sarawak Shell Co. and based in Sarawak. Soon after the crash, an inquiry was conducted in Brunei to determine the cause of the accident. The investigations revealed that the accident occured because of the misinterpretation of instructions in the S.N.I.A.S. maintenance manual by the engineers involved in the maintenance of the helicopter in Sarawak.

Three sets of proceedings were commenced by the plaintiffs. The first action was commenced in Brunei against Bristow Helicopters Malaysia Sdn. Bhd. and S.N.I.A.S.. The second action was commenced in France against S.N.I.A.S. and this was later discontinued. The third action was commenced in the Texas court and this action involved S. N. I. A. S. and its U. S. associates, Bristow Malaysia and its U.S. associates and the Sarawak Shell Bhd. as defendants. Subsequently an agreement was reached between the plaintiffs and the Bristow and Shell companies whereby in consideration for a sum of money, the plaintiffs granted them a general release. S. N. I. A. S. was not asked to be a party to this agreement. In the Texas proceedings, S. N. I. A. S. asked for a dismissal of the action on the ground of *forum non conveniens* arguing that it was the Brunei court which was the appropriate forum for the trial. This argument was rejected by the Texas court. After having exhausted all their possible remedies in the United States, S. N. I. A. S. then turned to the Brunei court to seek an injunction to restrain the plaintiffs from proceeding with the Texas action.

[1] [1987] 3 W. L. R. 59.

The Decision

In the High Court of Brunei Darusalam before Mr. Commissioner Rhind, the grant of the injunction was refused on the grounds that the Texas court was the neutral and appropriate forum for the trial. Before the Court of Appeal of Brunei Darusalam, however, the matter was argued *de novo* since it was accepted by both parties that because of the limited time available to them, the evidence put before the Commissioner was inadequate and to a certain extent misleading. Another consideration was that the full reported judgment of *Spiliada Maritime Corpn.* v. *Cansulex Ltd.,*[2] a House of Lord's decision laying down new rules for the determination of the appropriate forum, had just been made available. The Court of Appeal first referred to the House of Lord's decision of *Castanho* v. *Brown & Root (UK) Ltd.,*[3] where Lord Scarman had stated that "the principle to be applied is the same whether the remedy sought is a stay of English proceedings or a restraint of foreign proceedings".[4] In the light of Lord Diplock's test in *MacShannon* v. *Rockware Glass Ltd.,*[5] which was then the accepted test for stay of English proceedings, the test to be applied in cases involving a restraint of foreign proceedings was stated to be as follows; to obtain a stay of the foreign proceedings, the party wanting the stay must show that (a) the English court is a forum to whose jurisdiction both parties are amenable and in which justice can be done at substantially less inconvenience and expense and (b) the injunction must not deprive the other party of a legitimate personal or juridical advantage which would be available to him if he invoked the other jurisdiction.

Having accepted this as the correct test to be applied, the Court of Appeal concluded that on the facts before them, it was the Texas court which was the appropriate forum for the trial and therefore they could not even begin to exercise their discretion as to whether they should grant an injunction restraining the Texas proceedings. The injunction was therefore refused, affirming the decision of the High Court below.

On further appeal, the Privy Council referred to four basic principles "which are now beyond dispute"[6] in the law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction; they are as follows:

(1) The jurisdiction is to be exercised when the ends of justice require it.

(2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.

(3) An injunction will only be issued to restrain a party who is amenable to the jurisdiction of the court since otherwise such an order would not have any effect.

(4) This power must be exercised with caution since such an order indirectly affects a foreign court.[7]

[2] [1986] 3 W. L. R. 972.
[3] [1981] A. C. 557.
[4] *Supra.,* n.3, at p. 574.
[5] [1978] A. C. 795.
[6] *Supra.,* n.1, at p. 70.
[7] Supra., n.1, at p. 70.

The Privy Council then looked at the decided cases stretching back to over a hundred years and to the old principle where vexation or oppression was the sole ground on which injunctions were granted to restrain the pursuit of foreign proceedings. The Privy Council then decided that this old principle "still provides useful guidance on the circumstances in which such injunctions may be granted" and decided that henceforth the court should restrain the plaintiff from proceeding in a foreign court only when so proceeding would be vexatious or oppressive to the defendant. The Court hearing the application must be the natural forum for the trial of the action and since the court is concerned with the ends of justice, account should be taken of any injustice caused to the defendant if the plaintiff is allowed to pursue the foreign proceeding and also of any injustice caused to the plaintiff if he is not allowed to continue with his action in a foreign court.[8]

Applying this principle to the present case, the Privy Council concluded that it was the Brunei court which was the natural forum for the trial of the action, and therefore it could exercise its discretion as to whether it should grant an injunction to restrain the Texas proceedings, differing from the decision of the High Court and the Court of Appeal of Brunei. On the facts it decided that it was oppressive to S. N. I. A. S. for the action to be heard in Texas and therefore granted the injunction, reversing the decision of the courts below.[9]

Departure from Earlier Case Law

This principle enunciated by the Privy Council is a clear departure from the statement of Lord Scarman in *Castanho* v. *Brown & Root (UK) Ltd.* In that case, Lord Scarman stated that the principle to be applied was to be the same whether it was a situation involving a stay of the English proceedings or a restraint of foreign proceedings. Since *Spiliada Maritime Corpn.* v. *Cansulex Ltd.* changed the law with respect to stay of English proceedings, if Lord Scarman's statement was still to remain a correct proposition, it would mean that a party wanting to obtain a restraint of the foreign proceedings would only have to show that (a) the English court is the natural forum for the trial of the action, to whose jurisdiction the parties are amenable and (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.[10] It was pointed out by Lord Goff in this case that this would lead to a situation where the English court after concluding that it was the natural forum for the action could on that ground alone restrain a party from proceeding with his foreign action. This, he felt, would greatly increase the instances where a restraint of the foreign proceedings can be obtained and was inconsistent with comity and disregarded the fundamental requirement that an injunction will only be granted where the ends of justice so require. Concluding therefore that this cannot be the basis for restraint of foreign proceedings, Lord Goff decided that the correct principle was to be found in the cases decided prior to *Castanho* v. *Brown & Root (UK) Ltd.* which stated that foreign proceedings should

[8] *Supra.,* n. 1, at p. 74.

[9] This, according to the Privy Council, was because if the action were to continue in the United States and the plaintiffs were to succeed, the defendants would not be able to claim any contribution from the Malaysian companies and would have to institute a separate action in Brunei to obtain a contribution. This would necessitate the case being heard all over again in the Brunei court with a consequent high cost to S. N. I. A. S. and with no guarantee that the Brunei court would reach the same conclusion as that reached by the United States court.

[10] *Supra.,* n.1. at p. 73.

be restrained only where it would be oppressive or vexatious to the defendant if the plaintiff were to pursue his foreign action. In coming to his conclusion, Lord Goff also referred to Scottish and American decisions where one can find "no trace of any suggestion that the principles applicable in cases of stay of proceedings and in cases of injunctions are the same"[11] and where the principles on which foreign proceedings are restrained very closely resembled the vexatious or oppressive principle.[12]

This must clearly be correct since in the case of a stay of an action on the grounds *offorum non conveniens* the court is only concerned with the action before itself and there is no interference with any other foreign court. The court can therefore afford to be liberal in its determination of the appropriate forum. In cases which involve a restraint of foreign proceedings, however, there is interference with a foreign court, and it is only appropriate that the court apply a more stringent test in determining whether such proceedings should be restrained. It is therefore not possible for the principles in both these situations to be the same since the considerations in both cases are dissimilar.

Determination of Vexation or Oppression

However, by going back to the test of oppression or vexation, one is faced with the difficulty of identifying vexation or opression in a particular situation. This case itself illustrates this difficulty since the Court of Appeal of Brunei Darusalam, *inter alia,* on the facts decided that it was not vexatious or oppressive to the defendants in having their case heard in a Texas court whereas on the very same facts the Privy Council decided that it was oppressive to the defendants to have the action heard in a Texas court. In his judgment Lord Goff "emphasised that the notions of vexation and oppression should not be restricted by definition"[13] and referred to the decision of *Peruvian Guano Co.* v. *Bockwoldt*[14] where Jessel M. R. had given two examples of vexatious proceedings. One is where the proceedings are so utterly absurd that they cannot possibly succeed. Another is where the plaintiff thinking that he might get some fanciful advantage sues the defendant in two courts at the same time under the same jurisdiction. It was also stressed that there is no presumption that a multiplicity of proceedings in different forums is vexatious and that proceedings are not to be considered vexatious merely because they are brought in an inconvenient place. Lord Goff also referred to a situation where a plaintiff might bring an action in a foreign jurisdiction with no connection to the subject matter and which offers great inducements such as greatly enhanced or even punitive damages and suggested that this might constitute oppression.

It is recognised that it would not be possible to provide an exhaustive list of all the instances which would constitute vexation or

[11] *Supra.,* n.1, at p. 74.
[12] It is interesting to note that Goff L. J., as he then was, in the case *of Bank of Tokyo Ltd.* v. *Karoon* [1987] 1 A. C. 45, which was decided in 1984, pointed out that until *Castanho* v. *Brown & Root (UK) Ltd.,* there was a strong similarity in the way the law had been developing in the English and the United States' courts and that no reason had been offered by Lord Scarman as to why in a stay of the English action or in a restraint of foreign action the principles are to be the same.
[13] *Supra.,* n.1, at p. 71.
[14] (1883) 23 Ch. D. 225.

oppression. However, guidance should be given to trial court judges in the form of perhaps a tighter definition of the words "vexation" and "oppression" especially in light of Lord Goff's remark that these words should not be restricted by definition. This might decrease the chances of courts coining to different conclusions as to whether it is vexatious or oppressive on the same fact situation.

General Test for All Injunctions?

Reference should also be made to the 1986 House of Lords decision of *South Carolina Insurance Co.* v. *Assurantile Maatschappil "De Zeven Provincien" N. V.*[15] In this case, Lord Brandon had stated that there are only two specific situations where the English High Court can grant injunctions. The first situation is where one party to the action can show that the other party has either invaded, or threatens to invade his legal or equitable right and the other party is amenable to the jurisdiction of the court. The second situation is where one party to an action has behaved, or threatens to behave, in a manner which is unconscionable.[16] He however accepted that restraint of foreign proceedings was to be regarded as an exception to the two specific situations.[17] Lord Goff, who was also sitting as a member of the court in that case, whilst agreeing with the decision of the court, did not accept the proposition that the English High Court's power to grant an injunction was restricted to two specific situations and that restraint of foreign proceedings was to be regarded as an exception to these two situations.

Lord Goff's judgement in this case, whilst changing the rules to be applied when a restraint of foreign proceedings is asked for, does not appear to affect Lord Brandon's judgment with respect to the power of the English High Court to grant an injunction since Lord Goff's comments here appear only to be directed at restraint of foreign proceedings.[18] However in light of his earlier criticism of Lord Brandon's judgment and in light of his judgment in this present case, it does seem likely that in the future the law will develop towards a general test of vexation or oppression for all types of injunctions.

Difficulty in Determining the Appropriate Forum

This case also illustrates the difficulty in applying the test in *Spiliada Maritime Corpn.* v. *Cansulex Ltd.* to determine the appropriate forum for trial of the action. In that case, it was decided that in determining the appropriate forum, the court should look to see with which forum the case has the closest and most real connection. This question was to be decided by the trial judge as a matter of discretion and that as far as possible, this discretion was not to be interfered with. In this case the trial court and the Court of Appeal applying the principles in *Spiliada Maritime Corpn.* v. *Cansulex Ltd.* had concluded that the appropriate forum for the action was the Texas Court. The Privy Council however, on a reconsideration of the same factors concluded that it was the Brunei Court which was the appropriate forum for the trial of the

[15] [1987] 1 A. C. 24.

[16] *Supra.,* n.15, at p. 40.

[17] Although it is not explicitly mentioned, Lord Brandon does appear to accept the test in *Castanho* v. *Brown & Root (UK) Ltd.* as the correct test to be applied when a restraint of foreign proceedings is asked for; see *supra.,* n. 15, at p. 40.

[18] In any case, his comments in this Privy Council decision would not affect Lord Brandon's decision since that was a House of Lord's decision and the Privy Council does not form part of the English hierarchy of courts.

action. Perhaps in light of the difficulties illustrated in this case, some form of guidelines should be given to trial judges as to the types of connecting factors which would constitute "closest and most real connection" which they should have regard to in determining the appropriate forum.

Conclusion

This, being a decision of the Privy Council, is very persuasive within our jurisdiction and will in all likelihood be followed by the courts in Singapore.[19] It lays down "vexation or oppression" as the test to be applied in cases where a restraint of foreign proceedings is asked for and is indeed a good decision which makes a rational departure from the principles laid down in the House of Lord's decision *of Castanho* v. *Brown & Root (UK) Ltd.* in light of subsequent changes in the law relating to the determination of the appropriate forum. However it is suggested that some form of guidance be given as to the meaning of the words "vexation and oppression" and it be determined as soon as possible whether this test is only applicable for restraint of foreign proceedings or is to be a general test to be applied whenever a court is asked to grant an injunction.

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[19] See generally, Walter Woon, *"Stare Decisis* and Judicial Precedent in Singapore" in Chapter 4 of *The Common Law in Singapore and Malaysia* (edited by A. J. Harding, 1985).

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