EDESSA (INTERNATIONAL) TRADING LIMITED v. TIR-INN S.A.

COURT OF APPEAL (Fieldsend, P., Davis and O'Connor, JJ.A.): September 12th, 1996

Conflict of Laws—jurisdiction—forum conveniens—burden of proof—defendant to show proceedings have most real and substantial connection with foreign jurisdiction—if so, Gibraltar proceedings stayed unless plaintiff shows juridical disadvantage to himself in bringing proceedings in foreign court, e.g. delay or costs

The respondent brought an action against the appellant in the Supreme Court for breach of contract.

The respondent, a Belgian company, entered into a contract with the appellant, a Gibraltar company with branches in Russia and France, to transport goods from Belgium and France to Russia. The appellant failed to pay and the respondent issued proceedings in Gibraltar to recover the debt.

The Supreme Court refused the appellant's application to stay the proceedings on the ground of *forum non conveniens* on the basis that, although both Belgium and Russia appeared to be more appropriate jurisdictions for the trial of the action, the proceedings had been commenced as of right in Gibraltar, where the appellant company was registered, and therefore had a substantial connection with this jurisdiction.

On appeal, the appellant submitted that it was not required positively to establish that an alternative jurisdiction had jurisdiction to try the claim before the Supreme Court could order a stay of the Gibraltar proceedings on the ground of *forum non conveniens*.

The respondent submitted in reply that the court had properly refused a stay, since the appellant had not only failed to demonstrate that another jurisdiction had the most real and substantial connection with the action, but also had not proved that it, as plaintiff, would not suffer any disadvantage by the trial of the action there.

Held, allowing the appeal:

(1) In order to obtain a stay of the proceedings before the court on the ground of *forum non conveniens*, the appellant was required to show that another court had jurisdiction over the proceedings and was clearly the more appropriate forum for the trial, as having the most real and substantial connection with the proceedings, having regard *inter alia* to the law governing the contract, the availability of witnesses and expense.

Once this test had been met, the respondent bore the burden of showing that notwithstanding these matters, it would suffer a juridical disadvantage by having to bring proceedings in the foreign jurisdiction, whether in terms of the availability of costs, delay, or any other aspect of civil procedure (page 26, line 32 – page 27, line 12; page 27, lines 30–42).

(2) Since the affidavits filed by the parties had been so general in nature that the relevant issues remained largely unaddressed, it was in the interests of justice that the case should be remitted to the Supreme Court to give the parties an opportunity to file further evidence. The order of the lower court would be set aside (page 27, line 43 – page 28, line 2).

Cases cited:

(1) *Aldington Shipping Ltd.* v. *Bradstock Shipping Corp., The Waylink*, [1988] 1 Lloyd's Rep. 475.
(2) *Harrods (Buenos Aires) Ltd. (No. 2), In re*, [1992] Ch. 72; [1991] 4 All E.R. 348.
(3) *Spiliada Maritime Corp.* v. *Cansulex Ltd., The Spiliada*, [1987] A.C. 460; [1986] 3 All E.R. 843; [1987] 1 Lloyd's Rep. 1, applied.
(4) *Vishna Ajay, The*, [1989] 2 Lloyd's Rep. 558, considered.

K. Azopardi and *Ms. G.M. Guzman* for the appellant;
S.J. Bullock and *D. Whitmore* for the respondent.

FIELDSEND, P., delivering the judgment of the court: This appeal concerns a dispute over the appropriate forum to try the claim of the respondent against the appellant. After the conclusion of the hearing, the court ordered that the appeal was allowed to the extent that the Supreme Court's decision refusing a stay of the proceedings should be set aside and the matter remitted to the court *a quo* for a rehearing with leave to the parties to supplement their affidavits if so advised.

These are our reasons for making the order. They were primarily that on the material presented in the affidavits, a court could not have been expected to have reached a reasoned decision on (a) whether the Russian courts would have jurisdiction to determine the respondent's action, or (b) what were the relative advantages and disadvantages between a determination in Gibraltar and Russia.

The appellant is a company registered in Gibraltar, with offices in Moscow and Paris, carrying on the business of supplying goods from Europe (excluding Gibraltar) to Russia. The respondent is a Belgian company carrying on business there as a supplier of transport services. In November 1993 the appellant contracted with the respondent for the latter to carry a load of alcohol from Belgium to Moscow and a load of furniture from Paris to Moscow. It is common ground that the contract was concluded in Belgium by a telephone call from a director of the appellant to a representative of the respondent. It is also common ground

that the appellant has not paid for the transport service. Its defence is that the goods were delivered to St. Petersburg instead of to Moscow, causing expense to the appellant in storing the goods in St. Petersburg and in transporting them to Moscow, and were in any event delivered late.

A writ of summons was issued in Gibraltar on January 25th, 1995, served at the appellant's registered office in Gibraltar, and service was acknowledged on February 20th, 1995. On April 7th, 1995 the appellant filed a summons seeking a stay of the action on the ground that there was a more appropriate forum for the trial of the matter. This was supported by an affidavit by a Mr. Tapiero, a director of the appellant resident in Gibraltar, and opposed by an affidavit from a Miss Davidson of the firm acting for the respondent.

On the facts, which it is unnecessary to set out in any detail at this stage, the learned judge held that both Belgium and Russia appeared to be more appropriate jurisdictions than Gibraltar, but it was unclear to him which was the more appropriate forum. He held, however, that there was a substantial connection with Gibraltar where the proceedings had been commenced as of right. This was that Mr. Seban, a director of the company, had entered into the contract and that if he chose to conduct his affairs through the vehicle of a company in the way he had, "it ill becomes the defendant to complain if a plaintiff chooses the seat of his enterprise to seek redress." He refused a stay of the proceedings and it is from this decision that the appellant now appeals.

The affidavits filed by the parties are very vague and general. They are largely based on hearsay, Mr. Tapiero deposing mainly to what he had been told by Mr. Seban, and Miss Davidson deposing to what she had been told by some unspecified officers or employees of the respondent, by a Mr. Raquet as to certain correspondence, and a Mr. Mikarov, her firm's correspondent in Moscow.

The principles applicable in applications of this nature were finally settled in *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (3) and applied in this court in *The Waylink* (1). To repeat the basic principle set out by Lord Goff in *Spiliada* ([1986] 3 All E.R. at 854), it 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, i.e. in which the case may be tried more suitably for the interests of all parties and the ends of justice."

He went on to say (*ibid.*, at 855):

> ". . . [T]he burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly and distinctly more appropriate than the English forum."

In the event, the question of competing forums is to be decided by a two-stage test. The first enquiry is to determine which forum is the natural and

appropriate forum on the basis of with which forum the action has the most real and substantial connection. Secondly, if a forum other than that selected by the plaintiff is the natural forum, will the plaintiff suffer some juridical disadvantage by being forced to that forum? In the first test, the onus is upon the person seeking a stay and in the second, it is on the person resisting the stay.

But even before one reaches the stage of the first test it is quite clear that there must be two competing jurisdictions, and having competent jurisdiction to try the case. The person seeking a stay must therefore establish at the outset that the courts of another country have jurisdiction over him and can determine the case. The whole problem is one of competing competent jurisdictions.

Despite Mr. Azopardi's valiant efforts to persuade us that the question of another competent jurisdiction is merely one of the facts of the second of the above tests, I am satisfied that in this case the appellant had to satisfy the court that the courts of Russia had and would exercise jurisdiction over the parties and would try the dispute. It is true that the fact that the appellant has a trading address in Moscow and that the contract was to be finally performed in Moscow, and that the default is alleged to have occurred in Moscow all point to the likelihood of the dispute falling within the jurisdiction of the Russian court. But, in my view, that is not enough. It would not have been difficult for an affidavit to have been filed setting out the facts of Russian jurisdiction if that is a fact. It is important for this to be established, because otherwise the Gibraltar action might have been stayed without the existence of another competent jurisdiction. A case such as *In re Harrods (Buenos Aires) Ltd. (No. 2)* (2) shows the nature of the information that was there put before the court as to the judicial competence of the Argentine court to deal with the matter ([1991] 4 All E.R. at 353).

Once Russia has been shown by the appellant to be a competent jurisdiction then it is for the appellant to satisfy the court that it is the natural and appropriate forum, as the forum with which the case has the more real and substantial connection, compared with the Gibraltar court, having regard *inter alia* to such matters as the availability of witnesses, interpreters for them if necessary, expense and perhaps the question of the law governing the contract: see *Spiliada* (3) ([1986] 3 All E.R. at 856, *per* Lord Goff). Then, if the appellant had satisfied this test, it would be for the respondent to show that a hearing in Russia would bring some juridical disadvantage to it, such as for instance in *The Vishna Ajay* (4), where it was shown that a successful litigant would not be awarded costs and that there would be a much greater delay in the determination of the case if it were tried in India.

Very few of these issues were covered in the affidavits either by the appellant, where the onus fell on it, or by the respondent where the onus fell on it. It was for these reasons that we thought, in the interests of

justice, the parties should be given an opportunity, if so advised, of putting all relevant considerations before the court of first instance.

Appeal allowed; case remitted for rehearing.
