IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC(I) 03

Suit No 2 of 2016 (Summons No 5 of 2018)

Between

BNP Paribas SA

… *Plaintiff*

And

(1) Jacob Agam
(2) Ruth Agam

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Rules of Court] — [Singapore International Commercial Court] — [Offshore case]

TABLE OF CONTENTS

BNP Paribas SA
v
Jacob Agam and another

[2018] SGHC(I) 03

Singapore International Commercial Court — Suit No 2 of 2016 (Summons No 5 of 2018)
Vivian Ramsey IJ
5 March 2018

15 March 2018

Vivian Ramsey IJ:

Introduction

1 The Plaintiff is a private bank incorporated in France and conducts business in Singapore through its Singapore-registered branch. The Defendants are brother and sister and are Israeli nationals. The Defendants were customers of the Plaintiff's subsidiary company, BNP Paribas Wealth Management ("BNPWM"), prior to BNPWM's merger with the Plaintiff on 1 October 2016.

2 On 27 November 2015, BNPWM commenced an action in the Singapore High Court against the Defendants for recovery of €17,113,889.93 and €12,988,922.66, which was claimed to be due and owing by them jointly and severally as personal guarantors pursuant to two Personal Guarantees provided to BNPWM ("Personal Guarantees") as security for loans provided to SCI Ruth

Agam and Det Internationale, companies owned by the Defendants ("the Companies"), pursuant to two Facility Agreements.

3 On 5 April 2016, the proceedings were transferred to the Singapore International Commercial Court ("SICC"). Directions were given which led to a hearing in August 2017. The SICC issued its judgment on 17 November 2017 ("the Judgment"), finding for the Plaintiff and awarding the claimed amounts plus interest, and dismissing a counterclaim by the First Defendant (see *BNP Paribas SA v Jacob Agam and another* [2018] 3 SLR 1).

4 On 13 December 2017, the Defendants appealed against the Judgment to the Court of Appeal. In doing so, they also filed an offshore case declaration dated 5 December 2017 ("the Declaration"). In response to the Declaration, the Plaintiff then filed the present application on 24 January 2018 ("the Application"), pursuant to O 110 r 37(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules") for a declaration that this action is not or is no longer an offshore case, and that, consequently, the Declaration would cease to have effect. The Application was supported by the Second Affidavit of Yin Hsiu Mei dated 24 January 2018.

5 The Defendants sought to file an Affidavit of Jacob Agam, sworn in Paris on 12 February 2018 ("the Affidavit"), in response to the Application. They sent an email to the SICC Registry on 12 February 2018 attaching the Affidavit and requesting the Registry to file it with the Court of Appeal. The background to this request was that the Registry had previously assisted with the filing of the Defendants' Notice of Appeal, the Certificate for Security for Costs and the Declaration (the "Commencement Documents"). However, the Registry had in a letter dated 7 December 2017 emphasised that it would only assist with the filing of the Commencement Documents, and that the

responsibility for filing all future documents in the appeal would rest with the Defendants and the Registry would not be in a position to assist them in filing of future documents. The Registry therefore replied by letter on 15 February 2018 to point this out, and to say that it was unable to accede to the request for assistance in the filing of the Affidavit.

6 Subsequently, on 4 March 2018, the Defendants sent a letter by email to the Court, attaching a number of documents, including the Affidavit and explaining difficulties which they had in filing the documents with the Service Bureau through an agent. At the hearing on 5 March 2018, I observed that in the absence of the Defendants, it would be appropriate for me to have regard to the contents of the Affidavit, notwithstanding that it was not regularly filed, in order that I might understand their submissions on the issues raised by the Application. The Plaintiff had no objections to my taking into account the matters contained in the Affidavit and made submissions on the relevance of those matters to the Application. I have therefore taken into account all the matters which are relied upon by the Defendants and are relevant to the Application.

7 At the hearing, the Plaintiff was represented by Mr K Muralidharan Pillai and Ms Andrea Tan of Rajah & Tann Singapore LLP. The Defendants were neither represented nor present in person, but under O 32 r 5 of the Rules, I was satisfied that they had notice of the hearing and that it was expedient to hear the Application. I therefore decided to proceed in the absence of the Defendants. In particular, the Defendants had made their submissions in the Declaration and Affidavit and it was necessary to have an early decision on whether this case was an offshore case in the light of the time for filing the Appellants' case in the appeal.

8 Before dealing with the merits of the Application, it is necessary to deal with two initial points: the validity of the Declaration under O 110 r 35 and the jurisdiction to make a declaration under O 110 r 37 of the Rules.

Validity of the Declaration

9 The Plaintiff submits that the timing of the Defendants' filing of the Declaration is not in accordance with the relevant provisions of the Rules. In particular, the Plaintiff says that O 110 r 35 provides that:

> (3) An offshore case declaration must be filed —
>
> (*a*) by the plaintiff, together with the originating process; or
>
> (*b*) by any other party, together with the first document filed by the party in the action.

10 The Declaration was evidently filed long after it should have been filed under that provision, defences having been filed by the First Defendant on 12 February 2016 and by the Second Defendant on 27 January 2016. There was no application for an extension of time and, absent such an application and the Court granting the extension, I do not consider that the Declaration was validly made. Nor do I consider that there are grounds on which I should extend time. If a party fails to make an offshore case declaration under O 110 r 35, it can then apply under O 110 r 36 of the Rules for a decision that an action is an offshore case but, again, any application must be made within 28 days of the close of pleadings. In the present case, pleadings were deemed to have closed in April 2016, and no such application made within the 28 days thereafter.

11 I therefore do not consider that the Declaration was a valid offshore case declaration under O 110 r 35 of the Rules.

Jurisdiction under O 110 r 37

12 The Defendants have made the Declaration in the context of their appeal. The Plaintiff submits that the appropriate court to consider the Application is a first-instance SICC court rather than the Court of Appeal.

13 O 110 r 37(1) of the Rules provides that, "the Court may at any time decide that an action is not or is no longer an offshore case, either on its own motion or on application of a person." Under O 110 r 1(1) of the Rules, "Court" means the SICC. The jurisdiction of the Court of Appeal under s 29A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") is to hear appeals from any judgment or order of the High Court, of which the SICC is a division (see s 18A of the SCJA) and for the purposes of and incidental to the appeal, the Court of Appeal has "all the authority and jurisdiction of the court or tribunal from which the appeal was brought" (see s 29A(3)(*a*) of the SCJA).

14 I do not consider that an application for a decision that an action is not an offshore case is a matter which had to be decided "*for the purposes of and incidental to*" the appeal but is instead a matter on which the first-instance SICC court has to make a decision. This is confirmed in my judgment by O 110 r 37(6) of the Rules which provides that: "[t]he Court's decision as to whether an action is an offshore case is final for the purpose of section 34(1)(*e*) of the Act."

15 The "Act" referred to is the SCJA which provides, in relevant part, as follows:

> 34.—(1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> …

> (*e*) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

16 It follows that no appeal can be brought against the decision when the order of the court is, as here, expressed to be final and this provides very strong support for the High Court and not the Court of Appeal being the relevant court to make the decision.

17 I now turn to consider the merits of the Application.

The Application

18 The Plaintiff submits that, as set out by Bernard Eder IJ in *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2016] 4 SLR 75 ("*Teras*"), the question of whether or not an action is an "offshore case" must be determined by reference to the particular action and whether it can properly be said that the action has no substantial connection with Singapore (at [10]). As also noted in *Teras*, an "offshore case" is defined by a negative so that it is not the presence of substantial connections with other jurisdictions that is important, but the absence of a substantial connection with Singapore. Therefore, the mere fact that an action may have a substantial connection with one or more places other than Singapore does not necessarily mean that it does not also have a substantial connection with Singapore (at [8]).

19 The Plaintiff also refers to para 29(3) of the SICC Practice Directions ("SICC PD") which provides that:

> (3) For the purposes of Order 110, Rule 1(2)(f)(ii) of the Rules of Court, the existence of each of the following factors will not, by itself, constitute a substantial connection between the dispute and Singapore:

> (a) any of the witnesses in the case may be found in Singapore;
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> (b) any of the documents that are relevant to the dispute may be located in Singapore;
>
> (c) funds connected with the dispute have passed through Singapore or are located in bank accounts in Singapore;
>
> (d) one of the parties to the dispute has properties or assets in Singapore that are not the subject matter of the dispute;
>
> (e) where one of the parties is a Singapore party, or where a party is not a Singapore party, but has Singapore shareholders.

20 Whilst the authors of *The SICC Handbook: A Guide to the Rules and Procedures of the Singapore International Commercial Court* (Sweet & Maxwell, 2016) suggest at para 11.13 that the greater the presence and extent of such factors, the more likely a finding of a substantial connection, in *Teras* the Court held, on the facts, that factors (a) and (b) indicated some connection of the action with Singapore in a procedural or administrative sense but were not "substantial" and factors (c) to (e) were, at best, peripheral to the action (at [16]). Rather, the Court in *Teras* held that what was critical was that the various claims and counterclaims were all concerned with the provision of services and works allegedly done in connection with three liquefied natural gas projects in or off Queensland, Australia, and that the vast majority of these services and the issues relating thereto had nothing whatsoever to do with Singapore (at [17]).

21 The Plaintiff submits that the action cannot be said to have no substantial connection with Singapore but, on the contrary, has a substantial connection with Singapore. It refers to the fact that the relevant Facility Agreements and Personal Guarantees were subject to Singapore law and the jurisdiction of the Singapore Courts. It also says that Singapore was the place of performance of these contracts. It refers to the following matters:

(a) the relevant Facility Agreements were entered into with the Singapore branch of the Plaintiff's then-subsidiary, BNPWM and the Personal Guarantees were executed in favour of BNPWM's Singapore branch;

(b) any repayments to be made under the Facility Agreements and any payments under the Personal Guarantees were to be made to BNPWM's Singapore branch;

(c) the loans under the Facility Agreements were disbursed into the Companies' bank accounts in Singapore, which were held and maintained by BNPWM's Singapore branch at all material times;

(d) the banking relationship with the Defendants as well as their Companies were at all times managed by the Singapore branch of BNPWM;

(e) the contractual documents relevant to the dispute, such as the Facility Agreements and Personal Guarantees are held by the Plaintiff's Singapore branch; and

(f) three out of the five witnesses called by the Plaintiff at the trial of the action were located in Singapore.

22 The Defendants rely on the following matters in the Declaration and the Affidavit and submit that there is no substantial connection with Singapore:

(a) the Plaintiff is an international bank with its headquarters in Paris;

(b) the Defendants are Israeli nationals;

(c) the Companies are foreign companies not incorporated in Singapore;

(d) whilst the Facility Agreements and the Personal Guarantees provide for choice of Singapore law and the agreement on the jurisdiction of the Singapore Courts, none of the documents relating to the securities provided to secure the loan facilities were signed in Singapore; and

(e) the Defendants had denied liability in the Suit on the basis that:

(i) SCI Ruth Agam is only permitted to enter into agreements relating to real estate transactions and as such, the facility agreement with SCI Ruth Agam and the Personal Guarantees are illegal, void and unenforceable;

(ii) the choice of Singapore law in the Facility Agreements and the Personal Guarantees was not a *bona fide* and/or genuine choice of law; and

(iii) BNPWM failed to discharge its obligations as a French bank under the laws of France in respect of its duty of care to advise on risks and a statutory duty of care to act in an honest, fair and professional manner.

Decision

23 I have come to the conclusion that the action is not an offshore case as it is not a case where there is no substantial connection with Singapore. Although the relevant Facility Agreements, which were the underlying transactions for the Personal Guarantees, may have been entered into outside Singapore, they were entered into by the Singapore branch of BNPWM and all

the characteristics of performance were to be performed in Singapore. The loans were to be made by payments into the accounts of the Companies which they had opened at the Singapore branch of BNPWM which subsequently became the Singapore branch of the Plaintiff.

24 As set out in the Judgment at [21], a total of €61.7 million was drawn down under the facilities of which approximately €20.2 million was used to pay the former mortgagee, Bank Julius Baer (Monaco) SAM ("Julius Baer"); some €24.7 million was held as securities in a joint account maintained by the Defendants with BNPWM's Singapore branch and the balance was left on deposit with the Singapore branch and managed by BNPWM for discretionary investment. Whilst some of the funds from the loans may have been used to repay Julius Baer in Monaco in respect of mortgages by the Companies on properties in France and Monaco, the fundamental performance was the payment of the loan funds into the accounts of the Companies in Singapore and the majority of the funds remained as securities or funds of discretionary investment by BNPWM in Singapore.

25 In relation to the Personal Guarantees, these were given by the Defendants in favour of the Singapore branch of BNPWM which later became the Plaintiff. As submitted on behalf of the Plaintiff, the performance of the guarantees was to be by payment to the Singapore branch of BNPWM, later the Plaintiff.

26 The decision of the Singapore High Court in *EFG Bank AG, Singapore Branch v Teng Wen-Chung* [2017] SGHC 318 at [55] is of relevance. In that case George Wei J accepted that: "the key obligation in a loan contract is generally the obligation to make payments, and the place where those payments must be made is accordingly the place of performance".

27 He also considered the position in relation to the terms of an indemnity agreement and at [56] stated:

> The terms of the Indemnity Agreement were silent as to where repayment was to take place. However, the same arguments which the defendant acknowledged in relation to the First Surewin Facility similarly apply in respect of the Indemnity Agreement – *ie*, that the place of performance is in all likelihood Singapore, given that the Indemnity Agreement was executed in favour of the plaintiff, which is the Singapore branch of EFG Bank, and any payment would presumably take place in Singapore. The plaintiff also cites *Dicey, Morris & Collins on The Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) at para 11-197 for "[t]he general rule … that where no place of payment is specified … the debtor must seek out his creditor". I agree. …

28 In this case, as held in the Judgment at [59], the Personal Guarantees are contracts of indemnity and the place of payment under the guarantees would be the place of the creditor, being the Singapore branch of BNPWM, now the Plaintiff. As such, Singapore is clearly the place of performance of both the Facility Agreements and the Personal Guarantees.

29 As in *Teras*, I consider that the performance of the obligations under the relevant transactions is of fundamental importance in determining whether the action has no substantial connection with Singapore. The fact that the parties are not Singaporean is obviously of relevance, because if they were Singaporean that would provide a connection, albeit evidently not of itself determinative (see para 29(3)(e) of the SICC PD). Nor do I think that the factors in para 29(3)(a) that three of the Plaintiff's five witnesses might be found in Singapore or in para 29(3)(b) that the documents relevant to the dispute may be located in Singapore or in para 29(3)(c) that the funds connected with the dispute have passed through Singapore or are located in bank accounts in Singapore would on their own have been sufficient, without performance taking place in Singapore.

30 The Defendants place some emphasis on the fact that they denied liability on the basis that SCI Ruth Agam was only permitted to enter into agreements relating to real estate transactions so that the facility agreement with SCI Ruth Agam and the Personal Guarantees were illegal, void and unenforceable; that the choice of Singapore law in the Facility Agreements and the Personal Guarantees was not a *bona fide* and/or genuine choice of law; and that BNPWM failed to discharge its obligations as a French bank under the laws of France in respect of its duty of care to advise on risks and a statutory duty of care to act in an honest, fair and professional manner (see [22(e)] above). These were matters which raised questions of French law. However, as stated in [48] of the Judgment, during a case management conference on 17 July 2017, counsel then acting for the Defendants informed the court that the Defendants did not wish to adduce any evidence of French law and that they no longer sought to prove issues of French law, so that the defences reliant on the French law issues fell away, including the challenge to the applicability of Singapore law. As a result, I do not therefore consider that these matters can be relied on, even if they would otherwise have been relevant to the issue of whether the action has a substantial connection with Singapore.

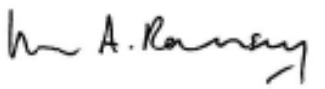
31 In paragraph 14 of the Affidavit, the Defendants also rely on the fact that the parties had been proceeding on the basis that the dispute was of an international and commercial nature. It is then stated: "[i]f indeed this case was not an 'offshore case', the High Court would not have ordered the Suit to be transferred to the SICC nor would the SICC have assumed jurisdiction to hear and determine the dispute." This however proceeds on a false premise. Whilst all cases in the SICC are international and commercial in nature, not all such cases are "offshore cases". The fact that the case was transferred is therefore not

relevant to the question of the connection of the case with Singapore, which is the relevant issue in determining whether the case is an "offshore case".

Conclusion

32 It therefore follows that, having considered the Declaration, the Affidavit, the evidence and submissions, I have come to the conclusion, based mainly on the place of performance of the relevant obligations relevant to the issues in the action, that the action is not one which has "no substantial connection with Singapore" and the action is therefore not an "offshore case".

33 As stated at the conclusion of the hearing on 5 March 2018 I therefore allowed the Application for the reasons which I now set out above and I awarded the Plaintiff costs fixed at $3,500, inclusive of disbursements.



Vivian Ramsey
International Judge

Pillai K Muralidharan, Luo Qinghui and Andrea Tan (Rajah & Tann Singapore LLP) for the plaintiff;
The first and second defendants absent.
