BANQUE NASIONALE DE PARIS v. WUAN SWEE MAY & ANOR
HIGH COURT MALAYA, KUALA LUMPUR
ABDUL HAMID MOHAMAD J
ORIGINATING SUMMONS NO: D8-24-1-2000
31 MAY 2000
[2000] 4 CLJ 387

***CIVIL PROCEDURE**: Judgment and orders - Setting Aside - Whether contrary to public policy - Whether transaction illegal - Banking and Financial Institutions Act 1989, s. 4- Exchange Control Act 1953, ss. 4& 11*

***CIVIL PROCEDURE**: Execution - Foreign judgment - Whether enforcement contrary to public policy - Reciprocal Enforcement of Judgments Act 1958, s. 5(1)(a)(v)- Whether Malaysian statutory provisions were breached - Scope of public policy*

The defendants filed an application to set aside the order registering the judgement of the Singaporean High Court ("Singaporean judgement") against them. The defendants' counsel submitted that the enforcement of the Singaporean judgement would be contrary to the public policy as there were breaches of (i) section 4 Banking and Financial Institutions Act 1989 (BAFIA 1989); and (ii) sections 4and 11 Exchange Control Act 1953 (ECA 1953). The main issue for the court to consider was whether the enforcement of the Singaporean judgement would be contrary to public policy in Malaysia.

Held:

[1] On the facts of the instant case, it could not be said that the plaintiff was carrying a business of banking in Malaysia. Hence, s. 4 BAFIA 1989was not breached.

[2] The defendants' counsel's submission on s. 4 ECA 1953was misconceived as the plaintiff was clearly not "a person resident in Malaysia".

[3] As the transactions were not illegal, the arguments on public policy failed. More over, "public policy" for the purpose of s. 5(1)(a)(v) Reciprocal Enforcement of Judgments Act 1958is wider than "illegally".

[4] When a Malaysian court is considering the issue of public policy in Malaysia, it should look at Malaysian law, Malaysian government policy, Malaysian moral values and all other relevant factors then prevailing in Malaysia.

[Application dismissed with costs.]

Case(s) referred to:

Commerz Bank (South East Asia) Ltd v. Dennis Ling Li Kuang [2000] 2 CLJ 57 ***(dist)***

Keppel Finance Ltd. v. Phoon Ah Lek [1993] 1 LNS 106 [1984] 3 MLJ 26 ***(dist)***

The Aspinall Curzon Ltd v. Khoo Teng Hock [1991] 1 LNS 6;[1991] 2 MLJ 484 ***(foll)***

Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 2, 4

Exchange Control Act 1953, ss. 4 (1), (2), 11(1)

Reciprocal Enforcement of Judgements Act 1958, s. 5(1)(a)(v)

Counsel:

For the plaintiff - Endrian Hii; M/s Shook Lin & Bok

For the defandants - Manyit Singh; M/s V Siva & PartnersReported by Izzaty Izzuddin

JUDGMENT

Abdul Hamid Mohamad J:

This is an application by the defendant for an order that the order of this court dated 5 January 2000 registering the judgment of the Singapore High Court dated 20 August 1999 against the defendant be set aside.

The first defendant had obtained a loan from the plaintiff bank, a bank in Singapore. The second defendant stood as guarantor for the debt. The plaintiff filed two suits in Singapore. After a full trial, judgment was given in the sum of RM1,375,666.85 with further interest and costs. Costs were taxed and reviewed and the amount awarded is equivalent to RM1,357,550.

The whole case turns on one main issue *ie* whether the enforcement of the judgment would be contrary to public policy in Malaysia.

Section 5, of the Reciprocal Enforcement of Judgements Act 1958 ("REJA 1958")provides:

> 5(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment -
> (a) Shall be set aside if the registering court is satisfied -

...

(v) that the enforcement of the judgement would be contrary to public policy in Malaysia.

The grounds forwarded by learned counsel for the defendants are:

(a) Breach of Banking and Financial Institutions Act 1989 ("BAFIA").

(b) Breach of the Exchange Control Act 1953("ECA").

Before considering the grounds, the facts regarding the loan transaction should be stated first.

The plaintiff is the Singapore branch of a French Bank. Ms. Rita Chou was at the material time a Vice-President of the plaintiff's private banking division. The first defendant is a Malaysian citizen. The second defendant was a Singapore citizen. He had been a permanent resident of Malaysia since 1996. He has business in Malaysia. He had made an application to become a Malaysian citizen on 20 January 1998 and became a Malaysian citizen from 15 November 1999. They both live in Kuala Lumpur. It is not disputed that they are "resident in Malaysia" for the purpose of ECA. Sometime in September 1996, during her marketing trip to Kuala Lumpur, Ms. Rita Chou met the second defendant at the Hilton Hotel. She asked him to introduce some clients to her. Ms. Rita Chou offered to provide credit facilities through the plaintiff in the form of a foreign currency shortterm loan. At that time the second defendant was assisting the first defendant to manage her share trading accounts in Malaysia. Ms. Rita Chou represented to the second defendant that the plaintiff would be able to provide the first defendant with a foreign currency loan facility to facilitate her share trading in Malaysia. So, the first defendant opened an offshore account with the plaintiff. Ms. Rita Chou prepared the necessary documentation for the opening of the account. The documents were sent to the first defendant in Kuala Lumpur for executions and were duly executed by her in Kuala Lumpur. Ms. Rita Chou also prepared the necessary documentation for the foreign currency loan with a limit of USD500,000 which was also executed by the first defendant in Kuala Lumpur. The second defendant executed a personal guarantee in respect of the loan, also in Kuala Lumpur. The first defendant then deposited stocks and shares with the plaintiff's nominee in Singapore namely, BNP Nominees (Singapore) Pte Ltd and the plaintiff's nominee in Kuala Lumpur namely BNP Nominees (Asing) Sdn Bhd. During the material time both the said nominees were holding the said stocks and shares for the benefit of the plaintiff. As stated by learned counsel for the defendants in his written submission which in my opinion is a correct statement of facts:

> As the loan was a foreign currency loan, it could be drawn down in any currency as instructed by the 1st Defendant. It is the Plaintiff's case that instructions were given to draw down part of the Loan in Japanese Yen and to convert the existing Ringgit loans at that material time to Japanese Yen. The 1st Defendant denies giving such instructions.
> As a result of the draw downs and conversion into Yen, the 1st Defendant was exposed to foreign exchange fluctuations and suffered a foreign exchange loss amounting to RM5,201,684.25. Of this sum, the Plaintiff claimed the sum of RMl,375,666.85 in the Singapore proceedings as the Plaintiff had caused BNP Nominees (Singapore) Pte Ltd and/or BNP Nominees (Asing) Sdn Bhd to sell the stocks and shares deposited by the 1st Defendant and had credited the proceeds from the same into the account of the 1st Defendant.

All these facts can also be found in the judgment of Chan Sen Onn, JC in the Singapore cases.

Breach Of BAFIA

Learned counsel for the defendants argues that the act of the plaintiff in soliciting the business of the plaintiff in Malaysia and offering financial facilities in foreign currency to the first defendant to purchase shares in Malaysia amounts to the plaintiff carrying on banking business in Malaysia without a valid licence in breach of s. 4 of BAFIA.

"Banking business" is defined in s. 2:

> "Banking business" means -
> (a) the business of - (i)... (ii)... (iii) provision of finance; or.

Section 4 of BAFIA provides:

> 4. No person shall carry on -
> (a) banking, finance company, merchant banking, or discount house business, unless it is a public company; or
> (b) money - broking business unless it is a corporation, and holds a valid licence granted under section 6(4) to carry on such business.

It is not disputed that the transaction in question is a "banking business" and that the plaintiff has no valid licence to carry on such business.

The issue is whether the plaintiff carried on the business of banking in Malaysia.

The plaintiff has neither branch nor office in Malaysia. The facts that appear to be in support of the contention that the plaintiff carried on business in Malaysia are, first Ms. Rita Chou, the plaintiff's vice president, private banking division approached the second defendant to open an offshore account with the plaintiff's Singapore branch. Secondly the necessary documents for the opening of the account and for the loan were sent to Kuala Lumpur for signature by the defendants and were signed by them in Kuala Lumpur. Thirdly, part of the securities were deposited with the plaintiff's nominee in Kuala Lumpur.

On those facts, can it be said that the plaintiff was carrying on the business of banking in Malaysia? I do not think so. Surely, it takes more than that to carry on the business of banking in Malaysia.

In my judgment the plaintiff had not breached the provision of BAFIA.

Breach Of ECA

Learned counsel for the defendants argues that the "act of the plaintiff in soliciting and offering the 1st defendant with banking facilities in foreign currency amounts to an act which involves, is in association with or is preparatory to a person resident in the scheduled territories namely the 1st defendant borrowing foreign currency from a person outside Malaysia namely the plaintiff. It was done without the permission of the controller and is

therefore, in breach of s. 4 of the Exchange Control Act 1953."

Section 4(1) and (2) of the ECA provides:

> 4(1) Except with the permission of the Controller, no person, other than an authorised dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer.
> (2) Except with Controller, the permission of the controller**no person resident the in the scheduled territories, other than an authorised dealer, shall, in Malaysia, do any act which involves, is in association with, or is preparatory to,** buying or borrowing any gold or foreign currency from, or selling or **lending** any gold or **foreign** currency to, any person outside Malaysia (emphasis added).

These provisions have been considered by Malaysian courts.

In *Keppel Finance Ltd. v. Phoon Ah Lek [1993] 1 LNS 106*[1984] 3 MLJ 26, the plaintiff is a licensed finance company incorporated and operating in Singapore. The defendant is a Malaysian citizen, resident in Malaysia. The defendant wrote to the finance company to apply for a loan, which was granted on the security of shares deposited by the defendant with the finance company. The defendant gave instructions for the loan to be released to one Ng Wing Fatt, a Singapore citizen, resident in Singapore. Neither the plaintiff nor the defendant had obtained the permission of the Malaysian Controller of Foreign Exchange for the loan.

VC George J (as he then was) held (I am quoting from the head-note of the report):

> (3) Section 4(2) does not per se prohibit residents in Malaysia from borrowing foreign currency outside Malaysia as it is clearly restricted to acts done "in Malaysia." Since "resident" is defined to include Malaysian citizens who do not reside in Malaysia, the words "in Malaysia" in section 4(2) must be meant to qualify "borrowing" and not "resident". This also supports the view that ECM-l0, the document issued by Bank Negara under the ECA, has no application to borrowing by a resident outside Malaysia from a non-resident.
> (4) Clearly, when the Defendant applied for the loan from Malaysia to Singapore without the permission of the Controller, he had contravened section 4(2). However, as the actual borrowing took place in Singapore, it did not run foul of section 4(2) or any other provision of the ECA or ECM-10 and was not illegal.

In *Commerz Bank (South East Asia) Ltd v. Dennis Ling Li Kuang [2000] 2 CLJ 57* ***(dist)*** the defendant had applied for credit facilities from the plaintiff in Singapore without the permission of the controller of foreign exchange of Malaysia.

It was*inter alia* held by Muhammad Kamil Awang J that s. 4(2) of the ECAdoes not prohibit a Malaysian resident or citizen from borrowing foreign currencies outside Malaysia.

It is to be noted that in these two cases the material question is whether the borrowing takes place in Malaysia or outside Malaysia. If the borrowing takes place in Malaysia it is prohibited unless the permission of the controller is obtained. If the borrowing takes place outside Malaysia, no permission is required.

I have no reason to disagree with the two decisions.

However, there seems to be a difference between the issue in the two cases and this case before me. In the present case, the issue, as argued by the learned counsel for the defendant, is:

> The act of the Plaintiff in soliciting and offering the 1st Defendant with banking facilities in foreign currency amounts to an act which involves, is in association with or is preparatory to a person resident in the Scheduled Territories namely the 1st Defendant borrowing foreign currency from a person outside Malaysia namely the Plaintiff.

What is complained about here is the act of the plaintiff, the non-resident lender, not the act of the resident borrower. The non-resident lender is said to do an act which involves, is in association with or is preparatory to the resident borrower borrowing foreign currency from the non-resident lender.

Is that one of the situations envisaged by that subsection?

That subsection reads, *inter alia* :

> ... no person **resident in the scheduled territories**... shall, in Malaysia, do any act...

The "person" referred to by that subsection is a "person resident" in Malaysia. Clearly the plaintiff is not such a person.

That subsection further provides that the resident is prohibited from "... borrowing... foreign currency from or... lending... foreign currency to, **any person outside Malaysia**." Again, the plaintiff did not borrow from or lend to a person outside Malaysia. Instead, the plaintiff was outside Malaysia and the defendant was in Malaysia.

So, clearly the situations envisaged in that sub-subsection are not applicable to the facts of this case.

With respect, I am of the view that the submission is misconceived.

Next, it is submitted that the "act of the plaintiff in procuring the 1st defendant to transfer security in the form of stocks and shares to the plaintiff's nominees, BNP Nominees (Singapore) Pte Ltd and/or BNP Nominees (Asing) Sdn. Bhd. amounts to a transfer of security registered in Malaysia to a nominee of a person resident outside the schedule territories. This was done without permission of the controller and is therefore in breach of s. 11 of the ECA."

Section 11(1) provides:

> 11. (1) Except with the permission of the Controller, no person shall, in Malaysia, issue any security or do any act which involves, is in association with, or is preparatory to, the issuing outside Malaysia of any security which is registered or to be registered in Malaysia, unless the following requirements are fulfilled:
> (a) neither the person to whom the security is to be issued nor the person, if any, for

> whom he is to be a nominee is resident outside the scheduled territories; and
> (b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.

I agree with the submission of learned counsel for the plaintiff that the provision covers the **issuing** of any security. What happened here was not the "issuing" of the security but shares were transferred to the nominees in and outside Malaysia as security for the loan. I do not think that that falls within the meaning of "to issue" the shares to a non-resident.

ECM 12 issued by Bank Negara which is applicable to transaction falling within purview of s. 11relating to securities etc. provides:

> 4. The Controller hereby gives permission -
> 4.1. To any person in Malaysia to issue to non-resident, ordinary shares, irredeemable preference shares, bonus and rights shares which are registered in Malaysia.
> 4.2....
> 4.3....
> 4.4. For the transfer of any security, bearer certificate or coupon registered in Malaysia between a resident and a non-resident.

So, even if what was done here amounts to "issuing" (which I do not think so) still it is exempted by para 4.1. Further, even if it is a "transfer" it is still exempted by para 4.4.

Again, with respect, the argument has no merits.

Public Policy

The provision of s. 5(1)(a)(v) REJAhas been considered by the courts of this country.

In *The Aspinall Curzon Ltd v. Khoo Teng Hock [1991] 1 LNS 6;*[1991] 2 MLJ 484, a case concerning the registration of a foreign judgment, Eusuff Chin J (as he then was) said, on the issue of public policy:

> The argument of the Defendant's learned counsel is that the enforcement of this foreign judgement is against public policy. But what is public policy? In *Richardson v. Mellish*, Burrough J protested against arguing too much upon public policy. It is a very unruly horse, and when once you get astride it you
> never know where it will carry you. It may lead you from the sound law.
> It is never argued at all but only when other points fail.

In *Naylor, Benzon & Co Ltd v. Krainische Industrie Gesellschaft*, McCardie J at p. 342 state:

> But the courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application. In *Janson v. Driefontein Consolidated Mines* (1902) AC 484, Lord Halsbury LC said: "I deny that any court can invent a new head of public policy." I very respectfully doubt if this dictum be consistent with the history of our law or with many modern decisions. In *Wilson v. Carnley* (1908) 1 KB 729 the Court of Appeal held that a promise of marriage made by a man who to the knowledge of the promise was at the time of making the promise married is void as being against

> public policy. This decision marked a new application or head of public policy. In *Neville v. Dominion of Canada News Co* (1915) 3 KB 556 the Court of Appeal held, affirming Atkin J, that an agreement by a journalist not to comment upon the Plaintiff's company or its directors or business was void as against public policy. This decision created, I think, a wholly new head of public policy. In *Horwood v. Millar's Timber and Trading Co* (1917) 1 KB 305 the Court of Appeal held that an agreement which unduly fettered a man's liberty of action and the free disposal of his property was void as against public policy. This decision also, I think, created in substance a new head of public policy. The truth of the matter seems to be that public policy is a variable thing.
> It must fluctuate with the circumstances of the time.

In *Egerton v. Brownlow (Earl)*, *Lord Truro*, at p. 196 stated:

> Exceptions have been made to the expression of "public policy", and it has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign states; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

In that case the plaintiff, a licensed gambling casino, obtained in the High Court of England a judgment against the defendant and subsequently applied to the High Court in Kuala Lumpur to have the judgment registered. The learned judge (as he then was) held that it was not against public policy to register that judgment in Malaysia. He said:

> In the case before me, the cheques were issued in ex-change for cash and gaming chips for purposes of gaming at a licensed gaming casino. It is not for an unlawful purpose by the law of England. On the facts of the case, had such transaction occurred in this country, it is a lawful transaction provided that the
> gaming is done in gaming premises licensed by the Finance Minister under section 27A of the Common Gaming Houses Act 1953.
> The enforcement of the UK judgment cannot be considered as against the public policy of this country.

I agree with the judgment of Eusoff Chin J (as he then was). However, I wish to stress that the public policy that should be considered is the public policy in Malaysia. That is what s. 5(1)(a)(v) of the REJAsays. Therefore Malaysian courts should not rely too much on decisions of courts in other countries. Adopting the principles is not objectionable, but it should be done with discretion, always bearing in mind the prevailing circumstances in this country. But to adopt a specific ruling that a particular matter is or is not against the public policy in one country at that particular point of time under the circumstances then prevailing in that country as a point of law applicable all the time in this country is, in my view, not advisable.

The public policy in one country, even at the same point of time, may be different from that of another country. The public policy in the same country may be different at different times.

Even at the same point of time moral values in one country may different from that in another country. The stage of development (economic, education etc) of one country may be different from that of another. Political and social problems may be different. Culture and religion may be different. Attitude of the general public and the government towards religion may be different. One country's vision may be different from that of another country. When foreign courts decide the issue of public policy before them they only consider the relevant circumstances in their respective countries. They certainly are not concerned with the circumstances in Malaysia, which may, most likely, be different. And when they decide that a matter is or is not against public policy, they actually decide it in the light of the public policy in their respective countries, not Malaysia.

So, when a Malaysian court is considering the issue of public policy in Malaysia, it should look at Malaysian law, Malaysian government policy, Malaysian moral values and all other relevant factors then prevailing in Malaysia, including what I have mentioned earlier. I know that some people may not feel comfortable with the use of the words "government policy". In my view, it is a relevant factor. I am also of the view that it is wrong to "marginalise" government policies in considering what is the public policy in Malaysia. Who can better claim to represent the public than a democratically elected government? Who is more responsible for the welfare of the people and the country than the government of that country? Who is more responsible for the law and order, economy, education and indeed everything affecting the people and the country, than the government of that country? "Public policy" for the purpose of s. 5(1)(a)(v) of REJAis in my view, wider than "illegally". But I will not attempt to define it. I do not think it can be defined.

Coming back to the argument in this case, all that is argued is that the transaction is illegal because it is in breach of the provisions of BAFIA and ECA and therefore it is contrary to public policy in Malaysia. In this case, that is all that I have to decide. As I have found that the transaction is not illegal, the argument fails.

The application is dismissed with cost.