INTERNATIONAL FINANCE AND SERVICES LIMITED

v

SOUTH PACIFIC ISLAND AIRWAYS INCORPORATED AND
WRAY AND STEFFANY

Supreme Court Apia
13, 24 August 1979
Nicholson CJ

PRACTICE AND PROCEDURE (Stay of proceedings) - Grounds for exercise of Court's power to grant stay - Whether action oppressive or vexatious to defendant or an abuse of the Court's process - Whether stay would cause injustice to plaintiff - Balance of convenience insufficient - Principles applicable where parties resident out of the jurisdiction and to cause of action arising outside jurisdiction.

Action was commenced by the plaintiff, a London Finance Company, claiming interest and general damages for breach of contract against the defendant Airways, a Company operating in the South Pacific islands with head office in American Samoa, and two guarantors of the contract, also resident there. It was conceded the Airways carried on business in Western Samoa from an office at the Airport. The contract in issue provided it was to be governed by English law and the forum for settlement of disputes would be the High Court of Justice in England subject to the right of the London Company to choose another jurisdiction "in its absolute discretion". Defendants were all duly served in the action by service on their solicitor, who accepted service on their behalf and proceeded to enter appearances and file defences. Defendants applied to set aside service and stay the proceedings on the date set for hearing the claim.

Held: All of the defendants must be deemed to have submitted to the jurisdiction in the circumstances.

In addition, the defendants had failed to discharge the burden on them of establishing that injustice by reason of oppression or vexation would result to them by continuance of the action which would be avoided by proceedings in another accessible and competent Court; nor had they shown that continuance of the action would result in an abuse of the process of the Court; nor that a stay would not result in injustice to the plaintiff: St. Pierre v South American Stores [1935] All ER 408, 414 (approved in Maharanee of Baroda v Wildenstein [1972] 2 All ER 689), Logan v Bank of Scotland (1906) 75 LJKB 218 considered and applied.

As to the defendant Airways, it was resident and carrying on business within the jurisdiction of the Court: Dunlop Pneumatic Tyre Co. v. Cudell & Co. [1900-1903] All ER Rep 195, and it was no less convenient for it to submit to the jurisdiction of the Court than to that of the United Kingdom or American Samoa. The same also applied to one of the other two defendants, who was the President of the Airways Company. As to the other defendant, there was no evidence that any injustice would result in requiring him to submit to the jurisdiction of the Court, nor would it be an abuse of the Court's powers to require him to do so.

MOTION by defendants to set aside service and for a stay of proceedings.

Application dismissed.

Enari for plaintiff.
Nickells for defendants.

Cur adv vult

NICHOLSON CJ. The plaintiff claims $14,976.20, together with interest and general damages from the first defendant in respect of an alleged failure to honour the terms of a contract to finance the purchase by the first defendant of a Britten-Norman Islander aircraft. The second and third defendants are sued as guarantors of the first defendant's performance of its obligations.

The three defendants seek a ruling that the service of the summonses be set aside and that the claim be stayed for lack of jurisdiction.

The facts as presented to me from the Bar are somewhat sketchy, but it appears that the plaintiff is a limited liability Company carrying on business as a finance house in London in the United Kingdom, while the first defendant is a Company incorporated in Pago Pago, American Samoa, carrying on business as an international airline. The second defendant, described in the proceedings as an attorney, is resident in American Samoa, and signed the contract presented to the Court by consent as "President" of the first defendant. The third defendant is described as a Company director resident in American Samoa. I have not been told what connection, if any, he has with the first defendant, nor have I been told what the nationalities of the second and third defendants are.

The contract between the parties is recorded in a letter form addressed to the first defendant from the London offices of the plaintiff dated 26th June, 1973, a copy of which was presented to the Court by consent.

The conditions of the contract provided, inter alia:-

(i) that repayment by the first defendant was to be made in London in sterling (Condition 14);

(ii) that any claims in respect of insurance of the aircraft will be payable in London in sterling (Condition 6);

(iii) that the defendant will supply confirmation of legal counsel in American Samoa that the contract and guarantees were valid and enforceable in both American Samoa and the United States of America (Condition 5);

(iv) that the Bills of Exchange drawn to provide the method of payment would be confirmed by the first defendant's bankers as valid and enforceable in American Samoa (Condition 15); and

(v) that the contract was "governed in all respects by the laws of England and all disputes which might arise out of or in connection with this contract shall be submitted to the jurisdictions of the High Court of Justice in England, unless, (the plaintiff) in (its) absolute discretion chooses to accept another jurisdiction." (Condition 11).

When the proceedings issued out of this Court, the solicitor representing all three defendants in this country accepted service on their behalf and has duly appeared and filed Statements of Defence on behalf of all three defendants. It was conceded that the first defendant operates an office and maintains staff at Faleolo Airport in Western Samoa for the purpose of handling passenger and cargo traffic for its aircraft calling into Western Samoa. Bookings on flights are also available through travel agents in Apia.

By virtue of Article 111 of the Constitution of Western Samoa, English common law and equity apply here insofar as they are not excluded

by any statute or other law in force in Western Samoa. It must also be recalled that no code of civil procedure is in force in Western Samoa at present, the Supreme Court having the power to prescribe appropriate procedure in individual cases by virtue of section 39 of the Judicature Ordinance 1961. While no procedure for service has been prescribed for this action, nevertheless it has always been the accepted practice that service upon the solicitor for a defendant, if that solicitor accepts it on behalf of his defendant client, is good service, and I accept it as such in this case. It appears that this application to strike out is somewhat belated, since not only was good service effected on all three defendants, but they unconditionally entered appearances and filed defences to the claim. Only on the day appointed for the hearing of the claim was this objection taken, and I am of the opinion that the three defendants must be deemed to have submitted to this jurisdiction in all the circumstances.

In addition, I consider that this application must fail on other grounds. To begin with, the draftsman of the contract by Condition 11 has gone to some lengths to spell out that the proper law to govern disputes on the contract shall be the law of England, but no doubt ex abundante cautela the possibility of submission to United States or American Samoan law is contemplated by some of the conditions of the contract. By contrast, however, any disputes will be subject to the jurisdiction either of the English Courts, or such jurisdiction as the plaintiff in its absolute discretion may choose. The defendants, having put their signatures to such a wide condition, cannot now be heard to complain that to file in this jurisdiction is unjust, oppressive or vexatious, or an abuse of this Court's process.

I refer to the decision of Scott L.J. in St. Pierre v. South American Stores [1935] All E.R. 408 at 414, which was approved by the English Court of Appeal in Maharanee of Baroda v. Wildenstein [1972] 2 All E.R. 689. He said, "The true rule about a stay under s. 41 [of the Supreme Court of Judicature (Consolidation) Act, 1925] so far as relevant to this case, may I think, be stated thus: (i) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's court must not be lightly refused; (ii) an order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive, or vexatious to him, or would be an abuse of the powers of the court in some other way, and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

Again, in Logan v. Bank of Scotland (1906) 75 L.J.K.B. 218 the Court of Appeal held that the power of the Court to stay an action which is vexatious and oppressive and an abuse of the process of the Court will be exercised where an action is brought by a person residing out of the jurisdiction against a person residing out of the jurisdiction in respect of matters which occurred out of the jurisdiction, if it appears that the effect of bringing the action in the English Court will be to subject the defendant to any injustice or unfair disadvantage to which he would not be subjected if proceedings were taken in another accessible and competent Court. Even if this Court were able to put to one side the terms of Condition 11 as unreasonable, applying the principles enunciated in the St. Pierre case and Logan's case I am driven to the conclusion that the defendants cannot succeed in this application.

Dealing with the first defendant's position, I am not clear from the admissions made at the Bar whether it maintains its own ticket and bookings sales office in Western Samoa, or whether it relies upon independent travel agents to do this, but clearly an integral part of its undertaking is conducted at Faleolo Airport where passengers and cargo are received by the first defendant's own staff at its office and processed for boarding the first defendant's aircraft arriving at and departing from Faleolo. It appears that the test to be applied to foreign companies on this question is that laid down in Dunlop Pneumatic Tyre Co. v. Cudell & Co. [1900-1903] All E.R. Rep. 195, where the

English Court of Appeal held that where a defendant Company is carrying on business and resident within the jurisdiction, a writ may properly be served on it. The circumstances of that case were that the defendant, a German company, set up a display booth at a National show in England for a period of nine days only. It was staffed by staff sent over from Germany, whose functions included the pushing of sales of their product during the exhibition. The Court refused an application to set aside the service of a writ upon the staff member in charge of the booth.

I regard the circumstances of the instant case as a much clearer example of a company being resident and carrying on business within the jurisdiction. Moreover, when the defendant is an international airline, it is difficult to show that it is placed in any great difficulty or inconvenience in submitting to this jurisdiction rather than to that of the United Kingdom or American Samoa, where the first defendant's headquarters are. The nature of the first defendant's operations are so well known in the South Pacific that I take judicial notice of the fact that its normal routine of business takes its various aircraft to a number of South Pacific islands and countries, and the short air journey from American Samoa to Western Samoa cannot be regarded as more than a question of mere balance of convenience for this defendant.

I find, applying the St. Pierre ruling as to burden of proof and the test set out in the Dunlop case regarding the residence and carrying on of business of the Company within the jurisdiction, that the first defendant has failed to establish a case for staying these proceedings against it.

Turning to the second defendant, his position as President of the first defendant Company, in my view, tends to place him in a similar situation to the Company. Through the Company he has a widespread interest in South Pacific aviation affairs, and in particular in Western Samoa. Again, it is a mere balance of convenience for him to face these proceedings in American Samoa, for example, rather than in this country, in the light of his interest in the Company, which operates its own regular service to Western Samoa. I am unable to find that it would be unjust, vexatious, or oppressive to him, or an abuse of the Court's process to require him to submit to this Court's jurisdiction.

I find the second defendant has failed to discharge the burden of proof upon him to justify the stay applied for.

As to the third defendant, the position is unclear. I am told only that he is a resident of American Samoa, and no evidence has been adduced to show his precise relationship with the Company. There is nothing to satisfy me that it would work an injustice or vexation or oppression to require him to submit to this Court's jurisdiction rather than that of American Samoa, or the United Kingdom, for example, or that it would be an abuse of this Court's process to require him to do so. I find the third defendant has failed to discharge his burden of proof on this claim for stay.

I refuse the application of the three defendants. I award costs of $40.00 on this application to the plaintiff.