The Court of Appeal for Bermuda

CIVIL APPEAL No. 20 of 2017

B E T W E E N:

AK BAKRI & SONS LIMITED

1st Appellant

MOHAMMED HANI ABDUL KADER BAKRI AL BAKRI

2nd Appellant

ZOHAIR ABDUL KADER BAKRI AL BAKRI

3rd Appellant

and

ASMA ABDUL KADER BAKRI AL BAKRI

1st Respondent

FAISAL ABDUL KADER BAKRI AL BAKRI

2nd Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Nathaniel Turner, ASW Law Ltd., for the Appellant;
Respondents unrepresented and not in appearance;

Date of Hearing: **21 November 2018**
Date of Judgment: **23 November 2018**

JUDGMENT

Concurrent proceedings in Supreme Court of Bermuda and in arbitration in Saudi Arabia – Refusal to stay proceedings in Bermuda on application of plaintiffs who had commenced the proceedings – Grant of antisuit injunction to restrain arbitration in Saudi Arabia – Article 8 of UNCITRAL Model Law.

KAY JA

Introduction

1. The issue at the heart of this appeal is whether the dispute between the parties should be resolved by litigation in Bermuda or arbitration in Saudi Arabia.

Background

2. A.K. Bakri & Sons Ltd. (“the Company”) is a company incorporated in Bermuda. The directors and shareholders are citizens of, and resident in Saudi Arabia. The company is the holding company in a group of companies which operates throughout the Middle East with interests in energy, shipping and financial services. The group was founded by Shaikh Abdul Kader Al Bakri (“the Shaikh”). He had five sons by his first wife, including Muhammad Hani Abdul Kader Bakri Al Bakri (“Hani”) and Zohair Abdul Kader Bakri Al Bakri (“Zohair”). Hani and Zohair are Directors and shareholders in the Company and plaintiffs in the action.

3. The Shaikh also had two children by his second wife. They are Asma Abdul Kader Bakri Al Bakri (“Asma”) and Faisal Abdul Kader Bakri Al Bakri (“Faisal”). They too were directors of the Company. They are the Respondents in this appeal and the defendants in the action. There are numerous disputes between the parties and other family members. The other disputes are the subject of litigation or arbitration in Saudi Arabia. The origin of the present dispute relates to a fallout between the Shaikh, Hani, Zohair and possibly others on the one side, and Asma and Faisal on the other side. It is common ground that Asma and Faisal were allotted shares in and became directors of the Company. However, it seems that the Shaikh later came to consider that this was unfair on his other children and contrary to Sharia law. The evidence of Hani is that he and his brother contributed substantially by investment and effort to the successful growth of the Company for over 35 years, whereas Asma and Faisal made little or no such contributions. The evidence is disputed by Asma and Faisal, and we are in no position to make findings about it.

4. The fallout between the parties gave rise to various changes in the structure and management of the Company. On 9 December 2015, the Shaikh signed share transfer forms transferring Faisal's shares to Zohair and Asma's shares to Hani. The case for the Appellants is that this was achieved lawfully pursuant to powers of attorney and the provisions of a shareholders agreement ("the Agreement") dated 1 July 2014. Faisal and Asma dispute the validity and exercise of the powers of attorney and say that they are not bound by the Agreement. They further claim dividends in excess of $5million which were declared while they were undoubtedly still shareholders but which they did not receive. The Appellants' answer to that is that all such dividends were paid to charity in accordance with a longstanding practice. Asma and Faisal say that they were unaware of the practice and did not consent to it. They also claim dividends in relation to the period after they were removed from the Register. There is a further dispute in relation to a resolution passed at a special general meeting of the Company on 22 June 2015, which approved an increase in the authorised share capital of the Company from $20,000,000 to $100,000,000 by the creation of 80,000,000 additional shares of the value $1.00 each.

5. Faisal was on his honeymoon at that time but Asma attended on behalf of them both. They did not support the increase. They complain that all the other shareholders were permitted to subscribe for additional shares, but they were not, which they characterise as a deliberate dilution of their shareholding.

The Procedural History

6. On 10 May 2016, attorneys on behalf of Asma and Faisal delivered a "letter before action" to the Appellants' attorneys seeking an explanation for the share transfers and the removal of Asma and Faisal from the Register. Alternatively, it sought a written undertaking by 18 May that the Company would not declare dividends; issue, transfer or deal with its shares; or dispose of or encumber its assets other than in the ordinary course of business, pending the determination

of an application to the Court by Asma and Faisal for their restoration to the Register.

7. On 17 May, the Appellants' attorneys responded with a letter enclosing a generally endorsed writ which sought declarations that (1) Asma is not entitled to an order transferring 900,000 shares from Hani to her and consequential rectification of the Register; and (2) Faisal is not entitled to an order transferring 1,800,000 shares from Zohair to him and consequential rectification of the Register.

8. Asma and Faisal filed a memorandum of appearance on 18 May 2016 and, on 31 May, they filed an ex parte summons seeking a freezing injunction. An ex parte hearing took place before Hellman J on 2 June, on short notice to the Appellants. The outcome was an interim injunction which prohibited the Company from dealing with or disposing of its assets other than in the ordinary course of business; declaring or paying dividends; or issuing or selling shares or increasing the share capital.

9. On 24 June, the Appellants filed a statement of claim. It placed reliance on the Agreement and Sharia law. It made no reference to arbitration.

10. On 11 July 2016, the Appellants filed a summons seeking a stay of the action and discharge of the interim injunction. Since that date, they have been endeavouring to steer the dispute away from litigation in Bermuda and towards arbitration in Saudi Arabia, relying on the provisions of clause 26 of the Agreement which provides that, if a dispute arises in relation to the Company or any of its shareholders, any party to the dispute can serve a dispute notice on the other parties. In that event, there is a period of 180 days within which the parties are enjoined to attempt to resolve the dispute. If the dispute has not been resolved by the end of that period, then it shall be resolved by arbitration. The

location of said arbitration is Saudi Arabia and the applicable law is Sharia law as applied in Saudi Arabia and the law of Saudi Arabia.

11. On 24 August 2016 the Company issued a dispute notice to Asma and Faisal. It concerned the matters in dispute in the Bermuda litigation. Shortly before the expiration of the 180 day period, Asma and Faisal, on 16 February 2017, filed a summons seeking an anti-suit injunction in relation to an arbitration in Saudi Arabia.

The Hearing in the Supreme Court

12. On 19 April 2017, the applications I have described came before Hellman J. Following a two day hearing, Hellman J reserved judgment. His judgment was handed down on 26 May 2017. He refused the application of the Appellants for a stay of the proceedings in Bermuda, and granted the anti-suit injunction sought by Asma and Faisal in relation to arbitration in Saudi Arabia. However, he discharged the interim injunction, taking the view that, with the benefit of fuller evidence, he was not satisfied that there was a real risk of dissipation, although the issue was “finely balanced”.

The Appeal

13. On 24 August 2017, Hellman J granted the Appellants leave to appeal pursuant to a Consent Order, without prejudice to the Respondents’ respective positions on the appeal. The notice of appeal is dated 22 September 2017. It contends that the learned judge was wrong in law to refuse to stay the Bermuda proceedings; that he ought to have found exceptional circumstances justifying such as stay; and that, in any event, he ought to have allowed arbitration in Saudi Arabia to take its course because, contrary to the judge’s conclusion, parallel arbitration proceedings would not be inappropriate. In April 2018, the attorneys who had been acting for Asma and Faisal were granted leave to come off the record. Since then, the Respondents have been unrepresented and they have not attended on the hearing of the appeal.

The Anti-Suit Injunction

14. In the Supreme Court Hellman J rejected a submission on behalf of the Respondents, that, because the Appellants had filed their Statement of Claim before applying to stay the action, they were barred from seeking a stay. The Respondents sought to rely on section 23 of the Bermuda International Reconciliation and Arbitration Act 1993 which incorporates, inter alia, Article 8 (1) of the UNCITRAL Model Law on International Commercial Arbitration. He was right to do so for the reasons he gave, and that part of his judgment is not to be revisited on this appeal. The issue that remains is whether the Appellants, as the parties who commenced the Bermuda proceedings, should be granted a stay in relation to them. It is not necessary to set out the authorities at length because there is now no dispute about the law. As Gloster J said in *Excalibur Ventures LLC v Texas Keystone [2012] 1 all ER (COMM) 933* paragraph 73:

> *"In circumstances where a claimant is applying to stay proceedings voluntarily brought by it, it needs to show that there are 'special', 'rare' and 'exceptional' circumstances to justify a stay."*

15. The quoted words were taken from the authorities, particularly the judgment of Mustill J in *Attorney General v Arthur Andersen & Co. [1989] ECC 224,* paragraph 13. The relevant extracts from the authorities are set out in the judgment of Hellman J at paragraph 36. Before us, Mr Nathanial Turner, counsel for the Appellants, accepts that he has to establish exceptional circumstances. Hellman J found none, rejecting a submission that the facts connecting the dispute to Saudi Arabia amounted to exceptional circumstances. He said, at paragraph 37:

> *"…the factors connecting the dispute to Saudi Arabia are not exceptional but generic. A dispute will very often be more closely connected with one jurisdiction rather than another. There are no other circumstances which are exceptional."*

16. The grounds of appeal assert that this conclusion was wrong in law and that the judge ought to have found exceptional circumstances.

17. The submissions on behalf of the Appellants seek to place strong reliance on the contention that the Bermuda proceedings were commenced at a time when the Appellants were unaware that the Agreement provided for the application of Sharia law and contained a clause providing for arbitration in Saudi Arabia. Their case is that, at the point in time when the proceedings were filed, the Company's books and records were in storage as it had recently moved offices. However, as the judge said at paragraph 35:

> *"Assuming the explanation to be true, it does not explain why the [Appellants], instead of discontinuing the proceedings as soon as they retrieved the Agreement from storage, filed instead a statement of claim. Their attorneys must have been familiar with the Agreement when they drafted the statement of claim as the pleading makes frequent and detailed references to it. Their attorneys would also have been familiar at that time with the facts and matters which they now say make Saudi Arabia the convenient forum for the resolution of this dispute."*

18. In my judgment, this analysis strikes a fatal blow to the claim of exceptionality. If the claim had any merit as at the date of the writ, it dissolved when, with full knowledge of the Agreement, the Appellants put forward their statement of claim. It is remarkable that, even as late as their skeleton argument for this appeal, the Appellants were taking a Nelsonian view of the contents and significance of the statement of claim in this regard.

19. It may well be that, if the Respondents had commenced Bermuda proceedings, as they had intended to do, the Appellants would have had a stronger argument for a stay in favour of arbitration in Saudi Arabia. However, that is not what happened. They responded to the threat of Bermuda proceedings with a pre-

emptive strike which they saw fit to further with a fully informed statement of claim. In these circumstances, they can have no complaint that the judge found the circumstances to be unexceptional. At one point in his oral submissions, Mr Turner seemed to be suggesting that the choice of Sharia law points to an exceptional stay. But he came to accept that for present purposes, Sharia law is not different from any other foreign law; it is susceptible to proof by expert evidence. Mr Turner also submitted that evidence of the Respondents' participating in mediation in Saudi Arabia is indicative of exceptional circumstances justifying a stay. But, for reasons I shall set out later, I reject that submission.

The Anti-suit Injunction

20. Having refused the application for a stay of the Bermuda proceedings, the judge considered whether he should grant the Respondents an anti-suit injunction in relation to the arbitration in Saudi Arabia. He was mindful of the fact that Article 8(2) of the UNCITRAL Model Law provides:

> *"Where an action referred to in paragraph 1 of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."*

21. He again considered *Excalibur* (above), in which Gloster J observed (at paragraph 54) that the power to grant an injunction restraining arbitration where the seat of the arbitration is in a foreign jurisdiction is only exercised in exceptional circumstances and with caution. Her ladyship added (at paragraph 56):

> *"Nonetheless, in exceptional circumstances, for example when the continuation of the foreign arbitration proceedings may be oppressive or unconscionable so far as the applicant is concerned, the court may exercise its powers….to grant such an injunction. These circumstances include the situation where the very issue is whether or not the parties consented to a foreign*

> *arbitration, and where, for example, there is an allegation that the arbitration agreement is a forgery…"*

22. In the present case, the judge noted similarities and differences between its factual matrix and that in *Excalibur*.

23. The judge's conclusion on this issue is set out in paragraph 63 of his judgment:

> *"In my judgment the circumstances of the [Respondents']…anti-suit application are exceptional in that the [Appellants] chose to commence the present action in Bermuda. [They] knew or ought to have known of the factors which they now say make the Saudi arbitral tribunal the convenient forum when they did so. It is reasonable for the Defendants to hold them to that choice. It would be oppressive to subject the [Respondents] to arbitral proceedings relating to the same dispute in Saudi Arabia as well."*

24. The notice of appeal contends that the grant of the anti-suit injunction was wrong in law. The submissions on behalf of the Appellants are that (1) having made no finding as to the enforceability of the Agreement and the validity of the arbitration clause, there was no basis for the judge to find that parallel arbitration proceedings were oppressive; and (2) the judge paid no regard to the unchallenged evidence of Hani that the Respondents had actively participated in discussions to resolve the dispute by mediation in accordance with clause 26 of the Agreement. The third submission amounts to no more than a reference to Article 8(2) of the Model Law of which the judge was plainly mindful.

25. I reject the first of these submissions. It was not possible for the judge to rule on the enforceability of the arbitration clause. He could do no more than observe that it is disputed. The finding of oppression was not based on any view of the enforceability of the clause in the Agreement as a whole but on the subjection of the Respondents to concurrent proceedings in two jurisdictions in relation to the

same dispute. He was entitled and, in my view, correct to find that, in the circumstances of this case, that would be oppressive.

26. As regards any participation by the Respondents in mediation in Saudi Arabia, this seems to be an afterthought. Although it is said that the judge ignored Hani's evidence on the point, the submissions were conspicuously absent from the Appellant's skeleton argument before him.

27. For my part, I do not think that the judge's silence on the point undermines his finding of oppression. At the time to which Hani was referring, the Respondents were facing both the Bermuda proceedings and the dispute notice in Saudi Arabia. Although there had yet to be a judicial determination of the application to stay the Bermuda proceedings, the Respondents had made clear their position as to which should proceed. I do not consider that by engagement in mediation in Saudi Arabia, they forfeited their right to seek restraint of an arbitration in Saudi Arabia.

28. In any event, that which is described as mediation in Saudi Arabia seems to me to have been somewhat vague and informal. Although Mr Turner referred to it as "a waiver", that greatly exaggerates its status and potential significance.

Conclusion

29. It follows from what I have said that I would dismiss this appeal.

BELL, JA

30. I agree.

BAKER, P

31. I also agree.

Kay JA

Baker P

Bell JA