Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA
[2002] SGCA 45

Case Number : CA 80/2002

Decision Date : 25 October 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J

Counsel Name(s) : Lawrence Lee Mun Kong and Lisa Theng Siew Lian (Chui Sim Goh & Lim) for the appellants; Joseph Tan Wee Kong (Kenneth Tan Partnership) for the respondents

Parties : Guan Chong Cocoa Manufacturer Sdn Bhd — Pratiwi Shipping SA

Civil Procedure – Appeals – Appellate court's review of trial judge's discretion

Civil Procedure – Mareva injunctions – Requirements to be satisfied – Factors indicating real risk of dissipation of assets

would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied. *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft Gmb H [1983] 1 WLR 1412* (refd). (See [17])

[3]

The test is objective and the court is not concerned with motive or purpose as opposed to effect and there is no need to show an intention to dissipate assets. *Felixstowe Dock & Rly Co v United States Lines Ltd [1989] QB 360* (refd)*; Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft Gmb H [1983] 1 WLR 1412* (refd). (See [17])

[4]

A mere assertion that there is a risk of dissipation is not good enough. There must be some solid evidence to substantiate the alleged risk. The evidence must reasonably have a bearing on the risk factor. *The Niedersachsen [1984] 1 All ER 398* (refd). (See [18] – [19])

[5]

Where the defendant starts to put his property up for sale or where a company just ceases business, then unless an explanation is offered, it would prima facie be an act of dissipation. (See [19] – [20], [23] – [24], [26])

[6]

Another indicative factor is where the proceeds when paid to the defendants are in cash and can be easily disposed of or dissipated. (See [25])

[7]

The fact per se that the defendant is a foreign company cannot be a ground to allege that there would be a real risk of dissipation. This may however be different when taken into account along with other factors. (See [22])

[8]

The cross-undertaking in damages furnished by the appellants provided an adequate safeguard against the possibility that the injunction might be wrongly granted. (See [28])

[9]

This injunction granted is not of a world wide nature. However, even if the injunction could be considered to be of a world wide nature, the injunction should still be granted as it did not appear that the respondents had other assets within the jurisdiction. *Derby & Co Ltd v Weldon (Nos 3 & 4) [1990] 1 Ch 65* (refd). (See [29])

Case(s) referred to

Hadmor Productions Ltd v Hamilton [1982] 2 WLR 322 (flld)

Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft Gmb H [1983] 1 WLR 1412 (refd)

Felixstowe Dock & Rly Co v United States Lines Ltd [1989] QB 360 (refd)

The Niedersachsen [1984] 1 All ER 398 (refd)

Derby & Co Ltd v Weldon (Nos 3 & 4) [1990] 1 Ch 65 (refd)

[Delivered by Chao Hick Tin JA]

Judgment

GROUNDS OF DECISION

1 This was an appeal against a decision of the High Court refusing the plaintiff-appellants' application for a Mareva injunction. The action related to a claim for the loss suffered by the appellants on account of damage to cargo due to a fire on board a vessel of the respondents. We heard the appeal on 12 September 2002 and allowed it. We granted a Mareva injunction in respect of the proceeds from the sale of a specific asset. We now give our reasons.

The facts

2 The appellants were the lawful holders of two bills of lading, No. 01/PRT/PL/VII/01 and No. 02/PRT/PL/VII/01, dated 13 July 2001. The bills related to the carriage of a cargo of cocoa beans of a total weight of 609 m/t on board the vessel "PRATIWI" from Palu, Indonesia to Pasir Gudang, Johore. The appellants were the buyers of the cargo. The defendant-respondents were the owners of the vessel "PRATIWI".

3 Foong Sun Shipping (Pte) Ltd (Foong Sun) were the respondents' agents and managers of the vessel. The bills of lading for this cargo were in Foong Sun's standard form. The appellants had business dealings with Foong Sun from early 2001.

4 On 17 July 2001 a fire occurred on board the vessel. It started at the engine room. After the fire was put out, the vessel was towed to Banjarmasin, Indonesia. The fire so badly damaged the vessel that eventually it was declared a constructive total loss and had to be sold for scrap for only S$50,000. No insurance had been taken out in respect of its hull and machinery though there was a policy with China Insurance for third party liability for up to $500,000.

5 The cargo of cocoa beans was then transferred to another vessel "SUN RAY" which carried it to Pasir Gudang. Unfortunately, the cargo was found on arrival to have also been damaged by the fire. It was eventually disposed of in a salvage sale, causing the appellants a loss that was subsequently quantified at $904,164.22. In October 2001, the appellants had made a claim against the respondents for the loss, without stating a specific sum. On 31 October 2001, the respondents denied liability.

6 The appellants had insured the cargo with Malaysian Assurance Alliance Bhd (MAA). The appellants notified Foong Sun that they would be submitting their claim for the loss to MAA. But on 10 April 2002, MAA informed the appellants that MAA would be repudiating liability because there was a breach of the policy. The appellants informed Foong Sun of this development and thereafter, the appellants' Finance and Trading Manager, Mr Hia Cheng, discussed the situation with the Manager of Foong Sun, Ms Elaine Quek. Both expressed a

wish to resolve the matter amicably.

7 On 16 May 2002 the appellants' solicitors made a claim of RM1,948,253 against China Insurance under their third party policy issued to the respondents. This communication was copied to Foong Sun.

8 On 18 June 2002, China Insurance denied liability through its solicitors, M/s Kenneth Tan Partnership (KTP), on the ground that the fire started without the fault of the owners. On the same day, the appellants' solicitors directed the claim of the appellants to the respondents. The appellants also asked Foong Sun's solicitors, KTP, for details of the owners of the PRATIWI, including its country of incorporation, registered address and assets. The details were not furnished.

9 The appellants instituted this action on 12 July 2002. Their claim was based on breach of contract and, in the alternative, on negligence. At the time, the searches carried out by the appellants indicated that the "PRATIWI" was owned by the respondents who had the same address as Foong Sun did and that the vessel's previous name was "TAKATORI". Neither the respondents, nor Foong Sun, informed the appellants that the respondents also owned another vessel, the "LANGSA".

10 In the meantime, on 22 June 2002, unbeknown to the appellants, the respondents had sold the "LANGSA". On 17 July 2002 the appellants learned, from discreet enquiries with the staff of Foong Sun, that the "LANGSA" had changed her name to "SRI BAHARI". However, subsequent searches on the "SRI BAHARI" carried out by Lloyds' Marine Intelligence Unit in England, Harper Wira Insurance Surveyors & Adjusters in Malaysia and Seabird Consultants of Singapore, on behalf of the appellants did not bring forth consistent results. Harper Wira reported that the vessel's owner was Foong Sun, whereas Seabird Consultants learned that it was PT Pelayaran Fajar Sribahari SAK. Furthermore, both Seabird Consultants and Lloyds Marine Intelligence Unit could not confirm whether the "LANGSA" had changed its name to "SRI BAHARI"

11 On 26 July 2002 the appellants' solicitors wrote to the respondents' solicitors, KTP, seeking confirmation that the respondents were still trading. There was no response.

12 On 29 July 2002, the appellants sought a world-wide Mareva injunction against the assets of the respondents, including the LANGSA and the sale proceeds of the "PRATIWI". The application came before the judge-in-chambers on 2 August 2002 who refused it. Thereafter, the appellants asked for further arguments and confined their application to only the vessel "LANGSA" or its proceeds. On 8 August 2002, the judge certified that she would not require further arguments.

13 In the court below, the respondents raised only one ground to resist the application, i.e., that the appellants had not shown that there was any real risk of dissipation of assets. The judge held that there was no "solid evidence" of any risk of dissipation to satisfy the court that a Mareva injunction should be granted over assets in Singapore, much less to pounce on the respondents' assets worldwide. The fact that the respondents were a Panamanian company and only owned the vessel "LANGSA" and no others, did not necessarily mean that an injunction should be granted. Before us, the main issue was again whether the real risk of dissipation test had been satisfied.

Real risk of dissipation

14 There was a suggestion that as the appellants had shipped cargoes on board the LANGSA previously, they would have known that it belonged to the respondents. We were unable to follow the logic of this contention. The appellants did not deal with the respondents but with Foong Sun who managed the LANGSA and issued its own form of bill of lading. A ship's manager cum agent could be handling the vessels of many owners. The appellants said that they did not know who the owners of the LANGSA were. There was no evidence that the shippers of goods would normally check on the ownership of a vessel. It was only after the fire had occurred on the PRATIWI and when further searches on the Lloyds' Register of Ships Supplement & New Entries July/August 2001 and May/June 2002 were made, that it was discovered that the respondents also owned the LANGSA. Upon this discovery, the writ issued earlier was, on 16 July 2002, amended to include the LANGSA.

15 The appellants relied in the main upon the following facts and circumstances to contend that there was a real risk of dissipation:-

(i) The timing of the sale of the LANGSA. In assessing the significance of this timing, the following two

dates must be kept in mind. In April 2002 the appellants informed the respondents that the insurers of the cargo had repudiated liability. Then on 18 June 2002, China Insurance informed the appellants that they denied liability for the claim. Thus, the matter could not be resolved amicably. Four days later, on 22 June 2002, the respondents executed the bill of sale of their only asset, the LANGSA, through their agents, Foong Sun. No reason was offered as to why the respondents had to dispose of that asset.

(ii) The bill of sale stated that the price had been paid. Admittedly, in Elaine Quek's affidavit she stated that the payment had not yet been received. But the question was, why did the bill of sale state something which was not true? Was there anything behind that? These were queries which any fair minded individual, viewing the situation, would naturally have raised. Answers should have been provided. Yet none was forthcoming.

(iii) The respondents were no longer carrying on business, having sold their only asset, the LANGSA.

(iv) The respondents were evasive about their country of incorporation, registered office address, assets and other matters;

(v) The proceeds of sale of the LANGSA, being cash, could easily be disposed of or dissipated.

(vi) The respondents were incorporated in Panama, a country with whom Singapore had no arrangement for the reciprocal enforcement of judgments.

The Law

16 It is settled law that an appellate court's function in relation to the judge's exercise of discretion in granting or refusing to grant an interlocutory relief is only one of review and not to exercise an independent discretion of its own. In the words of Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1982] 2 WLR 322.

> (The appellate court) must defer to the judge's exercise of his discretion and not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist which, although it was one that might legitimately have been drawn upon the evidence that was before the judge can be demonstrated to be wrong by further evidence that has become available by the time of the appeal… "

17 There are two main requirements which a plaintiff must satisfy before a court will grant a Mareva injunction. The first is that the plaintiff must have a "good arguable case". The respondents did not raise any argument in relation to this requirement. Their arguments centred wholly on the second requirement, which is that there is a real risk of dissipation of assets or, in the words of the Court of Appeal in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft Gmb H* [1983] 1 WLR 1412 at 1422 *("The Niedersachsen")* the test is whether "the refusal of Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied" and this is an objective test. The court is not concerned with motive or purpose as opposed to effect: *Felixstowe Dock & Rly Co v United States Lines Ltd* [1989] QB 360. There is no need to show an intention to dissipate assets: see *The Niedersachsen*.

18 Clearly, mere assertion that there is a risk of dissipation is not good enough. There must be some "solid evidence" to substantiate the alleged risk. In the words of Mustill J in *The Niedersachsen* [1984] 1 All ER 398, whose judgment was upheld on appeal, (at p.406):-

> It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are

its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely, what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there."

19 As is apparent from what Mustill J said, the hard question in each case is to determine whether the evidence adduced is sufficient to establish that there is a real risk of dissipation. It is practically impossible to lay down any general guidelines on how the evidential burden could be held to have been fulfilled. But the evidence must reasonably have a bearing on the risk factor. In our opinion, a good piece of evidence would be where the defendant, for no sufficient reason, starts to put his property up for sale or where a company just ceases business.

20 *Steven Gee on Mareva Injunctions and Anton Piller Relief (4th Edn)* at p. 195-7 set out the factors which are relevant to the consideration of the question of risk. Below are some of the factors which the author has identified and which are germane to the present appeal.

> "1. The nature of the assets which are to be the subject of the proposed injunction, and the ease or difficulty with which they could be disposed of or dissipated. The plaintiff may find it easier to establish the risk of dissipation of a bank account, or of moveable chattels, than the risk that the defendant will dispose of real estate, e.g., his house or office. …
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> 2. The nature and financial standing of the defendant's business ..
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> 3. The length of time the defendant has been in business …..
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> 4. The domicile or residence of the defendant …..
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> 5. If the defendant is a foreign company, partnership, or trader, the country in which it has been registered or has its main business address, and the availability or non-availability of any machinery for reciprocal enforcement of English judgments or arbitration awards in that country. …
>
> 6. The defendant's past or existing credit record. A history of default in honouring other debts may be a powerful factor in the plaintiff's favour – on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the plaintiff commences his action, may signify nothing more than the fact that the defendant has fallen upon hard times and has cash-flow difficulties, or is about to become insolvent. …
>
> 9. The defendant's behaviour in response to the plaintiff's claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, may be factors which assist the plaintiff."

Our Decision

21 It appeared to us clear that the following factors were not given sufficient consideration by the court below in refusing the grant of a Mareva injunction:-

(i) The sale on 22 June 2002 of the only vessel, LANGSA, owned by the respondents.

(ii) The respondents had ceased business.

(iii) The false statement in the bill of sale that the proceeds had been paid.

(iv) The respondents are a company incorporated in Panama, a country with whom Singapore has no arrangement on reciprocal enforcement of judgment.

(v) The proceeds of sale of the LANGSA when eventually received could be easily dissipated or removed out of Singapore.

22 In our judgment, these facts constituted "solid evidence" indicating that there was a real risk of dissipation. We recognised that each of these factors, on its own, would not necessarily indicate a real risk. An example would be where a defendant was a foreign company. That fact *per se* could not be a ground to allege that there would be a real risk of dissipation. A plaintiff who entered into a commercial arrangement with a foreign entity would have realized that he would encounter certain inconvenience in enforcing the contract or a judgment. That would be the normal order of things. But when one were to take this factor, together with the other factors enumerated above into account, the picture could well be different as in this case.

23 Of the five factors listed in 22 above, the two most critical ones were: (i) the fact that the respondents had sold the LANGSA, and (ii) the respondents had ceased to carry on business. It was significant that no reason was offered to explain why the respondents had to dispose of their only asset, the "LANGSA". This could not be a transaction in the ordinary course of business. Unless an explanation was offered it would *prima facie* be an act of dissipation. This factor alone would have sufficed for the court to grant a Mareva injunction.

24 Similarly, with regard to the factor of the respondents ceasing business, here again there was no explanation. There was no indication of any future plans. This factor alone would also have sufficed for the issue of a Mareva injunction. With respect to the judge below, we thought she indulged in speculation when she held that there was no evidence that the stoppage of trading by the respondents would be permanent. But the fact of the matter was that no explanation was given by the respondents at all. What was real was that the business of the respondents had stopped. There was no evidence to contradict or qualify that. If the stoppage was intended to be temporary, why didn't the respondents say so?

25 The bill of sale stated that the proceeds of sale had been paid when it was not. Why was a falsehood stated in the bill? No explanation was offered by either Elaine Quek or the respondents. The argument was made that if there was any intention to deceive, Elaine Quek would not have disclosed that the purchaser had not yet made payment. Be that as it may, it was a matter exclusively within the knowledge of the respondents and/or Elaine Quek. Perhaps, faced with an application for a Mareva injunction, Elaine Quek felt compelled to set out the true position. The silence certainly did not help. Moreover, the proceeds of the LANGSA, when paid to the respondents, would be in cash and could be easily disposed of or dissipated.

26 It seemed to us that a very significant feature of the case was the deafening silence on the part of the respondents and their managers, Foong Sun. Foong Sun, in the person of Elaine Quek, purported to speak for the respondents but gave no explanation of the various actions taken by the respondents including the fact that the respondents had agreed to a deferred payment of the price of the LANGSA. The court was also not told what were the actual payment terms. Points which required answers were just left unanswered. We would also add that many documents were disclosed in the proceedings, but we were never shown a single document emanating from the respondents.

27 Finally, there was one other circumstance we ought to allude to. It would be noted that China Insurance had issued a policy to cover the respondents for third party liabilities up to $500,000. But that was still way below the quantified claim of the appellants at $904,164. Moreover, China Insurance had yet to reply to the appellants' letter seeking confirmation that China Insurance would pay if the appellants should establish their claim against the respondents.

28 The cross-undertaking in damages furnished by the appellants provided an adequate safeguard against the possibility that the injunction might be wrongly granted. It could not be argued that the injunction might destroy the respondents' business, or that a third party's confidence in them might be undermined, as the respondents had already ceased business.

29 The injunction which the appellants sought before us, and which we granted, was very specific, namely, only in respect of the proceeds of sale of the LANGSA, irrespective of whether the moneys would be received in Singapore or elsewhere. Here again, we would observe that the respondents did not indicate whether the payment would be received in Singapore or elsewhere. We did not think this injunction was really of a worldwide nature. But even if this injunction could be considered to be of that nature, it should still be granted as it

did not appear that the respondents had other assets within the jurisdiction. In *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] 1 Ch 65 Lord Donaldson of Lymington MR said (at p.79):-

> I can see neither rhyme nor reason in regarding the existence of some asset within the jurisdiction of however little value as a pre-condition for granting a *Mareva* injunction in respect of assets outside the jurisdiction. The existence of *sufficient* assets within the jurisdiction is an excellent reason for confining the jurisdiction to such assets, but, other considerations apart, the fewer the assets within the jurisdiction the greater the necessity for taking protective measures in relation to those outside it."

30 In the result, we allowed the appeal and granted a Mareva injunction over the proceeds of sale of the LANGSA.

Sgd:

CHAO HICK TIN	JUDITH PRAKASH
JUDGE OF APPEAL	JUDGE