Dukkar S.A *v* Thailand Integrated Services Pte Ltd
[2015] SGHC 234

Case Number : Originating Summons No 632 of 2015

Decision Date : 07 September 2015

Tribunal/Court : High Court

Coram : Steven Chong J

Counsel Name(s) : Liew Teck Huat and Mildred Tan (Global Law Alliance LLC) for the plaintiff; Melanie Ho, Paul Loy and Tang Shangwei (WongPartnership LLP) for the defendant.

Parties : Dukkar S.A — Thailand Integrated Services Pte Ltd

Civil procedure – Mareva injunctions

7 September 2015 Judgment reserved.

Steven Chong J [delivering the oral judgment]:

1 These are my brief oral grounds for Originating Summons No 632 of 2015. I reserve the right to supplement these grounds with more detailed grounds should I decide to issue full written grounds.

2 This is the plaintiff's application for a mareva injunction against the defendant to restrain it from removing from Singapore or in any way disposing of or dealing with or diminishing the value of any of its assets in Singapore up to the sum of US$959,044.77 pending the determination of an international arbitration commenced by the plaintiff against the defendant in London.

3 It is common ground that the court has the jurisdiction under s 12A of the International Arbitration Act (Cap 143A, 2002 Rev Ed) to grant an interim injunction in aid of a foreign arbitration. However, the plaintiff is required to satisfy two conditions to justify the grant of the interim injunction:

(a) First, it must demonstrate that it has a good arguable case against the defendant for breach of the contract purportedly concluded on 30 March 2015 in respect of the sale and purchase of 100,000 metric tons (plus or minus 10% at the plaintiff's option) of bitumen mixture ("the Product").

(b) Second, it must demonstrate that there is a real risk of dissipation of assets by the defendant to frustrate the enforcement of an intended arbitral award.

Failure to satisfy either condition would be fatal to the application.

No good arguable case

4 I am mindful that the threshold at this stage is to examine whether the plaintiff's case is "more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50% chance of success": *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1991] 2 SLR(R) 713 at [18].

5 Having considered the arguments and the materials placed before me, in my view, the plaintiff has not been able to demonstrate that it has a good arguable case against the defendant. It is important for the purposes of this analysis to bear in mind that it is the plaintiff's case that an oral contract was concluded between the parties on 30 March 2015. The plaintiff further submits that this is evidenced by written documents: see the plaintiff's skeletal submissions dated 28 August 2015 at para 20, Yulia Yancheva's affidavit dated 15 June 2015 at para 16, and the letter of demand dated 15 May 2015 from the plaintiff's English solicitors, Arbis Sutherland LLP to the defendant. As such, my factual inquiry in the present case is limited to determining whether, based on the materials before me, the plaintiff has demonstrated a case which is more than capable of a serious argument that a contract was concluded between the parties on 30 March 2015.

6 The plaintiff acknowledges that there was no signed contract on 30 March 2015, but asserts that by that date, all the essential terms had been agreed. It is also accepted that the three most crucial terms of any contract for the sale of goods are:

(a) the identity of the parties;

(b) the price; and

(c) the specifications of the Product

7 In the words of the plaintiff, "the 3 Ps of property, party and price had been agreed". There is no dispute that the plaintiff and the defendant were the intended contracting parties. However, the defendant denies that any agreement was reached between the parties on either the price or the specifications of the Product.

Price

8 It is not disputed that the plaintiff sent a draft contract to the defendant on or about 31 March 2015. The contractual price was not a typical fixed price. Clause 8 of the draft contract provides that the price shall be "the arithmetic average of mean price quotations for fuel oil MOPS 380 cst published under the heading "FOB SINGAPORE" in Platts Asia- Pacific/Arab Gulf Markets can on 28th, 29th May 2015 minus a discount of USD 1,50 MT" for delivery to Singapore or Malaysia, or "plus a premium of USD4,50 MT" for delivery to Shandong, China. However, clause 8.1 provides for a price trigger mechanism which grants the defendant the option to trigger the applicable price for the quotation on a specific unpublished day within an agreed period. The longer the period, the more flexibility is afforded to the defendant to select the most favourable price and conversely, the higher the risk of an unfavourable price to the plaintiff.

9 In the draft contract of 30 March 2015, the period for the price trigger was stated by the plaintiff as being up to 28 May 2015. On 9 April 2015, the defendant counter-proposed to extend the price trigger period to 10 June 2015. In response, on the same day, the plaintiff informed the defendant that the counter-proposal was not acceptable. There was no suggestion in the 9 April 2015 correspondence that the defendant was not in a position to change the price trigger period because a contract had already been concluded between the parties. It appears from the SMS exchanges between the parties that as late as 10 April 2015, the parties were still negotiating the price trigger period – see SMS dated 10 April 2015 at 1232 hours, which states "They will counter laytime, price trigger period etc". Based on the exchange of correspondence alone, it is clear that on 30 March 2015, there was no agreement on the price trigger period which can have a material bearing on the contractual price of the Product.

Specification of the Product

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10 It appears that the parties were not *ad idem* on either the density or the asphaltene content of the Product as well.

11 In the draft contract of 30 March 2015, the plaintiff proposed a "density at 15ºC: max 0.985" and asphaltenes at a minimum of 6.3%. On 9 April 2015, the defendant counter-proposed a "density at 20ºC: max 0.987" and asphaltenes at a minimum of 8%. The plaintiff replied on the same day disagreeing to the counter-proposal.

12 It appears from the evidence before me that the parties never reached an agreement on the asphaltene content whether on 30 March 2015, or any time thereafter. As late as 13 and 14 April 2015, the parties were still exchanging SMS messages with a view to increase the asphaltene content to 8% by using different test methods and/or adding additives. The exchange of SMS messages on this issue ended with the plaintiff informing the defendant that the best it could do was to increase the asphaltenes to 6.9% and 7.2%. There is no indication from the evidence that the defendant had agreed to accept the Product with this level of asphaltenes.

Conduct of the plaintiff

13 The conduct of the plaintiff also strongly suggests that no contract was concluded on 30 March 2015. The evidence before me is replete with correspondence which is wholly inconsistent with the existence of a contract concluded on 30 March 2015:

(a) The plaintiff alleged that the oral contract was evidenced by the draft contract which was sent to the defendant by an email dated 31 March 2015. However, in the same email, the plaintiff reminded the defendant that "this is a draft and not a final version of Contract and we reserve the right to revert with *any* amendments or additions to it *at a later stage*" [emphasis added].

(b) On 8 April 2015, the plaintiff sent an SMS message to the defendant enquiring "Can we *finalize* the contract?" [emphasis added].

(c) On 10 April 2015, the plaintiff sent an email to the defendant stating "please revert ASAP with your comments/agreement to the contract as we cannot hold the Contract *unclosed* for such long period of time" [emphasis added]. This was followed by another SMS message on the same day from the plaintiff – "If we don't finalize the contract i will be on panic on monday".

(d) The plaintiff sent at least two SMS messages on 9 and 16 April 2015 stressing that it needed a "signed contract" from the defendant.

14 I make a few salient observations on the correspondence quoted above:

(a) All the correspondence emanated from the plaintiff and therefore represents its own contemporaneous assessment of the contractual position between the parties. Clearly, the plaintiff did not believe that a contract had been concluded on 30 March 2015 or any other date thereafter. Though, for the purposes of disposing of this application, it suffices that there is no good arguable case to support a concluded contract of 30 March 2015 as alleged by the plaintiff.

(b) The correspondence showing the plaintiff's belief that there was no concluded contract post-dated the alleged 30 March 2015 contract.

(c) The plaintiff was clearly keen to finalise the contract. Given the fact that the parties were

still negotiating the price trigger period, as well as the density and the asphaltene content of the Product, the reason the plaintiff kept pushing the defendant to finalise the contract is obvious. However, it appears from the evidence that the contract was not eventually finalised.

(d) The plaintiff was not satisfied with just the essential terms. Quite apart from my finding that there was no agreement on the price or the specifications of the Product, the plaintiff clearly wanted a signed contract from the defendant but this was never provided. This is entirely consistent with the plaintiff's insistence on a "signed contract".

15 The plaintiff however relies on several correspondence to support its case that there was a concluded contract as of 30 March 2015. The plaintiff submits that these correspondence show, *inter alia*, that parties had taken steps to perform the contract.

(a) The plaintiff relied on an email dated 29 March 2015 wherein the defendant stated that "we accept your DES price" and "thanks for the deal".

(b) On 10 April 2015, the plaintiff notified the defendant of the nomination of the vessel to load the Product. However, in response, the defendant informed the plaintiff not to fix any vessel as the nominated vessel had not been accepted.

(c) On 15 April 2015, the defendant provided a draft wording for the letter of credit for the plaintiff's acceptance. However, the plaintiff replied and proposed certain amendments. Based on the evidence before me, there was no response from the defendant accepting the proposed amendments.

(d) Thereafter, the plaintiff wrote several reminders chasing the defendant to issue the letter of credit but did not receive any response. This is neither here nor there.

(e) Although a letter of demand was sent by the plaintiff's English solicitors on 15 May 2015, only a holding response was received from Wong Partnership on 21 May 2015 and a substantive response was only sent on 17 June 2015. The plaintiff relied on the alleged long delay to suggest that the defendant did not "genuinely" believe that there was no concluded contract.

16 In my view, none of the points assist the plaintiff to show a good arguable case. The defendant's email of 29 March 2015 predated the plaintiff's subsequent email of 31 March 2015 whereupon in enclosing the draft contract, the plaintiff specifically cautioned the defendant that it is a draft and not the final version of the contract as it was reserving the right to add or amend at a later stage. Furthermore, the email makes no reference to the price trigger period as negotiation on this issue only came about after receipt of the draft contract. In any case, the defendant did not accept the plaintiff's purported nomination of the vessel. Neither did it accept the plaintiff's proposed amendments to the letter of credit. The fact that these issues remained outstanding is again entirely consistent with the plaintiff's repeated requests for the parties to "finalise" the contract and for a "signed contract". Clearly, the parties were taking steps to resolve issues such as the price trigger period, the Product specifications, the vessel's nomination and the terms of the letter of credit in anticipation of concluding a contract.

17 In the defendant's submissions, it was disclosed that it has commenced legal proceedings against the end-user of the Product, Jayta Petroluem Pte Ltd ("Jayta"), in the High Court of Singapore. As the suit is related to the purported transaction between the plaintiff and the defendant, I directed the defendant to produce the Statement of Claim to determine whether the defendant had taken an inconsistent position in commencing an action against Jayta. Having

examined the Statement of Claim and hearing the parties' submissions on the Jayta proceedings, I am satisfied that there is no inconsistency:

(a) First, according to the pleadings, the contract between the defendant and Jayta was evidenced by an exchange of email on 28 March 2015. This was two days before the alleged contract with the plaintiff. In other words, it is not a case of the defendant concluding a back-to-back contract with Jayta *after* having concluded the contract with the plaintiff.

(b) Second, unlike the present dispute, there is no price trigger period in the Jayta contract.

(c) Third, the asphaltene content had already been agreed under the Jayta contract and Jayta was requesting for a variation. In the present dispute, the parties were still negotiating the asphaltene content and therefore, the defendant was at liberty to seek a higher asphaltene content.

No real risk of dissipation

18 While the plaintiff accepts that it has the burden of demonstrating that there is a real risk of dissipation of assets with "some solid evidence", its case was woefully off the mark. Initially, the plaintiff had raised a number of trivial points in its attempt to demonstrate the existence of a real risk of dissipation. These include the following allegations:

(a) The only shareholder of the defendant is Marcopolo Energy Ltd, a BVI company. The plaintiff suggested that the choice of the shareholder's name was "deceptively similar" to Marco Polo Marine Ltd, a publicly listed company in Singapore. This was somehow intended by the defendant to show some connection with the listed company.

(b) The ACRA searches showed that the defendant had six "All Monies" charges with three different financial institutions. These were all lodged sometime between 8 April 2013 and 6 April 2015, during which the contract was "still alive".

(c) Although the defendant reported revenue of US$170,196,987 in 2013, its profit after tax was only US$164,153.

(d) While the defendant's accounts showed assets in the form of trade receivables worth US$72,609,488, the accounts also showed corresponding "trade payables" of US$72,445,335. On this simplistic comparison, the plaintiff alleged that the defendant's assets are merely "paper assets".

(e) Although the defendant exhibited a recent contract dated 14 July 2015 to show that it is active in trading, the redaction of the name of the buyer, the price, the quantity, *etc* rendered the exhibit "suspicious".

(f) Finally, although the defendant explained that the nature of its main trading business did not require significant staff and that it has only a total of four employees in Singapore, the plaintiff somehow sought to cast suspicion on this explanation by stating that the employees had not been named and that the defendant did not furnish CPF statements, *etc* to substantiate their employment.

19 In seeking to populate the grounds in support of the injunction, the plaintiff appears to be operating under a misapprehension that the more grounds are put forward, the higher its chances of

discharging its burden of proving a real risk of dissipation. However, the court is not concerned with a numbers game. Ultimately, each ground relied upon would have to be objectively assessed to determine how it would bear on the question whether there is a real risk of dissipation of assets by the defendant. During the hearing, recognising the weakness of the above grounds, counsel for the plaintiff, Mr Liew, decided not to rely on them. For completeness, I should mention that the weakness of the above grounds was also acknowledged in the plaintiff's skeletal submissions wherein it was stated "that whilst the weight of each particular factor may not be strong, the *cumulative* effect is sufficient to establish a real risk of dissipation" [emphasis original].

20 Two remaining grounds were pursued at the hearing:

(a) The fact that the defendant is relying on a defence which it knows is a "fiction" is evidence of a lack of "commercial morality" and hence calls into question its probity.

(b) The defendant's use of Ewiim Pte Ltd as its registered address even though it has an actual office elsewhere points towards "a shadowy existence". Ewiim Pte Ltd offers virtual office facilities.

21 I will start with the virtual office argument which, in my view, rightly belongs to the category of grounds abandoned by the plaintiff. It is not uncommon for companies to have registered offices which are different from their actual operating address. In fact, many law firms offer such services. Moreover, there is nothing inherently "shadowy" or suspicious about the defendant using its registered address in its affidavits. The fact that the defendant is not a company of shadowy existence is borne out by the following:

(a) Its paid up capital is US$5 million.

(b) It has a relationship with at least three financial institutions in Singapore. A letter of reference dated 6 April 2015 was in fact provided by Societe Generale to the plaintiff stating that the defendant "will not enter into commitments which they are not in a position to fulfil". In an earlier letter of reference dated 5 March 2015 to an unnamed party, Societe Generale stated that it has granted credit facilities of eight digits (in USD) to the defendant. What is significant is that these two references were provided *before* the dispute arose between the parties.

(c) It is an active trading company with transactions in excess of US$170 million. The fact that it only made a profit of US$164,153 in 2013 does not alter the fact that it is nonetheless an active trading company and not a shadowy company as alleged.

22 While a lack of probity can and often will be relevant to show that there is a real risk of dissipation of assets, the law is clear that the allegation must be "well-substantiated". It remains the duty of the court to examine the precise nature of the dishonesty and the strength of the evidence relied upon – see *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] SGCA 45 at [94]. In the present case, this ground is a non-starter for the following reasons:

(a) I have found that the plaintiff has failed to demonstrate that it has a good arguable case to begin with. This finding would effectively eliminate the only ground advanced by the plaintiff to support the existence of a real risk of dissipation.

(b) Even if the plaintiff has a good arguable case, it does not follow that the defence must necessarily be fictitious. It is clear to me that the defendant has a *bona fide* defence to the

claim. Just as I am not required to determine whether the plaintiff has a more than 50 per cent chance of succeeding in its claim, likewise, there is no necessity for the court to assess whether the defendant is likely to succeed in its defence. There is certainly sufficient evidence emanating from the plaintiff's own correspondence to support the defence that a contract for the sale and purchase of the Product was not concluded on 30 March 2015. It is not for the court to find that there might be another contract concluded on some other date which is different from that pursued by the plaintiff. I should also make it clear that this assessment is based entirely on the materials placed before the court with reference to the case as advanced by the plaintiff in its supporting affidavit and the letter of demand by the plaintiff's English solicitors. No pleadings in the arbitration have been served as yet. The pleadings may eventually take a different route. It will then be for the arbitral tribunal to decide the veracity and legal effect of the plaintiff's amended position should that come to pass.

(c) In any event, the defendant is a substantial and active trading company. There is no material to suggest that there is any risk, let alone a real risk, that the defendant will dissipate its assets to defeat the plaintiff's claim.

23 Therefore, for the reasons above, the application is dismissed with costs fixed at $9,000 inclusive of disbursements.