PT Sariwiguna Binasentosa *v* Sindo Damai Shipping Ltd and others [2015] SGHC 195

Case Number : Suit No 345 of 2015 (Summons No 1659 of 2015)

Decision Date : 27 July 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Leong Kah Wah and Lim Zhi Ming, Max(Rajah & Tann Singapore LLP) for the plaintiff; Tan Boon Yong Thomas and Ernita Osman (Haridass Ho & Partners) for the first to seventh defendants.

Parties : PT Sariwiguna Binasentosa — Sindo Damai Shipping Ltd and others

Civil Procedure – Mareva injunctions

27 July 2015 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is an Indonesian tin mining and exporting company. Around September 2014, the plaintiff contracted to sell four parcels of tin ingots to Uni Bros Metal Pte Ltd ("Uni Bros"). Shortly after, the plaintiff engaged the services of the first defendant, a Singapore shipping company to ship the parcels of tin ingots from Indonesia to Singapore under four bills of lading that were issued by the latter.

2 The second to sixth defendants are the directors of the first defendant, with the exception of the fifth defendant who resigned from the board on 20 February 2015. On the defendants' account, only the third defendant, who is the managing director, is involved in the day to day operations of the first defendant. The others are non-executive directors. The seventh defendant is not a director of the first defendant but is employed as its assistant general manager.

3 The cargoes of tin ingots were shipped by the first defendant for the plaintiff from Balam, Indonesia to Singapore as contracted, in four separate shipments from November 2014 to February 2015. Without the plaintiff's knowledge, the first defendant shipped the first parcel of ingot ("the first parcel") to Songkhla, Thailand on 2 December 2014. For reasons that are not clear at this stage, the defendant's destination agent in Thailand, N&N Forwarding Services Co Ltd ("N&N"), released the first parcel to a company, Thai Smelting and Refining Co Ltd ("Thaisarco") sometime in December 2014. Thaisarco is supposedly the party that had contracted to buy tin ingots from Uni Bros, who had in turn contracted to buy the same from the plaintiff.

4 The plaintiff discovered this only on 2 March 2015. After the defendants failed to comply with its demand for the return of the remaining three parcels that was still in the possession of the first defendant, the plaintiff commenced Suit 345 of 2015 on 10 April 2015 against the first to sixth defendants for:

(a) The conversion or mis-delivery of the first parcel that was shipped under the first bill of lading even though the plaintiff at no point presented the bill of lading.

(b) The conversion, detinue, as well as wrongful interference, of the plaintiff's rights to the

remaining parcels of tin ingots shipped under three other bills of lading that had also been issued by the defendant.

5 Concurrently, the plaintiff filed Summons No 1659 of 2015, in which it seeks an injunction to compel the defendants to deliver up the cargoes under three of the bills of lading as well as a Mareva injunction against all the defendants. On 29 April 2015, I ordered that the first defendant is to deliver up the cargoes, upon payment by the plaintiff of freight charges into court. I made no order as to the prayer on Mareva injunction but gave the plaintiff liberty to apply.

6 Subsequently, the plaintiff applied for the prayer on Mareva injunction to be heard again and for leave to include the seventh defendant, who had been added to the main action on 10 June 2015, in the summons. The question now before me is whether I should grant the plaintiff's application for a domestic Mareva injunction to be issued against all the defendants.

7 Mr Leong Kah Wah, counsel for the plaintiff accepts that an order for a Mareva injunction is not lightly granted. The plaintiff must show that (a) a valid cause of action over which the court has jurisdiction; (b) a good arguable case; (c) the defendant has assets within the jurisdiction; and (d) there is a real risk that the assets may be disposed of or dissipated so that any judgment which the plaintiff obtain cannot be enforced.

8 The risk of dissipation is an important factor. Mr Leong, submitted that there is a real risk that the defendants will dissipate their assets and that this may be shown by producing evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. He relied on the High Court case of *Spectramed Pte Ltd v Lek Puay Puay & Ors* [2010] SGHC 112 ("*Spectramed*") to submit that where the plaintiff can prove a good arguable case in support of an allegation that the defendant has acted dishonestly, it is not necessary for there to be any further specific evidence to show that there is a real risk of dissipation. Although counsel for the defendants, Mr Thomas Tan, argued the broader point that the plaintiff failed to show solid evidence to demonstrate a real risk, he did not contest the proposition in *Spectramed* that showing evidence of dishonesty alone is sufficient. Instead, he focused his efforts in trying to convince me that the defendants were not dishonest and have not acted in a way to show that their probity cannot be relied on. Mr Tan also submitted that the defendants who were non-executive directors (*ie*, second to fourth and sixth defendants) should not be implicated.

9 On the parties' submissions, it appears that if I find that the defendants have been dishonest in any way, the conclusion that a real risk that they will dissipate their assets should be drawn. In this approach, the nature of the dishonest acts appears to be of secondary, or little, importance. What seems to matter appears to be the fact of dishonesty.

10 With respect, I do not agree with this approach. The proposition in *Spectramed* is, in my view, stated too broadly. The proposition is found in [19] of *Spectramed*, where the court referred to several authorities such as the English case of *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH (The Niedersachsen)* [1984] 1 All ER 398 and the local case of *Multi-Code Electronics Industries (M) Bhd and another v Toh Chun Toh Gordon and others* [2009] 1 SLR(R) 1000 before stating:

> From the cases above, it is clear that allegations of dishonesty are relevant to the issue of whether there is a risk of dissipation of assets. If there is a *good arguable case* in support of an *allegation* that the *defendant has acted fraudulently, dishonestly or unconscionably*, it is *unnecessary for there to be any further specific evidence on risk of dissipation* for the court to be entitled to take the view that there is a sufficient risk to justify granting Mareva relief (see

Stephen Gee [sic], *Mareva Injunctions and Anton Piller Relief* (Sweet & Maxwell, 4th ed, 1998 ("Stephen Gee" [sic]) at 198).

[emphasis in original]

11 The cases cited by the court in that case accepted that where a defendant's probity, honesty and integrity are called in doubt, a court may consider that as a piece of material evidence that there is a real risk of dissipation. But the cases did not go so far as to say that the finding of dishonesty alone, regardless of what the dishonesty pertained to, is always sufficient to lead to the conclusion that a real risk of dissipation exists.

12 It cannot be gainsaid that the fact or the genuine likelihood that the defendant has been dishonest is a relevant piece of evidence to be considered. But it is not always a sufficient piece of evidence. Surely, the acts of dishonesty complained of must be capable of supporting the inference and conclusion that there is a real risk that the defendant in question has the tendency to dissipate assets and will do so. The ultimate inquiry ought to be whether there is a real risk of dissipation of assets such that the plaintiff will be unable to enforce a successful judgment. Showing that the defendant is dishonest is nothing more than one of the means to satisfy this ultimate inquiry. The court ought to assess whether the finding of dishonesty is, in itself, sufficient to ground an application for Mareva injunction. Similar observations have been made by the English courts, as summarised in the English Court of Appeal decision of *VTB Capital Plc v Nutritek International Corp* and others [2012] 2 CLC 431 from [169] to [179]. The case went on appeal but the Supreme Court did not disagree with the *obiter dicta* of the Court of Appeal on this issue.

13 A Mareva injunction is a draconian order that should only be granted in exceptional cases. Courts have consistently repeated that a mere assertion or unsupported fear of dissipation is insufficient, and the plaintiff must demonstrate that there is a real risk by solid evidence which is strong enough to support an inference that the defendant is likely to move assets abroad or dissipate them within the jurisdiction. It will be incongruous to allow a lower threshold to pass muster simply because the defendant has been found to be dishonest in some manner. After all, many cases that come before the courts involve some element of dishonesty and it cannot be that Mareva relief is appropriate in all of them. A court will be more ready to draw an inference that there is a real risk from the evidence of dishonesty in cases where a defendant is well-versed in intricate, sophisticated and international financial transactions and has been shown to use his expertise for dishonest purposes, as opposed to cases where the defendant has lied in the course of his business dealings with the plaintiff. Each case must of course turn on its own facts.

14 The question, therefore, is whether the evidence of the defendants' dishonesty as alleged by the plaintiff is strong enough to show that there is a real risk that the defendants will dissipate assets. Mr Leong argued that the defendants have been dishonest on numerous counts. First, he argued that the entire dispute is the result of a premeditated fraud by the defendants. He pointed out that there are two sets of bills of lading in respect of the first parcel. The first was issued by the first defendant to the plaintiff for carriage from Indonesia to Singapore. The second (which is unsigned) was issued by the first defendant's wholly-owned subsidiary, Sea Hawk Freight ("Sea Hawk"), to Uni Bro as shipper and Thaisarco as consignee, for the carriage from Indonesia to Thailand. The plaintiff had no knowledge of the second bill of lading prior to these proceedings. He accused the defendants of shirking responsibility and hiding behind N&N by attempting to distance themselves from the actions of N&N. The plaintiff believe that N&N, which is an established destination agent that is independent from the defendants, will only release the first parcel upon receipt of proper document, which the plaintiff submits must be the second bill of lading issued by Sea Hawk. There is also some evidence that N&N had received a telex release instruction and a delivery order in respect of the first parcel.

15 Further, Mr Leong submitted that the defendants completely disregarded the plaintiff's rights and were instead partial to the interests of Uni Bros. Additionally, the defendants continued to give the plaintiff the impression that the cargo was still in their possession for nearly three months after the first parcel had been converted or mis-delivered. To make things worse, the defendants persisted in its behaviour by refusing to hand over the remaining three parcels of tin ingots despite repeated demands by the plaintiff. The four parcels were only delivered to the plaintiff after my court order of 29 April 2015. Drawing his arguments together, Mr Leong submitted that thus, the defendants have shown themselves to be dishonest and there is a real risk of dissipation.

16 Mr Tan defended the allegations by arguing that there was never any intention or plan to defraud the plaintiff. He pointed out that the bill of lading issued by Sea Hawk was unsigned. He also tendered evidence to show that the first defendant gave clear and repeated instructions to N&N to not release the cargoes until the first defendant gave the green light after the plaintiff surrenders their bill of lading. As for the other three parcels that were not delivered to the plaintiff until my order of 29 April 2015, Mr Tan explained that this was because the first defendant was unsure if those cargoes fell within a Mareva injunction that had been granted in another related but separate case involving different parties. Mr Tan referred me to documentary evidence in the form of letters between the relevant law firms, which shows that when it was made clear that the three parcels were not subjected to the Mareva injunction, the first defendant conveyed on 13 April 2015 that they were ready to deliver them to the plaintiff upon the latter paying the freight charges. But as the plaintiff was only willing to pay the freight charges to court and not directly to the plaintiff, the matter was not resolved and the parties had to appear before me.

17 In my view, the evidence shows that the first defendant may have been dishonest in two aspects. First, it sent the first parcel to Thailand without the plaintiff's knowledge when the parcel was supposed to be in Singapore. Second, it did not inform the plaintiff that the first parcel was no longer in Singapore for more than two months. As for the first defendant's dealings with N&N and Uni Bro as well as the events that may have led to N&N releasing the consignments to Thaisarco, I do not think that it will be appropriate at this stage, without a trial, to determine that the first defendant had acted dishonestly. As Chan Sek Keong J (as he then was) held at [21] and [22] of *European Grain & Shipping Ltd v Compania Naviera Euro-Asia SA and others (CN Jaya SA, intervener)* [1989] 2 SLR(R) 445, it is not right to take a view on these allegations on the basis that they had been proved given the first defendant's denial and given that the trial is still pending.

18 Although I accept that the first defendant might not be honest in sending the first parcel to Thailand and not informing the plaintiff thereafter, this is not sufficient for me to find that there is a real risk that the first defendant will dissipate assets. To put it simply, being dishonest in contract dealings is one thing, showing an inclination to dissipate assets is another.

19 As the plaintiff has not put forward any other evidence to show that the first defendant is likely to dissipate assets, I decline to grant a Mareva injunction against the first defendant. So far as the second to seventh defendants are concerned, there is even less reason for me to grant Mareva relief. Even if the plaintiff has managed to shown that the first defendant was dishonest and that there is a real risk of dissipation of assets, it does not follow that the remaining defendants were also dishonest or will also likely dissipate assets. The evidence at this stage appears to be that four of the remaining defendants were non-executive directors at the material time who were not concerned with the day-to-day running of the business. Given that there is similarly little or no evidence before me that there is a real risk that these defendants will dissipate their assets, I decline to grant a Mareva injunction against the remaining defendants as well.

20 A Mareva injunction is a powerful remedy to prevent a defendant from dissipating assets or

removing assets from the jurisdiction such that the judgment that a plaintiff may subsequently get will have no practical effect. Like all strong medicine, it has side effects. In the case of a Mareva injunction, the enjoined party may suffer severe loss of business. The courts will not interfere before trial in granting such orders without strong and convincing reasons. In the absence of any real risk of such dissipation, courts will not allow this injunction to be used as a means for a plaintiff to obtain security, even if a plaintiff has successfully shown that it has a good arguable case against the defendant.

21 For the reasons above, the plaintiff's application in prayer 2 of the summons for Mareva relief against all the defendants is dismissed. I will hear the parties on cost.