IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 173

Registrar's Appeal (State Courts) No 7 of 2021

Between

Bugis Founder Pte Ltd

… *Appellant*

And

Seng Huat Coffee House Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure] — [Injunctions]

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Bugis Founder Pte Ltd
v
Seng Huat Coffee House Pte Ltd

[2021] SGHC 173

General Division of the High Court — Registrar's Appeal (State Courts) No 7 of 2021
Andre Maniam JC
21 June 2021

8 July 2021

Andre Maniam JC:

Introduction

1 In assessing whether there is risk of dissipation to justify a Mareva (or freezing) injunction over the assets of a defendant, should a lower threshold apply if the defendant has ceased to carry on a business that is the subject matter of the dispute between the parties?

2 An injunction was granted on that basis by the learned District Judge ("DJ"). This involved a modification of the approach set out in Court of Appeal decisions such as *Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 ("*Guan Chong*").

3 In deciding on the appeal from the DJ's decision, I had the benefit of submissions from a Young *Amicus Curiae* ("YAC"), as well as from the parties'

counsel. I allowed the appeal, set aside the injunction, and declined to modify the approach in *Guan Chong*. These are my grounds of decision.

Background

The parties and the Business

4 The parties are both companies in the food and beverage business. The business they collaborated in, was that of the "Founder Bak Kut Teh" restaurant selling pork rib soup at 530 North Bridge Road, #01-01, Singapore 188747 (the "Business", at the "Bugis outlet"). There were also "Founder Bak Kut Teh" restaurants at Balestier Road, Hotel Boss, and Downtown East, which were not the subject of the parties' collaboration.

5 In July 2020, the Founder Bak Kut Teh restaurants put out a plea on social media saying, "Founder Bak Kut Teh will be shutting down if the situation doesn't get better in the next 2 months". A "last attempt to save our brand" was announced, in the form of sets for dining-in at 30% discount – at the Bugis outlet, the Hotel Boss outlet, and the Downtown East outlet. This was also reported in the "8 Days" publication.

6 The respondent ("Seng Huat"), however, did not know about these statements on social or print media. Nor did the appellant ("Bugis Founder") directly inform Seng Huat of the potential closure of the Business.

7 On 30 September 2020, Seng Huat read that the Business would be closed the next day, 1 October 2020 – that was reported in a "Today" news article dated 30 September 2020 quoting a spokesperson for Founder Bak Kut Teh: "… business in Singapore is still dire. We are closing down our Bugis outlet starting from tomorrow, on October 1, 2020. Today is actually our last

day of operations at Bugis." The same article also reported the social media plea that had been made in July 2020 ([5] above).

The proceedings

8 On 9 October 2020, Seng Huat applied for a Mareva injunction to freeze the assets of Bugis Founder, citing the closure of the Business. That injunction was eventually granted by the DJ on 25 March 2021.

9 The parties had been involved in litigation since 18 June 2020, when Seng Huat sued Bugis Founder for a refund for $24,000 pertaining to the rental deposit for the Bugis outlet, and damages to be assessed (or alternatively an order for an account to be taken). Besides the claim for $24,000, Seng Huat complained that Bugis Founder had failed to furnish accounts of the Business as it was obliged to, and failed to share 40% of the profits from the Business as agreed.

10 Seng Huat applied for summary judgment on its claims, but was successful only to the extent of its claim that Bugis Founder had failed to provide accounts. On 17 February 2021, interlocutory judgment was granted to Seng Huat for damages to be assessed and interest, in respect of the claim for failure to provide accounts. Bugis Founder was given leave to defend Seng Huat's other claims. That was the state of play when the injunction application was heard on 26 February 2021, and then granted by the DJ on 25 March 2021.

The DJ's decision

11 The DJ noted the Court of Appeal's decision in *Guan Chong* where it was held that there must be some "solid evidence" to substantiate the alleged risk of dissipation (at [18]), and (at [19]) that:

> [T]he 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.

12 The court went on to note at [19] that "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." Both those factors featured in *Guan Chong*. Without any explanation, the respondents had (a) disposed of their only vessel, the proceeds of which could easily be dissipated or removed out of Singapore; and (b) ceased to carry on business (at [21(a)], [21(b)], [21(e)], [23], [24], [26]).

13 The court emphasised the lack of any explanation by the respondents, at [23]–[24]:

> 23 … 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 inujunction … 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 …
>
> [emphasis added]

14 Moreover, a falsehood had been stated in the bill of sale – that the proceeds of sale had been paid when that was not so (at [25]). A Mareva injunction was granted.

15 In the present case, Bugis Founder contended that it had "sufficient reason" for closing the Business, namely that it was unable to continue operations in view of the fallout following the global pandemic – so the closure of the Business should not be regarded as good evidence of a risk of dissipation.

16 The DJ, however, held that the closure of the Business would establish risk of dissipation, *even with a reasonable explanation for the closure*. In that regard, he approached the matter differently than the Court of Appeal had in *Guan Chong*. In his grounds of decision (*Seng Huat Coffee House Pte Ltd v Bugis Founder Pte Ltd* [2021] SGDC 57) at [34], he stated:

> I would suggest that the approach laid down in *Guan Chong* should be modified when applied to cases where the business that the defendant had ceased to carry on is also the business that is the subject matter of the dispute between the parties. In such cases, when the defendant unilaterally closes the business, a *prima facie* case of a risk *of* dissipation of assets is immediately established, *whether or not* a reasonable explanation is given for the closure. The circumstances surrounding the closure of the business would then have to be examined closely to determine if the *prima facie* case should be displaced. The circumstances should go beyond a reasonable explanation for ceasing the business.
>
> [emphasis in original]

17 Where a reasonable explanation had been provided for the closure of a business, that would not be regarded as good evidence of risk of dissipation on the *Guan Chong* approach: the business would not have "just cease[d]", "for no sufficient reason": *Guan Chong* at [19] (see [12] above). A business closure for which there was a reasonable explanation would not, *prima facie*, be an act of dissipation: *Guan Chong* at [23]–[24] (quoted at [13] above).

18 However, the DJ suggested that the approach in *Guan Chong* should be modified where the business is the subject matter of the dispute between the parties – to him, closing the business in such a case would *prima facie* establish

risk of dissipation of assets, *whether or not a reasonable explanation is given*. The DJ reinforced this by stating that this *prima facie* case would only be displaced, if there were something *beyond* "a reasonable explanation for ceasing business".

Should the approach in *Guan Chong* be modified?

19 Following the DJ's decision, the YAC was invited to address the following issue:

> Where the asset alleged to be at risk of dissipation is the subject matter of the parties' dispute and upon which the plaintiff's claims are premised, should the Court adopt a different or modified test to determine if there is a real risk of dissipation of assets for the purposes of a Mareva injunction?

20 That issue was put more broadly (in terms of an "asset" being dissipated) as compared to the DJ's decision, which was specifically about the closure of a business.

21 There are various permutations regarding the *ownership* of an asset (or a business) which is the subject matter of a dispute, such as:

(a) the asset/business may be jointly owned by the parties;

(b) the asset/business may belong to one of the parties;

(c) the asset/business may belong to a third party; or

(d) there may be a dispute over the ownership of the asset/business.

22 There are also different types of assets/businesses: real estate, vessels, moveable chattels, bank accounts, money, and so on. The nature of the assets and the ease or difficulty with which they could be disposed of or dissipated,

are relevant to consider on the question of risk of dissipation: *Guan Chong* at [20(1)].

23 It is not easy to formulate a specific test for risk of dissipation, which can be applied across all permutations of ownership and types of assets/businesses. The DJ, however, put forward such a test: that if the defendant closes a business which is the subject matter of the parties' dispute, that is *prima facie* risk of dissipation even if a reasonable explanation is provided.

24 In *UCO Bank v Golden View Maritime Pte Ltd* [2003] SGHC 271 ("*UCO Bank*"), a company had disposed of its only vessel, a "25-year old vessel" which "was at the end of her trading life" and "given her condition it was neither economical nor commercially viable to continue to trade her". The court did not regard that to be indicative of a risk of dissipation of assets, as the explanation "was perfectly plausible and a common occurrence in the shipping circle" – the sale was legitimate and in the ordinary course of the company's business: at [11]. The court did not accept the argument (at [9]) that because the company (a one-ship company) had sold its only trading asset and so had ceased business, that *in itself* is evidence of risk of dissipation. The court (at [10]) noted [19] of *Guan Chong*, which related to property being put up for sale "for no sufficient reason", or a company "just" ceasing business.

25 In *UCO Bank*, the company which had disposed of the vessel was not the defendant in that suit, it was the defendant in another suit by the same plaintiff (at [7]). But if the company *were* the defendant in the former suit, and the vessel *were* the subject matter of the parties' dispute, it would not follow that the legitimate sale of the vessel in the ordinary course of the company's business *would* then establish risk of dissipation. But that is what the DJ's modified approach would entail.

26 I did not agree with that. If a transaction does not establish risk of dissipation because there is a reasonable explanation for it, that does not change merely because the transaction involves an asset or business that is the subject matter of the parties' dispute.

27 The Court of Appeal in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 stated at [64]: "The overarching test is whether there is objectively a real risk that a judgment may not be satisfied because of a risk of unjustified dealings with assets". A *justified* dealing with an asset (or business) does not show a risk of *unjustified* dealings with assets. If the court accepts that there is a "reasonable", "sufficient", "plausible" or "justified" explanation for the asset disposal (or business closure), the court should not freeze the defendant's assets just because the asset disposed of (or the business closed) is the subject matter of the parties' dispute.

28 With respect, I did not think a modification of the approach in *Guan Chong* (and other Court of Appeal decisions) was warranted. The court should not lightly find that risk of dissipation is established, let alone from transactions for which there is a reasonable explanation.

29 Rather than applying a hard and fast rule as the DJ did, the nature of the asset (or business) and its connection with the parties' dispute should be considered in evaluating whether there is a real risk of dissipation. I do so below.

Was there a real risk of dissipation justifying a Mareva injunction?

30 In the present case, Seng Huat did not claim that the Business was jointly owned. Instead, in its statement of claim it acknowledged that the Business was "the Defendant's business" (at paras 6 and 7). Seng Huat claimed "40% share in the Defendant's profits of the business" (para 9), and a set of "the Defendant's

accounts" monthly (para 10). Thus, while one might say the Business was the "subject matter" of the dispute, it was still Bugis Founder's business; with Seng Huat claiming a share in Bugis Founder's profits, and asking to be provided with Bugis Founder's accounts. That is moreover consonant with the Collaboration Agreement that Seng Huat sued on: clause 1 recognises that Bugis Founder would be the party carrying on the Business at the Bugis outlet, and that it would be Bugis Founder's business operations that the parties would be sharing profits and losses in (as further provided for in clause 6). Clause 5 recognises that Bugis Founder's accounts were to be provided to Seng Huat. Under clause 10, the parties also agreed that their relationship was not a partnership or joint venture.

31 The Business which was closed was Bugis Founder's; it was not jointly owned. That is no different from the business closures discussed in *Guan Chong*, or *UCO Bank*.

32 Furthermore, the parties' collaboration in relation to the Business had already come to an end *before* Bugis Founder closed the Business. On 2 March 2020, Seng Huat gave written notice to terminate the Collaboration Agreement. Bugis Founder submitted that the Collaboration Agreement had ended even earlier than that: clause 4 of the Collaboration Agreement provides that the agreement shall, unless earlier determined by Seng Huat, remain in force so long as the Lease (as defined in the Colloboration Agreement) continues to subsist, and the Lease had ended by the end of 2018. On either party's case, the parties' collaboration had ended some time before Bugis Founder closed the Business. Seng Huat was not claiming that it had lost any *future* profits because of the closure of the Business: its claim for accounts related to an *earlier* period in time, its claim for a share of profits likewise.

33 Bugis Founder's explanation that it closed the Business because it was suffering losses as a result of the pandemic was a perfectly plausible, reasonable, explanation. It was consistent with what had been said in social and print media in July 2020, following a period of over two months where dining-in was not allowed (from the start of the 2020 "circuit breaker" on 7 April 2020, until dining-in resumed in Phase 2 from 19 June 2020). Moreover, the *potential closure* of the Business had publicly been mentioned: Bugis Founder did not just close the Business surreptitiously at the end of September 2020. Bugis Founder did not inform Seng Huat of the closure directly, but the parties' collaboration had already ended, and moreover, they were in litigation. Bugis Founder's closure of the Business, with a reasonable explanation for that closure, is not evidence of a real risk of dissipation of assets notwithstanding that Bugis Founder did not directly inform Seng Huat of the closure.

34 Bugis Founder also explained that for the period of the parties' collaboration, the Business had made a loss overall: there were no profits to share with Seng Huat, and nothing to return to Seng Huat in relation to the rental deposit. In this regard, Bugis Founder relied not only on what had been said on affidavit, but also accounts for 2017 and 2018 that were not before the DJ at the injunction hearing.

35 There was no evidence that Bugis Founder had *sold* the Business, it had simply *closed* the Business. This is not a case where an asset (or business) had become proceeds of sale that could more easily be dissipated (as in *Guan Chong*). Bugis Founder's closure of a loss-making business to stop incurring losses, was not illegitimate or out of the ordinary.

36 The court did find on Seng Huat's summary judgment application, that Bugis Founder had breached its obligation under clause 5 of the Collaboration

Agreement – to regularly provide its accounts to Seng Huat, for the full period of their collaboration. Some information had been provided to Seng Huat for part of the period, but that was not to Seng Huat's satisfaction and the court found Bugis Founder to be in breach. That failure to provide accounts, taken together with the other circumstances in the case, still did not establish a real risk of dissipation of assets. In particular, Bugis Founder's conduct was not indicative of dishonesty from which a real risk of dissipation of assets might be inferred.

Conclusion

37 In the circumstances, I set aside the injunction.

38 I conclude with a note of appreciation to YAC Ms Fiona Chew, whose research, and written and oral submissions, assisted me in reaching my decision.

Andre Maniam
Judicial Commissioner

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