Transfield Shipping Inc Panama v Sino-Add (Singapore) Pte Ltd
[2001] SGHC 239

Case Number : Suit 763/2001X, SIC 1487/2001

Decision Date : 27 August 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Danny Chua with Magdalene Chew (Joseph Tan Jude Benny) for the plaintiffs; Philip Ling with Ng Ee San (Wong Tan & Molly Lim) for the defendants

Parties : Transfield Shipping Inc Panama — Sino-Add (Singapore) Pte Ltd

Judgment:

1. The plaintiff company is the time charterer of the vessel *'Angelic Spirit'*. In April 2001, the plaintiffs entered into a voyage charter-party with the defendants, a company incorporated in Singapore. By this contract, the defendants employed the vessel to carry cargo from Panaji, a port on the west coast of India, to a port in China. In the event, loading took place at the port of Mormugao, India, and less than the full amount of cargo contracted for was loaded.

2. Arising out of this voyage charter-party, the plaintiffs have made a claim

against the defendants for freight charges, demurrage charges, dead freight, deviation costs, bunker charges and port charges. The total amount claimed by the plaintiffs is US$658,995.37. They sent the defendants an invoice dated 8 June 2001 for the amounts claimed but did not receive payment.

3. This action was started on 20 June 2001. Immediately thereafter, the plaintiffs applied for and obtained a mareva injunction over the assets of the defendants and another company known as Sino-Trust Shipping Ltd ('Sino-Trust') to the value of US$700,000. The applications before me were applications made by the defendants for the injunction order to be discharged and for the proceedings in the action to be stayed. I dismissed both applications.

Discharge of injunction

4. The grounds of the application for discharge of the injunction were:

> (1) that the plaintiffs had not established a real risk of dissipation of assets by the defendants; and
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> (2) that the plaintiffs had been in breach of their duty to make full disclosure of all material facts and circumstances in their application for the injunction.

The defendants conceded that the plaintiffs had established a good arguable case.

(i) Dissipation

5. The affidavit leading to the injunction was made by the plaintiffs' lawyer, Mr Navinder Singh. He stated that the defendants had their principal place of business in Singapore and that their registered address at the Registry of Companies ('ROC') was at 10 Anson Road, #35-08 International Plaza, Singapore. However, the address of the defendants given on the charter-party was 10 Anson Road, #30-05A International Plaza.

6. According to Mr Singh, the first invoice sent by the plaintiffs on 8 June 2001 was for the sum of US$643,652.12. The defendants did not respond. A second demand for payment was sent on 13 June, a third on 14 June and a fourth on 18 June. The defendants did not respond to any of these demands.

7. On 18 June, an inspection of the registered address of the defendants was commissioned by the plaintiffs' solicitors. This visit disclosed that the defendants did not have their own office. Their registered address was occupied by a firm of accountants called 'Paul Wan & Co'. The main doors to the office of Paul Wan & Co listed all the companies that had their registered offices at the said firm and the defendants' name was found on the board. Further, according to information from a telephone company, the defendants did not have a telephone or fax number and the business directory did not indicate the existence of any company by the name of Sino-Add (Singapore) Pte Ltd. Finally, in conference calls between the employees of the plaintiffs namely Messrs Chu Kong, Newmen Lock and Yu Ziao Feng, and one Steven Zhang of the defendants, it was intimated to the plaintiffs' employees that the defendant company would be abandoned if legal action was taken against it.

8. Mr Ling, counsel for the defendants, drew my attention to several cases which had reiterated the principle that a plaintiff seeking a mareva injunction must satisfy the court that there is a real risk of the debtor dissipating or disposing of his assets in order to intentionally deprive the plaintiff creditor of satisfaction for his debt. This principle was not, and could not be, disputed by the plaintiffs.

9. Mr Ling submitted that the plaintiffs had made a bare assertion that there was a real risk of the defendants removing their assets from the jurisdiction simply because the defendants were not actively trading in Singapore and maintained a registered address that was care of Messrs Paul Wan & Co. The defendants submitted that the fact that they did not have a telephone or fax number nor a business directory listing was wholly irrelevant and did not in any way show a risk of dissipation of their assets. Mr Fan He Li, a director of the defendants, had affirmed in his affidavit that Paul Wan & Co had been instructed to handle all incoming calls and correspondence for the defendants as well as to provide them with corporate secretarial, audit and accounting tax services. Accordingly, the defendants had seen no need to apply for a separate telephone or fax number. The defendants' decision not to have a telephone or fax number registered under their own name was a purely commercial one and did not mean that they had a transient presence in Singapore as alleged by the plaintiffs. Nor did it lead inevitably to the conclusion that there was a real risk of dissipation of the defendants' assets.

10. As for the conference calls between the plaintiffs' employees and Steven Zhang, Mr Fan affirmed that he had spoken with Steven Zhang and that the latter had confirmed that he had not uttered any threat to abandon the defendant company if legal action was taken. What he had said, in response to the plaintiffs' threat to sue and wind up the defendants, was that the plaintiffs could do whatever they liked to the defendants as he was in no position to stop them.

11. Mr Fan also averred that the plaintiffs had conveniently failed to highlight the fact that the defendants had been incorporated on 29 April 1998 and had a paid-up capital of S$800,000. Since then they had engaged in substantial business transactions and on sales revenues of $360,814 had made profits of more than $14,000 in 1998 whilst in 1999, their sales revenue exceeded $11 million and their profits came to some $113,000. It was also pointed out on behalf of the defendants that they had been filing their annual returns and conscientiously paying their taxes to the Singapore government.

12. Counsel submitted that even if the plaintiffs' version of events was to be accepted by the court, what was most important and significant was the fact that notwithstanding the plaintiffs having issued an arbitration notice on 14 June 2001 followed by a formal demand for payment on the same day through their London solicitors, the defendants had taken no steps whatsoever to dissipate or otherwise dispose of their assets whether in Singapore or elsewhere.

13. The plaintiffs, on the other hand, submitted that, with good cause, they had become fearful after the two telephone conversations that Steven Zhang had had with their employees. In one he had said that the defendants would 'walk away' if the plaintiffs proceeded with legal action and in another that the defendants would 'disappear' and that they had no assets at all. Far from being a bare assertion, this allegation was based on the evidence of two of the plaintiffs' employees as to what had been told to them directly. Subsequent to the grant of the injunction, these employees had filed affidavits in which they verified the plaintiffs' version of events which had first been put forward through their solicitors.

14. In my view, the plaintiffs had established that there was a risk of the assets being removed from Singapore so as to avoid satisfying a judgment against the defendants. First, they had given evidence of direct threats by the defendants to disappear. Although the plaintiffs' accounts of the telephone conversations were disputed by the defendants, the court could not at this interlocutory stage give no weight at all to the evidence of the plaintiffs simply because it was disputed. There were two employees of the plaintiffs who were prepared to go on oath with their allegations and that stand had to be given due consideration. The allegation made was not a bare allegation. It had a factual basis in what allegedly occurred during conversations between the parties.

15. Secondly, although the defendants were a company incorporated in Singapore, this in itself did not mean that they had a substantial presence here and were unlikely to remove assets from this jurisdiction in order to avoid the affect of a judgment against them. It was notable that all three of

the directors of the defendant company were Chinese citizens. These three persons were also the only shareholders of the company. Apart from one of them, Zhang Shujing (whom I take to be Steven Zhang), the addresses of the directors and shareholders given in the ROC's records were addresses in Heping District Shenyany China. For Steven Zhang a Singapore address was given, but that address was the address of Paul Wan & Co's office. No residential address in Singapore was given. He too, therefore, did not appear to be physically present in Singapore on a regular, let alone permanent, basis.

16. Further, the defendants did not appear to have any commercial presence in Singapore at all. Their address at Paul Wan & Co's office could not be considered a commercial address. As the plaintiffs submitted, whilst a company may use the address of an accounting firm as its registered address, the accounting firm does not carry on the business of the company nor participate in its day-to-day running. At best, the accounting firm would provide corporate secretarial support in terms of the filing of the annual returns on behalf the company and also lodgement of any necessary documents with the ROC. The company would usually carry on its business at another place that would be its ordinary business address.

17. The plaintiffs submitted that the defendants' presence in Singapore was limited to the existence of a brass plate and was a transient one. As an accounting firm, Paul Wan & Co were unlikely to engage in facilitating or carrying out ship chartering business for and on behalf of the defendants. I agreed that Paul Wan & Co were not likely to carry on business as ship charterers or handle the defendants' business activities on their behalf. It was clear from the evidence that the plaintiffs had all along been dealing with Mr Zhang and other directors of the defendant company. They had not been dealing with Paul Wan & Co or any of the latter's employees. The defendants' presence in Singapore was a legal one only. Apart from bank deposits, many of which turned out to be held in the name of Sino-Trust instead of the defendants' own name, the defendants were not able to point to any assets here. They had no staff, no office, and not even a telephone or fax number in Singapore. Obviously, their physical presence in Singapore was limited to the bare minimum required by the law ie the notice board outside the offices of Messrs Paul Wan & Co.

18. All the circumstances showed that the defendants' connection with Singapore was legal and peripheral only. In view of the threat that had been made and the failure of the defendants to deal in any substantive way with the plaintiffs' demands for payment, a serious risk of dissipation or removal of assets had been established.

(ii) Non-disclosure

19. On this ground, the defendants relied on the established principles that parties seeking injunctions must make full and frank disclosure of all material facts and circumstances, including matters which are or may be adverse to them and that this duty of disclosure applies not only to facts known to such party but to those which he would have known if he had made proper enquiries. See *Bank Mellat v Nikpour* [1985] FSR 87 and *Brinks-Mat Ltd v Elcombe* [1980] 3 All ER 188.

20. The defendants submitted that the plaintiffs had failed to make full and frank disclosure of the following material facts:

> (1) that far from having a 'transient presence' in Singapore, the defendants were in fact incorporated here in April 1998 with a substantial paid-up capital of $800,000;
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> (2) based on the audited accounts of the defendants for the years 1998 to 1999, the defendants had engaged in substantial business transactions including with the plaintiffs themselves;
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> (3) that they had by their London solicitors given formal notice to the defendants on 14 June 2001 that they were referring the dispute for arbitration in London (although the letter was exhibited in Mr Singh's affidavit, the defendants' complaint was that the fact had not been disclosed in the text of the affidavit);
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> (4) that they had not released the cargo shipped to the consignee and had effectively asserted a lien over the same and this meant that they had some security for the claim.

21. Dealing with the last point first, the fact that the cargo may not have been released to the consignee was not relevant to the plaintiffs' claim against the defendants. The defendants as charterers were liable, subject to any available defences, not only for freight but also for dead freight and demurrage under the charter-party. The plaintiffs' claim was not against the shippers or the cargo and the plaintiffs were entitled to look to the defendants to satisfy their contractual liability. The defendants were not named as shippers or receivers on the bill of lading. Any claim that the plaintiffs might have had for freight under the bill of lading was a claim arising under a separate contract and had nothing to do with the defendants' liabilities.

22. As regards the incorporation of the defendants in Singapore and their paid-up capital, the plaintiffs had disclosed copies of their searches at the ROC that made it quite clear what the paid-up capital of the defendants was. The plaintiffs had specifically stated in their affidavit that the defendants were incorporated in Singapore and had a registered office here. All pertinent information as to directors, shareholders, authorised, issued and paid-up capital was in the ROC searches and I do not think it was necessary for the plaintiffs to specifically reproduce that information in the text of their affidavit in order to disclose it. The ROC search is a document that is easily read and understood. Any registrar or judge hearing the plaintiffs' application for injunction would quite naturally and automatically turn to such a search in order to obtain information about the paid-up capital of the company whom it was alleged was on the verge of disappearing in order to find out what minimal information about the company could be gleaned from the official records.

23. The fact that the defendants had engaged in substantial business transactions did not seem to me to be a material matter for disclosure. The issue was whether there was a risk of dissipation or removal of assets. The defendants were charterers and traders who had been able to carry on their 'substantial business transactions' from outside Singapore with only a nominal presence here. In the current financial environment where large sums of money can be moved from one jurisdiction to another in the blink of an eye and where business transactions in any part of the world can be effected from any other part of the world through the use of the telephone, the fax and the e-mail, the magnitude of the defendants' business transactions seemed to me to be a neutral factor which would not affect the risk of dissipation one way or the other.

24. As regards the point on arbitration, paragraph 16 of Mr Singh's affidavit stated specifically that by faxes dated 14 June 2001, the plaintiffs' English solicitors, Messrs Holmes Hardingham, had invited the defendants to proceed with arbitration and that once again no response had been received from the defendants. In view of this, there was no substance in the defendants' assertion of non-disclosure of the intended arbitration proceedings especially as they themselves admitted that the text of the solicitors' notice had been annexed to the affidavit as an exhibit.

25. I found no merit in any of the assertions made by the defendants of material non-disclosure.

Stay of proceedings

26. The defendants' submission that the proceedings should be stayed in favour of arbitration was based on clause 32 of the charter-party. This provides that 'General Average and arbitration if any to be settled and adjusted in London, English Law to apply'. The defendants argued that the true construction of this clause was that it evidenced the parties' agreement to settle all disputes under the charter-party by arbitration in London. They referred to the case of *Tritonia Shipping Inc v South Nelson Forest Products Corporation* [1996] 1 LLR 114. The charter-party in that case contained a clause that read simply 'Arbitration to be settled in London' and there was a dispute over whether this clause amounted to a binding submission to arbitration. It was held that this clause, brief as it was, could only have the one meaning and must be expanded to mean. 'Any dispute under this charter-party to be settled by arbitration in London'.

27. The plaintiffs argued that the clause in this case did not have the one meaning that was found to exist in the *Tritonia* decision. They called in aid the holding in *The 'Ioanna'* [1978] 1 LLR 238. The first sentence in that clause in that case (clause 13) was almost identical to clause 32 in the present charter-party. It read 'General Average & arbitration to be settled according to York-Antwerp Rules 1950 in London …'. The question there as it was here was whether the clause meant that the parties had agreed that all matters in dispute under the charter-party should be settled by arbitration in London or whether it meant that all disputes relating to general average had to be so settled and that there was no agreement to arbitrate any other type of dispute. It should be noted that in that case the phrases '& arbitration' and 'in London' had been typed into clause 13 of the charter-party as it appeared on the printed Gencon form.

28. On appeal, it was held that on the true construction of the clause the words '& arbitration' indicated that the parties were agreeing to prefer arbitration to litigation in the Courts of any country for any dispute as to general average which might arise and it was English law which was to apply to the settlement of these disputes. In the course of his judgment, Stephenson LJ referred to the *Tritonia* case but did not find much assistance in it for his task of construing clause 13. Referring to *Tritonia* and another decision, the judge stated that both those cases dealt with a separate arbitration clause, and not a reference to an arbitration introduced to a clause dealing with a particular subject matter.

29. In coming to his decision, Stephenson LJ adopted the arguments of counsel (one Mr Collins) who propounded the view that the agreement on arbitration was limited to general average matters:

> 'It seems to me one must, without the assistance of authority, simply look at the wording of this clause, and doing that, it does seem to me naturally to have the meaning which Mr Collins gives it and asks us to give it. He points out that the law which would apply to a general average dispute is the law of the port of destination, and that adjustments of general average can be settled in one place and be nonetheless governed by the law of the port of destination; and he referred us to r. G of the York-Antwerp Rules, 1950. There is, therefore, nothing difficult or contradictory in a provision that general average is to be settled in accordance with the York-Antwerp Rules; the Gencon form does not print or provide a space for inserting the place where that adjustment is to be; other forms of charter-party do, and the insertion of the words "in London" first of all determined where the adjustment is to take place and probably which law is to apply to disputes as to general average. Then he submits – and I do not think Mr Tomlinson challenged this – that disputes as to liability to make general average contribution are by no means unusual and it is, therefore, reasonable to provide for the settlement of those disputes by arbitration, and the words "& arbitration", there being no provision for arbitration in the York-Antwerp Rules referred to in this clause, first of all show that the parties are agreeing to prefer arbitration to litigation in the Courts of any country for any dispute as to general average which may arise, and, secondly, make definite and clear that which might have been only probable but uncertain, that it is English law which is to apply to the settlement of those disputes.'

30. In the present case, the charter-party contract comprised two parts. The first part was the printed ' "Gencon" Charter (As Revised 1922 and 1976)' form with agreed amendments and at the bottom of this form it was stated that clauses 18 to 37 attached were incorporated as part of the charter-party. These clauses were typewritten clauses and included clause 32 which I have already

quoted. For the purposes of this contract, general average was dealt with in two clauses: the aforesaid typewritten clause 32 and clause 11 which appeared in the printed form. Clause 11 stated 'General average to be settled according to York-Antwerp Rules, 1974. Proprietors of cargo to pay the cargo's share in the general expenses even if same have been necessitated through neglect or default of the Owners' servants'.

31. It appeared to me that when the two clauses dealing with general average were taken together ie the printed clause providing for the governing rules and the typewritten clause providing for the place where general average was to be settled and the governing law of such settlement, the reasoning of Stephenson LJ in construing the clause before him applied equally to the clauses before me. I therefore accepted the submission of the plaintiffs that clause 32 in the present charter-party related only to arbitration of general average disputes and was not a general arbitration agreement. This being the case, there was no question of an automatic stay of the present proceedings as the dispute brought to this court had nothing to do with general average.

32. The defendants also contended that the plaintiffs, having given notice to their solicitors on 14 June that they wished to arbitrate, had by such action commenced arbitration proceedings. They had then commenced legal proceedings in Singapore claiming identical reliefs as those claimed in the intended arbitration proceedings in London. Counsel submitted that the plaintiffs having made an express election in the matter, their conduct in bringing simultaneous proceedings in two separate jurisdictions for the same claims arising out of the same subject matter was an abuse of process.

33. The plaintiffs' answer to the above point was that they were not obliged by clause 32 to arbitrate but that they did have the freedom to agree with the defendants that the disputes between the parties should be litigated by arbitration in London. The notice of arbitration by their English solicitors was nothing more than an invitation to the defendants to settle the dispute in this manner. The defendants had not responded in any way to this invitation nor had they agreed to the joint appointment of the person nominated by the plaintiffs as sole arbitrator nor had they taken any steps to appoint their own arbitrator in connection with the arbitration. In these circumstances, I took the view that the notice issued by the plaintiffs' solicitors had lapsed or had been revoked by the plaintiffs' commencement of legal proceedings in Singapore. Since the defendants had not indicated their agreement to arbitrate in any way prior to the commencement of the present proceedings, I did not consider that they had any ground to apply for a stay on that basis before me. The situation would have been different had the defendants replied promptly to say that they were willing to arbitrate because then the plaintiffs would have been bound to proceed in that manner. Instead, it was only in the affidavit which Mr Fan filed in support of the defendants' application for a stay that he indicated that the defendants were agreeable to referring the matter to arbitration and would be instructing their own solicitors in London to advise the latter accordingly. It appeared to me that this was an opportunistic submission to arbitration that would not have occurred but for the institution of these proceedings and the issuing of the mareva injunction.

34. I was satisfied that there was no basis on which to order a stay of the proceedings.

JUDITH PRAKASH
JUDGE
SINGAPORE