S E Shipping Lines Pte Ltd *v* Austral Asia Line Pte Ltd
[2012] SGHC 220

Case Number : Originating Summons No 638 of 2012 (Summons No 3368 of 2012)

Decision Date : 30 October 2012

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Govindarajalu Asokan (RHTLaw Taylor Wessing LLP) for the plaintiff; Kenneth Tan SC (instructed), Bazul Ashhab bin Abdul Kader, Mabel Leong Qing Jing and Ang Kai Li (Oon & Bazul LLP) for the defendant.

Parties : S E Shipping Lines Pte Ltd — Austral Asia Line Pte Ltd

Insolvency law – Winding up – Debtor applying for injunction to restrain filing of winding-up petition

30 October 2012 Judgment reserved

Choo Han Teck J:

1 The plaintiff, S E Shipping Lines Pte Ltd, is seeking a declaration that any application by the defendant, Austral Asia Line Pte Ltd, to wind up the plaintiff would amount to an abuse of the process of court, and an injunction against the defendant from filing any application to wind up the plaintiff. The plaintiff chartered the vessel "*AAL Shanghai*" from the defendant but failed to pay freight. By a letter dated 12 June 2012, the defendant's solicitors demanded repayment of outstanding freight in excess of USD 2 million and threatened to wind up the plaintiff if payment was not made within 21 days. As the freight remained unpaid, the defendant claimed the right to commence winding-up proceedings against the plaintiff, pursuant to s 254(1)(*e*) read with s 254(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed).

2 The charterparty between the plaintiff and defendant was entered into to allow the plaintiff to transport cargoes from South Korea and China to Brazil, under a distinct contract between the plaintiff and Suzlon Energy Limited ("SEL"). SEL was the owner of the cargo, and the consignee was Suzlon Energy Eolica do Brasil Ltda ("SEEBL"). Following non-payment by the plaintiff, the defendant exercised its lien over the cargo onboard *AAL Shanghai*. It also commenced a suit against SEL and SEEBL in Brazil, and issued a Notice of Arbitration against the plaintiff.

3 An injunction will be granted if the debtor is able to show that it is likely that a winding-up order would not be made if a winding-up petition is presented (*Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at ("*Metalform*") [77]). This is hardly one such case. Counsel for the plaintiff, Mr Govindarajalu Asokan, raised a host of objections to winding-up proceedings by the defendant. First, he argued that the plaintiff had tendered payment of the outstanding freight, which the defendant had unjustifiably rejected. However, the plaintiff's offer to pay the freight had been conditional and, in any event, remains unfulfilled. Second, he argued that the defendant had obtained security for its claim because SEEBL had paid a sum of USD 2,547,440.57 into the Brazilian court, and that having sued in Brazil and commenced arbitration, the defendant would be abusing the process of court if it were allowed to present a winding-up petition here. I find that the issues have been unnecessarily complicated by the plaintiff's vague submissions, which failed to address important facts. The contract under which the present debt has arisen is the charterparty between plaintiff and the defendant. This is entirely separate from the carriage contract between the plaintiff and SEL.

Further, the Brazilian proceedings concerned SEL and SEEBL, not the plaintiff, and the arbitration proceedings relate to separate claims. The plaintiff cannot piggyback on the security SEEBL paid into the Brazilian court as it related to a separate claim against a different party in proceedings which the plaintiff was not part of.

4 Third, Mr Asokan claimed that the plaintiff had cross-claims against the defendant arising from the latter's alleged unlawful exercise of its lien over the cargo on board *AAL Shanghai*. In "cross-claim" cases, the court will incline towards granting an injunction if there is a distinct possibility that the genuine cross-claim may exceed the undisputed debt (*Metalform* at [82]). However, the case that Mr Asokan sought to make out was not only unclear, but reasonably disputed. The charterparty between the plaintiff and the defendant expressly entitled the defendant to exercise a lien on all cargo for any amount due under this contract and the costs of recovering the same. The plaintiff has also failed to show that its cross-claim exceeded the value of the defendant's claim for freight. It need only be reiterated that a debtor asserting a genuine and substantial cross-claim must do more than merely assert the fact that a cross-claim exists, and that the court is entitled to reject evidence because of it is inherently implausible, contradicted or unsupported by the documents (*Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2011] 4 SLR 997 at [47]).

5 Under such circumstances, no reasonable court would declare that the defendant would be abusing the process of court if it were allowed to proceed with the winding-up proceedings. The plaintiff is entitled to challenge the winding-up petition and it lies in the jurisdiction of the winding-up court to determine whether there was any merit in the petition, and further, whether the petition was an abuse of the process of court. No court would grant an order preventing a party from seeking redress, whether by writ or petition, unless the evidence is clear and incontrovertible.

6 For the reasons above, the application in Originating Summons No 638 of 2012 is dismissed. Costs are to follow the event and be taxed if not agreed.