IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 238

Originating Summons No 635 of 2019
(Registrar's Appeal No 240 of 2019)

In the matter of Order 24, Rule 6(1), 6(5) of the Rules of Court (Cap. 322, R5, 2014 Rev Ed)

Between

China Merchants Bank Co Ltd

… *Plaintiff*

And

Sinfeng Marine Services Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Discovery of documents] — [Pre-action discovery]

TABLE OF CONTENTS

China Merchants Bank Co Ltd
v
Sinfeng Marine Services Pte Ltd

[2019] SGHC 238

High Court — Originating Summons No 635 of 2019 (Registrar's Appeal No 240 of 2019)
Tan Siong Thye J
2 September 2019

4 October 2019

Tan Siong Thye J:

Introduction

1 This is an appeal against the decision of the Assistant Registrar in Originating Summons No 635 of 2019 ("OS 635/2019"). The Assistant Registrar had allowed the application of China Merchants Bank Co Ltd ("CMB") to obtain pre-action discovery from Sinfeng Marine Services Pte Ltd ("Sinfeng") in its entirety. Sinfeng appealed against that decision. After having heard the parties' submissions, I dismissed the appeal on 2 September 2019. Sinfeng has filed an appeal against my decision. I now give my reasons.

Brief facts

2 Sinfeng is a company engaged in the trading of ships, marine equipment,

fuel oil and oil products.[1] Coastal Oil Pte Ltd ("CO") is a supplier of oil products to Sinfeng.

3 Between September and October 2018, CMB entered into a financing arrangement with CO that involved, amongst others, the extension of a loan facility in return for the assignment of receivables owing by Sinfeng to CO under a bunker supply contract with reference number TGS/1809-034.[2]

4 On 26 September 2018, CO entered into a bunkers contract (TGS/1809-034) with Sinfeng for the supply of 25,000 metric tonnes of fuel oil. On 29 October 2018, CO informed CMB of this bunkers contract and CO also sent a copy of this contract together with an acknowledgment, signed by Sinfeng's Mr Liang Yuwei ("Liang"), of CO's assignment to CMB of the receivables in relation to this bunkers contract ("the Acknowledgement"). On the same day, CMB had a meeting with Liang of Sinfeng and Mrs Huang Peishi of CO in which the Acknowledgement was allegedly countersigned again by Liang.[3] As a consequence, CMB allowed CO to draw down on US$9,971,752.84 under the loan facility.[4]

5 On 13 December 2018, CO went into voluntary liquidation. The liquidation constituted an event of default that led to CMB's cancellation of the loan facility on 14 December 2018.[5] CMB also demanded payment from

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1 Du Jing's affidavit at paras 3–4.

2 Du Jing's affidavit at para 14.

3 Du Jing's affidavit at para 1; Teo's affidavit at para 7; Liang's affidavit at paras 11–14.

4 Du Jing's affidavit at para 17.

5 Du Jing's affidavit at paras 18–20.

Sinfeng on the bunkers contract which would become due for payment on the seven invoices in January 2019 from Sinfeng to CO.

6 On 14 December 2018, CMB's representatives went to Sinfeng's office to seek confirmation that Sinfeng would be paying the assigned proceeds to CMB under the said invoices from CO totalling US$12,464,691.05. Liang denied that there was a contract with the reference number TGS/1809-034 on 90-day payment terms ("the 90-day contract"). Instead, Liang alleged that this was the first time Sinfeng had heard of the 90-day contract and that Sinfeng's stamp and his signature on the 90-day contract were forged. Sinfeng denied owing CO any money as it alleged that all transactions, including the payment on the invoices, between CO and Sinfeng had been performed.[6] According to Liang, he had signed the Acknowledgement for a *different* contract with CO bearing the same reference number – one that was on cash-in-advance payment terms ("the CIA contract") rather than 90-day payment terms. On the other hand, according to CMB, Liang refused to comment on why he signed the Acknowledgement and had not brought up the CIA contract at the 14 December 2018 meeting. Instead, Sinfeng had stated categorically that there was *no* 90-day contract with CO bearing reference number TGS/1809-034.[7]

7 Around 16 January 2019, Sinfeng emailed CMB's lawyers to inform that Liang did not sign on the 90-day contract and that Sinfeng had entered into the CIA contract although Sinfeng had not signed it. In the email, Sinfeng attached the following documents:

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6 Liang's affidavit at paras 7, 17.

7 Teo's affidavit at para 11.

(a) a copy of the CIA contract (CMB alleges that this was the first time the CIA contract was mentioned and that the copy attached was unsigned);[8]

(b) an email from CO to Sinfeng stating that the deal involved Sinfeng's purchase of bunkers from CO for on-sale to a third party;

(c) an email from Sinfeng to CO dated 26 October 2018 enclosing an acknowledgement of notice signed by Sinfeng; and

(d) a copy of Sinfeng's bank remittance advice evidencing that Sinfeng had made payment of US$12,486,600.00 to CO's bank account with CMB.

8 CMB then wrote to Sinfeng several times seeking further documents to support Sinfeng's claim that the 90-day contract was a sham. Sinfeng did not accede because the documents provided were in its view sufficient. Eventually, CMB took out OS 635/2019 to seek pre-action discovery of the following documents from Sinfeng:[9]

(a) all documents evidencing the CIA contract;

(b) invoices and/or document(s) against which payment of the US$12,486,600.00 to CO was made;

(c) documents evidencing the supply of the bunkers; and

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8 Teo's affidavit at para 12(3).

9 Du Jing's affidavit at para 30, OS 635/2019.

(d) documents evidencing payment made by the end-buyers to Sinfeng for the bunkers.

The parties' cases

Sinfeng's case

9 Sinfeng argued that the Assistant Registrar was wrong to allow pre-action discovery. CMB had never explained what the gap in its knowledge was, such that the documents sought would fill and enable it to formulate a cause of action. Further, the Assistant Registrar had mistakenly thought that CMB had only two causes of action (*ie*, fraudulent misrepresentation or conspiracy to injure) and had ignored the fact that CMB had an accrued cause of action as an assignee of receivables. The gravamen of CMB's claim was that it had disbelieved Sinfeng, but mutual disbelief could not justify pre-action discovery because cases that come to court inevitably arise because of such disbelief. In any case, CMB had not explained why it was not convenient or just for the information sought to be obtained after proceedings were commenced.[10]

10 Sinfeng also alleged that any claim from CMB would be "frivolous and speculative"[11] as on 31 October 2018, CMB had received the purchase price of US$12,486,600 for the bunkers deal. Thus, there was no loss to CMB. Sinfeng submitted that the pre-action discovery was CMB's "fishing expedition [that] hinged on frivolous and speculative claims to raid the cupboards of [Sinfeng] for the purposes of finding fault".[12]

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10 Sinfeng's submissions at paras 6–9.

11 Sinfeng's submissions at para 35.

12 Sinfeng's submissions at para 41.

CMB's case

11 CMB argued that the documents sought were relevant to the question of whether the CIA contract was genuine, which determination was necessary for it to ascertain whether it had a viable claim against Sinfeng.[13] CMB was not a party to the CIA contract and had no knowledge regarding this beyond what it had been told by CO or Sinfeng. If the CIA contract were genuine and Sinfeng had already made payment to CO as alleged, then CMB might not have a viable claim under the assignment acknowledged in the Acknowledgement. Conversely, if the CIA contract were a sham, it was questionable why Sinfeng signed on the Acknowledgement – other than to mislead CMB that the subject matter of the security existed. There was a reasonable basis for CMB's suspicion given that it had procured Seaweb investigation reports which revealed that the bunkers which Sinfeng claimed to have supplied were not in the locations where they were supposed to be.

My decision

12 The applicable law was not in dispute. The relevant provisions under the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") can be found in Order 24, and are as follows:

> **Discovery against other person** (O. 24, r. 6)
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> 6.—(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.
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> …

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13 Sinfeng's submissions at paras 3, 4(8), 14, 15.

> (5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.
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> …
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> **Discovery to be ordered only if necessary** (O. 24, r. 7)
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> **7.** On the hearing of an application for an order under Rule 1, 5 or 6, the Court may, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

13 A plaintiff seeking pre-action discovery must show that the documents sought are relevant and necessary. Order 24 r 7 of the ROC clearly states that for such application to succeed it must also be necessary for a fair disposal of the matter or for saving costs.

14 If a potential plaintiff is in possession of sufficient facts to commence proceedings, pre-action discovery is unnecessary and accordingly would not be granted (*Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185 ("*Ching Mun Fong*") at [23]):

> … the scheme of pre-action discovery is to accommodate the situation where a potential plaintiff does not have sufficient facts to commence proceedings. This is consistent with its purpose being to allow a potential plaintiff to determine whether he has a "good cause of action". It follows that pre-action discovery is unnecessary where an individual is in a position to commence proceedings. In this regard, we think the phrase in O 24 r 7, "discovery is not necessary, or not necessary at that stage of the cause or matter" lends weight to this approach.

15 Further, as stated in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 at [49]:

> Pre-action disclosure, while not exceptional, is not usual. A court should not make an order if it has not been provided with sufficient information to adequately assess the necessity of disclosure. Reasons ought to be given why it is neither convenient nor just for that information to be sought after proceedings have been commenced against an already identifiable party. Ordinarily, the court is always placed in a better position in matters where proceedings have already commenced as it can then additionally examine the pleadings of all the parties to assess the merits of an application. This is why the granting of interrogatories after the commencement of proceedings is the norm. Further, where there are serious allegations of wrongdoing which will attract public interest considerations, a very careful assessment must be made about the appropriateness of this intrusive procedure.

16 The potential plaintiff cannot use pre-action discovery simply to dispute the potential defendant's version of the events. Nor is the purpose of pre-action discovery for the potential plaintiff to assess the strength of its claim. Nonetheless, courts have acknowledged that, sometimes, it is not easy to distinguish between seeking information to decide whether to commence an action and obtaining information to ensure that action has a reasonable prospect of success (*Ching Mun Fong* at [10] and [27]):

> … pre-action discovery would appear to apply only for the limited purpose of allowing a potential plaintiff to obtain the facts and materials needed to mount a claim. It would not be granted if the plaintiff already knows his cause(s) of action and is not otherwise constrained from commencing proceedings. Nor would an application be granted if its purpose is to enable a potential plaintiff to assess or augment the strength of his claim.
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> …
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> Admittedly, in certain circumstances the line between seeking materials in order to mount a claim and obtaining information to determine whether a claim if mounted could have a reasonable prospect of success can be difficult to draw. …

17 I was satisfied that discovery of the documents sought in OS 635/2019 should be granted in relation to Sinfeng as CMB required the information to frame an appropriate cause of action.

18 The gap in CMB's knowledge was whether the CIA contract was genuine. That was a critical gap to fill because, as CMB submitted, whether CMB had any basis to bring a claim in misrepresentation, fraud or conspiracy to injure would turn on the answer to that question. It was incorrect for Sinfeng to state that CMB had an assignment claim regardless of whether the CIA contract was genuine. In an assignment, the benefits of the contract are transferred to an assignee, with the assignor remaining bound to perform its obligations under the contract (which continues to subsist as between the contracting parties): *Fairview Developments Pte Ltd v Ong & Ong & Ong Pte Ltd and another appeal* [2014] 2 SLR 318 at [46]. Thus, CMB's claim as an assignee was inextricably dependent on the validity of the underlying contract, which in this case was the 90-day contract. But because the CIA contract and the 90-day contract bore the same reference number, the genuineness of both contracts was a serious issue that formed CMB's pivotal consideration in deciding whether to proceed against Sinfeng. It would be unlikely for both versions of the contract to be genuine at the same time unless there was an honest careless mistake somewhere, which neither party contended was the case.

19 The documents sought (at [8]) were relevant because they went directly towards filling the gap in CMB's knowledge. I did not accept Sinfeng's oral submissions that pre-action discovery should be disallowed because the documents sought did not *conclusively* determine whether the CIA contract was genuine or a sham. That would be setting the bar too high. Nor did I accept Sinfeng's argument that CMB was merely trying to assess the strength of its case and did not need the documents to test the viability of its cause of action. Sinfeng had pointed to correspondence where CMB stated that it was trying to "seek further *clarification* and *information* in respect of what [Sinfeng]

explained in [its] Email" [emphasis added].[14] However, notwithstanding some infelicitous wording, in substance and taken as a whole I read CMB's emails as simply reaching out to Sinfeng for documents to check whether a claim against Sinfeng would lie in the first place. CMB was not trying to run ahead of itself to gauge the strength of its claim.

20 The documents sought were also necessary. Allegations of fraud cannot be made lightly in pleadings. Under O 18 r 12(1)(*b*) of the ROC, a plaintiff who pleads fraud must provide the particulars of the facts relied on:

> Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —
>
> …
>
> (*b*) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

For that reason, it was too glib for Sinfeng to claim that the matter boiled down to CMB seeking pre-action discovery simply because it did not believe Sinfeng. If CMB's position was that it did not have sufficient information based on the documents at [7] and that it only had a reasonable basis of suspicion based on the Seaweb investigation reports, then in my view it would be fair that CMB be given the opportunity to obtain the requisite materials to ascertain if it could formulate its case. Doing so at the early stage of pre-action discovery would lead to time and costs savings if CMB were to conclude that its claim is not viable. Conversely, disallowing pre-action discovery might expose CMB to an

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[14] Du Jing's affidavit at p 285.

application for further and better particulars and the risk of Sinfeng's striking-out application should it press on with its fraudulent misrepresentation or conspiracy claims. The Seaweb investigation reports drew possible suspicions of fraud based on circumstantial and hearsay evidence. It would be unwise to rely solely on the Seaweb investigation reports to frame a cause of action without seeking pre-action discovery of documents that were readily available in Sinfeng's possession.

21 Pre-action discovery would also enable CMB to decide whether to bring a fraud action against only Sinfeng or to join CO and its directors on grounds of conspiracy to defraud, as the bunkers contract (for which CMB was a beneficiary) was entered into between CO and Sinfeng. In my view, OS 635/2019 was necessary for CMB to frame proper causes of action against the appropriate defendants. Therefore, pre-action discovery was necessary for costs savings and also for fair disposal of the matter.

22 Sinfeng in its submissions alleged that it had paid CMB US$12,486,600 for the bunkers deal and so CMB suffered no loss. In the course of the hearing, I sought clarification from Sinfeng's counsel and it was disclosed that the payment of US$12,486,600 was paid to CO, which had an account with CMB. I informed Sinfeng's counsel that payment to CMB and payment to CO's bank account with CMB were completely different. She acknowledged the mistake. Therefore, it was incorrect and misleading for Sinfeng's counsel to state categorically that Sinfeng had paid CMB US$12,486,600.

23 Lastly, the cases relied on by Sinfeng did not further its position.

(a) In *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR(R) 39, several banks

sought discovery from APBS regarding APBS's state of knowledge in relation to certain accounts and loans, which the banks claimed were unauthorised. The court stated that "a disbelief of APBS's position itself cannot be a sufficient reason for seeking pre-action discovery" (at [26]). But it was crucial to understand *what was being disbelieved and why*. The banks disbelieved APBS's claims regarding APBS's state of knowledge, because the banks had formed – *on the basis of their bank documents, which nobody alleged were fakes* – the belief that there was a banker-customer relationship (at [24]). The banks, therefore, had enough to plead their cause of action: the documents sought were, as CMB's counsel put it, "good to have" but not necessary. This was unlike the present case where the very validity of the 90-day contract and documentation was disputed.

(b) In *Ching Mun Fong*, a bank's customer sought pre-action discovery of voice logs of communications regarding investments with the bank. This was disallowed because the customer was going beyond ascertaining the viability of her cause of action by trying to gauge her chances of success (at [40]). The applicant had clearly formulated causes of action in contract or tort and the voice logs were "record[s] of the verbal communications between the parties that *each must naturally have been equally privy to*" [emphasis added] (at [42]). This was not the case here, as CMB was not privy to the CIA contract and had yet to formulate its cause of action.

Conclusion

24 For the reasons stated above, I dismissed the appeal and fixed costs at $4,000 (all in) in favour of CMB.

Tan Siong Thye
Judge

Ong Boon Hwee William, Lim Jun Rui, Ivan and Erik Widjaja (Allen & Gledhill LLP) for the plaintiff in OS 635/2019 and the respondent in RA 240/2019;
Tan Poh Ling Wendy and Carl Lim Kok Wee (Morgan Lewis Stamford LLC) for the defendant in OS 635/2019 and the appellant in RA 240/2019.