Asta Rickmers Schiffahrtsgesellschaft mbH & Cie KG v Hub Marine Pte Ltd [2005] SGHC 184

Case Number : OS 734/2005

Decision Date : 28 September 2005

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Thomas Tan (Haridass Ho and Partners) for the plaintiff; Cheah Kok Lim and Keh Kee Guan (Ang and Partners) for the defendant

Parties : Asta Rickmers Schiffahrtsgesellschaft mbH & Cie KG — Hub Marine Pte Ltd

Civil Procedure – Discovery of documents – Plaintiff having to find alternative avenue to enforce arbitral award against company after company wound up – Plaintiff suspecting defendant related to wound-up company – Plaintiff applying for pre-action discovery against defendant to determine if arbitral award may be enforced against defendant – Whether appropriate to order pre-action discovery – Order 24 r 6, O 24 r 7 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

28 September 2005

Tay Yong Kwang J:

1 This is an application for pre-action discovery commenced pursuant to O 24 r 6 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). It seeks an order against the defendant that within 14 days from the date on which the order is made, the defendant is to give discovery of documents by making and serving on the plaintiff a list of documents specified hereunder which are or have been in its possession, custody or power, and make and file an affidavit verifying such list:

(a) documents relating to the hire, use and/or operation of the vessel *Hub Racer* by the defendant during the period February to April 2001;

(b) the documents should include but are not limited to correspondence, notes and memoranda passing between the defendant and Hub Lines Pte Ltd and/or authored by the defendant's director, Au Ah Yian (NRIC No S1162597E) ("Au"); bank statements, cash book entries and ledgers; bills of lading and/or any similar document; charterparty, fixture note and/or any similar document;

(c) the documents should cover the period November 2000 to May 2001.

2 On 29 July 2005, the Deputy Registrar of the Supreme Court granted the plaintiff discovery of the following:

(a) documents relating to the hire, use and/or operation of the vessel *Hub Racer* by the defendant during the period November 2000 to 1 May 2001;

(b) documents relating to the hire, use and/or operation of the vessel *Hub Racer* authored by Au for the period November 2000 to 1 May 2001;

He also ordered that the costs of the application, fixed at $3,000 (excluding disbursements which were to be paid in full), be paid by the plaintiff to the defendant. He further ordered that the costs of complying with his order be paid by the plaintiff to the defendant on an indemnity basis, such costs to be agreed or taxed.

3 The defendant appealed to a judge in chambers, asking that the Deputy Registrar's order be set aside and that the plaintiff's action be dismissed with costs. On 22 August 2005, I dismissed the defendant's appeal and ordered the defendant to pay the plaintiff $2,000 as costs of the appeal. The defendant has appealed to the Court of Appeal against my decision.

The plaintiff's case

4 The plaintiff was the owner of the vessel, *Hub Racer* ("the vessel"), now known as *Asta Rickmers*. By a charterparty dated 1 December 2000, the plaintiff chartered the vessel to Hub Lines Pte Ltd ("Hub Lines") for two years commencing from the date of delivery until at least 1 March 2003, with the latest date being 1 May 2003. The exact period was to be Hub Lines' option. The hire rate was US$11,000 per day. The charterparty provided for any disputes to be referred to arbitration in London.

5 On 5 February 2001, the vessel was delivered to Hub Lines. However, on 13 April 2001, Hub Lines sent a fax to the plaintiff's broker purporting to terminate the charter. On 17 April 2001, the plaintiff informed Hub Lines that it considered the purported termination a repudiatory breach, which the plaintiff accepted, and that the plaintiff would seek full compensation for all losses and damage arising therefrom.

6 The matter proceeded to arbitration in London. Hub Lines was represented by Rajah & Tann in the arbitration proceedings until 5 February 2003 when it informed the arbitrators that it had not received instructions from Hub Lines in respect of the submissions in defence and therefore would not be acting for Hub Lines any further. The arbitration proceeded in spite of that and on 28 August 2003, the arbitral award in the plaintiff's favour was published. The plaintiff was awarded more than US$2.3m, interest and costs. Hub Lines was also ordered to pay the costs of the arbitral award amounting to £4,980.

7 On 5 February 2003, a Thai company commenced winding-up proceedings against Hub Lines. On 14 March 2003, Hub Lines was ordered to be wound up.

8 Since Hub Lines had been wound up, the plaintiff had to consider other avenues of enforcing the arbitral award. In March 2004, the German Shipowners' Defence Association ("GSDA") wrote on the plaintiff's behalf to EOX Group Berhad ("EOX"), inviting EOX to settle the award on the basis that Hub Lines was its subsidiary. EOX was a public company based in Kuching, Sarawak with its shares quoted on the Kuala Lumpur Stock Exchange. The group managing director of EOX, Richard L C Wee, replied to state that it did not have a subsidiary by that name and that neither EOX nor any of its subsidiaries or related companies entered into the charterparty in question. GSDA replied to say that the website of "HUBLINE" stated that "Hubline is a subsidiary of EOX Group Berhad" and invited EOX again to settle the arbitral award. There was no further response from EOX.

9 On 19 May 2004, the Singapore correspondents of GSDA wrote to EOX with the intention of persuading EOX to settle the arbitral award on the basis that Hub Lines was indeed linked to it, threatening to initiate action to pierce the corporate veil and to publicise the matter in all trade papers so as to warn other shipowners. EOX's solicitors in Sarawak replied, maintaining that Hub Lines was not EOX's subsidiary and was not related to it and threatening legal action for defamation should the allegations be published to third parties.

10 Faced with this situation, the Singapore correspondents of GSDA obtained the financial statements filed by Hub Lines with the registry of companies for the four years ending 31 December

1998 up to 31 December 2001. Hub Lines' financial statements showed that its two directors, Heng Tong Nerng and Au, each held one share in the company which had an issued and paid-up capital of $2. The plaintiff was not aware at the time it entered the charterparty on 1 December 2000 that Hub Lines was a two-dollar company.

11 It appeared from the documents that the central figure in this matter was Au. He was a director of both Hub Lines and the defendant at the material time. He signed the charterparty on behalf of Hub Lines. The defendant had an issued and paid-up capital of $200,000 in June 2001 and its sole shareholder was Wonder Link Sdn Bhd ("Wonder Link"), with the ultimate holding company being Billion Power Sdn Bhd. The financial statements of the defendant for the year ending on 30 June 2000 showed that Au held 1m shares in Wonder Link. As Wonder Link's issued and paid-up capital was RM10m in 10m shares, Au was effectively a 10% shareholder of the defendant.

12 The defendant's financial statements for the year ending on 30 September 2001 reported that Au had 3,452,013 shares in EOX. The defendant's issued and paid-up capital increased to $1m. The defendant was still a wholly-owned subsidiary of Wonder Link although its ultimate holding company has changed to EOX. Therefore, although it could not be said that Hub Lines was a subsidiary of EOX, both companies had Au as their common shareholder.

13 The object of the plaintiff in taking out this application was to ascertain if the defendant was liable in any way for the payment of the arbitral award. The plaintiff's allegations were that:

(a) The defendant, by virtue of having operated the vessel, was the real charterer of the vessel and Hub Lines was only named as the charterer as a front for the defendant.

(b) The defendant was a sub-charterer of the vessel under a back-to-back charterparty or similar arrangement with Hub Lines.

14 The plaintiff's allegations were based on several grounds. The first ground was that in the survey report dated 6 February 2001 for the on-hire of the vessel, the defendant was named as the charterer of the vessel. There was a joint inspection arranged by Hub Lines or the defendant and the plaintiff merely consented to the party conducting the survey. It could be assumed therefore that Hub Lines or the defendant provided the charterer's name for the survey.

15 The second ground was that documents such as letters to the master of the vessel, sailing instructions and a circular were all sent on the notepaper of the defendant.

16 The third ground was that the defendant paid most of the charter hire during the two months of its hire. Out of a total of seven payments, the first two payments amounting to US$321,743.95 were paid by Hub Shipping Sdn Bhd ("Hub Shipping") and the rest of the payments amounting to US$371,112.84 were made by the defendant. None of the seven payments was made by Hub Lines. It was likely that the defendant, having paid such a large amount of the hire, was more than the mere agent that it purported to be.

17 The fourth ground for the plaintiff's allegations came from the notes to the accounts and the report of the auditors of Hub Lines contained in the financial statements for the years ending on 31 December 1998 to 31 December 2001. The principal activities of Hub Lines were those of shipping and forwarding agents but it ceased to do business between 1 January 1997 and 31 December 1998. For the years 1999 to 2001, Hub Lines consistently made losses and it was said that the company may be unable to continue operating as a going concern. The directors and an unnamed related party and, in later years, a trade creditor, had undertaken to provide financial and other support necessary

at least for the next 12 months to enable Hub Lines to trade and meet its liabilities. For 2000 and 2001, Hub Lines employed only its directors and no one else. No mention or provision was made in the financial statements for the year ending on 31 December 2001 for the plaintiff's claim on the charterparty which arose in April 2001.

18 Further, given its precarious financial position in 2000, it was questionable why Hub Lines entered into the two-year charterparty costing it US$11,000 per day or some US$330,000 per month. It was therefore necessary to investigate what financial and other support was actually given and whether the related party and the trade creditor in question was the defendant.

19 The defendant was likely to be a party to subsequent proceedings in court as the purpose of the plaintiff's application was to determine its involvement in the use, employment and operation of the vessel. Although the vessel was operated under the charterparty for only two and a half months between February and April 2001, the documents would have to cover the period from November 2000, when negotiations for the charterparty began, until May 2001, the month after the vessel was withdrawn because of the breach. Such documents would be relevant for showing the true involvement of the defendant in the charterparty.

The defendant's case

20 The general manager of the defendant, Lui Yuen Kheng, filed an affidavit in response. In her affidavit, she said that the arbitral award arose out of an agreement in which the defendant played no part and that the plaintiff was embarking on nothing more than a "fishing expedition". She denied that the defendant was the real charterer of the vessel merely by reason of having operated it or that Hub Lines was a front for the defendant. She also denied that the defendant was a sub-charterer under a back-to-back charter or similar arrangement with Hub Lines.

21 The defendant was incorporated on 8 July 1993 as DZ Shipping (S) Pte Ltd. It changed to its present name on 20 May 1997. Its principal activity was that of a shipping agent and ship manager. As a shipping agent, it provided various services such as canvassing for freight cargo, processing of shipping documents and collection of freight. As a ship manager, it managed its principals' fleets of vessels, supply of crew and ship spares and stores. Its remuneration consisted of freight commission and management fees.

22 The defendant provided shipping agency services and ship management services to Hub Lines. Both companies were separate and distinct and neither the defendant nor any of its associated companies had ever held any shares, directly or indirectly, in Hub Lines. The defendant never had any control over, or participation in, the board of directors of Hub Lines.

23 The defendant explained that EOX began as a private limited company in Malaysia in 1975 and was originally known as Eastern Oxygen Sdn Bhd, dealing in industrial gases. EOX was listed on the second board of the Kuala Lumpur Stock Exchange in 1995. In 1993, the defendant was incorporated in Singapore. It had no connection whatsoever with EOX.

24 In May/June 1997, the defendant changed its name to the current one and, together with Hub Shipping, was injected into Wonder Link, a Malaysian private limited company. In December 1997, Au came into the picture for the first time as a 10% shareholder of the paid-up capital of Wonder Link and, by virtue of that shareholding, became an indirect shareholder of the defendant and Hub Shipping.

25 In 1999, EOX entered into an agreement to acquire Wonder Link and its regional container

shipping business which went under the trade name and carried the logo of "HUBLine". This acquisition was subject to approval from various Malaysian authorities.

26 In January 2001, EOX obtained the final approval and its acquisition of Wonder Link was complete. At the same time, Au disposed of his shares in Wonder Link and, from 2001, ceased to be an indirect shareholder of the defendant and Hub Shipping.

27 While he was holding shares in Wonder Link, Au was a non-executive director of the defendant with no managerial role. He did not have any active part in the daily operations of the defendant. In 2002, Au resigned as a director of both Wonder Link and the defendant. He was never a director of Hub Shipping and did not have any role whatsoever in the running of its shipping business.

28 The screenshot of EOX's website which stated that "HUBLine is a subsidiary of EOX Group Bhd" referred to the trade name used by Hub Shipping and not to Hub Lines, a totally unrelated entity. The annual report of Wonder Link showed clearly that Hub Lines was not a subsidiary of the EOX Group. The words on EOX's website were introduced only in November 2002 and could not have caused any confusion to the plaintiff which entered the charterparty with Hub Lines in December 2000. Hub Lines was wound up in March 2003, a few months after EOX's website was updated. There was no reason why EOX would want to be associated with a company on the brink of insolvency, a situation EOX was unaware of as by 2002, the defendant had nothing more than a historical connection with Hub Lines' director and shareholder, Au.

29 In January 2001, Hub Shipping informed the defendant, its sister company, that Hub Shipping had agreed to purchase slots from Hub Lines on the vessel on a "use basis". Hub Shipping requested the defendant to provide agency services in respect of those slots. Hub Shipping did not purchase all the slots. Between February and April 2001, Hub Shipping's usage of the slots was, on average, less than 40% of the capacity of the vessel. The slots were bought on a commercial basis.

30 Since Hub Shipping was obliged to pay Hub Lines for the slots used and since Hub Lines had to pay the plaintiff for the charter of the vessel, for administrative convenience, Hub Lines requested Hub Shipping and the defendant to make payment for the slots directly to the plaintiff. Those instructions were given orally by Au from Hub Lines to Lui Yuen Kheng. The payment vouchers produced by the plaintiff showed that the defendant and Hub Shipping made those various payments on the instructions of Hub Lines. The payments, made in the ordinary course of business, were not made by the defendant for its own account.

31 In respect of the survey report where the defendant was named as the charterer, the defendant claimed that it was not aware why the surveyor did so. The defendant did not at any time commission the survey as charterer of the vessel. The error could have arisen due to the fact that the defendant, as manager of the vessel, was the party authorised to give instructions to the crew with regard to schedules and operating procedures adopted by Hub Lines. The survey report was dated 6 February 2001. In its letters dated 5 and 20 February 2001 to the captain of the vessel, the defendant stated clearly that it was the agent.

32 Where the financial statements of Hub Lines were concerned, the defendant stated categorically that it was not the related party or the related trade creditor which undertook to provide financial or other support to Hub Lines.

33 The defendant asserted that the documents requested by the plaintiff were not necessary and would not result in the saving of costs and the fair disposal of this matter. The queries raised would be best answered by the liquidator of Hub Lines but the defendant's solicitors have confirmed

from the said liquidator that the plaintiff had not filed a proof of debt nor requested any documents from the liquidator. The defendant therefore asked that the plaintiff's application be dismissed.

The decision of the court

34 Order 24 r 6 of the Rules of Court provides:

> **6.**—(1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons in Form 7 and the person against whom the order is sought shall be made defendant to the summons.
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> (2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by summons, which must be served on that person personally and on every party to the proceedings.
>
> (3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must —
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> > (*a*) in the case of a summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court;
> >
> > (*b*) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.
>
> (4) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.
>
> (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.
>
> (6) An order for the discovery of documents may —
>
> > (*a*) be made conditional on the applicant's giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and
> >
> > (*b*) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.
>
> (7) No person shall be compelled by virtue of such an order to produce any document which he could not be compelled to produce —
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> > (*a*) in the case of a summons under paragraph (1), if the subsequent proceedings had

already been begun; or

(*b*) in the case of a summons under paragraph (2), if he had been served with a writ of subpoena *duces tecum* to produce the documents at the trial.

(8) For the purpose of Rules 10 and 11, an application for an order under this Rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

(9) Unless the Court orders otherwise, where an application is made in accordance with this Rule for an order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

35 Order 24 r 7 provides:

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.

36 In *Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169, the Court of Appeal said, at [50], [59] and [60]:

50 Thus, there must be some grounds for seeking pre-action discovery, bearing in mind that the provision should not be used for fishing expeditions, and that the normal course is to get 'ordinary discovery' after commencement of proceedings.

…

59 … It was not the court's function, at this stage of the application, to dwell into the merits of the case and to determine, based on what little available evidence, whether there is a good claim or not. The court's duty is only to ensure that the application was not frivolous or speculative or that the applicants were on a fishing expedition.

60 It is precisely because the appellants feel that they have a claim that they are seeking pre-action discovery to determine whether the documents would ground their cause of action. As Denning MR said in *Dunning*, the object of pre-action discovery would be defeated if the appellants had to show in advance that they had already got a good cause of action before they saw the documents.

37 In *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39, Belinda Ang Saw Ean J, after concluding that it was inappropriate to make an order for pre-action discovery at the stage of the proceedings in that case, went on to say, at [29] and [37]:

29 … Even if the documents (or some of them or some parts of them) are relevant, I am not satisfied on the material before me that disclosure in the sense of producing the documents or any of them is in the least necessary for disposing fairly of the issues in the intended actions or for saving costs.

…

37 … The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough. Obviously, if a document is not relevant, it cannot be necessary for disposing of the cause or matter. On the other hand, documents may be relevant to a case without being necessary to it. The word used in O 24 r 7 is "necessary" and not "desirable" or "relevant". It is the common experience of lawyers and the court that often many documents are produced because they are relevant, but only very few of them are of use.

38 Applying the principles set out in O 24 rr 6 and 7, as expounded by the cases cited above, it seems to me that necessity must therefore be considered in the light of the purpose for which pre-action discovery is sought. Here, the plaintiff is trying to ascertain whether it has a cause of action against the defendant by lifting the corporate veil to uncover the real charterers of the vessel. It believes it would be able to do so because Lee Seiu Kin JC has said in *Gerhard Hendrik Gispen v Ling Lee Soon* [2001] SGHC 350 at [125]:

It can be seen from the last two cases that where a company is a cloak or sham to avoid the legal obligations of a party to the Plaintiff, the court will lift the veil of incorporation.

39 The plaintiff has not launched this application in order to try its luck by trawling in the open seas of chance to see whether it can ensnare some bigger fish to look to for the satisfaction of the arbitral award. It has set out several material facts for its belief that the defendant may have a much closer connection with Hub Lines than it has disclosed thus far. The defendant, on the other hand, seems to want the plaintiff to accept its word that it had no nexus whatsoever with Hub Lines. In my opinion, the plaintiff is entitled, in the light of the evidence it has uncovered thus far, to be sceptical about the disavowal of the defendant and to want to be certain that the defendant truly had no connection with Hub Lines beyond what it had acknowledged. The grounds relied on by the plaintiff are not frivolous or far-fetched in any way.

40 Why was the defendant named as the charterer of the vessel in the survey report? The defendant did not know the answer. There was nothing from the defendant in writing from the start of the charterparty identifying itself as the mere agent of Hub Lines or as the manager of the vessel. It is not unreasonable for the plaintiff to believe that the defendant was operating the vessel in its own right. Why did the defendant pay such large amounts of money to the plaintiff for administrative convenience on the mere oral instructions of Au if he was nothing more than a non-executive director? Does this not at least show that the relationship between the defendant and Hub Lines could be much more than what was being professed and that the defendant was a lot more involved in the charterparty? Further, if the full amount of hire was paid directly by Hub Shipping to the plaintiff, what was the benefit due to Hub Lines as the charterer?

41 The defendant asserted that "HUBLine" was only the trade name used by Hub Shipping. Nevertheless, the similarity that the alleged trade name had with Hub Lines appears rather remarkable.

42 I accepted that the plaintiff's ignorance of the fact that Hub Lines was a two-dollar company was irrelevant for the purpose of this application. There was no allegation that Au or the defendant had made any representations on the creditworthiness of Hub Lines to the plaintiff before the charterparty was signed. I also agreed with the defendant that even if it was the one which provided financial support to Hub Lines, that fact alone could not render it liable to the plaintiff. However, if

that were true, then was the defendant "related" to Hub Lines or was it only Hub Lines' trade creditor and, if so, how much was owing to the defendant that warranted a rescue effort by the defendant?

43 The fact that a liquidator has been appointed in respect of Hub Lines does not preclude the plaintiff from helping itself by looking to other avenues of trying to satisfy the arbitral award in its favour. If the plaintiff is right in its belief that the defendant and Hub Lines were in reality related companies, then it would be unlikely that the officers of Hub Lines would assist the liquidator in answering the plaintiff's queries to him beyond echoing what is being asserted by the defendant in this application.

44 The defendant did not deny having the documents requested by the plaintiff. In my opinion, discovery of such documents would necessarily save costs for both the plaintiff and the defendant. If the plaintiff's belief turns out to be unfounded after perusing the relevant documents, a potentially costly action would be averted for both parties. If, however, the documents reveal otherwise, the ends of justice would be served. The defendant's costs of providing the documents are to be paid by the plaintiff on an indemnity basis in any case. The incursion into the documentary domain of the defendant is amply justified in the circumstances.

45 I therefore thought the Deputy Registrar was correct in directing pre-action discovery to be made by the defendant. Accordingly, I dismissed the defendant's appeal with costs fixed at $2,000 to be paid by the defendant to the plaintiff.