Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and Another [2005] SGHC 57

Case Number : OS 1646/2004, SIC 4/2005, 257/2005, 295/2005

Decision Date : 22 March 2005

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Alvin Yeo SC, Tan Kay Kheng and Tan Hsiang Yue (Wong Partnership) for the plaintiff; Anjali Iyer (Haq and Selvam) for the defendants

Parties : Karaha Bodas Co LLC — Pertamina Energy Trading Ltd; Pertamina Energy Services Pte Ltd

Civil Procedure – Mareva injunctions – Whether Mareva injunction granted locally in connection with foreign proceedings should be set aside – Whether Mareva injunction may be granted to assist proceedings in foreign jurisdiction – When court may grant Mareva injunction – Applicable principles

Civil Procedure – Service – Plaintiff granted leave to serve originating summons out of jurisdiction – Whether order granting leave should be set aside – Whether requirements for grant of leave to serve out of jurisdiction under Rules of Court fulfilled – Order 11 r 1, O 11 r 2 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

22 March 2005

Choo Han Teck J:

1 The proceedings before me concerned two summonses in chambers, namely, Summons in Chambers No 257 of 2005, which was an application by the second defendant, and Summons in Chambers No 295 of 2005, which was an application by the first defendant, both asking for Originating Summons No 1646 of 2004, and an order for leave to serve the Originating Summons out of jurisdiction, to be set aside. The plaintiff is a company incorporated in the Cayman Islands. Its given address is that of KPMG's trust office in the Cayman Islands. The details of its shareholders and directors have not been disclosed. All its affidavits were filed on its behalf by its solicitors, principally by its Hong Kong lawyer, Michael Joseph Pilkington. Through his affidavit it was deposed that the plaintiff "was established for the purpose of exploring, developing and exploiting geothermal resources, including the construction, operation and maintenance of electric power generation facilities fuelled by geothermal power". The plaintiff, through Mr Pilkington, affirmed that it was presently not carrying on any such business anywhere. Mr Pilkington deposed that the plaintiff's "principal investors" were "two prominent energy companies". He named them as Caithness Energy LLC, a private company, and FPL Energy LLC, which is a subsidiary of the FPL Group Inc, a company listed on the New York Stock Exchange. Miss Iyer, counsel for the defendants, had asked for the details of the shareholding and directorship of the plaintiff but they had not been disclosed. An "investor" is not necessarily a shareholder. The first defendant is a Hong Kong company and is a 99% subsidiary of Pertamina (Persero), a state-owned company in Indonesia. The second defendant, a Singapore company, is a 100% subsidiary of the first defendant.

2 From the affidavits of the defendants and the submissions of Miss Iyer, the following may be summarised as useful background facts. In 1994, the plaintiff made a contract with Pertamina (Persero). The contract was, essentially, a joint venture to produce and develop energy resources in Indonesia. This contract was signed during the time when Suharto was the president of Indonesia. It was signed in Indonesia and provided that it was to be governed by Indonesian law. There was also a related contract to sell all the energy produced by the joint venture to another state company. In 1997, there was a new regime in Indonesia. The Indonesian economy was in need of funds and sought

funding from the International Monetary Fund ("IMF"). As a condition to funding, the IMF required the Indonesia government to cancel the two abovesaid contracts. Notice of termination was served on the plaintiff by Pertamina (Persero). The plaintiff challenged the termination and commenced arbitration proceedings as provided for under the contracts. The place for arbitration was stipulated to be Switzerland.

3 Arbitration proceeded in Geneva, Switzerland, sometime in 1998. Pertamina (Persero) did not participate. It thus lost its right to appoint one of two arbitrators. In default, the appointing authority, the International Centre for Settlement of Investment Disputes, appointed the second arbitrator, and the two arbitrators appointed the third arbitrator, as provided for under the contracts.

4 Halfway through the arbitration, Pertamina (Persero) changed its mind and decided to participate. The arbitration award was handed down on 18 December 2000 in favour of the plaintiff against Pertamina (Persero) and PT PLN (Persero) ("PLN"), the state electricity board that was the body to have purchased the energy produced by the joint venture. PLN also did not appoint an arbitrator. Pertamina (Persero) applied to set aside the award in Geneva. The amount awarded was US$260m, which included future loss of profit, and interests. The application by Pertamina (Persero) failed to set aside the award, and the plaintiff proceeded to enforce the award in various jurisdictions, including the US, Canada, Hong Kong, and Singapore. Pertamina (Persero) challenged the registration of the award in these jurisdictions. Subsequently, the plaintiff and Pertamina (Persero) agreed to proceed only in the US and Hong Kong. The registration applications in Canada and Singapore were stayed by agreement.

5 Pertamina (Persero) failed in the US and Hong Kong in its challenge to the registration of the arbitration award. In the US, the plaintiff had attached US$270m and had received a further US$29m in direct payment. The Indonesian government is still challenging the ownership of the US$270m. The plaintiff started enforcement proceedings in Hong Kong, after registering the award on 15 March 2002. It obtained a garnishee and charging order on 23 May 2002, which was made absolute on 11 September 2003, and subsequently, the plaintiff garnished money due from the first defendant to Pertamina (Persero). Miss Iyer pointed out that the two defendants were, and still are, carrying on a legitimate business in oil trading, and are key and vital suppliers of oil and oil products to the people and industries in Indonesia.

6 The plaintiff obtained an order of court appointing a receiver to find out what was due from the first defendant to Pertamina (Persero) as at 24 May 2004 under the garnishee order. In December 2004, the plaintiff issued a judgment-debtor summons against the first defendant, under which the first defendant's manager, Chan Ting Chung ("George Chan"), was cross-examined. At that time, the plaintiff had not yet obtained judgment against the first defendant. The first defendant contended that the procedure was wrong because the receiver was only appointed to determine what was due by the judgment debtor to the judgment creditor. The first defendant has applied to set aside the order for cross-examination of George Chan and that application is pending. The Hong Kong Master (registrar) made an order that the first defendant pay the plaintiff US$5.5m because of three instances where the first defendant had paid money to Pertamina (Persero). One of these alleged payments was a set-off (US$2m) and the other two transactions were actual payments. The first defendant also applied to set aside the order for the payment of US$5.5m. The issue there was whether Pertamina (Persero) owed more money to the first defendant than *vice versa* when the garnishee order was served on the first defendant. Miss Iyer submitted that at that critical moment, there were no assets to be garnished. The two payments made by the first defendant to Pertamina (Persero) were subsequent to 24 May 2002, and so were not subject to the garnishee order.

7 Miss Iyer submitted that during the cross-examination of George Chan by Mr Pilkington, the

plaintiff had bank statements of the first defendant which it had obtained from discovery. It also had financial statements audited by PricewaterhouseCoopers ("PWC"), and the consolidated accounts of the first defendant, including the accounts of the second defendant. George Chan was asked about the US$36m due from the second defendant to the first defendant instead of being asked what the first defendant owed to Pertamina (Persero). George Chan answered in Cantonese, "Yes, loans we made to [the second defendant] for its operational purposes." He was asked why the money was sent to the second defendant. In reply, George Chan said, "Because of [the plaintiff's] case." Asked when it would be returned, George Chan said "when [the plaintiff's] case is over", giving the impression that the money left Hong Kong for Singapore to evade execution in Hong Kong. On that basis, the plaintiff took out Originating Summons No 1646 in Singapore and obtained a Mareva injunction as well as an order for service of the Originating Summons out of jurisdiction. Both orders were granted on 22 December 2004 on an *ex parte* basis. Miss Iyer said that Pertamina (Persero) was taking steps to resist the registration of the arbitration award in Singapore. It had already been registered. The proceedings to set aside the registration have been adjourned *sine die* by consent for the time being.

8 The Originating Summons had only two prayers. The first was for a declaration that the second defendant holds US$36m in trust for the first defendant. The second was for an order that the second defendant repay all the money it had received to the first defendant in Hong Kong. Mr Alvin Yeo SC, counsel for the plaintiff, submitted that the said money moved from Hong Kong to Singapore in trust and were moved to defeat the garnishee order. He submitted that George Chan had admitted that these were loans. Miss Iyer replied that the US$36m was a "net-off" position, after years of trading, as at 31 December 2003. She submitted that this was supported by the 2004 audited accounts of the first defendant. There was also the movement of US$27m from the second defendant to the first defendant over a two-year period from 2002 to 2003. She submitted that the second defendant had also made payments on behalf of the first defendant in the course of business. The US$36m was a "bottom-line figure". It was not sitting somewhere, earmarked as "trust money". She said that these figures and payments were audited by PWC. She further argued that this entire sum of money was kept by banks and was charged to the banks, because the banks had provided trading lines. There was no transfer of a specific sum of US$36m; as explained above, that was a net sum standing to the credit of the first defendant in the accounts. At all material times, the US$36m was in Singapore. There were payments in, but they did not come from Hong Kong. Miss Iyer argued that it did not make sense to pay this money to the second defendant to defeat the plaintiff's enforcement effort against the first defendant because it would have made greater sense to pay it over to some untraceable account. She submitted that George Chan was not given the opportunity to give a proper explanation during his cross-examination because he was not told what inferences the plaintiff had wanted to draw, and thus George Chan plainly admitted to the transfer of money amounting to US$36m. He now gave a proper explanation in his affidavit in these proceedings. The point he now makes is that this money was given to the second defendant for genuine commercial transactions.

9 Furthermore, Jamshid Medora, an accountant, deposed that the said money never came from Hong Kong:

> In my opinion, the US$36MM+ was in the nature of loans to PES [the second defendant] by Petral [the first defendant]; not monies transferred or held in "trust" for Petral. Further, the transfer was not at the expense of any creditor of Petral as the creditors were substantially repaid and their debts substantially discharged before Petral ceased to do any business. The Plaintiffs, even though they were not reflected as a creditor of Petral at the Relevant Period, were themselves also not "frustrated" in their prospective execution against Petral since the funds moved to a 100% subsidiary of Petral. On the contrary, the audited accounts show that the Petral Group profitability and the value of the Petral shares significantly increased.

Mr Pilkington, the plaintiff's Hong Kong lawyer, now says that the first defendant had in fact transferred its *business* to Singapore in breach of Hong Kong's Transfer of Businesses (Protection of Creditors) Ordinance (Cap 49) ("Transfer of Businesses Ordinance"). Thus, in response, the defendants produced the evidence of another Hong Kong lawyer, Mr Eugene Fung, to say that the Transfer of Businesses Ordinance does not apply to the present situation.

10 Mr Fung deposed that one had to be a creditor at the time of the transfer of business in order to make a claim under the Transfer of Businesses Ordinance. The moneys in question were pre-30 September 2004 (the management account dated 30 September 2004 is the document showing the US$36m). The plaintiff was never a creditor of the first defendant. There was a sum of US$5.5m ordered by the Hong Kong court to be paid over to the plaintiff in December 2004. The first defendant is challenging this order but Mr Yeo informed me that the time for appeal has passed. The first defendant has applied for leave to appeal out of time but the date for hearing that application is 1 September 2005. The Transfer of Businesses Ordinance does not create an interest in the assets transferred, and only applies as a money claim. Mr Fung deposed that it creates no rights *in rem*.

11 Miss Iyer also submitted that there was no jurisdiction for this court to grant an injunctive relief in the present circumstances. The plaintiff's real dispute is with the first defendant in Hong Kong, but it is asking for ancillary relief in Singapore. The Singapore court cannot grant a Mareva injunction to assist proceedings in a foreign jurisdiction. Counsel relied on the authority of *Siskina v Distos Compania Naviera SA* [1979] AC 210, ("*The Siskina*") as well as *Mercedes Benz AG v Leiduck* [1996] AC 284 ("*Mercedes Benz*") in support. The Privy Council, in the latter case from Hong Kong, stated at 299:

> [T]here are two unanswerable objections to a jurisdiction asserted under sub-paragraph (m). The first is that the claim would not be "brought to enforce" a judgment. Unlike a suit founded on the cause of action created by a judgment the *Mareva* injunction does not enforce anything, but merely prepares the ground for a possible execution by different means in the future. Secondly, and more simply, in a case such as the present the injunction does not enforce a "judgment," but is intended to hold the position until a judgment comes into existence. At the time when the injunction is sought and granted there is no judgment. All that the plaintiff can do is to assert his hope that a favourable judgment will at some time in the future be obtained in an action which at the time when the application is made may not even have commenced. It is quite plain that sub-paragraph (m) was not intended to encompass such a case.

12 The Privy Council in *Mercedes Benz* accepted and applied what was held by the House of Lords in *The Siskina*. Lord Diplock's judgment at 256 stated the following principle:

> A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.
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> …
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> ... [T]he thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country

and enforceable here by a final judgment for an injunction.

13 *The Siskina* had been expressly approved by our Court of Appeal in *Teo Siew Har v Lee Kuan Yew* [1999] 4 SLR 560 ("*Teo Siew Har*"). Miss Iyer submitted that the Hong Kong court in *Mercedes Benz* was asked to do exactly what this court is now being asked to do. Her argument was thus: that s 25 of the UK Civil Jurisdiction and Judgments Act 1982 (c 27), which now gives the UK High Court specific power to order ancillary Mareva injunctions, merely emphasises the lack of such jurisdiction in Singapore. Further, O 11 r 8A of the UK Civil Procedure Rules 1998 (SI 1998 No 3121) has also been amended accordingly, and applies to specific countries only. We do not have an equivalent of the UK s 25 or O 11 r 8A, and neither does Hong Kong.

14 Miss Iyer next challenged the order granting a service of the Originating Summons out of jurisdiction on the first defendant under O 11 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). Relying again on *The Siskina* and *Mercedes Benz*, she submitted that O 11 r 1 sets out the "pigeon holes" in which a Singapore court would grant leave to serve an originating process out of jurisdiction. Every limb refers to the qualification "in Singapore". Hence, there must be a connection with Singapore. Secondly, O 11 r 1 is only the process. The requirements under O 11 r 2 must first be satisfied, that is to say, the applicant must have a good cause of action. There was, however, in this case, no cause of action, merely, for example, to say that A owes B money, when neither of them is the plaintiff: see *Fowler v Lanning* [1959] 1 QB 426. Counsel submitted that the plaintiff had not complied with the requirement under O 11 r 1.

15 Miss Iyer further argued that even if O 11 r 1 had been complied with, the plaintiff must show that all the relevant limbs applied. Rule 1(c) provides that the applicant must show a real dispute with a local party, the second defendant. There is no cause of action against a debtor's debtor. Rule 1(m) provides for the situation where there is a judgment or award that the plaintiff wishes to execute here, but in such a case, it must be a judgment that is executable locally – this is the effect of *Mercedes Benz*. If a party wishes to enforce a foreign judgment or award, he is required to register that judgment or award first. The plaintiff here further purported to enforce a judgment for US$36m, but there was no judgment for US$36m. Miss Iyer argued that the best that the plaintiff had was the sum of US$5.5m, and in any event, that would be a purely monetary claim against the first defendant in Hong Kong. Another possible ground would be r 1(p), but for that rule to apply, the application must be based on a cause of action arising in Singapore. In this regard, I find myself asking the same question S Rajendran J asked in *Kishinchand Tiloomal Bhojwani v Sunil Kishinchand Bhojwani* [1997] 2 SLR 682 at 688: "Where in substance did the trust in favour of the plaintiff arise?" The plaintiff's claim in this case was founded on the basis that the second defendant held the US$36m on trust for the first defendant. There is no issue of any constructive, implied or any other trust in favour of the plaintiff so it is not necessary for me to consider that aspect. No specific substantive right is being asserted by the plaintiff against the defendants in the present originating summons.

16 Finally, Miss Iyer challenged the discretionary basis upon which the Mareva injunction was granted. Miss Iyer outlined the six requirements that the applicant must satisfy the court in order that a Mareva injunction might issue in his favour. Briefly, she contended that the plaintiff could not, and did not, show any legal or equitable interest in which the order could be founded. Secondly, she contended that this court did not possess jurisdiction because there was no issue of an ancillary order for a Mareva injunction (see [13] above), and that there was no jurisdiction under O 11 for service out of jurisdiction. Thirdly, there was no good arguable claim because such a claim must be a good arguable claim of the plaintiff's own action. It was not disputed, however, that there were assets within the jurisdiction, thus the plaintiff satisfied the fourth requirement. In respect of the fifth requirement, counsel refuted the plaintiff's allegation that the reduction in the first defendant's business dealings with Pertamina (Persero) was evidence of dissipation of the first defendant's assets.

The plaintiff could not compel the garnishee to carry on business with the judgment debtor. Miss Iyer submitted that the garnishee was not the debt collector for the plaintiff garnishor. Hence, any drop in the volume of trade was not evidence of dissipation. Rebutting the plaintiff's point that the transfer of business by the first defendant to the second defendant had resulted in a drop in value of the first defendant's shares held by Pertamina (Persero), Miss Iyer referred to the summary by the accountant, Jamshid Medora, to the effect that the end position of the first defendant was positive, as everything increased – the turnover, profits and value of shares – over the past three years (see [9] above). Counsel argued that there was no "free money" being transferred from Pertamina (Persero) to the first defendant. When the first defendant was doing business, the money was in the bank, BNP Paribas, which was lending money to the first defendant. The general creditors were not disadvantaged. The sixth requirement is the requirement for an undertaking to pay damages and the duty of giving full and frank disclosure. In this regard, counsel relied on *Bank Mellat v Nikpour* [1985] FSR 87 for the express statements of Lord Denning MR in respect of the consequences and effect of non-disclosure, and the proposition that in appropriate circumstances, the applicant would be obliged to make further inquiries and not merely rely on words taken out of context from the defendants. The parallel situation that Miss Iyer saw in this case was the statements made by George Chan in the course of a cross-examination in the Hong Kong inquiry into the first defendant's assets.

17 Some further issues were raised in argument on behalf of the defendants and I shall deal with these briefly. Miss Iyer pointed out that there was no receiver appointed. The receiver was appointed for the limited duty of finding what was due from the first defendant to Pertamina (Persero), and no more. The plaintiff had asked the Hong Kong court in June 2004 for wide powers but that application was refused. The same application was made again in November 2004 but it was similarly refused. Those applications were not disclosed to this court.

18 Mr Yeo submitted that the plaintiff would be applying to convert the originating summons to a writ action, and it was willing to take early trial dates. He submitted that the court ought not to strike out the plaintiff's originating summons, but should allow it to amend its case if the defect could be cured. Mr Yeo submitted that the plaintiff's claim would be amended to include conspiracy as a cause of action. I am of the view that the defect in the case is too serious to be cured by an amendment to the Originating Summons. An allegation of conspiracy requires the strictest pleading and a fully particularised statement of claim. Until all that is accomplished, there is no cause of action that will justify the present injunction from continuing. Where the defendants have shown that assets were plausibly moved or transferred in the course of business, as in this case, the court should not be too eager to find a sinister motive. Mr Yeo further submitted that *The Siskina* had not clearly settled the position in English law, arguing that the Court of Appeal in *Teo Siew Har* did not support the defendants' case. It may be appropriate at this juncture to see what the Court of Appeal actually said. Chao Hick Tin JA stated at [14] as follows:

> It is clear that generally a Mareva injunction is only granted against a person where there exists an action, actual or potential, claiming substantive relief which the High Court has the jurisdiction to grant and in respect of which the Mareva order is an ancillary relief: *The Siskina …*

That was an express endorsement of *The Siskina* on an aspect that was directly relevant to the present case before me. In *Teo Siew Har*, the defendant was sued on substantive defamation actions in Singapore. He left the jurisdiction and did not return for trial. In those circumstances, the plaintiffs obtained a Mareva injunction against his assets. Although there was no direct action against the appellant, Teo Siew Har, who was the defendant's wife, the injunction order was granted as an ancillary relief to a substantive action in Singapore. Finally, Mr Yeo relied on a passage from the judgment of Lord Browne-Wilkinson in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 ("the *Channel Tunnel* case") at 343:

> Even applying the test laid down by the *Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by the English court or by some other court or arbitral body.

The scepticism of Lord Browne-Wilkinson in respect of the ambit of *The Siskina* would not be relevant in the circumstances of the present case before me if the first defendant was not duly served. Furthermore, which is more to the point, nothing in the *Channel Tunnel* case affects the exercise of the court's discretion in taking the circumstances and the context of the application into account when deciding whether or not to continue an injunction.

19 I find that, having regard to the circumstances as outlined by Miss Iyer and the reasons evident in my grounds above, I am not inclined to continue the injunction. I am also inclined to accept the submission of Miss Iyer in respect of the order for the service out of jurisdiction, and I would only say that had these arguments been presented to me at the time, I would not have issued the order. However, I make no findings as to the veracity or reliability of George Chan, or, for that matter, any other deponent. The grounds upon which I now set aside the injunction and service out of jurisdiction do not require that exercise to be carried out. It is sufficient to find that the defendants had made out a plausible defence and argument. Accordingly, I now set aside the order made under the *ex parte* application on 22 December 2004. I shall hear the parties on costs on a later date.