IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 6

Civil Appeal No 2 of 2022

Between

Milaha Explorer Pte Ltd

… *Appellant*

And

Pengrui Leasing (Tianjin) Co Ltd

… *Respondent*

In the matter of Originating Summons No 849/2021

Between

Pengrui Leasing (Tianjin) Co Ltd

… *Applicant*

And

Milaha Explorer Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure — Mareva injunctions]

Milaha Explorer Pte Ltd
v
Pengrui Leasing (Tianjin) Co Ltd

[2023] SGCA 6

Court of Appeal — Civil Appeal No 2 of 2022
Judith Prakash JCA and Tay Yong Kwang JCA
7 September 2022

20 February 2023

Judith Prakash JCA (delivering the grounds of decision of the court):

Introduction

1 The present appeal arises from the decision of the judge below (the "Judge") in *Pengrui Leasing (Tianjin) Co Ltd v Milaha Explorer Pte Ltd* [2022] SGHC 80 (the "Judgment") granting a Mareva injunction over the assets of the appellant.

2 On 7 September 2022, we heard and allowed the appeal and set aside the Mareva injunction granted by the Judge. These are the detailed grounds of our decision.

Factual background

3 On appeal, the parties only disputed a single issue, that is, whether there was a real risk of dissipation of assets by the appellant (see below at [22]). We

therefore set out only the facts that are relevant to this issue. The complete facts are set out in the Judgment.

The parties

4 The appellant, Milaha Explorer Pte Ltd ("Milaha"), is a Singapore-incorporated company. It is a special purpose vehicle incorporated for the purpose of owning its sole asset, a vessel called the "Milaha Explorer" (the "Vessel"). Milaha has a paid-up capital of $50,000 and is fully owned by a company called Milaha Offshore Holding Company Pte Ltd ("Milaha Offshore"), which is in turn fully owned by Milaha Offshore Support Services Co W.L.L. ("Milaha Support"). Milaha's ultimate beneficial owner is Qatari Navigation QPSC ("Qatari Navigation"), which owns 99.5% of the shares in Milaha Support. Qatari Navigation is a public company listed on the Qatar stock exchange.

5 The respondent, Pengrui Leasing (Tianjin) Co Ltd ("Pengrui"), is a Chinese company engaged in the business of ship-owning and leasing.

The memorandum of agreement

6 The dispute between the parties relates to the alleged breach of a memorandum of agreement ("MOA") signed by the parties on 31 May 2021. Under the MOA, Milaha agreed to sell the Vessel to Pengrui for US$26m.

7 We highlight two relevant clauses in the MOA:

(a) Under cl 13 ("the buyer's default clause"), should the deposit not be paid in accordance with cl 2, Milaha had the right to cancel the MOA immediately and Pengrui would be liable to pay compensation to Milaha. Should the balance price not be paid in accordance with cl 3,

Milaha would be entitled to cancel the MOA and forfeit the deposit together with any interest earned thereon.

(b) Under cl 16 ("the arbitration clause"), any dispute between the parties would be referred to arbitration in London.

8 A dispute over the MOA arose shortly after it was signed. In late July 2021, Pengrui alleged that Milaha had breached the MOA because the Vessel did not meet certain requirements stipulated in the MOA. There was then a meeting on 2 August 2021 (the "2 August 2021 meeting"). Certain variations to the MOA were allegedly discussed at this meeting. In these proceedings, Pengrui denied that its representative attended the 2 August 2021 meeting. It therefore denied that there were any discussions between the parties regarding the variation of the MOA on 2 August 2021.

9 Milaha, on the other hand, alleged that Pengrui was in breach of the MOA for failing to effect the amendments discussed and agreed to during the 2 August 2021 meeting. Milaha took the position that Pengrui had wrongly repudiated the contract by its failure. Milaha therefore sent Pengrui a letter on 12 August 2021 (the "12 August 2021 letter") cancelling the MOA. Milaha also highlighted in the 12 August 2021 letter its contractual right under the buyer's default clause to sell the Vessel to someone else upon Pengrui's breach of contract. Pengrui replied on 16 August 2021 stating that Milaha's exercise of the buyer's default clause was wrongful.

10 Pengrui then commenced arbitration proceedings in London (the "London arbitration") pursuant to the arbitration clause. Thus, the factual disputes are to be resolved in the London arbitration. We emphasise that in

setting out the factual background to this appeal, we are *not* making any conclusive findings of fact.

Procedural history

11 The procedural history leading to this appeal was somewhat involved. On 20 August 2021, Pengrui filed HC/OS 849/2021 ("OS 849") *ex parte* seeking a Mareva injunction against Milaha in aid of the London arbitration. The *ex parte* Mareva Injunction in OS 849 was granted by the Judge on 23 August 2021. On 9 September 2021, Milaha filed HC/SUM 4226/2021 ("SUM 4226") to set aside the *ex parte* Mareva Injunction. SUM 4226 was dismissed by the Judge on 18 October 2021.

12 Milaha then appealed against the Judge's decision. However, the appeal was initially filed to the Appellate Division of the High Court. Thereafter, Milaha filed CA/OS 31/2021 to transfer the appeal to this court. Pengrui objected to the transfer and filed AD/SUM 35/2021 ("SUM 35") to strike out the Notice of Appeal. The transfer of the appeal to this court was allowed on 25 January 2022: see *Milaha Explorer Pte Ltd v Pengrui Leasing (Tianjin) Co Ltd* [2022] 1 SLR 1147. SUM 35 was dismissed on 15 February 2022.

Decision below

13 The dispute below centred around whether the requirements for the grant of a Mareva injunction set out in *Bouvier, Yves Charles Edgar and another v Accent Delight International Ltd and another and another appeal* [2015] 5 SLR 558 ("*Bouvier*") were satisfied. These requirements are as follows:

(a) whether there is a valid cause of action over which the court has jurisdiction;

(b) whether Pengrui as the claimant has a good arguable case on the merits;

(c) whether Milaha has assets within the jurisdiction; and

(d) whether there is a real risk that Milaha will dissipate its assets to frustrate the enforcement of an anticipated judgment of the court or tribunal.

14 In response to Pengrui's argument that all the above requirements were satisfied, Milaha argued that Pengrui had failed to give full and frank disclosure of material facts and therefore, the Mareva injunction should be set aside.

15 The Judge held that all the requirements in *Bouvier* were satisfied. The Judge also held that Pengrui did not fail to give full and frank disclosure of material facts.

16 In support of its argument that there was a real risk of dissipation of assets, Pengrui pointed to the corporate structure of Milaha. Specifically, Pengrui highlighted that Milaha had a paid-up capital of only $50,000 and its sole shareholder is Milaha Offshore. It, however, recognised that Milaha's ultimate owner is Qatari Navigation. Pengrui also pointed out that Milaha had suffered accumulated losses totalling over US$12m as of 31 December 2019. Milaha was only able to stay afloat due to financial support from Qatari Navigation.

17 In response, Milaha submitted that the mere fact that it was a special purpose vehicle and a one-ship company did not evince a real risk of dissipation. Further, Pengrui knew that Milaha's ultimate owner is Qatari Navigation, which is a listed company in Qatar.

18 The Judge held that there was a real risk that Milaha would dissipate its assets for the following reasons:

(a) If not for the continued financial support of Qatari Navigation, Milaha would be insolvent.

(b) It is cold comfort to a creditor to be told that a Qatari listed company is the ultimate shareholder of its debtor when the parent company is not shown to be a shareholder of the debtor as in this case. Hence, Milaha's submission that "[Pengrui] is fully aware that [Milaha] is ultimately owned by Qatari Navigation, a Qatari public company traded on the Qatar Stock Exchange" is neither here nor there.

(c) Should Pengrui succeed in the arbitral proceedings, Pengrui would still be at the mercy of Qatari Navigation as to whether it wishes to bail out Milaha and meet Milaha's legal obligations.

(d) Nothing could be clearer as to Milaha's intentions than the 12 August 2021 letter which stated that Milaha was free to sell the Vessel to other buyers. This demonstrated a real risk of dissipation of assets.

(e) Bearing in mind that Milaha is a special purpose vehicle and a one-ship company, there was reason to fear that if Pengrui succeeded in the arbitral proceedings, the award would be rendered nugatory by the prior sale of the Vessel.

19 The Judge also dealt with Pengrui's argument that there was dishonesty on Milaha's part in concealing material facts relating to the Vessel. Pengrui submitted that such dishonesty further supported the conclusion that there was

a real risk of dissipation of assets. The Judge disregarded Pengrui's (hotly contested) allegations of dishonesty on the part of Milaha, citing [66] of *Bouvier*, which stated that the existence of a real risk of dissipation must be assessed *independently* from the prospect of the claimant's eventual success (or failure) in establishing an allegation of dishonesty.

20 The Judge also noted that when Milaha's counsel Mr Edgar Chin ("Mr Chin") was asked whether Milaha would provide security if the court were to discharge the injunction, Mr Chin responded that he would take his client's instructions and added that his client had no plans to sell the Vessel. If they did, they would pay the entire proceeds into court. The Judge noted that Milaha's counsel did not revert on the inquiry nor on his statement on his client's intention and "[h]ad Milaha offered security, the court would have discharged the Injunction Order without more".

21 In the event, the injunction granted prohibited Milaha from removing from Singapore or in any way dealing with or disposing of its assets in Singapore whether jointly or severally owned up to the value of US$23,760,473. The prohibition was specifically stated to include the Vessel, Milaha's property and assets in Singapore and money in its Hongkong and Shanghai Banking Corporation Limited bank account numbered XXX178 ("the HSBC Account").

The issue in this appeal

22 As earlier alluded to, Milaha only contested the Judge's decision that there was a real risk of dissipation of assets on Milaha's part. This was therefore the sole issue on appeal. We turn next to detail our decision in this regard.

Our decision

The applicable test

23 The essential test, as stated by this court in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 ("*JTrust*") at [64], is whether there is objectively a real risk that a judgment may not be satisfied because of a risk of unjustified dealings with assets. The claimant must produce "solid evidence" to demonstrate this risk, and not just bare assertions of fact: see also *Bouvier* at [36].

24 The court would consider, among others, the following factors in assessing whether there is a real risk of dissipation (see *JTrust* at [65]): (a) the nature of the assets which are to be the subject of the proposed injunction; (b) the ease with which the assets could be disposed of or dissipated; (c) the nature and financial standing of the defendant's business; (d) the length of time the defendant has been in business; (e) the domicile or residence of the defendant; (f) if the defendant is a foreign entity, the country in which it is registered and the availability of reciprocal enforcement of local judgments or awards in that country; (g) the defendant's past or existing credit record; (h) any intention expressed by the defendant about future dealings with the assets; (i) connections between a defendant and other companies which have defaulted on awards or judgments; (j) the defendant's behaviour in respect of the claims, including that in response to the claimant's claims; and (k) good grounds for alleging that the defendant has been dishonest. It can be seen from many of these factors that the court is also concerned to determine whether there are circumstances suggesting that the defendant not only can but likely will frustrate the judgment.

Milaha's corporate structure

25 We begin by addressing the arguments in respect of Milaha's corporate structure. At the outset, we observe that the mere fact that a defendant holds their assets through offshore structures or by way of special purpose vehicles is not in itself evidence of a risk of dissipation: see *Holyoake and another v Candy and others* [2018] Ch 297 at [27]. Ultimately, we must look at all the surrounding circumstances.

26 In our view, Milaha's corporate structure did not support a real risk of dissipation of assets. Its structure can be explained by the purpose of its incorporation. It is a special purpose vehicle incorporated for the purpose of owning the Vessel. Milaha explained that it is industry practice (and regarded as common commercial sense) to ringfence risks and liabilities arising from owning and operating vessels for the vessels to be put in the ownership of one-ship companies. Due weight must also be accorded to the fact that Milaha is owned by a public listed company being traded on the Qatar stock exchange.

27 More importantly, Milaha's corporate structure must have been known to Pengrui when the MOA was concluded. At the least, information on Milaha's corporate structure was available to Pengrui and Pengrui could have conducted basic searches to obtain that information. There was no suggestion by Pengrui that Milaha had made any attempt to conceal Milaha's corporate structure. We contrast this with *JTrust*, where the corporate structures of the relevant companies there were described as "complex and opaque" and there were attempts made to conceal the ownership of the relevant companies: see *JTrust* at [73]–[74]. In the present case, Pengrui conducted business with Milaha with its eyes wide open and it must therefore be taken to have accepted the risks associated with Milaha's corporate structure. That Pengrui would be, as the

Judge had described, "at the mercy of Qatari Navigation as to whether it wishes to bail out Milaha and meet Milaha's legal obligations" was simply part of the risks associated with dealing with Milaha, which Pengrui had accepted. If Pengrui had been perturbed by such risks, it could have looked for ways to mitigate the same. One such way would perhaps have been to ask Milaha's ultimate owner to provide a corporate guarantee.

28 Having accepted the risks involved, Pengrui alleged in court that Milaha might siphon monies from any subsequent sale of the Vessel to pay other creditors or its ultimate beneficial owner, Qatari Navigation. But even if monies were to be paid out, such payment could well be for legitimate commercial purposes like paying off its creditors. The key inquiry is still whether there were unjustified dealings with assets, which we discuss in detail below at [31]–[35]. If Milaha eventually becomes insolvent because of these payments, Pengrui's remedy would lie in insolvency law. Perhaps Pengrui could seek to set aside such payments based on fraud or undue preference if it is so advised. But it cannot seek a Mareva injunction on the basis that the business risks (which it was or should have been aware of) may materialise.

29 The purpose of a Mareva injunction, we stress, is *not* to provide security to a litigant or to guard against potential insolvency of the counterparty: see *Lee Shieh-Peen Clement and another v Ho Chin Nguang and others* [2010] 4 SLR 801 ("*Lee Shieh-Peen Clement*") at [26]; see also *Tribune Investment Trust Inc v Dalzavod Joint Stock Co* [1997] 3 SLR(R) 813 at [14]. Instead, the undoubted object of the Mareva injunction is to prevent the course of justice from being frustrated by a defendant's deliberate actions which would have the effect of defeating wholly or in part any judgment or order which the claimant may thereafter obtain against the defendant: see *Lee Shieh-Peen Clement* at [26] citing *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC

181. The test, as earlier explained, is still whether there were unjustified dealings with assets or a real risk thereof on Milaha's part.

30 Before turning to address the arguments in respect of whether Milaha had engaged in unjustified dealings with its assets, we first make some observations on how we should treat foreign companies and/or companies with foreign ultimate beneficial owners when deciding whether there was a real risk of dissipation of assets. In a previous decision of this court, we observed that the fact that the relevant parties are not based in Singapore may support the existence of a real risk of dissipation: see *JTrust* at [65] and [80]–[82]. But at the same time, we are also fully cognisant of the reality that commercial parties conducting business, especially in a global business hub like Singapore, often have foreign origins. We therefore make the point that the foreign origin of a company/person is but *one* factor to consider and *cannot in and of itself* justify a real risk of dissipation of assets. Ultimately, the inquiry is a holistic one that accounts for all the surrounding circumstances and factors stated above at [24].

Whether there were unjustified dealings with assets

31 The Judge noted (at [84] of the Judgment) that "nothing could be clearer as to Milaha's intentions" to dissipate its assets than the 12 August 2021 letter where Milaha iterated its right to sell the Vessel under the buyer's default clause.

32 We stress that dealing with assets in and of itself would be insufficient to show a real risk of dissipation; the dealing with assets must be *unjustified*. In other words, if the dealing with assets was for legitimate commercial reasons, then such dealing would not be unjustified.

33 In our judgment, there was no unjustified dealing with assets by Milaha. We make three points. First, Milaha was simply stating the consequence of Pengrui's alleged breach of contract in the 12 August 2021 letter. There was nothing unusual about this as contractual parties often bring certain clauses to the attention of the counterparty when a dispute arises. Secondly, at the date of the application for the Mareva Injunction (and even at the date of the hearing of the appeal), the Vessel had not been sold and Milaha had not entered into any contract for the sale of the Vessel. Finally, even if the Vessel were eventually sold, there could be various legitimate commercial reasons for the sale. For instance, Milaha could be planning to replace the Vessel with a newer or bigger ship, or its financial situation might be so bad that it needed to realise its assets and had come up with a scheme to settle its indebtedness. Ultimately, Pengrui bore the burden of producing "solid evidence" of a real risk of dissipation. In our view, no such evidence was produced.

34 The present case can also be distinguished from *Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 ("*Guan Chong Cocoa*"), the facts of which, at first glance, appeared similar to those of the present case. There, the court noted that there was no explanation offered by the respondent for the sale of its only vessel and its cessation of business. This lack of explanation supported the conclusion that there was a real risk of dissipation of assets: see *Guan Chong Cocoa* at [19] and [23]–[26]. Here, Milaha did not cease its business but there were allegations that Milaha had attempted to sell its only asset, the Vessel. There are, however, two important points to bear in mind here that were absent in *Guan Chong Cocoa*. First, Milaha had from the outset been desirous of selling the Vessel and that was the reason the MOA was concluded. It would or should have been in Pengrui's reasonable contemplation that, in these circumstances, if its deal with Milaha fell through,

Milaha would look to sell the Vessel to someone else. The sale of the Vessel to another commercial party would simply be a continuation of what Milaha had set out to do in the first place. This was not what happened in *Guan Chong Cocoa* where the sale of the vessel was only undertaken after a completely unrelated dispute had arisen and a claim had been made. Secondly, a right of re-sale was expressly provided for in cl 13 of the MOA, *ie*, the buyer's default clause. In these circumstances, it cannot be inferred that Milaha's potential sale of the Vessel would simply be to avoid the consequences of a lawsuit rather than for legitimate commercial reasons.

35 We also make some observations on Milaha's conduct in relation to the deposit paid to it by Pengrui. Under the MOA, Pengrui was obligated to pay Milaha a deposit of US$5.2m, which it did on 27 June 2021. The deposit was paid into Milaha's HSBC Account. Subsequently, on 23 August 2021 Pengrui obtained the Mareva injunction against Milaha's assets, which included the HSBC Account. As of 1 November 2021, the balance in the HSBC Account was US$5.186m; only about US$13,000 (only about 0.25% of the deposit) had been spent by Milaha. It could have dissipated the deposit in the two-month period between the payment of the deposit and the granting of the Mareva injunction, but it did not. This, in our view, supported our conclusion above that there was no real risk of dissipation of assets by Milaha.

Pengrui's allegations of dishonesty

36 We agreed with the Judge that Pengrui's allegations of dishonesty on Milaha's part should be disregarded. As stated by this court in *Bouvier* at [93]–[94], the alleged dishonesty must be of such a nature that it has a real and material bearing on the risk of dissipation. In our view, there was no such connection here.

37 Further, the allegations of dishonesty are hotly contested. On a quick perusal of the facts, we note that the arguments by both sides on the substance of the dispute were finely balanced. For instance, although Pengrui alleged that Milaha had lied about the condition of the Vessel, there was evidence showing that Pengrui continued to negotiate with Milaha to reduce the price of the Vessel upon discovery of certain issues with the Vessel. This indicated that Milaha had no intention of defrauding Pengrui and was willing to engage them on the reduction of the price of the Vessel. Again, we stress that we are not making any conclusive findings of fact as it would be impossible without a full hearing to conclude that Milaha had acted dishonestly. Again, we stress that the proper forum to resolve these factual disputes would be the London arbitration.

Other observations

38 We also make two other observations. First, we emphasise the draconian effects of the Mareva injunction. As Milaha had only a single asset, *ie*, the Vessel, the Mareva injunction essentially prevented Milaha from conducting its entire business in its best interests. In deciding whether to grant a Mareva injunction, the court should balance the effects of the Mareva injunction on the respondent against the potential prejudice or loss that would be caused to the claimant.

39 Secondly, Pengrui in its Respondent's Case suggested that Milaha should set aside a sum of money as security or pay that sum of money into escrow or into court. As earlier explained (at [29]), it is not the purpose of a Mareva injunction to provide security. Further, as there was no basis for a Mareva injunction, there would similarly be no basis on which to compel Milaha to do the things suggested by Pengrui.

Conclusion

40 For the above reasons, we allowed the appeal and set aside the Mareva injunction. We awarded Milaha costs fixed at $45,000 (inclusive of disbursements) for its costs here and below. We also set aside the costs order made by the Judge. Pengrui was ordered to refund the costs below paid by Milaha. The usual consequential orders applied.

Judith Prakash
Justice of the Court of Appeal

Tay Yong Kwang
Justice of the Court of Appeal

Harpreet Singh Nehal SC, Jordan Tan,
Victor Leong (Audent Chambers LLC) (instructed),
Edgar Chin Ren Howe, Ch'ng Cheng Yi Samantha, and
Teo Jim Yang (Ascendant Legal LLC) for the appellant;
Goh Kok Leong (Ang & Partners) for the respondent;
Shawn Lim Zi Xuan (Oon & Bazul LLP) for OHT Osprey AS
(watching brief).