Marubeni International Petroleum (S) Pte Ltd v Projector SA
[2004] SGHC 179

Case Number : Suit 1164/2003, SIC 7420/2003

Decision Date : 16 August 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Werner Tsu (Drew and Napier LLC) for plaintiff; Govindarajalu Asokan and Kelvin Poon (Rodyk and Davidson) for defendant

Parties : Marubeni International Petroleum (S) Pte Ltd — Projector SA

Civil Procedure – Costs – Principles – Defendant seeking costs of application – Merits of substantive action yet to be finally decided at trial – Whether costs of application should be determined at this stage

Civil Procedure – Damages – Defendant seeking inquiry as to possible damages sustained by reason of interim mandatory injunction – Merits of substantive action yet to be finally decided at trial – Whether inquiry as to damages should be undertaken at this stage

Injunctions – Mandatory injunction – Interim mandatory injunction granted to plaintiff to compel defendants to secure release of vessel -Defendant subsequently objecting to granting of injunction on grounds of existing triable issues to be determined at trial – Factors to consider when granting interim mandatory injunctions

16 August 2004

Belinda Ang Saw Ean J:

1 The plaintiff is Marubeni International Petroleum (S) Pte Ltd. The writ of summons in this action was issued on 28 November 2003 to enforce the plaintiffs' rights under two letters of indemnity dated 16 and 18 July 2003 respectively. On the same day, Tay Yong Kwang J granted *ex parte* an interim mandatory injunction against the defendant, Projector SA ("the interim order"). The interim order provided that the defendant, *inter alia*, secure the release from arrest of the vessel *Dynamic Express* by payment into court in South Korea of approximately US$2.6m in respect of gas oil shipped under bills of lading nos DMEXP-A and KAKR-001.

2 Mitsui OSK Lines Ltd ("Mitsui"), as disponent owner of *Dynamic Express*, time chartered the vessel to the plaintiff who in turn entered into a voyage sub-charter with the defendant on 3 July 2003 for the carriage of gas oil from Taiwan to South Korea. As the originals of bills of lading nos DMEXP-A, DMEXP-B and DMEXP-01 and KAKR-001 had not arrived at the discharge port, the defendant requested the plaintiff to deliver the gas oil to Petaco Petroleum Inc ("Petaco") without production of the originals bills of lading. The plaintiff acceded to the defendant's request in exchange for two letters of indemnity dated 16 and 18 July 2003 ("the LOI"). The gas oil was released to Petaco at the port of Pyongtaek, South Korea. The bank creditors of Petaco arrested the *Dynamic Express* in Daeson, South Korea, on 21 November 2003 for loss and damage suffered by reason of the delivery of gas oil to Petaco without production of the original copy of bills of lading nos DMEXP-A and KAKR-001.

3 The basis of the plaintiff's application before Tay J, as it was before me, was that the defendant had not, contrary to the LOI, provided security to secure the release from arrest of the vessel *Dynamic Express*. The plaintiff wanted the defendant to furnish the necessary security to the registered owners of *Dynamic Express* so that the plaintiff itself need not provide it. The purpose of

the LOI was to achieve this.

4 On 2 December 2003, the defendant filed an application to discharge the interim order. It denied being in breach of the LOI. Under cl 4 of the LOI, the defendant agreed to provide, but only on demand, bail or the security as might be required to prevent the arrest or detention or to secure the release of the vessel from arrest. Security or bail was furnished within a reasonable time of the plaintiff's demand. Furthermore, there was no obligation to indemnify the plaintiff in respect of any loss, damage or expense caused by such arrest or detention, as the plaintiff had suffered no loss. There was no obligation under cl 5 of the LOI to produce and deliver the originals bills of lading until the defendant had them in their possession.

5 The plaintiff's demand to post bail by way of a cash deposit was made on 27 November 2003. This demand was received on 28 November 2003, which was the same day the plaintiff applied and obtained *ex parte* the interim order. The defendant submitted that it was entitled to a reasonable time within which to comply with the demand and such a reasonable time would, at the earliest, expire on 1 December 2003. As early as 24 November 2003 the plaintiff's solicitors, Drew & Napier LLC, were notified in a fax that the defendant would comply with its contractual obligations under the LOI. The plaintiff's application for an interim injunction was thus unnecessary and decidedly premature.

6 The thrust of the defendant's argument was that the other written communications from Drew & Napier LLC on behalf of the plaintiff calling the defendant to meet its LOI obligations did not constitute a demand of the kind envisaged by cl 4 of the LOI. For instance, the first fax dated 21 November 2003, which the defendant passed on to its London office on 24 November 2003, did not specify the form of security required to prevent an arrest of the vessel. Drew & Napier LLC sent two further faxes both dated 24 November 2003. The defendant was told that, under South Korean law and practice, a preferred guarantor would be a first class international bank with a presence in South Korea. The defendant duly worked towards furnishing this form of security with the assistance of its lawyers in South Korea and their counterparts representing the arresting party. This form of security was rejected on 27 November 2003. The defendant's anticipation of an alternative proposal, that Mitsui provide security directly to the arresting party and that the defendant in turn counter-secure Mitsui, did not materialise. Instead, Mitsui's lawyers asked the defendant to post cash bail. Counsel for the defendant, Mr Govindarajalu Asokan, submitted that the defendant's efforts were in keeping with the promises made under the LOI. He argued that security was furnished pursuant to the LOI, and not because of the interim order.

7 Mr Werner Tsu, for the plaintiff, explained that the *ex parte* application was founded on the defendant's breach of the LOI. The defendant had not secured the release of the vessel for arrest as it was required to under the LOI. His point was that the defendant posted the security only after the interim order was obtained. Prior to that, the defendant had failed to respond to the plaintiff's demands to comply with the LOI. The defendant was given ample notice (some three weeks) of the impending claims from the South Korean banks but did nothing to prevent the arrest of the *Dynamic Express*. The first demand was sent as early as 6 November 2003. The defendant was tardy and ineffectual in its responses both as to preventing the vessel's arrest as well as to securing her release from arrest. Contrary to Mr Asokan's contention, Mr Tsu argued that the defendant was aware that it had to put up a cash deposit as early as 21 November 2003. M/s Kim & Chang, who were Mitsui's lawyers, in their letter dated 20 November 2003 explained that the only way to lift an arrest in South Korea was to post a cash deposit equal to the value of the gas oil plus an uplift of 30–50% for costs and interest. That letter was sent to the defendant on 21 November 2003. The plaintiff pointed out that it had on no less than four occasions since the arrest of the vessel on 24 November 2003 informed the defendant that, barring a satisfactory response, the plaintiff would be applying for an injunction.

8 The contest as to whether the interim order should have been granted centred on whether or not the defendant had breached its obligations under cll 4 and 5 of the LOI. The defendant, in its written submissions, recognised that this primary issue had to be determined at trial. In its action, the plaintiff sought various declarations and specific performance of the terms of the LOI. One declaration was that the defendant should indemnify and hold harmless the plaintiff in respect of any liability, loss or damages of whatsoever nature (whether direct or indirect) on account of the delivery of gas oil to Petaco at the defendant's request as well as for the arrest of *Dynamic Express*. In addition, the plaintiff also sought an inquiry and an account to be taken to ascertain the amounts so due and payable by the defendant to the plaintiff. Alternatively, the plaintiff sought damages against the defendant for breach of the LOI.

9 A determination of the primary issue will also answer the question whether or not the plaintiff acted reasonably in seeking interlocutory relief on 28 November 2003 and whether the interim order was rightly or wrongly obtained. The defendant suggested that the plaintiff had acted in bad faith when it sought the interim order. In my view, the factual issues raised and argued by the parties, the determination of which the rights of the parties depend on, are best reserved to the trial judge. They cannot be justly dealt with at this *inter partes* hearing without permitting the defendant the right of trial and the court the opportunity to go into the full merits of the case. It is not a matter of simply deciding whether *Tomongo Shipping Co Ltd v Heng Holdings SEA (Pte) Ltd* [1997] 2 SLR 550 was rightly decided.

10 So as not to be misunderstood, I am not agreeing with Mr Asokan that the interim order should not have been granted because of the existence of triable issues that have to be fully considered and determined at trial. All cases on interlocutory relief emphasise that the primary consideration of the court is to find the course that is likely to involve the lower risk of injustice if it turns out to be "wrong" at the trial. The Court of Appeal in *Singapore Press Holdings Ltd v Brown Noel Trading Pte Ltd* [1994] 3 SLR 151 reaffirmed what it said in *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR 729 at 743, [89], that the strength of a party's case is neither a necessary nor sufficient condition for the grant of an interlocutory mandatory injunction. The existence of triable issues is a factor to consider when deciding on the course to take. Other factors such as the conduct of the parties and whether damages are an adequate remedy have to be considered. This "merits" threshold is a guide designed to take into account the fact that the grant of an interlocutory mandatory injunction may involve a greater risk of injustice if it turns out to have been wrongly granted; and the fact that the greater the degree of assurance that the plaintiff will succeed, the less the risk of injustice to the defendant. If the court does not feel assured that the plaintiff will establish its rights at trial, there can still be circumstances when it will be appropriate to grant an interlocutory mandatory injunction. This will be where the risk of injustice if the interlocutory mandatory injunction is refused outweighs the injustice if it is granted.

11 I was, in the circumstances, reluctant to go into the whole question of the way in which Tay J exercised his discretion based on all the affidavits filed. An assessment of the primary issue could not be satisfactorily entertained at an interlocutory stage on untested material. I was mindful that with a continuation of the interim order the action could end in the plaintiff's favour without permitting the defendant the right of trial. Nevertheless, I was able to approach the defendant's application in another way. Had that option not been available, it might have been appropriate to adjourn the application to the trial judge. An adjournment, on balance, would avoid injustice to either party. It would also avoid revisiting the same issues at the trial, and would be in the interest of sparing court's resources and costs that should be saved and could still be saved by not dealing with the application at the *inter partes* hearing. As I said, I need not have to go down that route.

12 When the matter came up for hearing before me, security for the release of the vessel had

already been deposited with the South Korean courts. The risk of injustice if the interlocutory relief was granted or refused, which Tay J had to weigh at the time of the plaintiff's application, had all but disappeared. The vessel has since been released. I was of the view that the interim order was no longer necessary and should therefore be discharged. On that footing, it is clearly open to the defendant to contend at the trial that the interim order ought not to have been granted in the first place as there was no breach of the LOI.

13 Accordingly, I discharged the injunction on the condition that the money deposited with the South Korean courts was to be retained to abide by the outcome of the proceedings in South Korea. I imposed the condition for two reasons. First, it was not free from doubt that the security could not be withdrawn. Second, Mr Asokan informed the court of the defendant's willingness to leave the security in place, but he had no instructions to give an undertaking to the court that if the interim injunction were to be discharged the security would not be withdrawn.

14 I reserved prayers 3 (inquiry as to damages) and 5 (costs) of the defendant's application to the trial judge. I also granted each party a general liberty to apply in connection with the orders made.

15 Upon discharge of the interim order, the court has discretion whether or not to enforce the undertaking in damages. In this case, it was appropriate to reserve prayer 3 (inquiry as to damages) to the trial judge. A proper time to consider prayer 3 is when the merits of the action have been finally decided at trial. It is convenient to mention that two questions usually arise when a defendant seeks to enforce an undertaking in damages. The first question is whether the undertaking should be enforced at all. The answer depends on the circumstances in which the order was obtained and the success or otherwise of a plaintiff at the trial. If the first question is answered in favour of the defendant, the next question is whether the defendant has suffered any damage from the granting of the interlocutory injunction: *per* Lloyd LJ in *Financiera Avenida SA v Shiblaq* [1991] TLR 21.

16 I reserved costs of the application to the trial judge as an order for costs at this stage was not the correct order to make. Although some of the costs incurred were referable to the instant application, it was impossible to reach a proper view as to what portion of the costs was attributable to the interim dispute and what portion to the general dispute in the substantive action between the parties.