PSONS Ltd *v* UPF Holding Pte Ltd and others
[2014] SGHC 55

Case Number : Suit No 750 of 2013 (Summons No 5068 of 2013)

Decision Date : 31 March 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Pradeep Pillai, Stephanie Wee and Ng Wenling (Shook Lin & Bok LLP) for the plaintiff; P Padman and Aaron Wham (Tan Kok Quan Partnership) for the defendants.

Parties : PSONS Ltd — UPF Holding Pte Ltd and others

Equity – Remedies – Injunction

31 March 2014 Judgment reserved.

Choo Han Teck J:

1 This is an application by the defendants to set aside the mareva injunction granted pursuant to Summons No 4333 of 2013. Summons No 4333 of 2013 concerned an application by the plaintiff in this case, before me on 29 August 2013, for an injunction against the defendants in this case, prohibiting the disposal of their assets in Singapore up to the value of US$900,000. For the first defendant, the injunction extended to monies in its corporate bank accounts, whereas for the second and third defendants, the injunction extended to their shares in the first defendant.

2 The plaintiff is a company incorporated in Hong Kong, engaged in the business of mining and trading minerals. The first defendant is a trading company primarily involved in the wood and pulp business, incorporated in Singapore. The second and third defendants are directors of the first defendant, and are involved in the day-to-day running of the business. Each of them owns 50% of the shares of the first defendant.

3 On 18 November 2009, after some negotiations, the plaintiff and the first defendant signed a Memorandum of Understanding ("MOU"). Under the MOU, the plaintiff was to pay US$610,000 to the first defendant in exchange for the first defendant's help to procure a mining licence for the plaintiff in Laos. This sum was to be paid in stages. When the first defendant accomplished a certain goal in the process of obtaining the licence, a portion would be due. Altogether, the plaintiff had paid the first defendant an aggregate sum of US$841,350 (including expenses). However, no licence was obtained. The plaintiff and the defendants tried many times to resolve their dispute through negotiations. On 25 July 2012, parties arrived at a further agreement ("the Bangkok Agreement"), through which the plaintiff gave the defendants two to three weeks more to obtain the licence, failing which the defendants had to return the sum of US$841,350 to the plaintiff. However, the licence was not obtained, nor was the plaintiff repaid.

4 On 20 August 2013, the plaintiff commenced Suit No 750 of 2013 in the High Court. It pleaded two causes of action, namely, breach of contract and the tort of deceit. On 29 August 2013, the plaintiff appeared before me seeking an urgent *ex parte* injunction order. I allowed the application. On 10 December 2013, proceedings against the first defendant were stayed in favour of arbitration – the plaintiff commenced arbitration against the first defendant and filed the notice of arbitration on

11 March 2014. The plaintiff wishes to continue the proceedings in Suit No 750 of 2013 against the second and third defendants. As such, the plaintiff prayed for the injunction order to remain in force against all three defendants.

5 5 Having now had the benefit of hearing submissions from both parties, I find that the foundation on which this mareva injunction was based is untenable. I am thus allowing the defendants' application to set aside the injunction. When counsel appeared before me, both sides seemed keen to delve into whether the elements of the test for granting a mareva injunction had been made out. Both sides agreed there was a good arguable case, and the contention was on whether there was a risk of dissipation. I find it more appropriate, however, to review the equitable nature of a mareva injunction. It is from this perspective that I am allowing the defendants' application, for I have found that the plaintiff did not come to this court with clean hands. I explain my decision by first highlighting the background as it was presented to me by parties both in their written and oral submissions. Second, I will briefly elaborate on the "clean hands" doctrine.

6 Much revolves around the MOU, the negotiations that led up to it, and the subsequent attempts at negotiation when the first defendant allegedly failed to perform its side of the "bargain". Based on the facts as presented in [3], two questions arise: what was the plaintiff paying the defendant for? And why did the plaintiff need the defendants? The plaintiff is a company with experience in the mining industry. The defendant is not – it is a trading company primarily involved in the wood and pulp business. When parties appeared before me on 17 March 2014, I posed these questions to counsel for the plaintiff. Counsel for the plaintiff responded that the plaintiff had made the payments totalling US$841,350 with the understanding that the would be used by the defendants towards paying "facilitation fees" and "costs for the relevant applications to liaising with the various government departments to secure the licences". The plaintiff also claimed to have relied on the defendants as they represented to it that they had already established relationships with relevant parties in Laos. The plaintiff made much of the fact that the MOU was structured in a manner that required payments to be made in stages. This, the plaintiff argued, signified the "legitimacy" of the plaintiff's involvement in the deal. For ease of reference, I set out the relevant terms of the MOU:

APPLICATION COSTS, PAYMENT MILESTONES and TIMEFRAMES

The structure of payment of the facilitation fee shall be as follows:-

1. US$100,000.00 to be paid within 3 banking days from the date of signing of this MOU.

   Date:- 12th – 20th November 2009

2. US$150,000.00 to be paid when DFSP is completed, the said draft reviewed by PSONS and approved by PSONS, and the said DFSP is submitted to FIMC for Circulation to all Relevant Ministerial Departments (list of 8 as per attachment "B" of this MOU) and the relevant confirmation from FIMC to be provided by UPF.

   Date:- 28th – 30th November 2009

3. US$140,000.00 to be paid upon receipt of confirmation that FIMC has circulated the application to all relevant Depts, Such confirmation shall be a letter / message from FIMC confirming that the circulation has been completed.

   Date:- 1st – 5th December 2009

4. US$120,000.00 to be paid when UPF provides confirmation that all Dept have received the Application as circulated by FIMC. Such confirmation shall be provided by UPF by way of stamped confirmations from each relevant Dept. indicating that the application has been received by them.

   Date:- 20th – 25th December 2

5. US$100,000.00 to be paid when FIMC is instructed by the PM's Office to issues a letter to PSONS advising that the Mining Licence has now been submitted to the PMO's office and will be discussed and processed at the Parliament Meeting for approval on 11th – 13th January 2010.

   Date:- 8th – 10th January 2010

6. US$140,000.00 to be paid in exchange for the Exploration Mining Licence as signed by the PM's Office.

   Date:- 18th – 20th January 2010.

   [sic]

7 It is evident from the "payment schedule", even without an understanding of the abbreviations used (most of which were not even defined in the MOU), that the plaintiff's claim to legitimacy is a weak one. There is no term as to the use to which the sums are put, no clarification as to how the sums are arrived at, which portion is directed to the defendant and which to the administrative costs (if any). The payment schedule is hence neutral at best and damaging to the plaintiff's case at worst. From the casual manner and careless drafting (for example, the year in the date in cl 4, is incomplete), as well as arithmetic inadequacy of the schedule (the plaintiff alleges that US$841,350 had been paid to the defendants, whereas the schedule only "accounts" for US$750,000), it may even be taken as an attempt by the plaintiff – or both parties – to obscure their conduct and create a misleading story of their venture. The plaintiff's very reliance on the schedule as a "shield of legitimacy" lends further support to that possibility.

8 The schedule was relied on by the plaintiff presumably as a ground for resisting the defendants' application to set aside the injunction. That approach failed. So, too, did the plaintiff's reliance on the case of *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2014] 1 SLR 174 ("*Solvadis*") for the proposition that evidence that the defendant had previously acted in a way which shows that his probity is not to be relied on can constitute evidence of a risk of dissipation of the defendant's assets" (see *Solvadis* at [16], citing with approval *Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping SA* [2003] 1 SLR(R) 157 at [18], which in turn cited with approval the words of Mustil J in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH (The Niedersachsen)* [1983] 1 WLR 1412 at 406). The plaintiff tried to emphasise the defendants' alleged "lack of probity" to bolster its case that there was a risk of dissipation of assets. The defendants had argued that the first defendant was a company worth more than S$12m, that the shares in the first defendant, which were owned by the second and third defendants, had always been in Singapore, and that the defendants had hitherto made no attempt to sell away the the shares, or dissipate the assets by any other means. In response, the plaintiff submitted that the defendants acted dishonestly by their forgery of a letter allegedly from a Deputy Minister in Laos. This forgery was discovered by the plaintiff on 21 June 2012. Although I accept that forgery of an official document would be a fraudulent act, all I have is the plaintiff's word on this point. And although I am not prepared to make

a conclusive finding as to whether the document was indeed forged (although, counsel for the defendants did not seem to dispute it), I note that the plaintiff continued to deal with the defendants even after it was made aware of the forgery – and even went so far as to sign a further agreement (the Bangkok Agreement, on 25 July 2012).

9 If it was not clear to the plaintiff initially that it had encouraged the defendants to conduct illicit activities at the time of signing the MOU (which I doubt), it must surely have been clear by 21 June 2012. As such, the two points raised by the plaintiff, the schedule and the defendants' alleged forgery, turned out to be its Achilles' heel. The situation then seems to be a clear one: the plaintiff went into the deal with the defendants with full knowledge of what the defendants had to do.

10 The authority of ICF Spry, *The Principles of Equitable Remedies* (Sweet & Maxwell, 7th Ed, 2007) at p 409 was cited by Judith Prakash J in *Beckkett Pte Ltd v Deutsche Bank AG and another* [2011] 1 SLR 524 ("*Beckkett*") for its description of the "clean hands" doctrine. I think it is useful to set it out as well:

> It is not uncommon to find broad statements that a plaintiff is not granted an injunction if he does not have clean hands. Properly understood these statements are correct; but they should be applied cautiously, for it is by no means true that a plaintiff who has acted unconscionably is refused all access to the court or that he is considered to be beyond protection for all purposes. ... It has been said that the principle on which the court acts is that protection is denied the plaintiff 'where the right relied on, and which the court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff', so that protection for what he claims involves protection for his own wrong: 'No court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim.'

11 Although *Beckkett* concerned an anti-suit injunction, I do not see why the clean hands doctrine should be any different when it comes to mareva injunctions. In this case, I am able to come to one of four findings, with regard to the parties' eligibility for equitable remedies:

(a) that neither party was in the wrong;

(b) that the defendants were in the wrong;

(c) that the plaintiff was in the wrong; or

(d) that both the plaintiff and defendants were in the wrong.

12 The plaintiff's injunction can only be justified in the case of either (a) or (b). However, based on the evidence presented to me, I am unable to reach the finding in either (a) or (b). With the benefit of submissions from the defendants, but more so – ironically – the plaintiff's rebuttals, I am now able to better understand the plaintiff's involvement in this matter, and am more inclined towards (d). The plaintiff cannot say it was not involved, let alone unaware, of the illicit activities in Laos, and hence should not be allowed to avail itself to equitable relief. Accordingly, I have allowed the defendants' application to set aside the mareva injunction granted on 29 August 2013. Liberty to the defendants to apply for damages and costs at the end of the arbitration proceedings.