Guan Chong Cocoa Manufacturer Sdn Bhd v Pratiwi Shipping S A
[2002] SGHC 202

Case Number : Admiralty Action in Personam No 41 of 2002/G, SIC Entered No 2701 of 2002/K

Decision Date : 31 August 2002

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean JC

Counsel Name(s) : Lawrence Lee (Chui Sim Goh & Lim) for the plaintiffs; Joseph Tan (Kenneth Tan Partnership) for the defendants

Parties : Guan Chong Cocoa Manufacturer Sdn Bhd — Pratiwi Shipping S A

Judgment

GROUNDS OF DECISION

1. On 12 July 2002, the Plaintiffs, Guan Chong Cocoa Manufacturer Sdn Bhd commenced in personam action against shipowners, Pratiwi Shipping S.A., a Panamanian company, claiming damages for loss of and/or damage to two consignments (with a total gross weight of approximately 609 mt) of Sulawesi cocoa beans in bags lately laden on board the vessel "PRATIWI" pursuant to bills of lading nos. 01/PRT/PL/VII/01 and 02/PRT/PL/VII/01 both dated 13 July 2001 at Palu.

2. The Plaintiffs, as cargo interests, sued the Defendants, Pratiwi Shipping S.A., for breach of contracts of carriage evidenced by the two bills of lading, breach of duty as bailees of the cocoa beans and/or negligence of the Defendants, their servants or agents in or about the carriage, custody and care of the two consignments of cocoa beans.

3. The Plaintiffs' claim arose as a consequence of a fire on board the "PRATIWI" which started in the engine room on or about 17 July 2001 during the voyage from Pantoloan, Palu, Indonesia to Pasir Gudang, Malaysia. The "PRATIWI" was towed to Banjarmasin, Indonesia where the bags of cocoa beans were discharged. The "PRATIWI" was a constructive total loss and was eventually sold for S$50,000.

4. Since the Defendants abandoned the voyage at Banjarmasin, the two consignments of cocoa beans were forwarded to Pasir Gudang on another vessel "SUN RAY". The damaged cocoa beans were eventually disposed in a salvage sale. The Plaintiffs' loss is computed at $904,164.22 plus interest and costs.

5. On 29 July 2002, the Plaintiffs applied for a worldwide mareva injunction to freeze the assets of the Defendants within and outside Singapore up to the value of the Plaintiffs' claim of $904,164.22 plus costs. The assets sought to be injuncted included the hull proceeds of the "PRATIWI", the net sale proceeds of "PRATIWI", the vessel "LANGSA" or if sold, the net sale proceeds after payment of any mortgage.

6. M/s Kenneth Tan Partnership ("KTP") was appointed in June 2002 to represent the Defendants and their liability insurers, China Insurance Co Limited. M/s Chui, Sim, Goh & Lim ("CSGL") represented the Plaintiffs.

7. On 30 July 2002, counsel for both the Plaintiffs and Defendants attended before Justice Lai Kew Chai. The Plaintiffs obtained leave to serve the in personam Writ on Foong Sun Shipping (Pte) Ltd ("Foong Sun"), the managers of "PRATIWI". Justice Lai directed the ex-parte application for a mareva injunction to be heard inter parte.

8. I heard the application on 2 August 2002. It transpired during the course of the hearing that the vessel "PRATIWI" had no hull and machinery insurance and her sister ship, the "LANGSA", had been sold for US$150,000. The only asset, which could conceivable be attached was the sale proceeds of the "LANGSA".

9. It was not the Defendants' case nor was it suggested then that the sale of the "LANGSA" was a sham. This could not be clearer than from CSGL's letters dated 5 and 6 August 2002 requesting further arguments. In both letters, Counsel stated:

> "We are instructed to write under section 34(1)(c) of the Supreme Court of Judicature Act (Cap 322) and Order 56 rule 2 of Rules of Court for further arguments in respect of the Plaintiffs' application for mareva injunction in connection with the sale proceeds of the motor vessel "LANGSA" only. "

10. I dismissed the Plaintiffs' application. The Plaintiffs, being dissatisfied with my decision, filed Notice of Appeal on 19 August 2002. I now publish my reasons for dismissing the application.

The Affidavits

11. The Plaintiffs' filed one affidavit in support of the application. This was the affidavit of Hia Cheng filed on 29 July 2002. Hia Cheng is the Finance & Trading manager of the Plaintiffs. The Defendants filed one affidavit to oppose the application. On 2 August 2002, Elaine Quek Ee Ling ("Elaine") affirmed an affidavit on behalf of the Defendants. Elaine is the manager of Foong Sun.

12. On 5 and 6 August 2002, the Plaintiffs filed two other affidavits. Those two affidavits were sworn by the Plaintiffs' counsel, Lawrence Lee, in support of the Plaintiffs' application for further arguments. The Defendants naturally objected to their use as they were filed without leave and after I had dismissed the application. For completeness, I should mention that I declined to hear further arguments.

The Plaintiffs' case

13. In this interlocutory application, the Defendants did not touch on the Plaintiffs' assertion that they have "a good arguable case", prefering to resist the application on the ground that the Plaintiffs have not establised any risk of dissipation of assets.

14. It was said on behalf of the Plaintiffs that a risk of dissipation of the assets is to be inferred from the following facts:

(i) the Defendants became a one-ship company after "PRATIWI" was sold. The Defendants subsequently sold their only asset "LANGSA". The Defendants appeared to be no longer in business.

(ii) the timing of the sale of the "LANGSA". The sale was on 22 June 2002 after the Defendants were informed that the Plaintiffs' cargo underwriters had repudiated liability and after M/s Zaid Ibrahim & Partners and CSGL had written to the Defendants and China Insurance demanding payment of the claim. The Plaintiffs had earlier informed Foong Sun that they would claim from their cargo underwriters.

(iii) the length of time the Defendants have been in business. The Defendants appeared to have

started business from early 2001.

(iv) Asset to be attached is the sale proceeds, which by its very nature is easily dissipated.

(v) The Defendants are not incorporated in a country where a Singapore judgment may be registered.

(vi) The Defendants' liability cover is for S$500,000 and the Plaintiffs' claim is for S$904,164.22.

The Defendants' case

15. Elaine denied the Plaintiffs' accusation that the Defendants were "trying to hide their assets". The Defendants had in the past on numerous occasions shipped cargo on board the "LANGSA". The "PRATIWI" and "LANGSA" used to ply regularly between Singapore, Malaysia and Indonesia. She was perplexed to see Hia Cheng's statement that the Plaintiffs did not know until July 2002 that the Defendants also owned the "LANGSA". The Plaintiffs' lawyers had ascertained the ownership of "LANGSA" from Lloyds' Register. It was wrong to state that it was not easy to trace the ownership of "LANGSA" to the Defendants. The insinuation that the Defendants carry on business in an elusive manner was baseless.

16. I should mention that this business relationship with Foong Sun appeared more than cordial as the Plaintiffs were able to discreetly obtain from Foong Sun's staff, information such as (i) "PRATIWI" had no hull cover and (ii) the "LANGSA" had changed name to "SRI BAHARI". The "SRI BAHARI" is managed by Foong Sun and the Plaintiffs in July 2002 had shipped cargo on board that vessel.

17. Elaine said in paragraph 18 of her affidavit that the "LANGSA" was sold to an Indonesian concern PT Fajar Sribahari Sakti for US$ 150,000. The Bill of Sale was dated 22 June 2002.

Decision

18. The Plaintiffs' application is to attach assets belonging to the Defendants within and outside the jurisdiction.

19. In *SSAB Oxelosund AB v Xendral Trading Pte Ltd* [1992] 1 SLR 600, the defendants successfully set aside the ex-parte order prohibiting the defendants, their servants or agents from disposing the hull proceeds following the sinking of the vessel "PROTEKTOR" with her cargo on board in severe weather. Lai Siu Chiu JC (as she then was) held that a worldwide mareva injunction order is a draconian measure to be ordered only in exceptional circumstances. See also *Wallace Kevin James v Merrill Lynch International Bank Ltd* [1998] 1 SLR 785 at 793 and *Republic of Haiti & Ors v Duvalier & Ors* [1990] 1QB 202 at 215. The situation must be so exceptional as to "cry out" as a matter of justice to the plaintiffs for an order covering foreign assets of the defendants before judgment: Kerr LJ in *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 33

20. In my view, the facts in evidence relied upon by the Plaintiffs do not even satisfy the test for a mareva injunction of assets within Singapore let alone an order to attach assets outside the jurisdiction where a more stringent test is demanded. A plaintiff seeking to freeze assets within the jurisdiction must as a pre-condition to the grant of the injunction adduce "solid evidence" of a risk of dissipation: *Choy Chee Keen Collin v Public Utilities Board* [1997] 1 SLR 604; *Petromar Energy Resources Pte Ltd v Glencore International AG* [1999] 2 SLR 609.

21. I was not persuaded by the Plaintiffs that on the affidavit evidence taken as a whole the

behaviour of the Defendants was such as to seek to frustrate, or was in a way designed or calculated to frustrate a judgment in favour of the Plaintiffs.

22. It is true that the Defendants became a one-ship company after the "PRATIWI" was sold. It is generally an accepted way of ship owning and doing business in the shipping world.

23. Lai Siu Chiu JC (as she then was) in *SSAB Oxelosund AB v Xendral Trading Pte Ltd* at p 607 observed that one-ship company "is a norm rather than an exception in the shipowing industry".

24. Again, Amarjeet JC In *The Skaw Prince* [1994] 3 SLR 379 at p 386 said:

> "It is well known that businesses engaged in shipping set up and utilize one-ship companies within their corporate structure for the purpose of limiting liability. The device has been around and recognized by the courts as a legitimate one .."

25. Chan Sek Keong J in *European Grain & Shipping Ltd Compania Naviera Euro-Asia SA & Ors* [1990] 2 MLJ 291 at 294 commented:

> ".. There was nothing wrong, from a commercial stand point of view, for SSC from carrying on its business through Panamanian companies; this was a normal method of carrying on shipping business and, in my view did not imply dishonesty or craftiness(in its derogatory sense) on the part of the directors or shareholders."

In that case, SSC was a substantial company and the way it carried on business did not cast suspicion in the Judge's mind as to the bona fides of the SSC group in the way it had carried on its businesses.

26. The Defendants are a company incorporated in Panama. The very fact of incorporation there might have resulted in an adverse inference being drawn against such entities in some cases. But in the present case, there exists other evidence that tended to countermand or mitigate the negative effect of a Panamanian incorporated company. It cannot be said that the Defendants before and after the casualty had been elusive in the way they did business and held assets.

27. The Defendants have business presence here through managers, Foong Sun. They had properly insured against liability arising from their activities as shipowners and carriers well before the casualty and their liability insurers, China Insurance Limited, carry on business in Singapore.

28. I agree with the Defendants' contention that if indeed the Defendants were attempting to make themselves judgment proof, they would have sold the "LANGSA" shortly after the fire instead of waiting for almost a year. In the course of the year, prior to 22 June 2002, the Defendants continued to do business with their remaining vessel "LANGSA".

29. Hia Cheng in his affidavit asserts that there was an ownership change and change of name of the "LANGSA" to "SRI BAHARI". Elaine in her affidavit confirmed the sale of "LANGSA" on 22 June 2002. She deposed that the Defendants have not yet received the sale proceeds of US$150,000 from the buyers.

30. I should mention that the acknowledgement of receipt of the sale proceeds on the standard form Bill of Sale was inconsistent with Elaine Quek's evidence. This apparent discrepancy was not lost o n Counsel for the Plaintiffs. However, he submitted that he was not taking issue with this inconsistency, preferring to accept the evidence that the proceeds of sale have not yet been paid.

31. Counsel for the Plaintiffs in his letter dated 8 August 2002 for further arguments, however questioned whether the sale of "LANGSA" was an attempt to dissipate the Defendants' asset. He argued that the sale of "LANGSA" could not have been in the "ordinary and proper course of business". Having regard to the timing of the sale and no explanation being afforded for the sale. The Bill of Sale was signed by Elaine for the Defendants and "SRI BAHARI" is now managed by Foong Sun.

32. I do not agree with Counsel's contention. If that were so, I see no reason for Elaine to disclose in her affidavit that the sale proceeds have not yet been paid. It would have been easy enough and consistent with nefarious conduct to rely on the acknowledgement of receipt in the Bill of Sale, which would have left the Defendants with no known asset and the Plaintiffs no chance to attach intact the sale proceeds of US$150,000. Elaine's disclosure is contrary to any manifest intention to avoid a judgment in the Plaintiffs' favour.

33. It was said that the sale took place after the Plaintiffs' lawyers came on the scene and demanded payment of the claim. The Defendants were aware that the Plaintiffs would be claiming under their cargo policy. They were also subsequently aware that cargo underwriters had repudiated policy liability in April 2002 and the Plaintiffs would therefore be looking to the Defendants for compensation. I cannot see how from those facts an inference can be drawn that the Defendants had rid themselves of their only asset the "LANGSA" to render themselves judgment proof.

34. The Defendants would inevitably be faced with a suit regardless of whether or not cargo underwriters paid under the cargo policy. The only difference is that if cargo underwriters paid on the claim, the latter would be pursuing a recovery action by way of subrogation.

35. What is obvious is that neither cargo underwriters nor their insured took steps immediately after the casualty to enhance their recovery prospects. Ordinarily, whenever there is a shipping casualty of this kind, a pre-emptive strike would invariable have been taken in early days by cargo underwriters (albeit without prejudice to policy liability) with the cooperation of the insured for mutual benefit.

36. The Defendants were aware at the outset that the Plaintiffs had held them responsible for the damage to the cocoa beans. Foong Sun had denied liability on behalf of the Defendants. In October 2001, Foong Sun disclosed to cargo surveyors, McLarens Toplis International Loss Adjusters, that the Defendants are insured with China Insurance for shipowner's liability as carrier under Hague/Hague-Visby Rules up to a maximum sum of S$500,000 for any one accident. Foong Sun even provided the Plaintiffs with a copy of the cover note in June 2002. The cargo liability cover is subject to a deductible of $10,000 for each and every claim.

37. Hia Cheng in paragraph 18 of his affidavit deposed that Tey How Keong of the Plaintiffs had in early 2002 informed Elaine that the Plaintiffs intended to seek compensation from Foong Sun. On 16 May 2002, the Plaintiffs' Malaysian lawyers, Zaid Ibrahim & Co, wrote to China Insurance to claim RM 1,948,253.08. China Insurance sent on 14 June 2002 a standard reply stating that they were looking into the matter. On 18 June 2002, KTP on instructions of China Insurance wrote to the Malaysian lawyers denying liability. They advised that under Art IV R2(b) of Hague–Visby Rules, the carrier would have a complete defence to the cargo claim. The Plaintiffs were invited to withdraw their claim. On the same date, CSGL wrote to the Defendants c/o Foong Sun. They demanded payment of

RM1,948,253.08 by 21 June 2002 failing which legal action would be taken. KTP repeated the Defendants' defence to the Plaintiffs' claim.

38. CSGL disagreed with KTP and told them so on 20 June 2002. They advised that the Plaintiffs intended to press on with their claim unless the Defendants admitted liability and pay RM1,948,253.08. In the same letter, they requested details of the Defendants such as place of incorporation, address and assets.

39. Hia Cheng complained in his affidavit that the Defendants were being deliberately evasive about disclosing their registered address and assets. It would be nave to expect the Defendants to willingly respond to the request knowing as KTP did that the Plaintiffs were making the inquiries with a particular objective in mind. KTP were not wrong. It was admitted in CSGL's letter of 8 August 2002 that the information requested was to support the application for mareva injunction. Of course, if the Plaintiffs had on Hia Cheng's affidavit established a prima facie inference of a risk of dissipation, the Defendants would have to adduce rebuttal evidence. Elaine's response that they were advised that they were not under a legal obligation to assist would not have been good enough.

40. There is no cogent evidence that the sale of the "LANGSA" was a sham. This is obvious from CSGL's letter dated 6 August 2002 wherein they wanted to verify the sale by asking for information concerning the relationship between the Defendants, their managers and buyers of the "LANGSA". KTP pointed out in their letter of 7 August 2002 that the Plaintiffs were simply fishing for information to test the genuineness of the sale and perhaps with a view to proceedings against the "LANGSA" in rem. The Plaintiffs had issued an in rem writ on 12 July 2002 against the "PRATIWI". The in rem writ was amended on 16 July 2002 to include the vessel "LANGSA".

41. It is probably true that after the sale of the "LANGSA", the Defendants are no longer in business. It is not an unreasonable inference. However, neither can it be said that the situation is bound to be a permanent one. Although the Defendants did not specifically address this point, there is evidence that the Defendants were minded to see an amicable resolution of the matter, which in my view, went some way to neutralise the inference.

42. Hia Cheng said in his affidavit that Elaine's preference was to settle the matter without legal proceedings. But as it turned out the Plaintiffs' instructed Malaysian and Singapore lawyers to deal with the claim. In fact KTP on 26 July 2002 after commenting on the tenor of CSGL's letter of 26 July 2002 remarked: "..we assume that your fax of today is not part of any attempts at an amicable resolution of this matter."

43. There is also no evidence that the Defendants' liability insurers would not pay on the claim if liability against the Defendants were established. In fact KTP are defending the claim on instructions from China Insurance. The fact that the liability cover is less than the Plaintiffs' claim amount cannot merit the court granting a mareva injunction. It is the sort of commercial risk any cargo interests in the position of the Plaintiffs would face.

44. For those reasons, I refused the Plaintiffs' application for a mareva injunction and ordered costs fixed at $1,800 against the Plaintiffs..

Sgd:

BELINDA ANG SAW EAN