Jay Machinery Pte. Ltd. *v* C T Environmental Services Pte. Ltd. and Ng Cheng Chuan
[2018] SGDC 246

Case Number : District Court Suit No. 1987 of 2018, District Court Summons No. 2597 of 2018, HC/RAS No. 26 of 2018

Decision Date : 19 September 2018

Tribunal/Court : District Court

Coram : Georgina Lum

Counsel Name(s) : Mr Tan Sheng An Jonathan (M/s Tan Lee & Partners) for the Plaintiff.; Mr Chooi Jing Yen (M/s Eugene Thuraisingam LLP) for the Defendant.

Parties : Jay Machinery Pte. Ltd. — C T Environmental Services Pte. Ltd. — Ng Cheng Chuan

Civil Procedure – Mareva Injunctions – Real risk of dissipation of assets

19 September 2018

District Judge Georgina Lum:

A. INTRODUCTION

1 The Plaintiff is a company incorporated in Singapore who carries on the business of manufacturing, wholesale, renting and the servicing of machinery .

2 The 1st Defendant is a company incorporated in Singapore who carries on business relating to sewer systems, environmental engineering and consultancy and recycling.

3 The 2nd Defendant is a de facto director of the 1st Defendant.

4 In the present Suit, the Plaintiff is claiming that the aggregate sum of S$200,000 was due and owing from 31 December 2017: (a) from the 1st Defendant under the terms of two verbal loan agreements entered into in May and April 2017 ("the Loans"); and (b) from the 2nd Defendant under the terms of two Guarantees dated 6 April 2017 and 11 May 2017 ("the Guarantees") in which the 2nd Defendant had undertaken to guarantee the repayment of the Loans taken out by the 1st Defendant in full to the Plaintiff.

B. THE PRESENT APPLICATION

5 The Plaintiff commenced proceedings on 12 July 2018 and filed an application entered Summons No. 2597/2018 seeking a mareva injunction against both the Defendants on 20 July 2018 ("the Application").

6 On 24 July 2018, the Application came before the Court. Service had not been effected on the 2nd Defendant at this point but the 1st Defendant's solicitors were in attendance.

7 At the first hearing, the 1st Defendant had not provided its solicitors with instructions on the material facts in the present dispute and consequently the 1st Defendant's solicitors could and did not take a position on all the primary allegations raised by the Plaintiff.

8 On the basis of the unrefuted evidence before me, I was of the view that the Plaintiff had fulfilled the preconditions for the grant of a Mareva injunction and accepted the Plaintiff's submission that the matter should be heard on an *ex parte* basis *vis a vis* the 2nd Defendant as there was real and sufficient urgency in its request for a Mareva injunction to be granted.

9 As such, I granted the Plaintiff a Mareva injunction against both Defendants and further directed *inter alia* that the Application would be returnable on a later date for parties to address me on the discharge of the Mareva injunction granted herein.

10 On 27 August 2018, all parties (including the 2nd Defendant) appeared before me at an *inter partes* hearing. At this hearing, I dismissed the Plaintiff's Application and discharged the Mareva injunction granted herein on 24 July 2018. The Plaintiff has appealed against my decision on 24 July 2018 to the High Court. I cite my grounds of decision for discharging the Mareva injunction below.

C. BACKGROUND FACTS

11 The Plaintiff asserts that their Application for a Mareva injunction was necessitated by a series of conduct on the Defendants' part which allegedly displayed a real risk of dissipation and dishonesty.

12 On 24 July 2018, I had accepted the Plaintiff's then unrebutted evidence in its supporting affidavit filed herein and granted the Mareva injunction on the basis that:

(a) On 30 April 2018, the 1st Defendant's representative(s) had informed Mr Jesper Lim (a director of the Plaintiff) that the 1st Defendant would be selling off its business and gave him a cheque in the sum of S$200,000 for the repayment of the Loans ('the Cheque");

(b) Mr Jesper Lim was informed that the 1st Defendant would receive funds from this sale in the middle of June 2018 and that when the Cheque was presented on 4 July 2018, it was dishonoured;

(c) On 5 July 2018 and 12 July 2018, the 2nd Defendant had informed the Plaintiff that the 1st Defendant had not received money from Chye Thiam Maintenance Pte Ltd ("Chye Thiam") who were the buyers of the 1st Defendant's business and that since the Defendants had no money, they were unable to pay the Plaintiff [para 33 and 38 of Supporting Affidavit];

(d) On 13 July 2018, the Plaintiff was informed by representatives of Chye Thiam at a meeting that: (i) they had bought over the 1st Defendant's equipment and business for S$2.9 million; and (ii) had made full payment of the purchase price on or about 1 June 2018 and showed proof of such payment [para 41 to 43 of Supporting Affidavit];

(e) On 17 July 2018, the Plaintiff received a letter from Chye Thiam informing it that Chye Thiam had been using the 1st Defendant's premises since 1 June 2018 further evidencing their acquisition of the 1st Defendant's business [para 45 of Supporting Affidavit];

(f) Despite the above payment from Chye Thiam on 1 June 2018:

(i) The cheque for S$200,000 presented for payment on 4 July 2018 had been dishonoured indicating that the Defendants' failure to repay the loan was deliberate and/or that the Defendants had in all likelihood taken steps to move assets out of the Plaintiff's reach; and

(ii) The 2nd Defendant had informed the Plaintiff on 5 and 12 July 2018 that no payment had been received so as to deliberately hide the Defendants' receipt of monies and assets from the Plaintiff

13 The factual matrix asserted by the Plaintiff was however substantially contradicted by the contemporaneous documentation and assertions raised by the Defendants after their solicitors had the opportunity to take their instructions and file reply affidavits on their behalf.

14 In the Defendant's Reply Affidavit filed herein, the Defendants accepted that a Sale and Purchase Agreement dated 17 May 2018 had been entered into between Chye Thiam, the 1st Defendant and Enda Environmental Services Pte Ltd ("Enda") ("the Sale and Purchase Agreement") and that the Plaintiff had been informed of the sale.

15 However, the Defendants dispute all claims that repayment was due under the terms of the Loans and/or that there had been any agreement for repayment to be made by July 2018 or after the sale of the 1st Defendant's business.

16 The Defendants highlighted that the terms of the Loans had been misstated in the Guarantees in at least 2 respects. The first being that the Loans were not "free of interest" and the second being that the Loans were not due on 31 December 2017 but would only be due if the Defendants stopped paying the said interest payments. A series of invoices and a bank statement reflecting the monthly payment of 1.5% interest amounting to the sum of S$3210 per month till June 2018 were exhibited in the Defendant's Reply Affidavit filed herein. The Plaintiff's only response to the Defendant's assertions in relation to the interest payments was to assert in its final reply affidavit that "only invoices up till the month of May 2018 were issued by the Plaintiff. No invoice was issued for the month of June 2018".

17 The Defendants further highlighted that the terms of the Sale and Purchase Agreement substantially differed from the claims made by the Plaintiff in its Supporting Affidavit.

18 The terms of the Sale and Purchase Agreement expressly state that:

(a) The 1st Defendant and Enda had agreed to divest their waste collection business to Chye Thiam comprising of 238 identified contracts set out in Schedule 2 of the Sale and Purchase Agreement, assets set out in Schedule 1 of the Sale and Purchase Agreement, the employees hired by the 1st Defendant and Enda for their waste collection business and other resources necessary for the conduct of the said business;

(b) The Completion date for the Sale and Purchase Agreement would be on 1 June 2018;

(c) The first tranche of payment to be made under the Sale and Purchase Agreement would be on the completion date of 1 June 2018 ("the First Payment");

(d) The First Payment would consist of the aggregate sum of S$2,000,000 divested by to the 1st Defendant and Enda by way of outstanding payments owed by the said entities to their creditors amounting to the aggregate sum of S$1,353,931.87 as set out in Schedule 5 of the Sale and Purchase Agreement with the balance to be paid to the 1st Defendant and Enda;

(e) The 1st Defendant and Enda would procure the novation of the 238 identified contracts at varying effective dates in terms of a draft agreement annexed to the Sale and Purchase Agreement and be responsible for complying with all obligations under the relevant project even after the Completion date till the relevant agreements were novated; and

(f) The 1st Defendant would comply with the terms of a Service Agreement it will enter into with Chye Thiam on or prior to the Completion date of 1 June 2018.

19 The Defendant further drew the Court's attention to the fact that while the Cheque was post-dated to 20 May 2018, it had been expressly marked with the words "Drop chq date – To be advise" (sic). The Defendants submitted that this notation reflected the fact that when the Cheque was presented to Mr Jesper Lim, it was given as "some form of security" to the Plaintiff and that the Defendants had given the Cheque on the condition that it not be presented until Mr Jesper Lim had been told he could do so as the 1st Defendant was not sure when it would be receiving sufficient funds in order to pay the Loans.

20 It was the Defendants' position that as the Loans were not due so long as the interest payments were being made, the Defendants had no reason to believe that the Cheque would be presented on 4 July 2018 as they had made interest payments consistently till the end of June 2018 and had marked the Cheque to specify that the "Drop chq date" was to be advised.

21 The Defendants further asserted that apart from the liabilities stated in the Sale and Purchase Agreement, the 1st Defendant had other trade debts not listed therein and had to keep some money to continue operating its business on a limited basis, that not all of the 1st Defendant's contracts were novated to Chye Thiam and that this was implicitly reflected in the terms of the Sale and Purchase Agreement with Chye Thiam as the 1st Defendant continues to operate on a limited basis or a reduced scale to *inter alia* fulfil its obligations pending the completion of the novation of the 238 contracts identified in Schedule 2 of the Sale and Purchase Agreement and the completion of its service agreement stated in Clause 3.3 of the Sale and Purchase Agreement.

22 In the circumstances, the Defendants argued that it was clear no sum of S$2,900,000 was ever paid to the 1st Defendant as alleged by the Plaintiff, that there was never any intention to dissipate assets by the Defendants, that there was no attempt made to dissipate assets and that there is therefore no real risk of dissipation.

D. DECISION

23 In the arsenal of applications available to a plaintiff within the framework of the Rules of Court, the Mareva injunction is one of the most draconian weapons which can be utilised against a defendant. The effects of a Mareva injunction in freezing a defendant's assets and his liberty to utilize the said assets can only be justified when a specified set of requirements are met.

24 In ***Yves Charles Edgar Bouvier & Anor v. Accent Delight International Ltd and anor*** [2015] 5 SLR 558 ("***Bouvier v. Accent Delight International***"), the requirements which must be necessarily fulfilled were summarised by the Court of Appeal. At paragraph [36], the Court had opined that a Mareva injunction would be granted where there is: (a) a good arguable case on the merits of the plaintiff's claim; and (b) a real risk that the defendant will dissipate his assets to frustrate the enforcement of an anticipated judgment of the Court.

25 Expanding on the above, I am of the view that it is trite law that a plaintiff has to satisfy at least 4 well known and established preconditions when seeking a Mareva injunction. He must show:

(a) a valid cause of action;

(b) a good arguable case;

(c) that the defendant has assets within the jurisdiction; and

(d) that there is a real risk that the assets may be disposed of or dissipated to prevent a judgment obtained from being enforceable.

26 Out of these 4 pre-conditions, the paramount consideration before the Court is whether a real risk of dissipation exists. Obviating a real risk of dissipation is the primary aim of a Mareva injunction[note: 1] and the focus of the courts in determining whether to grant or discharge a Mareva injunction is an ascertainment on whether such a risk exists based on the facts and evidence placed before them.

27 The test applied by courts to determine if there is a real risk of dissipation is an objective one and the burden is on a plaintiff to show "solid evidence" that there was a real risk of dissipation occurring and a mere possibility or unsupported fear of dissipation raised by a plaintiff will not suffice[note: 2].

28 Some relevant factors to be considered in the evidential evaluation of the risk of dissipation of assets have been helpfully detailed in ***Guan Chong Cocoa Manufacturer Sdn Bhd v. Pratini Shipping SA*** [2003] 1 SLR(R) 157. The factors listed therein include the nature of the assets which are the subject of the proposed injunction, the nature and financial standing of the defendant's business, the length of time the defendant had been in business, whether there was a pattern of persistent default by the defendant in the honouring of its debts, the domicile and resident of the defendant and the defendant's response to the plaintiff's claim.

29 On an application of the approach taken in the above authorities and on a review of the evidence and submissions presented by both parties, I am of the view that the Plaintiff has not shown that there is presently any real risk of dissipation by either of the Defendants and that the Mareva injunction granted herein should be discharged.

30 The Defendants are both domiciled in Singapore with the 1st Defendant being a Singapore registered company which has been in business since 2005 and the 2nd Defendant being a Singaporean citizen domiciled in Singapore with his family in a HDB flat.

31 Both Defendants appear to be experiencing financial difficulties and the 1st Defendant (through the 2nd Defendant) has notably entered into the Sale and Purchase Agreement in order to *inter alia* meet a large quantum of existing debts the 1st Defendant owe to its numerous creditors identified in the said Agreement.

32 Notwithstanding the potential insolvency of the two Defendants, the 1st Defendant is also (through its employees and the 2nd Defendant) presently still conducting business albeit on a limited basis in order to *inter alia* continue honouring its debts, meet its obligations for the projects to be novated to Chye Thiam and fulfil its varying obligations under the Sale and Purchase Agreement.

33 In my view, the profile of both Defendants herein and their present and continuing efforts to honour existing debt obligations and project obligations to their creditors notwithstanding their financial difficulties run contrary to the Plaintiff's depiction of both Defendants as a company and individual who are attempting to sidestep their obligations under the Loans and dissipate funds to avoid meeting their repayment obligations.

34 Further to the above, I am also of the view that there is no "solid evidence" in support of the primary allegation submitted by the Plaintiff in support of its application for a Mareva injunction that - the Defendants had intentionally dissipated S$2.9 million allegedly received in June 2018 to ensure that it would not meet its payment obligations under the Loans when the Cheque was presented on 4 July 2018.

35 It was the Plaintiff's position at the *inter partes* hearing that notwithstanding the evidence submitted by the Defendant, the Mareva injunction granted herein should be maintained as:

(a) The Defendants' alleged conduct in June and July 2018 as stated in its affidavits was still dishonest notwithstanding the clarifications made to the underlying facts and the position taken in the Defendant's Reply Affidavit;

(b) "The Defendant(s) **may have potentially** received a sum of S$646,068.13" from the sale of its business and that it is "**trying to enquire with Chye Thiam** on the discrepancy between the figures" (emphasis added) in the Sale and Purchase Agreement and the S$2.9 million payment which the Plaintiff had unequivocally claimed was made to the 1st Defendant; and

(c) There is an unbelievable "paucity of assets" declared by the Defendants under the disclosure orders made in the Mareva injunction.

36 I do not find the above sufficient to maintain the Plaintiff's previously unrebutted allegation that there is a real risk of dissipation.

37 With respect to the first two points raised, while the Defendants still have to present their witnesses at trial in order for the Court to determine the terms of the Loans, to ascertain whether the Loans and the Guarantees arising thereon are in breach of the Moneylenders Act and in the alternative, to decide if the Cheque was delivered on a conditional basis, there is now evidence and an arguable defence presented by the Defendants that:

(a) They were not obliged to repay the Loans by 31 December 2017 or July 2018 as *inter alia* interest payments have been consistently made;

(b) There was a condition imposed that the Cheque was only to be presented once the Defendants had informed the Plaintiff that there were sufficient funds in its account;

(c) They had not received S$2.9 million in June 2018 as alleged by the Plaintiff and/or any significant sum after payment was made to their creditors and Enda as provided in the Sale and Purchase Agreement;

(d) The Defendants were not aware that the Plaintiff intended to present the Cheque on 4 July 2018;

(e) The remaining funds received from the Sale and Purchase Agreement were being used since June 2018 to meet their existing debts and obligations stated under the Sale and Purchase Agreement;

(f) They were entitled to utilise the funds they had received to meet their existing debt obligations without granting the Plaintiff priority over their other creditors; and

(g) They had therefore never dissipated any assets to avoid payment to the Plaintiff.

38 Further to the above, it cannot be disputed that an allegation of dishonesty in itself also cannot obviate the need to establish a real risk of dissipation[note: 3]. While the Plaintiff maintains its allegations of dishonesty, a substantial amount of the material facts stated in the Plaintiff's Supporting Affidavit on which its allegations of dishonesty and the present Application were based on are contrary to the contents of the contemporaneous documents and evidence submitted by the Defendants on the terms of the Loans and the Sale and Purchase Agreement.

39 In particular, it is now clear that consistent monthly interest payments were made by the 1st Defendant with invoices being issued by the Plaintiff till at least May 2018 and that the sum of S$2.9 million was not paid or even contemplated under the terms of the Sale and Purchase Agreement to the 1st Defendant.

40 There is therefore significant doubt cast on the veracity of the claims made by the Plaintiff in its Supporting Affidavit including its assertions that interest payments had been sporadic and not tracked by the Plaintiff and that it representatives had allegedly been shown "proof" and informed by representatives of Chye Thiam that payment of S$2.9 million was made to the 1st Defendant on 1 June 2018 resulting in the Plaintiff's alleged discovery that the 1st Defendant had divested a significant amount of funds from its accounts in order to avoid honouring the Cheque and the Loans.

41 A mere belief on the Plaintiff's part that the Defendants were dishonest, presently "may have potentially received a sum of S$646,068.13" and could have deliberately divested its monies to avoid the presentation of the Cheque on 4 July 2018 is not sufficient in my opinion to show a real risk of dissipation.

42 With respect to the alleged "paucity" of assets disclosed by the Defendants, I refer to the passage below from the decision by the Singapore Court of Appeal in ***Bouvier v. Accent Delight International***.

> *"(A disclosure order) aims to give the plaintiff a snapshot of the defendant's assets at the time of disclosure. This is to enable the plaintiff to police the injunction and ensure that the defendant's assets are kept at the steady state which the Mareva injunction seeks to preserve…*
>
> *When the Mareva injunction itself is ultimately found not to have been justified on the basis of the material before the Court at the time it was granted, it seems to us inherently unfair to nonetheless allow the plaintiff to use information that he has obtained through the ancillary disclosure orders to try to shore up a case for a real risk of dissipation….*
>
> *The disclosed information does not provide a longitudinal view of the defendant's assets. All that is disclosed are the assets standing to the defendant's name at the time of disclosure. The information will not show whether there has been a systematic and unexplained attrition of the defendant's assets over time, which, presumably, would be the justification for inferring a real risk of dissipation. The disclosed information is often rough and ready. Given that the disclosure affidavits usually have to be filed under stringent timelines, the information set out therein is not the type of information that stands up well to the microscopic scrutiny of lawyers and forensic accountants….*
>
> *Ancillary disclosure orders may only be relevant to the risk of dissipation in two narrow situations. The first is where the defendant refuses to provide any disclosure of his assets at all… The second is where the information disclosed by the defendant reveals assets which are so glaringly inadequate or suspicious that the deficiencies cannot be attributed to the urgency with which the disclosures were made or other accounting or valuation inaccuracies".*

43 I do not accept the Plaintiff's assertions that: (a) the 1st Defendant must have more assets than a cash balance of S$35,000 because it has continuing monthly expenditure amounting to S$43,015.78; (b) the mere alleged appearance of one Mr Amos Neo at the 1st Defendant's previous business premises to inspect equipment Mr Neo claims the 1st Defendant is attempting to sell "suggests that the 1st Defendant may have other assets in Singapore which are not disclosed"; and (c) the disclosed ownership of a Mercedes Benz by the 2nd Defendant is contrary to his assertion that he only has S$230 worth of cash assets and "suggests that there are other assets belonging to the 2nd Defendant which he has not disclosed".

44 The quantum of assets disclosed are merely a "snapshot" of the Defendants assets as at the date on which their affidavits were filed and I do not think the information disclosed appears to be inaccurate and/or evinces "a systematic and unexplained attrition of the defendant's assets over time".

45 The factual matrix relied on by both parties clearly indicate that both Defendants presently have insufficient funds to meet their commercial or monetary obligations as a company and an individual respectively. In my view the low quantum of assets disclosed as at the date of the affidavits simply reflect the potential future insolvency of both the Defendants which they are trying to avoid by *inter alia* entering into the Sale and Purchase Agreement.

46 I therefore do not accept the plaintiff's assertions and find that the low quantum of assets disclosed in itself is not "glaringly inadequate or suspicious" and cannot stand as proof of any dissipation of assets by the Defendants.

E. CONCLUSION

47 In the circumstances, I found that the Plaintiff has not met the requirements for the grant of a Mareva injunction and therefore ordered that:

(a) The Mareva injunction granted on 24 July 2018 be discharged;

(b) An assessment be made on the damages the Defendants claim to have suffered; and

(c) In the event that an assessment is commenced by the Defendants and only nominal damages are found that the Defendants will have to pay the costs of the Plaintiff for the assessment.

[note: 1]***Choy Chee Keen Collin v. Public Utilities Board*** [1996] 3 SLR(R) 812

[note: 2]***Bahtera Offshore (M) Sdn Bhd v. Sim Kok Beng and another*** [2009] 4 SLR (R) 365

[note: 3]Paragraph 65 of ***Bouvier v. Accent Delight International***

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