Royal Global Exports Pte Ltd and Others v Good Stream Co Ltd and Another [2004] SGHC 174

Case Number : Adm in Per 218/2003, SIC 3608/2004, 3792/2004

Decision Date : 12 August 2004

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : R Govintharasah (Gurbani and Co) for plaintiffs; Michael Lai and Ow Kim Kiat (Haq and Selvam) for first defendant; Loo Dip Seng and Mathiew Rajoo (Ang and Partners) for second defendant

Parties : Royal Global Exports Pte Ltd; Wood Craft International Pte Ltd; Pargan Singapore Pte Ltd; Murli Dhar Pandey Anil Kumar Mishra t/a Shree Ram Saw Mill; Shree Krishna Timber Co Pvt Ltd; Century Plyboards (India) Ltd; Binikom Products Pvt Ltd; Sri Balaji Logs Products Pvt Ltd — Good Stream Co Ltd; Trustrade Enterprises Pte Ltd

Civil Procedure – Production of documents – Whether appropriate for court to grant plaintiffs' application for production of documents and cross-examination of directors

Injunctions – Mareva injunction – Variation of Mareva order – Applicable principles

Injunctions – Mareva injunction – Whether Mareva order should be varied to allow first defendant to pay debts owing to second defendant out of insurance proceeds – Whether debts bona fide incurred in ordinary course of business

12 August 2004

Belinda Ang Saw Ean J:

1 On 22 August 2003, the plaintiffs, who are cargo interests, sued the first defendant, Good Stream Co Ltd ("Good Stream") as owner of the "Fortune Carrier" and the second defendant, Trustrade Enterprises Pte Ltd ("Trustrade") as contracting carrier. The plaintiffs' claim for damages arose from a total loss of timber logs on board the "Fortune Carrier" when the vessel sank on 10 June 2003 in the Bay of Bengal during a voyage from Malaysia to Kolkota, India. On 26 August 2003, the plaintiffs obtained *ex parte* a Mareva injunction of the proceeds of the vessel's hull and machinery policy ("the Mareva order"). On 15 January 2004, the plaintiffs successfully resisted the defendants' challenge to the *ex parte* Mareva order.

2 On 2 July 2004, Trustrade applied for an order varying the Mareva order so as to permit Good Stream to pay its debts to Trustrade out of the proceeds of the hull and machinery policy. On 29 July 2004, I allowed Trustrade's application to vary the Mareva order. At the same time, I dismissed the plaintiffs' application filed on 13 July 2004 for production of documents and cross-examination of Tio Kie Chwan ("TKC") and Tio Wee Kun ("TWK") on the affidavits affirmed by each of them in these proceedings. The plaintiffs have appealed against both orders. I now publish the reasons for my decision.

3 There is no objection in principle to a defendant being allowed to use assets subject to the injunction if he satisfies the court that the purpose for which he requires the assets does not conflict with the policy underlying the Mareva jurisdiction. The rationale is that the plaintiffs cannot, by way of the Mareva jurisdiction, obtain a preference over other creditors that they do not otherwise have: see *K/S A/S Admiral Shipping v Portlink Ferries Ltd* [1984] 2 Lloyd's Rep 166.

4 In *Iraqi Ministry of Defence v Arcepey Shipping Co SA (The "Angel Bell")* [1980] 1 Lloyd's Rep 632, the defendant shipowner, a one-ship Panamanian company, was indebted to a third party, Gillespie Brothers & Co Ltd ("Gillespie"). Gillespie had advanced a sum of £270,000 to the defendant for the purpose of buying ships, including the "Angel Bell". The plaintiff cargo owner brought an action against the defendant for loss of its cargo when the "Angel Bell" sank. The plaintiff obtained a Mareva injunction, restraining the defendant from disposing of any of its assets including the proceeds of the policies. The proceeds of the policies were later paid to London brokers and Gillespie applied for an order varying the Mareva injunction so as to permit the brokers to pay Gillespie the amount of the loan due from the defendant to Gillespie out of the proceeds of the policies. Robert Goff J varied the injunction to enable the loan to be paid. After observing that it was not the function of the court to rewrite the law of insolvency, Goff J continued at 636:

> It is not to be forgotten that the plaintiffs' claim may fail, or the damages which he claims may prove to be inflated. Is he in the meanwhile, merely by establishing a prima facie case, to preclude the bona fide payment of the defendant's debts? … It does not make commercial sense that a party claiming unliquidated damages should, without himself proceeding to judgment, prevent the defendant from using his assets to satisfy his debts as they fall due and be put in the position of having to allow his creditors to proceed to judgment with consequent loss of credit and of commercial standing.

5 The "Fortune Carrier" was insured for US$900,000. At the time of the hearing, the insurance proceeds were still unpaid. Counsel for Good Stream, Mr Michael Lai, informed the court that the insurance claim might be compromised at 75% of the sum insured. It is common ground that Good Stream is a one-ship company, and with the loss of the "Fortune Carrier" its only remaining asset is the insurance money.

6 Trustrade is a management company. In their affidavit in support of the application for the Mareva injunction, the plaintiffs recognised and referred to Trustrade as the ship manager of the "Fortune Carrier". Trustrade ordered supplies, appointed the port agents and obtained cargoes for the "Fortune Carrier" which was under its management. There was no written management agreement, but Trustrade as ship manager was given the role of collecting freight on Good Steam's behalf. At all material times, Trustrade maintained a running account for the trading activities of the "Fortune Carrier" with moneys owing to Trustrade being deducted from the freight receipts. The arrangement is consistent with Trustrade's authority to operate and manage the vessel for the account of Good Stream. Freight receipts up to the time of the casualty were not enough to meet the total debts of Good Stream. Consequently, Trustrade sought payment from Good Stream.

7 Counsel for Trustrade, Mr Loo Dip Seng, argued that the Mareva order should not preclude the *bona fide* payment of Good Stream's debts incurred on its account in connection with the purchase and operation the vessel. Trustrade was entitled to the moneys owed in "the ordinary course of business". The amount due is S$1,099,836.29 plus interest on a US$300,000 loan from Pacific Timor Shipping Agency Pte Ltd ("Pacific Timor"). At the hearing, Good Stream accepted its obligation to discharge its indebtedness to Trustrade and conceded that, upon receipt of the insurance proceeds, it would have to pay up but for the Mareva order. There was no question of Good Stream having other funds from which payment of its debts might be made. The only remaining asset would be considerably depleted or even exhausted if Trustrade succeeded in its application.

8 The plaintiffs' counsel, Mr R Govintharasah, pointed out that no application was made in the ten months that had lapsed since the injunction was granted. The *bona fides* of the debts were put in issue because of the close relationship or links between Good Stream and Trustrade. In short, the

plaintiffs were suspicious that the application for payment out was nothing more than a disguise to dissipate the insurance proceeds to avoid the plaintiffs' claims. A cross-examination of TKC and TWK would elicit the relationship between Good Stream and Trustrade. Contrary to counsel's suggestion, it was unnecessary that the application to vary the Mareva order should be held over until after the disposal of the second application. I heard both applications together.

9 TWK, a director of Trustrade deposed to the fact that after Good Stream's acquisition of the "Fortune Carrier" she was employed on two voyages. The first voyage was in April 2003. The casualty happened during the third voyage. Expenses for all these voyages were incurred on account of Good Stream. TWK also deposed to the fact that Trustrade drew on its overdraft facility with United Overseas Bank Ltd ("UOB") for the vessel's trade activities. In October 2003, UOB reduced the overdraft facility from S$1.1m to S$600,000. Trustrade was required to clear the indebtedness of S$1.05m as at 22 October 2003 to below the new overdraft limit of S$600,000. Accordingly, the company borrowed US$300,000 from a related company, Pacific Timor, which in turn obtained financing from UOB. The UOB loan was directly disbursed on 27 October 2003 to Trustrade. Besides documents from Pacific Timor, contemporaneous bank statements bear out these transactions.

10 As at the end of March 2004, the overdraft facility was limited to S$600,000 and Trustrade was indebted to the bank in the sum of S$582,225.12. On 12 May 2004, UOB terminated with immediate effect the overdraft facility. A sum of S$605,073.97 was owing to the bank as at 12 May 2004. On the same day, UOB also terminated the overdraft facility of US$300,000 to Pacific Timor. Consequently, the Pacific Timor loan and interest thereon also had to be repaid.

11 On 21 May 2004, M/s Ang & Partners wrote to M/s Gurbani & Co to seek the plaintiffs' agreement to vary the Mareva order. M/s Gurbani & Co requested supporting documents and they were forwarded on 4 June 2004. When no positive response was forthcoming, Trustrade filed the application to vary the Mareva order on 2 July 2004. It was served on the plaintiffs on 5 July 2004. A day before the hearing on 14 July 2004, the plaintiffs filed their application.

12 Without doubt, Trustrade's lenders had demanded repayment of the loans. The bank's actions in May 2004 served to explain Trustrade's application for variation of the Mareva order on 2 July 2004. As both loans are ultimately payable to UOB, Trustrade had asked for an order that the insurers pay the insurance proceeds directly to UOB to discharge the loans. UOB had initially granted Trustade up to 26 July 2004 to discharge the indebtedness. Since then, UOB has agreed to a further extension of six weeks.

13 Mr Loo prepared a table showing the purchase price of the vessel and the operating expenses of the vessel. Those came to S$1,940,988.40. After deducting freight collected in the sum of S$841,152.11, the net amount owing by Good Stream to Trustrade was S$1,099,836.29. In the interests of time, Mr Loo limited his submissions to a number of sample cases (undisputedly operational in nature) sufficient to establish the pattern of the various operating expenses. Notably, the bulk of all payments was made to third parties. Significantly, the bulk of the operating expenses was for crew wages, bunkers, deck stores, hull and machinery premium, protection and indemnity ("P & I") cover and port agents' disbursements. In addition, there were expenses related to post-casualty activities like payment of wages and repatriation of crew, and the fees of loss adjusters, surveyors and lawyers; these expenses were grouped under the heading "manager's disbursements". Exhibited in the affidavit of TWK were many supporting documents from third parties. Trustrade's claim for its management fee totalling S$59,768.75 and freight commission of S$20,907.03 was relatively unsubstantial in comparison with the entire indebtedness. I did not consider the two claims to be dubious or excessive.

14 At one stage, Mr Govintharasah was minded to argue that there was no debtor and creditor relationship between Good Stream and Trustrade in that the third party debts were incurred not on account of Good Stream but for itself as principal. Counsel in his affidavit in support of the plaintiffs' application for cross-examination alleged that Good Steam was a nominee, a shell company in the stable of companies controlled by TKC and his family. In a later paragraph, he boldly asserted that Good Stream was the nominee one-ship company of Trustrade. In order to mount the argument that Trustrade was the true principal or alter ego of Good Stream, he had to persuade me to reject Good Stream as the owner of the vessel and the whole of TWK's evidence concerning Trustrade's relationship with Good Stream as ship manager, when such a course plainly contradicted the writ of summons and the plaintiffs' own case repeated in the affidavit of Yeoh Jye Chye filed in support of the *ex parte* application for a Mareva injunction.

15 I therefore asked counsel for clarification as his argument would change drastically the plaintiffs' whole case. Was he saying that Good Stream was a "mere façade" concealing the true facts? Was he trying to show that the business of Good Stream was to be treated as Trustrade's business by lifting the corporate veil? The cases in which the veil has been lifted are generally ones where the company is being used as a means of shifting responsibility from the person (company or individual) who would otherwise be liable or might reasonably be expected to be liable. That element is absent in this case. The fact that Good Stream is a one-ship company is not determinative. In any case, a one-ship company is generally an accepted way of owning a ship and doing business in the shipping world. It is also a common feature that managers are engaged by the shipowner to carry on the business of the shipping company.

16 Seeing these difficulties, counsel for the plaintiffs backtracked and raised a "fall-back" argument. The plaintiffs, he argued, wanted to know who were the persons behind Good Stream. The "eye of equity" could look behind without lifting or piercing the corporate veil. He explained that the plaintiffs were not saying that the sale of the vessel from the previous owner, Indo Asia Maritime Ltd ("Indo Asia") to Good Stream was a sham. However, they were not prepared to accept, at face value, the arrangement contained in the memorandum of agreement dated 3 March 2003 ("the MOA"). The plaintiffs were suspicious of its genuineness as the MOA was not mentioned or alluded to at the outset when the defendants tried to set aside the injunction. Indo Asia and Trustrade had some common directors and shareholders. TKC was the managing director of Trustade and Indo Asia and the major shareholder of both companies. Good Stream, Trustrade, Indo Asia and Pacific Timor appeared to the plaintiffs to be controlled and managed by TKC and his family. In these circumstances, TWK's assertions of debts owing by one company to another related company could not be accepted at face value. They had to be verified by a cross-examination of TKC and TWK. Furthermore, the payments made by Trustrade to third parties in relation to Good Stream also had to be scrutinised, as they appeared to be working capital invested by Trustrade in Good Stream as its nominee shell company. Good Stream did not carry out any operations on its own and did not have capital of its own. Besides, UOB's letters recalling the overdraft facilities were copied to TKC, TWK and Mah Say Hua, presumably as guarantors, and they each had a personal interest in Trustrade's application.

17 Counsel cited *Atlas Maritime Co SA v Avalon Maritime Ltd* [1991] 1 Lloyd's Rep 563 in support of the plaintiffs' stance. The case concerned a parent company and its wholly-owned subsidiary, the defendant, a one-ship company. The defendant, Avalon, purchased and operated the vessel the "Coral Rose" with money obtained from its parent company, Marc Rich. The defendant applied to court to vary the injunction so that it could transfer money to its parent in order to pay the debt. It was held, lifting the corporate veil without piercing it, that the court would examine the commercial reality. On doing so, it was perceived that the "debt" was not an ordinary business debt but the

entire trading capital of the defendant, through which the parent was trying to achieve its own commercial aims. Marc Rich had declined to buy the vessel in its own name but agreed to advance sufficient funds to Avalon, which had been purchased for this purpose by a subsidiary of Marc Rich. The purposes of the scheme were to reduce the incidence of taxation and avoid the risk of liability that Marc Rich might be exposed to in the course of trading with the vessel. The English Court of Appeal was of the view that the money owed to the parent company as sole beneficial owner of the defendant was not a debt incurred in the course of ordinary routine trading but represented moneys advanced as trading capital. The two important factors that Staughton LJ considered determinative of the application to vary were Marc Rich's status as the ultimate parent company of the defendant and that the debt was in the nature of loan capital: *Atlas Maritime*, at 572. On that basis, the application was refused.

18 *Atlas Maritime Co SA v Avalon Maritime Ltd* is distinguishable on the facts. The "eye of equity" would look behind the corporate veil in order to do justice as the character of a company or the nature of the person controlling it was relevant. The situation here is appreciably different, in the sense that even if the same people were behind Good Stream and Trustrade it would not matter. First, a significant undisputed fact is that Trustrade was at all material times the ship manager of the "Fortune Carrier". Second, equally important is the fact that the ownership of the "Fortune Carrier" was never disputed. It was not the plaintiffs' case that Good Stream was a mere nominee in order to pin liability on Trustrade. That is not an argument they will want to pursue for the sake of the hull proceeds, which belonged to Good Stream. Third, the plaintiffs sued two parties, Good Stream and Trustrade. Trustrade was sued as "contracting carrier" in these proceedings because Trustrade issued the bills of lading as "carrier". For the same reasons, cross-examination of TKC and TWK, including discovery and production of the documents the plaintiffs sought, are quite unnecessary.

19 TWK deposed that in March 2003 Good Stream contracted to purchase the "Fortune Trader" which was renamed "Fortune Carrier" after the sale. Ownership was transferred to Good Stream on 1 April 2003. At the time of the sale, the vessel under previous ownership was already indebted to Trustrade in the sum of S$927,893.84 for the trade activities of the vessel that was under Trustrade's management. The plaintiffs had previously conceded that Trustrade was "the [manager] and [operator] of the vessel all along under the previous owner as well as under the present owner". Financially, Indo Asia was in no position to settle this indebtedness. Indo Asia agreed to sell the "Fortune Trader" and use the sale proceeds to pay Trustrade. The arrangement was for the sale proceeds to flow directly from Good Stream to Trustrade. Good Stream was to mortgage the vessel to finance part of the purchase. The mortgage was to be for S$600,000. This S$600,000 would go towards discharging Indo Asia's indebtedness to Trustrade. The balance sum of S$325,000 was to be paid to Trustrade in monthly instalments of S$5,000 till full payment was received. The vessel sank before the mortgage could be put into place.

20 Mr Govintharasah submitted that TWK should be disbelieved on her affidavit evidence because of the inconsistent reasons TKC and TWK had given for the sale of the vessel. In my view, there is no inconsistency. TKC in his affidavit of 8 October 2003 was explaining the reason for the company's decision to register "Fortune Carrier" under the Belize flag as opposed to keeping her on the Singapore register. On the other hand, TWK was talking about Indo Asia's reason for selling the vessel to repay money owed to Trustrade. They were each referring to different points in time and events.

21 Mr Loo referred me to *Bakarim v Victoria P Shipping Co Ltd (The "Tatiangela")* [1980] 2 Lloyd's Rep 193. In that case, the chairman and chief executive of the defendant, Mr Pefanis, advanced money to the defendant for the purchase of the vessel "Tatiangela". The vessel became

the subject of a salvage claim and required extensive repairs. Mr Pefanis paid for some of the repairs, but as a considerable amount was still outstanding, finance was obtained from the Commercial Bank of the Near East Ltd. Almost two years later, in January 1979, the vessel sustained a major casualty. There was an explosion and fire in the engine room after which the "Tatiangela" sank and the plaintiffs' cargo of coffee was lost. The plaintiffs obtained a Mareva injunction of the proceeds. The bank brought an application to vary the injunction so as to permit it to receive the hull proceeds and apply them in satisfaction of the amounts owing to the bank on the current accounts of the defendant and Mr Pefanis respectively. The bank loan was US$350,000, secured as to US$150,000 by a mortgage on the vessel and as to US$200,000 on a current account with Mr Pefanis personally. In addition, the defendant guaranteed payment of the indebtedness of Mr Pefanis under the current account agreement. The loan of US$200,000 was for financing part of the purchase of the vessel, repairs and improvements. Parker J allowed the bank's application since the overdraft on Mr Pefanis' account was for the benefit of the defendants. The payment was *bona fide* as the defendant's potential liability for Mr Pefanis' overdraft preceded the plaintiff's claim.

22 Likewise, the overdraft facility in this case was used for the benefit of Good Stream and the bulk of the indebtedness was incurred before the plaintiffs' claim. Trustrade had an equitable charge of the vessel until it received S$925,000 in full discharge of the indebtedness. Above all, freight collected was utilised to set off amounts owing to Trustrade. In my view, the equitable charge of the vessel and deduction of freight are features that are consistent with a loan rather than the notion of a capital investment in Good Stream argued for by Mr Govintharasah.

23 The second case relied on by Mr Govintharasah is *Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd* [1992] 1 SLR 659. Goh Joon Seng J refused to vary a Mareva injunction to allow the first defendants to reimburse the freight Tamar Shipping (Bermuda) Ltd ("Tamar") had paid on behalf of the first defendants who were unable to pay the disponent shipowner because of the injunction. Goh J was not satisfied that the purpose for the variation was to meet a payment that should be made in the ordinary course of the first defendants' business. A concern there was that the principal shareholder of Tamar and the first defendants was Robin Nederkoorn who was the second defendant in the action.

24 Every case has to be dealt with on its merits. Goh J's concerns do not arise here since TKC and TWC are not defendants in these proceedings. As stated, it is not the plaintiffs' case that Good Stream is Trustrade's nominee so as to pin liability on Trustrade. In the context of the Mareva jurisdiction, the close relationship or links between entities is a factor inviting the eye of equity to probe further into the matter. Where there is such a relationship or link, "the court should have a healthy scepticism in dealing with parties to whom the Mareva injunctions applied": see *Campbell Mussels v Thompson* (1985) 81 LS Gaz 2140, cited in Iain S Goldrein *et al*, *Commercial Litigation: Pre-Emptive Remedies* (4th Ed, 2003) at para A2-227. But so long as the applicant seeking to vary a Mareva injunction satisfies the court by full disclosure of its needs and that there is no ulterior motive involved in the sense that the purpose for which the applicant requires the use of asset does not conflict with the Mareva jurisdiction, there is no reason not to grant the variation: Goldrein, at para A2-228.

25 In the overall circumstances, I am satisfied that the proposed payment is not for a disguised purpose to frustrate the objective of the Mareva order by depleting the fund available to satisfy such judgment as the claimant may ultimately obtain against the defendants. I was persuaded as to the *bona fides* of the Good Stream's debts and that proposed payment out of the hull proceeds to discharge Good Stream's indebtedness to Trustrade would be a *bona fide* payment in the course of Good Stream's business.

26 There is another point. The Mareva order was directed at both defendants. Trustrade was enjoined not to deal with the insurance proceeds. In granting Trustrade's application, I considered and applied the principle that the Mareva injunction should not inflict hardship on the defendants, and if it did their legitimate interests must prevail over those of the plaintiffs who are not judgment creditors. The evidence is that Trustrade is being pressed by its lenders to clear the UOB loans and Trustrade should not be put in the position of having to allow its creditors to proceed to judgment. The order sought is for release of hull proceeds by the insurers directly to UOB to pay off the loans without passing first into the hands of Good Stream, Trustrade or Pacific Timor. Goff J's comments in *The "Angel Bell"*, [4] *supra*, at 637, are apposite:

> A reputable businessman who has received a loan from another person is likely to regard it as dishonourable, if not dishonest, not to repay that loan even if the enforcement of the loan is technically illegal by virtue of the Moneylenders Acts. All the interveners are asking is that the defendants should be free to repay such a loan if they think fit to do so, not that the loan transaction should be enforced. For a defendant to be free to repay a loan in such circumstances is not inconsistent with the policy underlying the *Mareva* jurisdiction. He is not in such circumstances seeking to avoid his responsibilities to the plaintiff if the latter should ultimately obtain a judgment; on the contrary, he is seeking in good faith to make payments which he considers he should make in the ordinary course of business. I cannot see that the *Mareva* jurisdiction should be allowed to prevent such a payment. To allow it to do so would be to stretch it beyond its original purpose so that instead of preventing abuse it would rather prevent businessmen conducting their business as they are entitled to do.

27 For these reasons, I allowed the second defendant's application with costs fixed at S$8,000. As a corollary to my decision, I dismissed the plaintiffs' application with costs fixed at S$800.

Plaintiffs' application dismissed; second defendant's application allowed.