CHS CPO GmbH and Another v Vikas Goel and Others
[2006] SGHC 49

Case Number : Suit 636/2004, SIC 4265/2005, 4324/2005, 4325/2005, 4340/2005

Decision Date : 22 March 2006

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Francis Xavier and Julian Soong (Rajah & Tann) for the plaintiffs; Nigel Pereira (KhattarWong) for the first and second defendants; Samuel Chacko and Lim Shack Keong (Colin Ng & Partners) for the third defendant; Davinder Singh SC, Harpreet Singh, Christina Goh and Kelly Fan (Drew & Napier LLC) appear as Counsel; Gan Theng Chong and Jiang Ke Yue (Lee & Lee) for the fourth defendant

Parties : CHS CPO GmbH; Karma International SARL — Vikas Goel; Neeraj Chauhan; Esys Distribution Pte Ltd; Karma Distribution (S) Pte Ltd

Civil Procedure – Anton piller orders – Application to discharge – Whether grave danger or real risk of evidence being destroyed or dissipated

Civil Procedure – Mareva injunctions – Application to discharge – Whether real risk of dissipation of assets existing – Whether non-disclosure of material facts existing – Whether failure to draw information to court's attention amounting to non-disclosure

22 March 2006

Woo Bih Li J:

Background

1 There have been various interlocutory applications between the parties and a summary of the background and dispute between them has been set out by Andrew Phang JC (as he then was) in *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202. I will use his summary to set out the background and dispute below.

2 The first plaintiff, CHS CPO GmbH ("CHS GmbH"), is a Swiss company (which was recently declared bankrupt). It was involved in the business of distributing computer components and related products. The first plaintiff is, in turn, wholly owned by the second plaintiff, Karma International Sarl ("KIS"), a company incorporated in Luxembourg. KIS is a wholly-owned subsidiary of a Dutch company (CHS Logistics Services BV), which is in turn wholly owned by a company incorporated in the US, CHC Electronics Inc ("CHC Inc").

3 CHS GmbH had incorporated a branch office, Distribution Karma ("DK"), in Dubai. CHS GmbH, through DK, later incorporated the fourth defendant Karma Distribution (S) Pte Ltd ("Karma Singapore") in Singapore. DK itself later became converted into a different type of corporate entity in Dubai and became known as Karma ME FZE.

4 The third defendant, Esys Distribution Pte Ltd ("Esys"), is a major distributor of computer components and related products, whilst the first defendant, Vikas Goel ("Goel"), was the promoter and is the principal shareholder of Esys. Goel owns virtually all of the shares in Esys, whilst Esys owns all but one of the shares in Karma Singapore. The second defendant Neeraj Chauhan ("Chauhan") holds one share each in Esys and Karma Singapore. Goel and Chauhan are also directors of Esys and Karma Singapore.

5 The gist of the plaintiffs' claims centres around the argument that they had been defrauded of their interest and holdings in Karma ME FZE. The alleged events (in particular, the alleged elaborate schemes effected by the defendants) upon which the plaintiffs' claims are based are complex. The plaintiffs alleged that the defendants are liable to account to them for all profits and assets misappropriated and that the defendants are also liable as constructive trustees. It is not clear whether, as a result of developments in relation to a Mareva injunction order ("MIO"), the plaintiffs are still pursuing this claim. The plaintiffs' alternative claim is that the defendants have been guilty of a conspiracy to defraud the plaintiffs of the said profits and assets.

6 The defendants totally deny the plaintiffs' claims and put them to strict proof thereof.

7 On 30 July 2004, the plaintiffs obtained on an *ex parte* application the MIO and an Anton Piller order ("APO"). The MIO and the APO were directed at Goel, Esys and Karma Singapore. The MIO was to restrain the disposal of assets up to $11m each. The $11m figure was approximately that of the plaintiffs' tentative estimate of their losses. The APO was executed between 2 to 4 August 2004. More than one year later, various applications were filed by each of the four defendants between 22 to 25 August 2005 to set aside the MIO and the APO and to seek various consequential orders including an inquiry into and an assessment of damages payable by the plaintiffs pursuant to their undertaking as set out in Sched 1 of the MIO and Sched 3 of the APO.

8 After hearing submissions, I set aside the MIO, but not the APO, in respect of the applications by Esys, Goel and Karma Singapore. I also made various consequential orders including an order for an inquiry into and an assessment of damages. However, I deferred the inquiry and assessment till after the action was struck out (as there was a pending application to strike out the action) or after the outcome of the trial of the action, whichever was applicable. I made no order in respect of the application by Chauhan since the MIO and the APO had not been addressed to him in the first place.

9 The plaintiffs have appealed against my decision to set aside the MIO in respect of Goel and Esys and the consequential orders regarding the inquiry and assessment of damages.

The court's reasons

10 The main arguments to set aside the MIO and the APO were presented by Mr Davinder Singh SC for Esys. He focused on two grounds:

(a) that there was no real risk of dissipation of assets prior to the trial of the action; and

(b) that there was non-disclosure of material facts.

Mr Singh's arguments for those two grounds overlapped to some extent. After hearing submissions, I was of the view that there was no real risk of dissipation of assets and that there was non-disclosure of material facts. I elaborate below.

11 Mr Singh stressed that the group turnover for 2003 was $1.4bn and was projected to be $2.5bn in 2004. Esys is the world's largest hard disk drive ("HDD") distributor. Esys had relocated its computer assembly plant from China to Singapore prior to the application for the MIO and the APO. Esys had been courted by the Economic Development Board ("EDB") of Singapore and had been awarded a Business Headquarters award by the EDB which provided tax concessions and was intending to list on the Singapore Stock Exchange. Such information was available from press reports including a report in *The Business Times* of 29 May 2004 and of 22 June 2004. While an affidavit of

Marcus Yip Tai Meng, a Singapore solicitor of the plaintiffs, had exhibited a copy of the report in *The Business Times* of 22 June 2004, Mr Singh submitted that it was not sufficient to just include such information in one of many exhibits without drawing such information to the court's attention.

12 In *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, Bingham J said (at 437):

> The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents.

13 I agreed that it was not sufficient to exhibit the *The Business Times* report of 22 June 2004 given the importance of the information therein. Such information demonstrated that the business of Esys, and Goel, who were the principal defendants, were here to stay and was contrary to any suggestion that there was a real risk that they would dissipate assets merely to deny the plaintiffs the fruits of their judgment should they eventually succeed. There was non-disclosure of material facts by reason of the failure to draw such information to the court's attention.

14 I come now to a point raised by Mr Francis Xavier, counsel for the plaintiffs. He submitted that Mr Joerg Zimmermann's supporting affidavit for the application for the MIO and the APO had referred to the turnover and paid-up capital of Esys for certain years before 2003. I was of the view that such information had been given in a different context, *ie*, to show how the business of Karma Singapore had been diverted to Esys by Goel. The court's attention had not been drawn to the fact that:

(a) Esys is the world's largest HDD distributor;

(b) Esys had relocated its plant from China to Singapore;

(c) Esys had been granted the Business Headquarters award by the EDB; and

(d) Esys was seeking a listing on the Singapore Stock Exchange.

15 A second reason why I was of the view that there was no real risk of dissipation of assets was that the first affidavit of Mark Keough ("Keough"), the manager of KIS, filed also in respect of the application for the MIO and APO, revealed that there had been an exchange of e-mail between Keough and Goel since 19 February 2002 about the transfer of assets or diversion of business from Karma ME FZE. There was no suggestion in Keough's e-mail that he was concerned that Goel would dissipate assets to avoid a potential judgment in favour of the plaintiffs if Goel was put on notice of an impending action. Indeed, the fact that such e-mail was exchanged for more than one year since 19 February 2002 militated against such a concern.

16 As another illustration of this point, I refer to a fax dated 31 March 2003 from M/s Berger Singerman ("Singerman"), the attorneys at law to Keith F Cooper in his capacity as Responsible Person for CHC Inc. That fax was addressed to Goel and it sought, *inter alia*, a review of various documents listed therein with a warning that the Responsible Person had the authority to subpoena such documents and obtain formal discovery if co-operation was not forthcoming. Such a fax militated against a concern about the risk of dissipation of assets or the risk of destruction of documents upon

the commencement of an action.

17 On 11 April 2003, Goel responded to the attorneys by e-mail stating he did not mind showing original audited documentation provided a non-disclosure agreement was signed. There was some dispute as to whether Keough was aware of this reply since it was not copied to him and there was also some argument as to what Goel's offer actually extended to. However, the point was that this was not the conduct of someone who would dissipate assets in the face of a claim or an action.

18 Accordingly, I was surprised that after the exchange of e-mail between Keough and Goel and after the fax from Singerman, the plaintiffs should think it fit to launch an *ex parte* application more than another year later on 30 July 2004 without any prior warning to Goel or Esys or the other defendants that this was coming. It seemed to me that this *ex parte* application was designed to be a pre-emptive strike to put undue pressure on the defendants and was quite inappropriate.

19 I should mention that Mr Xavier had submitted that since the plaintiffs' claim included a proprietary claim in respect of various assets, including shares held by Goel in Esys, there was no need to satisfy the court of a real risk of dissipation of assets. Mr Xavier relied on *Choy Chee Keen Collin v Public Utilities Board* [1997] 1 SLR 604 where L P Thean JA said at [19] and [22]:

> 19 On the material before us, there was no 'solid evidence' of any conduct on the third defendant's part which suggests that there was a risk of dissipation occurring, let alone a real risk. …
>
> 22 Plainly, on this ground alone the third defendant had made out a case for the discharge of the Mareva injunction and we would have discharged it but for the proprietary claim of the plaintiffs (of which more will be said shortly) and the offer made by the third defendant to retain the injunction on a limited basis.

20 At [48] and [49], Thean JA referred to *Polly Peck International plc v Nadir (No 2)* [1992] 4 All ER 769 and cited with approval what Scott LJ said at 776 of the law report for that case:

> Equitable tracing leads to a claim of a proprietary character. A fund is identified that, in equity, is regarded as a fund belonging to the claimant. The constructive trust claim, in this action at least, is not a claim to any fund in specie. It is a claim to monetary compensation. The only relevant interlocutory protection that can be sought in aid of a money claim is a Mareva injunction, restraining the defendant from dissipating or secreting away his assets in order to make himself judgment proof. But if identifiable assets are being claimed, the interlocutory relief sought will not be a Mareva injunction but relief for the purpose of preserving intact the assets in question until their true ownership can be determined. Quite different consideration arise from those which apply to Mareva injunctions.

21 However, developments since the grant of the MIO and the APO revealed that Kan Ting Chiu J had stayed part of the MIO as Esys had provided $11m to meet the plaintiffs' claims. Nevertheless, Kan J allowed the plaintiffs to make an application within a stipulated deadline to preserve the assets which were the subject of their proprietary claims. The plaintiffs chose not to do so. In such circumstances, Mr Singh submitted that the MIO remained as a pure Mareva injunction order. I agreed. In any event, as I have mentioned, I discharged the MIO also on the ground of non-disclosure of material facts.

22 I come now to two other instances of material non-disclosure.

23 First, I was informed that Keough is entitled to 50% of the proceeds of the litigation. Ideally, this should have been disclosed at the *ex parte* stage. However, as Keough's affidavit in support of the *ex parte* application was essentially to highlight extracts from the exchange of e-mail between Goel and himself, I would not have discharged the MIO on this non-disclosure alone.

24 Secondly, a few weeks before the present action in Singapore was filed, the plaintiffs had taken out proceedings in Dubai. The defendant in the Dubai proceedings was one Sekhar who was apparently a manager of Karma ME FZE and the Dubai proceedings were not based on the same complex allegations of wrongdoing as in the Singapore action. The relief sought in the Dubai proceedings was for an accountant to be assigned to review the files of Karma ME FZE to determine the wrongdoings perpetrated by Sekhar and how the ownership of Karma ME FZE had been transferred without the consent of its actual owners. The Dubai proceedings were not disclosed in the *ex parte* application in Singapore for the MIO and the APO.

25 Although the underlying complaint in the Dubai proceedings was not inconsistent with that in the Singapore action, the focus of the Dubai proceedings was different from that in the Singapore action. The plaintiffs ought to have disclosed the Dubai proceedings to the Singapore court and the fact that there was no allegation in the Dubai proceedings against Goel or Esys or any of the other defendants. In my view, such non-disclosure was material because the Singapore court might then have wanted to be satisfied why the focus was different and why the plaintiffs had alleged in the Dubai proceedings that they were unaware of what had transpired and yet could give a complex account of their allegations in the Singapore action.

26 Although this non-disclosure and the non-disclosure about Keough's interest in the litigation might in themselves still not have persuaded me to discharge the MIO, they were the additional factors which persuaded me to make the order for discharge.

27 I would add that Mr Singh had stressed the outcome of the proceedings in Dubai which was that there was no finding of any wrongdoing by Mr Sekhar. In my view, that finding is irrelevant to the question of non-disclosure since it came about after the order granting the MIO and the APO was made. I also noted that in the course of arguments, Mr Singh had veered into the lack of merits of the plaintiffs' claims. As that was not the ground relied on to set aside the orders, I placed no weight on such arguments.

28 There were also other allegations of non-disclosure of material facts but, in respect of those allegations, I was not able to conclude that non-disclosure of material facts had occurred. For example, Mr Singh stressed that payment of $500,000 had been made for the transfer of assets and there were documents disclosing this which should have been disclosed. According to him, this was contrary to the plaintiffs' assertion that there was no consideration for the transfer. On the other hand, the plaintiffs did not accept that such payment had been made. Mr Xavier also stressed that if the allegation of payment was true, it would have been made at the earliest opportunity by the defendants instead of belatedly. In my view, the plaintiffs could not be expected to disclose the alleged payment when they disagreed with the nature of the payment in the first place and there was no evidence that the plaintiffs were aware that the defendants would assert such a payment before the *ex parte* application was made. Although the documentary evidence which Mr Singh referred to raised issues on this point which the plaintiffs will have to deal with eventually, they were not sufficient for me at this stage to rule that there had in fact been a payment for the transfer and that such payment had not been disclosed.

29 Another example was Mr Singh's point that internal documents showed that the assets of Karma ME FZE was worth $500,000 only and this was not disclosed by the plaintiffs. On the other

hand, Mr Zimmermann's affidavit in support of the *ex parte* application did refer to at least one of the documents which Mr Singh pointed to (see p 225 of Mr Zimmermann's affidavit). Also from that affidavit, the plaintiffs were not accepting that the value of the Karma group had dropped as much as the document was suggesting (see para 31 of Mr Zimmermann's affidavit).

30 As a third example, Mr Singh also submitted that far from receivables of Karma ME FZE having been diverted to Karma Singapore, there was a memorandum of understanding ("MOU") pursuant to which it was agreed that Goel would realise the trade debts of Karma ME FZE and the same would be used by Karma Singapore and would be "settled over a period of time" from money generated by the Karma Singapore operations. Mr Singh submitted that Karma Singapore had paid back Karma ME FZE for the amount it had received from the receivables. However, the MOU was undated. It was between Goel of the first part, Karma ME FZE of the second part and Bernd Karre of the third part. Roland Karre had represented Karma ME FZE in this MOU and he is the son of Bernd Karre. Goel and Bernd Karre were the primary players in the alleged conspiracy. The documents purportedly evidencing repayment referred to a loan and more importantly, it was unclear what happened to the moneys if, indeed, paid back. As it was, the plaintiffs were alleging that receivables owing from Karma Singapore to Karma ME FZE had been wrongfully assigned to a company registered in Mauritius known as Globex Corporate Holdings Limited. The documents which Mr Singh relied on did not address this allegation.

31 As regards what the plaintiffs knew from their investigations in Germany, it was also difficult for me to make a finding about that at this stage.

32 As regards the APO, I was initially of the view that the communication between Keough and Goel for over a year suggested that Keough himself did not believe there was a real risk of destruction of documents, whether electronic or otherwise. However, there was some evidence that during the execution of the APO, some electronic documents were being deleted or tampered with. This raised a concern on my part although, of course, I could not then determine the materiality of the deletions or the tampering. Perhaps sensing my concern, Mr Singh said that Esys would abide by whatever order I should make in relation to the preservation of evidence. The status as at the time of the hearing before me was that various documents were held by the supervising solicitors. I saw no reason why that arrangement should not continue and accordingly I declined to set aside the APO. After hearing further arguments, I maintained that decision and made consequential orders on the access thereto.

33 As regards the deferment of the inquiry into and assessment of damages, I took into account the fact that the application to discharge the MIO had been filed more than a year after the same was granted and presumably served. No explanation for this delay was forthcoming. Instead, the position taken by Mr Singh was that such an application could be made at any time. I was of the view that while such an application can be made at any time, the delay may affect the relief to be granted. An order for the plaintiffs to fortify their undertaking for damages should the MIO be discharged had already been made. True, the sum which the plaintiffs were required to provide for the fortification was $315,646 which was much less than the approximately $49m which had been sought. However, if the defendants genuinely believed that the fortification sum was grossly inadequate, they should have applied to discharge the MIO earlier rather than later. Indeed, the application for the MIO should have been made at the earliest opportunity. Instead, I was informed by Mr Xavier that the defendants had filed 22 other interlocutory applications in the meantime. As at the time of the hearing before me on 13 and 14 September 2005 to discharge the MIO and the APO, there was a pending application to strike out the entire claim which had still not been heard. Notwithstanding this, Mr Singh orally sought directions for an early date for trial although he was instructed that the application to strike out would not be withdrawn. As I was of the view that the parties should not be required to proceed towards a trial while having to deal with an application to strike out at the same time, I declined to give such directions. Although Mr Singh had said that the defendants were not

shrinking from a full trial, the manoeuvres employed by the defendants, before Mr Singh was instructed, suggested otherwise. In order not to further distract the parties from their main dispute and in view of the long delay in making the discharge applications, I ordered that the inquiry into and assessment of damages be deferred. Such an order has been made before, an example of which is Justice V K Rajah's order in *Asian Corporate Services (SEA) Pte Ltd v Impact Pacific Consultants Pte Ltd* [2005] 4 SLR 61 at [13].

34 I should add that by the time of the hearing of the further arguments on 15 March 2006, the application to strike out the entire claim had apparently been disposed off. The defendants appeared to be more resolute about facing a trial but the discovery and inspection of documents had not been completed.