Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng and Another
[2009] SGHC 171

Case Number : Suit 47/2009, SUM 1154/2009, 1328/2009

Decision Date : 03 August 2009

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Liew Teck Huat and Wang Yingyu (Global Law Alliance LLC) for the plaintiff; Subramanian A Pillai (Acies Law Corporation) for the defendants

Parties : Bahtera Offshore (M) Sdn Bhd — Sim Kok Beng; Intraline Resources Sdn Bhd

Civil Procedure – Mareva injunctions – Culpable material non-disclosure with intention to mislead court on material facts – Test to determine whether full and frank disclosure had been made

3 August 2009

Chan Seng Onn J:

Introduction and brief facts

1 The plaintiff is a Malaysian company engaged in business as shipowners/charterers ("Plaintiff"). The second defendant is also a Malaysian company but engaged in business as marine contractors ("Second Defendant"). The first defendant is the shareholder/director of the Second Defendant ("First Defendant"). He is also a shareholder/director of Intraline Corporation Sdn Bhd ("ICSB"), which is wholly owned by the Second Defendant. Where appropriate, the First and Second Defendant will collectively be referred to as the "Defendants".

2 Between July to November 2007, the Second Defendant chartered several vessels from the Plaintiff and by 28 January 2008, the former owed the latter RM 3,728,052.40 and USD 539,342.29 in charterhire. However, it did not pay these sums to the Plaintiff. In accordance with the Charterparties, which provided that disputes under it were to be arbitrated in Malaysia, the Plaintiff therefore initiated arbitration proceedings in Kuala Lumpur against the Second Defendant for payment of the outstanding charterhire.

3 In addition, the Plaintiff also commenced proceedings in Kuala Lumpur to obtain security for the arbitration (the "Security Action"). On 21 March 2008, the Plaintiff obtained a worldwide Mareva injunction on an *ex parte* basis ("the Malaysian injunction") in the Security Action restraining the Second Defendant from disposing of and/or dealing with its assets up to RM 7 million. The Second Defendant then applied to set aside the Malaysian injunction on the ground that it was not liable to the Plaintiff under the Charterparties. It also applied to vary the Malaysian injunction to allow the payment of "operational expenses". The variation was allowed.

4 While claims for "operational expenses" were made, the Second Defendant commenced separate proceedings in the Shah Alam High Court for the equivalent of Judicial Management ("Section 176 Action") on 25 June 2008. There, it sought a moratorium on all proceedings commenced against it so that it could have the opportunity to restructure. The Second Defendant's case in the Section 176 Action was that it was undergoing short term financial difficulties but was capable of operating successfully in the long term should the stay sought be granted. The court subsequently made an order for a stay of all proceedings against the Second Defendant on 23 July 2008 (the

"Section 176 Order").

5 In response to the grant of the Section 176 Order, the Plaintiff applied to set aside this order on the basis that the Second Defendant had failed to put the full facts before the Shah Alam High Court. It alleged that the Second Defendant was denying the Plaintiff's claim for outstanding charterhire in one action whilst simultaneously seeking protection from the Plaintiff in respect of the same debt in another action. It also objected to the subsequent scheme of arrangement ("Scheme"), alleging that it was conceived dishonestly.

6 With regards to the First Defendant, the Plaintiff contended that he conspired with the Second Defendant to evade payment of the sums due under the Charterparties. The Plaintiff therefore commenced an action based on the tort of conspiracy in Singapore.

7 On 12 February 2009, Tay Yong Kwang J (the "Judge") granted an *ex parte* worldwide Mareva injunction in Summons No. 242 of 2009, in support of the action on conspiracy, on the ground that there was a real risk of asset dissipation ("the Singapore injunction").

8 The Defendants applied to set aside the Singapore injunction in Summons No. 1154 of 2009 on 12 March 2009. As part of their application, the Defendants filed five affidavits, the contents of which were alleged by the Plaintiff to have raised more questions than answers. The Plaintiff therefore sought leave to cross-examine two deponents of those affidavits, namely, the First Defendant and one Cheam Tow Yong in Summons No. 1328 of 2009.

9 In essence, there were two main issues before this court. First, whether the First Defendant and Cheam Tow Yong, who had affirmed affidavits on 12 March 2009 on behalf of the Defendants for the purpose of setting aside the Singapore injunction, should be cross-examined (Summons No. 1328 of 2009); and second, whether the *ex parte* Mareva injunction dated 12 February 2009 should be set aside (Summons No. 1154 of 2009),

10 As regards the first issue, I did not see a need to make any order on the Plaintiff's application for cross-examination. I would now deal with the First and Second Defendant's application to set aside the Singapore injunction granted on 12 February 2009.

Defendants' application to set aside the Mareva injunction

11 The Plaintiff contended that the Defendants had conducted themselves in a fraudulent and/or dishonest manner with respect to the Plaintiff and that there was a real risk of the Defendants dissipating their assets in Singapore. After considering the circumstances of this case and the principles which the court should take into account in determining whether to discharge or allow the continuation of the Mareva injunction, I decided that a discharge was the proper course to take. I now state my reasons for doing so.

12 Under s 4(10) of the Civil Law Act ("CLA") (Cap 43, 1999 Rev Ed), read with s 18(2) of the Supreme Court of Judicature Act ("SCJA") (Cap 322, 2007 Rev Ed), and para. 5(c) of the First Schedule thereto, and Order 29 r 1, Rules of Court ("Rules") (Cap 322, R5, 2006 Rev Ed), the court has the power to grant or continue a Mareva injunction.

Civil Law Act (Cap 43) s 4(10)

Injunctions and receivers granted or appointed by interlocutory orders

4. …

(10) A Mandatory Order or an injunction *may be granted* or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.

[emphasis added]

Supreme Court of Judicature Act (Cap 322) ("SCJA")

Powers of High Court

18. —(2) Without prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule.

First Schedule

Preservation of subject-matter, evidence and assets to satisfy judgment

5. —(c) the preservation of assets for the satisfaction of any judgment which has been or may be made.

Rules of Court

Application for injunction (O. 29, r. 1)

1. —(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's originating process, counterclaim or third party notice, as the case may be.

13 For a Mareva injunction application to succeed, the plaintiff must satisfy four basic requirements:

(a) He has a valid cause of action over which the court has jurisdiction;

(b) He has a "good arguable case";

(c) The defendant has assets within or outside the jurisdiction; and

(d) There is a real risk that those assets may be disposed of or dissipated so that any judgment which the plaintiff may obtain cannot be enforced.

14 Additionally, because the application is made *ex parte* so that the defendant will not have the opportunity to dissipate his assets before the order is made, the court hears the plaintiff's representations and arguments in the absence of the defendant. The defendant is not given an opportunity to be heard. This gives rise to the danger that the plaintiff might exploit the situation by not disclosing certain facts which may go against his application. Accordingly, the law has also imposed an obligation on the plaintiff to make full and frank disclosure of all material facts at the time of application.

Full and frank disclosure of material facts

Historical development of the rule

15 The rule that there should be full and frank disclosure of all material facts in an application for an *ex parte* injunction dates back to the cases of *Castelli v Cook* (1849) 68 ER 36, *Dalglish v Jarvie* (1850) 42 ER 89 and the most celebrated case of *The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington; Ex parte Princess Edmond de Polignac* [1917] 1 KB 486 ("*Kensington Income Tax Commissioners*"). While *Kensington Income Tax Commissioners'* does not deal specifically with Mareva injunctions, the Lord Justices' *dicta* are applicable to *ex parte* applications in general and have been quoted with approval in subsequent cases. At 509, Warrington LJ said:

> It is perfectly well settled that a person who makes an *ex parte* application to the Court – that is to say, in the absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he *will* be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.
>
> [emphasis added]

Further, Scrutton LJ added at 514:

> … [I]t has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex-parte statement he should make a full and fair disclosure of all the material facts … the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court *will* set aside any action which it has taken on the faith of the imperfect statement.
>
> [emphasis added]

16 More recently in *Bank Mellat v Nikpour* [1985] FSR 87 ("*Bank Mellat*"), a case concerning the action by an Iranian bank to recover money allegedly owed to it by its former chief executive, Lord Denning MR said at 89:

> When an ex parte application is made for a Mareva Injunction, it is of the first importance that the plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally, in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere. It is only if such information is put fairly before the court that a Mareva injunction can properly be granted.

Donaldson LJ also reaffirmed the rule of full and frank disclosure at 90–92:

> This principle that no injunction obtained ex parte shall stand if it has been obtained in circumstances in which there was a breach of the duty to make the fullest and frankest disclosure is of great antiquity. Indeed, it is so well enshrined in the law that it is difficult to find authority for the proposition; we all know it; it is trite law. … [T]he court will be astute to ensure

> that a plaintiff who obtains an injunction without full disclosure – or any ex parte order without full disclosure – is deprived of any advantage he may have derived by that breach of duty. … The rule requiring full disclosure seems to me to be one of the most fundamental importance, particularly in the context of the draconian remedy of the Mareva injunction. It is in effect, together with the Anton Piller order, one of the law's two 'nuclear' weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it *should* be revoked.
>
> [emphasis added]

17 The underlying rationale of this requirement is that it ensures the judge a balanced view of the application at hand. Often, because of the nature of an *ex parte* application (the defendant is not present to make submissions and relief is sought on an urgent basis), the judge hearing the matter "may not be appropriately sensitised to the real merits of the application and the potentially hazardous ramifications of the remedy": *The Vasiliy Golovnin* [2008] 4 SLR 994 ("*The Vasiliy Golovnin*") at [85]. This is dangerous, particularly where the grant of a Mareva injunction may potentially cause enormous and sometimes irreparable damage to the defendant.

Modern principles governing full and frank disclosure

18 The above-mentioned cases form the foundation for subsequent case law concerning the duty to make full and frank disclosure. Several principles may be extracted from some of the more recent authorities: *Brink's-MAT Ltd v Elcombe* [1988] 1 WLR 1350 ("*Brink's-MAT*"); *Poon Kng Siang v Tan Ah Keng* [1992] 1 SLR 562 ("*Poon*"); *Nikkomann Co Pte Ltd v Yulean Trading Pte Ltd* [1992] 2 SLR 980 ("*Nikkomann*"); *Tay Long Kee Impex Pte Ltd v Tan Beng Huwah* [2000] 2 SLR 750 ("*Huwah*"); *Asian Corporate Services (SEA) v Eastwest Management (Singapore Branch)* [2006] 1 SLR 901 ("*Asian Corporate Services (SEA)*"), *The Vasiliy Golovnin*, and *Multi-Code Electronics Industries (M) Bhd and Another v Toh Chun Toh Gordon and Others* [2009] 1 SLR 1000 ("*Multi-Code*").

19 First, the judge hearing an *inter partes* application to discharge an *ex parte* injunction on the ground that the plaintiff has failed to make full and frank disclosure would not be sitting in appeal over the decision of the first judge who granted the injunction at the *ex parte* hearing. The court would have to determine whether, on the full facts, the injunction should be continued or discharged, or a fresh injunction be issued. If the defendants successfully show that the plaintiff has misrepresented or suppressed material facts in obtaining the injunction, then the court hearing the discharge application would make such order as it deems fair and just in all the circumstances: *Huwah* ([18] *supra*) at [19]; *Multi-Code* ([18] *supra*) at [122].

20 Second, the plaintiff in an *ex parte* application is under a clear duty to make full and frank disclosure of all material facts in his possession at the time of application, even if they are prejudicial to his claim. This includes defences which are likely to be raised. *In Poon* ([18] *supra*), it was said at [40] that:

> 'Material', in this context, does not mean decisive or conclusive. What is required is that the applicant should make full and frank disclosure of all facts and matters which could or would reasonably be taken into account by the judge in deciding whether to grant the application. This includes any defence that the applicant has reason to believe may be advanced by the other side. He has in general to put his case fairly before the court. This is all trite law.

21 Third, this duty is to disclose all material facts: *The Vasiliy Golovnin* ([17] *supra*) at [85]. Materiality is to be decided by the court and not by the applicant or their advisers: *Kensington*

Income Tax Commissioners' ([15] *supra*) at 504.

22 Fourth, "material facts" cover both factual and legal matters, which may be advantageous or prejudicial to the applicant's application. It extends to facts which the applicant has knowledge of and facts which he ought to know or could have discovered had he made proper inquiries: The *Vasiliy Golovnin* ([17] *supra*) at [86] to [87] and *Multi-Code* ([18] *supra*) at [124]. The extent of enquiries which will be held to be proper depends on the circumstances of each case, including (a) the nature of the applicant's application; (b) the order for which the application is made and the probable effect of the order on the defendant; and (c) the degree of legitimate urgency and the time available for the making of inquiries.

23 In short, material facts are facts which the court should take into account in making its decision: *The Vasiliy Golovnin* ([17] *supra*) at [86]. Whether or not a fact is a material fact depends on the facts and circumstances of each case and also on the particular relief sought. There is no single criterion to establish what constitutes a material fact. Ultimately, it is all about striking a right balance. The duty to make full and frank disclosure does not require the plaintiff to disclose every relevant document, as it must on discovery.

24 Fifth, even if the plaintiff has made a disclosure of material facts, mere disclosure without more or devoid of the proper context is in itself insufficient to constitute full and frank disclosure. The manner of disclosure must also meet the threshold of the disclosure. This was made clear by VK Rajah JA in *The Vasiliy Golovnin* ([17] *supra*) at [91]:

> It should also be pointed out that mere disclosure of material facts without more or devoid of the proper context is in itself plainly insufficient to constitute full and frank disclosure; the threshold of the disclosure to be met is also crucial. In this regard, we are referring specifically to the *manner* of disclosure that is required of a plaintiff making the *ex parte* application. In other words, we are concerned with how the material facts can best be presented to the court so as to ensure that the court receives the most complete and undistorted picture of the material facts, sufficient for its purpose of making an informed and fair decision on the outcome of the application, such that the threshold of full and frank disclosure can be meaningfully said to be crossed.
>
> [emphasis in original]

This threshold is crossed where the plaintiff has identified "the crucial points for and against the application, and not [relied] on general statements and the mere exhibiting of numerous documents" (per Bingham J in *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428 at 437).

25 Sixth, conversely, where the court finds that the plaintiff has not made a full and frank disclosure, it does not necessarily follow that the court must discharge the Mareva injunction. There is discretion in the matter. The court may continue the injunction notwithstanding non-disclosure (*Mohamed Said bin Ali v Ka Wah Bank* [1989] SLR 667 and *Lee Hung Khoon v Yeo Tang Mui* [1990] SLR 509) or deal with the non-disclosure by discharging the original injunction and granting a fresh injunction (*Huwah* ([18] *supra*), *Brink's-MAT* ([18] *supra*)). This is notwithstanding *Kensington Income Tax Commissioners'* ([15] *supra*) and *Bank Mellat* ([16] *supra*). By using the phrases "will be deprived", "will set aside", and "should be revoked", both cases appear to suggest that the court is obliged to discharge injunctions obtained *ex parte* where the plaintiff failed to make full and frank disclosures, even if the non-disclosure had been innocent (see [15] to [16] above). This is no longer the position today: *Huwah* ([18] *supra*) at [25]; *Multi-Code* ([18] *supra*) at [128]. In *Nikkomann* ([18] *supra*), it was said at [43] that the court would consider whether the non-disclosure:

> … is of such materiality as to justify or require the immediate discharge of the interim orders without examination of the merits. This depends on the importance of the fact to the issue which was to be decided by the judge hearing the *ex parte* application.

26 Seventh, whether or not the court would exercise its discretion depends on factors such as the particular relief sought, how serious the material non-disclosure is or how important the undisclosed facts are, and the overall merits of the plaintiff's case.

27 Eight, where the information suppressed is sufficiently material, the court would then have to consider whether the material non-disclosure was inadvertent or innocent (in the sense that the applicant did not know that fact, forgotten its existence, or failed to perceive its relevance), or whether it was deliberate and intended to mislead the court into granting the injunction: *Multi-Code* ([18] *supra*) at [129].

28 Ninth, as a general rule of thumb, courts tend to take a stricter view of any material non-disclosure in respect of Mareva injunctions as compared with other orders because the grant of the former will confer on the applicant an advantage over the party restrained. In *Brink's-MAT* ([18] *supra*), Balcombe LJ said at 1358 that "the discretion is one to be exercised sparingly".

29 Tenth, the court is less likely to exercise its discretion to set aside the Mareva injunction where the plaintiff did not have any deliberate intention to suppress those material facts from the court. That being so, this does not mean that all innocent non-disclosures are excused. In *Lloyds Bowmaker Ltd v Britannia Arrow Holdings* [1988] 1 WLR 1337 ("*Lloyds Bowmaker*") at 1343-1344, Gildewell LJ appeared to be reluctant to exercise his discretion against the plaintiff:

> ... even though a first injunction is discharged because of material non-disclosure, the court has a discretion whether to grant a second Mareva injunction at a stage when the whole of the facts, including that of the original non-disclosure, are before it, and may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.

This reaffirmed the principles declared in *Yardley & Co Ltd v Higsons* [1984] FSR 304 ("*Yardley*") and *Eastglen International Corp v Monpare SA* (1987) 137 NLJ 56 ("*Eastglen International*"). In *Eastglen International*, Gatehouse J expressed the view that if an omission was innocent and the undisclosed fact was not of central importance, the court might well decline to set aside the Mareva injunction.

30 Eleventh, where the plaintiff did intend to suppress material facts from the court however, whether or not the court would exercise its discretion to discharge the Mareva injunction would depend on the facts of each case. The court would have to balance, amongst other factors, the degree of the plaintiff's culpability and the burden of the injunction against the defendants should the injunction be upheld, against the adverse impact on the plaintiff should the injunction be discharged.

31 Dillon LJ expressed the view in *Lloyds Bowmaker* ([29] *supra*) at 1349 that the court has discretion in an appropriate case to refuse to discharge the existing injunction even though there was culpable non-disclosure in respect of the original injunction:

> There is no doubt that there is jurisdiction to grant a fresh injunction, even though there has been culpable non-disclosure when the original injunction was applied for. I find it a cumbrous procedure that the court should be bound, instead of itself granting a fresh injunction, to discharge the existing injunction and stay the discharge until a fresh application is made, possibly in another court, and that the court which is asked to discharge the injunction should not simply,

> as a matter of discretion in an appropriate case, refuse to discharge it if it feels that it would be appropriate to grant a fresh injunction. That leads me to think that there is a discretion in the court on an application for discharge.

This view was endorsed by Balcome LJ with approval in *Brink's-MAT* ([18] *supra*) at 1358:

> I agree with the views of Dillon, LJ in the Lloyds Bowmaker case, at p1349C-D, [[1988] 3 All ER 178 at p 187] that, if there is jurisdiction to grant a fresh injunction, then there must also be a discretion to refuse, in an appropriate case, to discharge the original injunction.

32 However, *Huwah* ([18] *supra*) and *Poon* ([18] *supra*) are cases where the court discharged an injunction after finding that the non-disclosure was deliberate.

33 Most recently, *Multi-Code* ([18] *supra*) suggests that where there has been culpable non-disclosure, the court would be more inclined towards exercising its discretion to discharge the injunction for abuse of process, *unless* there are very extenuating circumstances for which the court would be prepared to excuse the plaintiff. An example of such circumstances is the situation where discharging the injunction would cause serious injustice to the plaintiff:

> [129] … the court would be much more likely exercise its discretion to discharge the Mareva injunction immediately as it would be an abuse of process to mislead the court during an *ex parte* hearing into granting the Mareva injunction. Only in very extenuating circumstances (for instance where serious injustice would be caused to the plaintiffs) would the court be prepared to excuse the plaintiffs, and to allow the *ex parte* injunction to continue or to grant a fresh injunction after full and proper disclosure upon a subsequent application. This would be despite the plaintiffs' earlier deliberate suppression of material information or deliberate distortion of material information to mislead or deceive the court at the *ex parte* hearing.

Failure to make a full and frank disclosure of the material facts

34 In the present instance, I found that the Plaintiff had not only failed to abide by the requirement to make full and frank disclosure, it had even intentionally set out to mislead the court on material facts pertaining to the grant of the Mareva injunction. The Plaintiff had deliberately suppressed and distorted material facts so that the court hearing the *ex parte* application would believe that the Defendants were dissipating their assets. Importantly, it failed to disclose that the Section 176 Order was extended and that the extended Order was amended to bind the Plaintiff. The Plaintiff also failed to disclose that a scheme of arrangement had been proposed and approved by the majority of the Second Defendant's unsecured creditors.

Failure to disclose extensions and amendments to the Section 176 Order

35 The Plaintiff alleged that the Section 176 Order granted on 23 July 2008 and mandating a stay of proceedings did not refer to the Plaintiff but to some other company, and that the Second Defendant's failure to rectify this mistake demonstrated a lack of good faith on its part. The list of unsecured creditors annexed to the Order obtained on 23 July 2008 referred to a company named "Bahtera Offshore Sdn Bhd" rather than "Bahtera Offshore *(M)* Sdn Bhd" [emphasis added]. The letter "M" in parenthesis was missing. As such, the Plaintiff contended that it was not bound by the Order. Also, it alleged that more than 3 ½ months elapsed but the Defendants failed to vary the Section 176 Order to correctly reflect the company it was allegedly intended to extend to.

36 However, what the Plaintiff omitted to mention, was that the Second Defendant *did* take

cognizance of the mistake and had corrected it. This court has been provided with evidence that the Second Defendant's solicitors had written to the Plaintiff's solicitors to confirm that there was a typographical error and that the Order did in fact refer to and bound the Plaintiff.[note: 1] Subsequently, when the moratorium under the Order expired on 23 October 2008 (the stay was only in force for a period of 90 days from the date of the Order) and the Second Defendants applied to the High Court for an extension of a further period of 90 days to 23 January 2009, it corrected this typographical error in the list of unsecured creditors annexed to the extended Order obtained on 30 October 2008.[note: 2] The amended extended Order was then published and advertised in the New Straits Times in Malaysia on 7 November 2008. The Order was also served on the Plaintiff by registered mail and received by the Plaintiff on that very same day.[note: 3]

37 Accordingly, by 16 January 2009 when the Plaintiff filed its *ex parte* application for a worldwide Mareva injunction in the present action, the Plaintiff had been served and would have had in its possession the extended Section 176 Order for two months. Notwithstanding this fact, the Plaintiff failed to disclose this material fact during its application before the Judge. It continued to assert that the Section 176 Order did not apply to it and that the earlier mistake had not been corrected.

38 To my mind therefore, the Plaintiff had intentionally omitted the fact that the Section 176 Order had been extended and rectified to include the Plaintiff. This was a material fact which the Plaintiff was under a clear duty to disclose (*The Vasiliy Golovnin* ([17] *supra*) at [83]; *Multi-Code* ([18] *supra*) at [123]). It was one which the Plaintiff clearly had knowledge of (*The Vasiliy Golovnin* at [86] to [87] and *Multi-Code* at [124]). It was also one which the Court would likely have taken into account when determining whether or not the *ex parte* worldwide Mareva injunction requested for in Summons No. 242 of 2009 ought to be granted. Had the Plaintiff disclosed to the court that the Malaysian High Court had issued a valid and binding order on 30 October 2008 restraining all actions against the Second Defendant, the Plaintiff would then have had to explain why it should be allowed to pursue the Second Defendant for the outstanding charterhire debt nonetheless. In other words, granting the worldwide Mareva injunction could result in the Malaysian Order being circumvented. Accordingly, had the Court known of this material fact (which the Plaintiff failed to disclose), it would or could have influenced the Judge in deciding whether to grant the Mareva injunction.

Failure to disclose material facts relating to the Second Defendant's scheme of arrangement with unsecured creditors which included the Plaintiff

39 Further, the Plaintiff also alleged that it was not informed that a scheme of arrangement was contemplated, let alone proposed. Accordingly, the Scheme was not *bona fide*. In any case, the Plaintiff asserted that even if such a scheme was proposed, it, together with other unsecured creditors, would have dismissed it outright.

40 I was not at all persuaded that this was what transpired.

41 On 1 December 2008, the Second Defendant sent a Notice of the Unsecured Creditors meeting, the proposed Scheme, the Explanatory Statement to the proposed Scheme, and the proxy form for attendance at the meeting to be convened on 23 December 2008 to the Plaintiff ("Unsecured Creditors Meeting").[note: 4] At the Unsecured Creditors Meeting, a scheme of arrangement was put to the vote and 85.7% of the total number of unsecured creditors (who represented 93.4% of the total value) voted in favour of the proposed Scheme. On 9 January 2009, a copy of the Minutes of the Unsecured Creditors Meeting was sent to the Plaintiff and received by it.[note: 5]

42 Accordingly, when the Plaintiff filed its *ex parte* application on 16 January 2009, it had been

served and would have had in its possession the Notice of Meeting and the Scheme documents for more than a month. It was also fully aware that the Second Defendant's proposed Scheme had been approved by the required majority of unsecured creditors. Nevertheless, the Plaintiff omitted to disclose this fact before the Court in its *ex parte* application before the Judge. Instead, it continued to allege that it was not informed that a scheme of arrangement was proposed or even contemplated, and that the majority of the other unsecured creditors would have rejected the proposed Scheme, together with itself.

43 The fact that the Scheme was proposed and approved by a majority of the unsecured creditors was a crucial material fact which must be disclosed to the court because it directly affected the basis of the Plaintiff's action against the Defendants. The Plaintiff's action against the Defendants was founded on the recovery of the outstanding charterhire debt. The effect of a scheme of arrangement would be to compromise this debt. Accordingly, granting the worldwide Mareva injunction in support of the Plaintiff's action could operate so as to circumvent the Second Defendant's scheme of arrangement. There was no doubt that the compromise would be a factor which would have influenced the court in deciding whether to grant the Mareva injunction or otherwise.

Exercise of discretion to discharge the Mareva injunction

44 As mentioned earlier, the fact that there was a material non-disclosure does not *ipso facto* mean that the *ex parte* order must be set aside. There is discretion in the matter. Ultimately, the court must consider the all-important question of whether it would be "just and convenient" in the circumstances to lift the Mareva injunction. In other words, the court must determine whether the "punishment" imposed by way of the discharge would outweigh the "culpability" of the material non-disclosure and distortion.

45 In the present case, not only was I convinced that the Plaintiff had failed to make a full and frank disclosure of the material facts in its application, I was satisfied, as the court was in *Huwah* ([18] *supra*) and *Multi-Code* ([18] *supra*), that the Plaintiff had intentionally and deliberately set out to mislead the court on the material facts. This went far beyond a failure to make full and frank disclosure. It called into question the Plaintiff's honesty, probity and integrity. The fact that the Section 176 Order was extended and amended to include the Plaintiff was one which would or could have influenced the Judge in deciding whether to grant the Mareva injunction. This applied equally to the fact that a scheme of arrangement was proposed and approved by the majority of unsecured creditors. Both facts were not only deliberately suppressed, they were also deliberately distorted with an intention to mislead the court at the *ex parte* hearing. The Plaintiff had continually insisted that the Section 176 Order did not apply to it and that the mistake in the earlier Order had not been rectified. It had also concealed the fact that the majority of unsecured creditors had approved of the Scheme. This cannot be tolerated.

46 Against the Plaintiff's deplorable conduct, I considered whether "punishment" by way of discharge for the Plaintiff's "culpability" would be disproportionate in the circumstance. I decided to exercise my discretion to discharge the Mareva injunction because I was not convinced that the Plaintiff would be the recipients of any grave injustice or inconvenience should the injunction be discharged for two main reasons. First, I did not think from the evidence disclosed that the Plaintiff had a good arguable case against the Defendants. There was no reliable *prima facie* evidence of conspiracy between the First and Second Defendant: see [57] to [66] below. Second, neither was there any real risk of dissipation. Since the Plaintiff had obtained a worldwide Mareva injunction in Malaysia against the Second Defendant, I very much doubted that discharging the present Mareva injunction would affect the continued existence of the Second Defendant's assets to satisfy any judgment subsequently obtained: see [67] to [81] below.

Good Arguable case

47 It is settled law that a "good arguable case" is one "which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success": per Mustill J in *Ninemia Maritime Corp v Trave Schiffarhtsgesellschaft mbH & Co* ("*The Niedersachsen*") [1984] 1 All ER 398 at 404. On appeal in that very case, Kerr LJ also stated that a good arguable case is the "minimum" which the plaintiff must show before a Mareva injunction may be awarded. The plaintiff must show that there is a likelihood of his application succeeding, but there is no need to show a particular degree of likelihood.

48 In Singapore, the Court of Appeal has since quoted Mustill J with approval in *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703 ("*Amixco*") at [18]. Very recently, Rajah JA reaffirmed these principles by expressing the view in *The Vasiliy Golovnin* ([17] *supra*) at [51] that establishing a good arguable case requires "a preliminary assessment of the merits of the claim", though there is "no need to establish a conclusive case at the outset". In other words, the plaintiff does not have to establish that he has a cause of action that might probably prevail in the final analysis.

49 I now examine the Plaintiff's substantive claim against the Defendants.

50 The Plaintiff's substantive claim against the Defendants was for conspiracy in both forms, *ie*, conspiracy by lawful means to injure and in the alternative, conspiracy by unlawful means.

51 First, it had pleaded that the First Defendant conspired with the Second Defendant with the predominant purpose of injuring the Plaintiff by not paying the latter sums due to it under the Charterparties ("conspiracy to injure"). Instead, funds were being dissipated to Singapore.

52 In the alternative, it was pleaded that the Defendants unlawfully conspired against the Plaintiff by breaching the terms of the Mareva injunction obtained on 21 March 2008 in the Security Action ("conspiracy by unlawful means"). Once again, the breach involved 'spiriting away' the Second Defendant's funds to Singapore.

53 Accordingly, the Plaintiff alleged that there was, at the very least, a serious issue to be tried with regard to the tort of conspiracy.

54 I disagreed with the Plaintiff. I acknowledge that it is often difficult for a victim of a conspiracy to obtain direct evidence proving the allegation. As such, proof of conspiracy is normally to be inferred from other objective facts. As was suggested in *R v Siracusa* (1990) 90 Cr App R 340 at 349, and adopted by the Court of Appeal in *Asian Corporate Services (SEA)* ([18] *supra*) at [19]:

> [T]he origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable…

55 Be that as it may, there was simply no evidence, however little, allowing me to infer any conspiracy from the circumstances of the present case viewed as a whole. The strength of the Plaintiff's case was so weak, even bordering on being hopeless, that there was hardly any prospect of the Plaintiff succeeding in its action for conspiracy. As such, I would not consider the Plaintiff to have made out an arguable case, let alone a good one.

56 I now give my reasons for reaching this conclusion.

Essential elements of conspiracy

57 In order to make out a case of conspiracy, the plaintiff must establish the following three elements: -

(1) There is an agreement between two or more persons to do certain acts;

(2) The agreement is with the intention of or for the purpose of injuring the plaintiff, but if lawful means are used, then it must be further shown that that was the predominant intention or predominant purpose; and

(3) Acts were done pursuant to that agreement, resulting in loss or damage to the plaintiff.

58 The tort of conspiracy comprises two types: conspiracy by unlawful means and conspiracy by lawful means (*ie*, conspiracy to injure). Lai Kew Chai J helpfully summarized the essence of both types at [45] in Q*uah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390 ("*Quah Kay Tee*"):

> A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. But there is the additional requirement of proving a 'predominant purpose' by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved.

This statement of law was approved in *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [2000] 1 SLR 385 at [34] and most recently in *Beckkett Pte Ltd v Deutsche Bank AG and Another and Another Appeal* [2009] SGCA 18 at [120].

59 The existence of an agreement or understanding between the alleged conspirators is the starting point to all claims in conspiracy. In *Seagate Technology (S) Pte Ltd v Heng Eng Li* [1994] 1 SLR 534, Goh Phai Cheng JC said at [54]:

> [T]he starting point in a claim in conspiracy is an agreement or understanding between two or more persons to carry out an act or acts. The existence of such an agreement must be proved before [the court needs] to consider the predominant purpose for which the act or acts are carried out and the means by which such acts are carried out. … The burden of proving the existence of an agreement … is on the [plaintiff] and … a high degree of proof is required.

60 In the present case, the Plaintiff argued that the First Defendant was the alter ego of the Second Defendant, in that the latter was in reality no more than the former in corporate form, and that the actions of the Second Defendant were done at the behest of the former.

61 I did not see a need to consider this submission, for even if I did agree with the Plaintiff that the First Defendant was indeed the controlling mind of the Second Defendant, the Plaintiff had not crossed the next hurdle, which was to show that there was in fact a conspiracy on the facts. Establishing that the First Defendant was the Second Defendant's controlling director *per se* was not sufficient to establish a conspiracy between the two parties.

62 The Plaintiff must also produce reliable evidence of the Defendants' intention to injure. In the

case of conspiracy by unlawful means, an intention to injure, *whether it is a predominant or subsidiary intention*, would suffice. In the absence of an unlawful act however, it was not sufficient to merely establish an intention to injure. The intention to injure must be a *predominant* one.

63 On a cursory examination of the evidence tendered, I was not satisfied that there was sufficient evidence showing an intention to injure, let alone a predominant one.

64 The Plaintiff asserted that the Defendants were removing assets from Malaysia to Singapore and dissipating them so as to injure the Plaintiff. They alleged that the First Defendant had removed the Second Defendant's assets out of Malaysia and into the First Defendant's accounts in Singapore with the intention of injuring it.

65 To my mind, these were merely bare assertions based on far-fetched inferences. I found that neither solid evidence suggesting such actions nor evidence demonstrating the Defendants' intention, be it a predominant or subsidiary intention, had been adduced: see [76] to [80] below. At [22] of the Plaintiff's submissions, it was submitted that "as matters stand, the evidence of conspiracy is sufficiently compelling". However later at [25], the Plaintiff then conceded that "it is not presently known into what bank accounts and with what banks these assets have been transferred". Similarly at [90]-[93] of Mohd Amin Abdullah's first affidavit, Mohd Amin Abdullah merely made unsubstantiated assertions that assets had been moved into the accounts of the First Defendant, his family, and/or nominees in Singapore.

66 I do not propose to dwell any further on the merits of the Plaintiff's action in conspiracy as the law only requires a preliminary assessment of this claim: see [47] to [48] above. Suffice to say, I did not think from the evidence disclosed that the Plaintiff had a good arguable case against the Defendants.

Real risk that assets may be disposed of or dissipated

67 The other factor which I considered in determining whether grave injustice would result should a discharge be ordered was the presence (or lack thereof) of a real risk that assets may be disposed of or dissipated. The following principles, extracted from the leading authorities of *Art Trend Ltd v Blue Dolphin (Pte) Ltd & Ors* [1983] 1 MLJ 25 ("*Art Trend*"), *The Niedersachsen* ([47] *supra*), *Choy Chee Keen Collin v Public Utilities Board* [1997] 1 SLR 604 ("*Collin Choy*"), *Guan Chong Cocoa Manufacturers v Pratiwi Shipping SA* [2003] 1 SLR 157 ("*Guan Chong Cocoa*") and *Multi-Code* ([18] *supra*) guide the application of this principle.

68 It is not sufficient that the defendant might dispose of or dissipate his assets. The plaintiff must show that there is a *real risk* that the defendant might do so, such that the judgment may remain unsatisfied: *The Niedersachsen* ([47] *supra*); *Art Trend; European Grain & Shipping v Compania Naviera Euro-Asia SA* [1989] SLR 1001 ("*European Grain*"); *Collin Choy* citing *Barclay-Johnson v Yuill* [1980] 3 All ER 190 with approval; and *Guan Chong Cocoa*. The failure to satisfy the court of the risk of dissipation of assets led to the discharge of the Mareva injunction in all four cases.

69 The test of whether there is a real risk of dissipation of assets is an objective one. There is no need for the plaintiff to show that the defendant in fact intended to dispose of or dissipate the assets.

70 The plaintiff must produce 'solid evidence' to show that there was a risk of dissipation occurring. A mere possibility or unsupported fear of dissipation will not suffice. Neither will mere

assertions. This was made clear by Mustill J in *The Niedersachsen* ([47] *supra*). Mustill J has since been cited repeatedly with approval in numerous cases, including *Collin Choy* ([67] *supra*) at [20] and *Guan Chong Cocoa* ([67] *supra*) at [18]. In *Multi-Code* ([18] *supra*), it was said at [138]:

> *… It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence*. This evidence may take a number of different forms. It may consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. *Precisely what form the evidence may take will depend on the particular circumstances of the case. But the evidence must always be there*.
>
> [emphasis added]

The Court went on to state in *Collin Choy* ([67] *supra*) at [21]:

> At the minimum, a plaintiff in seeking a Mareva injunction must furnish 'some grounds for believing that there is a risk' of the assets being dissipated (per Lai Kew Chai J in *Art Trend Ltd v Blue Dolphin (Pte) Ltd* [1983] 1 MLJ 25 at p 29; [1982-1983] SLR 362 at p 367). A mere possibility or unsupported fear of dissipation is insufficient: *O'Regan & Ors v Iambic Productions Ltd* (1989) 139 NLJ 1378, at p 1379 where Sir Peter Pain said:
>
> > There are numerous paragraphs in the authorities relating to Mareva injunctions which make it plain that unsupported statements and expressions of fear carry very little, if any, weight. The court needs to act on objective facts from which the court can infer that the defendant is likely to move assets abroad or dissipate them within the jurisdiction. Here, there is nothing of that nature in the documents at all …

In *Virgin Mobile (Singapore) Pte Ltd v Virgin Store (Singapore) Pte Ltd* (formerly known as *Optimatum Pte Ltd)* [2002] 3 SLR 575, *CHS CPO GmbH and Another v Vikas Goel and Others* [2006] SGHC 49, and *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 all three Mareva injunctions were dismissed for a lack of sufficient evidence of dissipation.

71 Precisely what form the evidence may take will depend on the facts of each case. In general, the court has recognized the difficulties in laying down any generic guidelines as to when the adduced evidence can be said to indicate a real risk of dissipation. It has merely said that the evidence of any risk of dissipation "must reasonably have a bearing on the risk factor": *Guan Chong Cocoa* ([67] *supra*) at [19].

72 That being so, Steven Gee's Mareva Injunctions and *Anton Piller* Relief (4th Ed, 1998) identified some relevant factors to be considered in the evidential evaluation of the risk of dissipation at pp 195–197. These factors received judicial recognition in *Guan Chong Cocoa* ([67] *supra*) at [20]:

(a) The nature of the assets which are to be the subject of the proposed injunction, and the ease or difficulty with which they could be disposed of or dissipated. The plaintiff may find it easier to establish the risk of dissipation of a bank account, or of moveable chattels, than the risk that the defendant will dispose of real estate, *eg*, his house or office…

(b) The nature and financial standing of the defendant's business…

(c) The length of time the defendant has been in business…

(d) The domicile or residence of the defendant…

(e) If the defendant is a foreign company, partnership, or trader, the country in which it has been registered or has its main business address, and the availability or non-availability of any machinery for reciprocal enforcement of English judgments or arbitration awards in that country…

(f) The defendant's past or existing credit record. A history of default in honouring other debts may be a powerful factor in the plaintiff's favour – on the other hand, persistent default in honouring debts, if it occurs in a period shortly before the plaintiff commences his action, may signify nothing more than the fact that the defendant has fallen upon hard times and has cash-flow difficulties, or is about to become insolvent…

(g) The defendant's behaviour in response to the plaintiff's claims: a pattern of evasiveness, or unwillingness to participate in the litigation or arbitration, or raising thin defences after admitting liability, or total silence, may be factors which assist the plaintiff.

73 Other factors that can be gleamed from *Guan Chong Cocoa* ([67] *supra*) at [18] and [19] include:

(a) Direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on;

(b) Evidence as to what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on;

(c) Evidence that a plaintiff's inquiries about the characteristics of the defendant have led to a blank wall;

(d) Where the defendant, for no sufficient reason, starts to put his property up for sale; and

(e) Where a defendant company just ceases business.

74 The plaintiff must state clearly in its affidavit the facts on which it relies to show a real risk of disposal or dissipation.

75 In the present case, I did not see any real risk of any asset dissipation. I would add that, even without any suppression of material facts (be it innocent or intentional) by the Plaintiff, I would, on this ground alone, have discharged the injunction.

76 The Plaintiff alleged that the Defendants had transferred or removed assets from Malaysia to Singapore and that these assets are being dissipated in Singapore. However, it had not produced any 'solid evidence' sufficiently reliable to indicate, demonstrate or enable such an inference to be drawn.

77 First, the Plaintiff said that the Defendants' alleged misstatement of their monthly administration

and operational expenses was evidence of such dissipation. It argued that the Second Defendant had been stalling on payment in many ways in order to dissipate its assets. I was not persuaded that this was the case. For instance, the alleged ten fold increase in administration and operational expenses between April 2008 and June 2008 were the result of the Plaintiff looking selectively at the Second Defendant's administration expenses and disregarding the other operating expenses such as rentals and hire, taxation, and payroll related payments.[note: 6]

78 Second, the Plaintiff also alleged that the First Defendant was dissipating the Second Defendant's assets in Malaysia by removing them to Singapore. However, I did not think that there was sufficient evidence of this allegation. For instance, I was not satisfied that the Second Defendant's payments to trader suppliers and staff in Singapore in 2008 were illegitimate and were part of a plan to dispose of their assets. The Second Defendant had adduced evidence to show that it had ongoing projects which involved the supply of materials by trade suppliers in Singapore, as well as the provision of other services by other suppliers. There was also no evidence that assets had been placed in the First Defendant's accounts or in the names of his family and/or other nominees in Singapore, and the Plaintiff itself agreed as such.[note: 7] Accordingly, these allegations of dissipation were bare and unfounded.

79 Third, I did not think that the extent of the First Defendant's assets in Singapore lent itself to an inference of a real risk of dissipation. The First Defendant did not own or possess any property in Singapore, except a POSB bank account and a CPF account. Both were opened almost a decade ago when he used to work in Singapore in the 1990s. The current balances in both the POSB account and the CPF ordinary account were in any event not significant. The First Defendant also resided in Selangor and his family home remained in Penang. All but one of his children studied in Malaysia.[note: 8]

80 Fourth, the Plaintiff had not provided any concrete evidence showing that the Second Defendant did indeed have any significant assets in Singapore. Its conclusion that this was so was based on deductions and inferences drawn from the Defendants' allegedly evasive response in relation to the presence or absence of assets in Singapore. For instance, when the Second Defendant applied to stay this action on the grounds of *forum non conveniens*, ground 2(e) in its application stated that "The Defendants do not have any *material* assets in Singapore". Because the qualifier "material" is used, the Plaintiff immediately concluded that the Defendants must have assets in Singapore.[note: 9] It then made the bare assertion that the Defendants intended to remain evasive and accordingly did not support its application by an affidavit. Also, the Plaintiff asserted that the Second Defendant must have assets in Singapore because it would not make sense to seek a stay on *forum non conveniens* were it to be otherwise. On the whole, these were merely weak deductions and would not suffice as 'solid evidence'.

Orders made

81 For the reasons stated above, I made the following orders:

(a) I allowed the Defendants' application in Summons No. 1154 of 2009 to set aside the *ex parte* Mareva injunction obtained on 12 February 2009.

(b) I ordered an enquiry to be made on damages. If only nominal damages are found, the Defendants will have to pay the costs of the Plaintiff for the enquiry.

(c) I did not make any order on the Plaintiff's application in Summons No. 1328 of 2009 to cross-

examine the First Defendant and Cheam Tow Yong. Costs for this application were ordered at $500 to the Defendants.

(d) Costs and disbursements of Defendants' application for the setting aside were fixed at $4,000 to be paid by the Plaintiff.

[note: 1]see affidavit of Sim Kok Beng ("SKB") at tab 10 ("SKB-10") for evidence of the correspondence between parties.

[note: 2]see SKB-11 for evidence of amended annex.

[note: 3]see SKB-12 for evidence of advertisement, receipt of posting.

[note: 4]see SKB-13 for evidence of posting.

[note: 5]see SKB-14 for minutes of meeting, SKB-15 for evidence of receipt of posting.

[note: 6]see p 294, 302 and 311 of Plaintiff's affidavits for accounts.

[note: 7]See Plaintiff's submissions at [25].

[note: 8]The Plaintiff had submitted that his children were studying in Singapore. This is true but only for one child.

[note: 9]Mohd Amin Abdullah's 6th Affidavit at [13]-[14].