

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1982] SGHC 29

Civil Suit 1804/1982

Between

Art Trend Ltd

... Plaintiff

And

Blue Dolphin (Pte) Ltd

... Defendant

GROUND OF DECISION

Civil Procedure — Injunctions

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Art Trend Ltd v Blue Dolphin (Pte) Ltd and Others

[1982] SGHC 29

Civil Suit 1804/1982

Lai Kew Chai J

15 September 1982

1 At the conclusion of the hearing of the plaintiffs' motion to continue the interim Mareva injunctions obtained on 6 May 1982 as varied on 21 May 1982, I discharged the injunctions. I also ordered the plaintiffs to pay the first and second defendants damages to be assessed by the registrar which the first and second defendants had sustained by reason of the interim injunctions. I now give my reasons.

2 By this action commenced on 5 May 1982 the plaintiffs made two claims against the first defendants, a Singapore company, viz: (1) the sum of US\$33,943.05 under a bill of exchange due on 17 July 1981 drawn by the plaintiffs and accepted by the first defendant plus interest and commission under a discounting and financing agreement entered into between them and dated 12 February 1980; and (2) the sum of US\$326,202.17 under a written guarantee dated 11 November 1981 given by the first defendant in favour of the plaintiffs and in which the first defendant had guaranteed the payment of all the liabilities of a Nigerian company known as Ojomo Industries (Nigeria) Ltd (hereinafter referred to as 'Ojomo') plus interest at the date of the writ amounting to

US\$128,394.23 and further interest, and commission payable under the guarantee.

3 The plaintiffs have also asserted two claims against the second defendant, a partnership in Singapore, viz: (1) the sum of US\$182,407.93 under a bill of exchange due on 6 May 1981 drawn by the plaintiff and accepted by the second defendant plus interest as at the date of the writ amounting to US\$56,521.27 and further interest and commission payable under a discounting and financing agreement entered into between them and also dated 12 February 1980; and (2) the sum of US\$326,202.17 under a written guarantee dated 21 April 1980 given by the second defendants in favour of the plaintiffs and in which the second defendants had guaranteed payment of all the liabilities of the first defendant plus interest as at the date of the writ amounting to US\$128,394.23 and further interest and commission. It should be noted that the second claim against the second defendants arises out of the self-same Ojomo's liabilities to the plaintiffs.

4 Seeing that the second claims of the plaintiffs against both the first and second defendants, as sureties, arise out of the self-same liabilities of Ojomo, the total claims of the plaintiffs on the two bills of exchange and under the guarantees are approximately US\$727,468.65 plus further interest and commission. I have mentioned this global figure of the claims as against both defendants because, as will be seen later in these grounds of decision, the interim injunctions obtained had sought to freeze the assets of both defendants up to US\$1.23m. It is also clear that the plaintiffs by the interim injunctions had effectively frozen one set of assets of the first defendant and another set of assets of the second defendant for their single claim arising out of the liabilities of Ojomo.

5 On the day following the filing of the writ of summons, the plaintiffs obtained ex parte the interim Mareva injunctions against both defendants. In effect both the defendants were restrained from removing from Singapore or otherwise disposing, whether within or without the jurisdiction, of any of their asset or assets (including immovable properties and moneys in bank accounts) in which they were beneficially interested, or otherwise pledging them or giving them by way of security.

6 The defendants were also restrained from re-directing any payments made or to be made by their debtors from their accounts with their several banks.

7 Paragraph 3 of the injunctions stated as follows:

The defendants shall not be prevented from dealing in any way with their assets in so far as the assets of the defendants available to meet the Plaintiffs' claim herein exceed in aggregate the sum of US\$1,230,000.

8 At least 12 banks of the defendants were served with the injunction order. The business operations of the defendants were brought to a grinding halt. The proviso was of no assistance to the defendants. As the plaintiffs well knew, or must have known, unless each of the defendants had assets in a bank which in each bank exceeded US\$1.23m, the banks could not, and quite properly would not, as they did not, allow any further transactions in the accounts of both the defendants. I was also unable to see any justification in the plaintiffs freezing US\$1.23m worth of assets of the defendants. After all, their effective total claim against both of them was only US\$728,468.65 plus further interest and commission.

9 The defendants protested vigorously against the interim injunctions. By their solicitors' letter dated 10 May 1982 the second defendants pointed out that

the claims against them as pleaded amounted to US\$740,261.53 whereas the injunction sought to freeze assets up to US\$1.23m. They asserted that they were an old established firm in Singapore which enjoyed a very good reputation with bankers and that the service of the injunctions on all their bankers had brought their daily transactions to a grinding halt.

10 They also referred to the two landed properties which were covered specifically by the injunctions, namely, the building known as `Malaysia Arcade` at No 75 High Street, Singapore and No 9 Lyndhurst Road, Singapore. Both properties are owned as to 3/4% shares thereof by the three partners in the second defendant firm. They are together worth S\$7.3m. The valuation does not appear to me to be unreasonable. The first property is subject only to a S\$100,000 mortgage. It is quite evident that the second defendants have owned these assets for a long time, as the plaintiffs well knew, and they were in themselves more than sufficient to meet the claims of the defendants. The second defendants indicated that they had never intended to dispose of these properties, as their long ownership of them amply demonstrated.

11 In the circumstances, they requested the plaintiffs to give notice to all the bankers of the second defendants that they, the plaintiffs, would not be enforcing their rights under the injunctions in relation to the bank accounts of the second Defendants. But the plaintiffs stood firm. They kept on the pressure. It was only some 11 days later that they agreed to a variation of the injunctions as contained in the order of this court dated 21 May 1982. Both the defendants had required and had agreed to the variation to lift the freeze on their bank accounts without prejudice to their right to have the interim injunctions as varied discharged.

12 I now turn to the facts giving rise to these proceedings. I begin by saying something about the parties to these proceedings and Ojomo.

13 The plaintiffs are a company with limited liability incorporated in England. They are a confirming house and as such they finance international trade. They also purchase goods and sell them or pass documents of title to their customers on such terms as have been previously agreed.

14 The first defendant are a company with limited liability incorporated in Singapore in June 1979. They handle the exports of electronic component parts from Singapore and the Far East to Ojomo of Nigeria. They have a paid up capital of one million shares of S\$1 each, of which 999,998 are held by Sunny Lane Investments Ltd of Nassau, Bahamas. The other two shares are held by Henry Chow and Sally Phuan. The directors are Chaterbhuj s/o Hassaram (hereinafter called Chaterbhuj), one of the partners of the second defendants, and Hiro Gurmukhdas Kishnani of Lagos, Nigeria (hereinafter called `Kishnani`).

15 The second defendants are a partnership of three brothers, including Chaterbhuj. They have been registered as a firm and have been in business since 9 June 1947. They were importers and exporters of textiles. They are in the world renowned High Street textile centre. They are also in real estate. They also buy and sell all manner of electronic goods and components. They buy these from suppliers in Hong Kong and Japan and sell them to buyers in Indonesia and Nigeria.

16 Ojomo are a company incorporated in Nigeria in 1979 by Kishnani and one Nigerian national, Mr Ojomo. They are engaged in the assembly and sale

of electronics in Nigeria and they import electronic components for the use of their factory in Lagos.

17 In February 1980 Chaterbhuji visited the plaintiffs and asked for discounting and financing facilities to pay for the second defendants' purchase and sale of electronic component parts to Ojomo. The plaintiffs were initially unenthusiastic about financing exports to Nigeria as the risks were extraordinary. But in view of the plaintiffs' past associations with the second defendants as confirmers and importers and exporters of merchandise, and the high reputation of the second defendants, the plaintiffs agreed to offer discounting and financing facilities up to Stg £300,000 to the second defendants. By an agreement dated 12 February 1980 the plaintiffs agreed to extend to the second defendants facilities up to Stg £300,000 for opening sight letter of credit and discounting bills of exchange up to a maximum tenor of 120 days D/A. It was agreed, amongst other things, that all bills would be drawn by the plaintiffs with a fixed due date of 120 days from the date of plaintiffs' payment to the suppliers of the second defendants. On top of the commission of 4% flat on the invoice value, interest was payable at 3% over LIBOR from the date of negotiation in London until payment.

18 At about the same time, the plaintiffs also agreed to extend to the first defendant facilities up to £150,000 on terms similar to those which were agreed with the second defendants.

19 On 21 April 1980, the second defendants signed a guarantee in writing in favour of the plaintiffs irrevocably guaranteeing payment of any amount 'present or future', and the actual and contingent liabilities of the first defendant.

20 By September 1980, the second defendants had accepted 12 bills of exchange drawn on them by the plaintiffs under the financing and discounting agreement. They totalled approximately US\$1,083,285.45. These bills of exchange were fully honoured and paid.

21 In late September 1980 the first defendant had bought electronic component parts from suppliers in the Far East for export to Ojomo. The suppliers had to be paid. Without going into details of the negotiations regarding this particular financing, the Plaintiffs in the event drew six 150 days D/A bills of exchange on Ojomo for acceptance. On or about 18 November 1980 Ojomo accepted them and they were payable on 20 March 1981. The total amount of the six bills of exchange was \$326,202.17. Ojomo defaulted and these bills form the subject matter of the second claims of the plaintiffs against both the defendants.

22 In turn, the plaintiffs had upon Ojomo`s acceptance discounted the six bills of exchange with their bankers, one of whom in October 1981 lost their patience and recovered the proceeds of the bill discounted from the Plaintiffs.

23 When Ojomo defaulted, it appears that the first defendant and the second defendants were also owing the plaintiffs on the bills of exchange they had accepted. According to the plaintiffs the second defendants, for instance, was owing the plaintiffs US\$1,010,120.19 when the latter wrote them on 8 October 1981. But by the time these proceedings were commenced the following May, the plaintiffs were suing the defendants on only two bills of exchange which I had described earlier. Substantial sums under various bills since September 1980 up to early this year had been paid by the second Defendants.

24 But since the Ojomo bills were outstanding, the plaintiffs kept pressing for payment. Finally, on 11 November 1981 the plaintiffs obtained from the first defendant a written guarantee under which the first defendant irrevocably guaranteed payment of all `present or future` liabilities of Ojomo to the plaintiffs.

25 In the event, Ojomo defaulted. There were considerable delays and it appears Chaterbhuj gave one excuse after another.

26 The plaintiffs, as I have stated at the beginning of these grounds of decision, commenced these proceedings and obtained the Mareva injunctions against both the defendants.

27 I will now say a few words about the practice of issuing Mareva injunctions in Singapore. Mareva injunctions have been issued by the High Court in Singapore for some years now. They have been issued under s 4(8) of the Civil Law Act (Cap 30). The subsection in terms are equivalent to the former s 45 of the English Supreme Court of Judicature (Consolidation) Act 1925, since replaced and expanded. The latter provision was the basis on which an injunction, later known by the soubriquet Mareva injunction, was for the first time granted in England in May 1975: see Colin Ying, ***The Mareva Injunction and Pre-trial Attachment*** [1981] 2 MLJ cvii. In Singapore, they have been issued in addition to and notwithstanding the alternative procedure which is available for the attachment of property before judgment under Pt III of The Debtors Act (Cap 19).

28 Section 4(8) of the Civil Law Act (Cap 30) states:

A mandamus 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.

29 What is `just and convenient` in any case to a court in exercising its discretion is not possible to, and obviously should not, be encapsulated into a set of rigid principles. Each case must turn on the merits of its facts. But applicants for a Mareva injunction have been required to observe five guidelines: ***The `Genie`*** [1979] 2 Lloyd`s Rep 184 at p 189 per Denning MR. Since its inception, the interlocutory remedy has grown apace and has become a potent weapon to plaintiffs. The temptation to go outside the scope of the discretion is there.

30 The case before me is one, in my view, where the purpose for which Mareva injunctions were given was overlooked. The relevant guideline which was overlooked by the plaintiffs was the requirement that they had to give some grounds for believing that there is a risk of the assets of both the defendants being removed out of Singapore before the judgment, if any, is satisfied.

31 It is timely to record what Goff J (as he then was) recently said in ***Searose Ltd v Seatrain UK Ltd*** [1981] 1 WLR 894 at p 897:

But care must be taken to ensure that such injunctions are only given for the purpose for which they are intended, viz to prevent the possible abuse of a defendant removing assets in order to prevent the satisfaction of a judgment in pending proceedings: and likewise, care must be taken to ensure that such injunctions do not bear harshly upon innocent third parties. If the principles are not observed, a weapon which was forged to prevent abuse may become an instrument of oppression.

32 The cornerstone of the interlocutory remedy was also emphasized by Sir Robert Megarry V-C in ***Barclay-Johnson v Yuill*** [1980] 3 All ER 190 at p 194:

It seems to me that the heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. If there is no real risk of this, such an injunction should be refused; if there is a real risk, then if the other requirements are satisfied the injunction ought to be granted.

33 I should note that Sir Robert Megarry V-C also stated that the fact that a defendant is not a foreigner, or is within the jurisdiction of the courts in the United Kingdom, is not by that mere fact a bar to the granting of a Mareva injunction. But, in determining the risk of the removal of the assets the learned Vice-Chancellor pointed out that the defendant's nationality, domicile and residence are material factors. To this, I would respectfully add the course of dealings between the parties and the historical antecedents of the defendant's business.

34 Before the injunction is issued, I also must consider the potential effect or hardship on the defendants' business if it is granted.

35 The evidence on the risk of the defendants removing the assets were these. One Kishore Bhagwandas Hirdaramani, the export manager, swore a lengthy affidavit in support of the application. Towards the end of his affidavit, he complained of the defendants' delaying tactics. He alleged that the first defendant had made considerable profits but have failed to file the statutory accounts. He also alleged that Chaterbhuj had told him in November 1981 that Ojomo was owing the first defendant some US\$13m.

36 As was known to the plaintiffs, Ojomo had also defaulted on the first defendant. They had some 370 bills of exchange outstanding. The total figure is US\$29m. The first defendant had debtors and when a particular sum of US\$251,557.01 was received by them from a debtor in April 1982 it was equitably distributed amongst the creditors of the first defendant.

37 On the danger of the defendants disposing of their assets, Hirdaramani could only say this in his affidavit: `With (the defendants`) experience in international finance and in transfer of funds, it is highly probable that they will successfully dispose of their assets or re-direct funds coming to the firm on the subject transactions so as to deprive the plaintiffs of the fruits of any judgment that may be entered herein.` This statement is baffling to me. In my view, knowledge of the practice of international finance and transfers of funds is not evidence of a predisposition to remove assets to frustrate any judgment.

38 As against this statement of a speculative nature, the facts are overwhelmingly in favour of the defendants. If the plaintiffs succeed, the bulk of their claims will have to be paid by the second defendants under their guarantee for the liabilities of the first defendant, who as I have pointed out, had guaranteed Ojomo`s liabilities. As far as the second defendants are concerned, their remarkable business antecedents since 1947 and financial standing were known to the plaintiffs. The plaintiffs were told of the plaintiffs` substantial ownership of the building known as Arcade Malaysia. The accounts for year ended 31 March 1980 of the second defendants which were given to the plaintiffs in early 1980 showed the property with a book value of S\$3m. The second defendants also substantially own No 9 Lyndhurst Road, Singapore with a book value of S\$345,973.05. Both properties are said to be worth S\$7.3m and I have no reason not to accept the valuation. There is not the slightest hint of any intention on the part of the second defendants to dispose of these properties which have remained their property throughout the subsistence of the relationship between the Plaintiffs and the second defendants.

39 Similarly, the first defendant own a shop unit at Katong Plaza which is subject to a mortgage of S\$150,000. They have substantial receivables totalling

US\$29m. Undoubtedly, they have creditors but their cash flow difficulties are evidently caused by Ojomo`s default as well.

40 The plaintiffs themselves gave the first defendants and Ojomo time of well over a year to pay. The Ojomo bills were due since March 1981. Some nine months later, they managed, and were willing, to secure their position by getting a guarantee from the first defendant on 11 November 1981 who willingly gave it. The latter could have refused. By reason of the underlying guarantee given earlier by the second defendants, they apparently also willingly assumed responsibility for the Ojomo bills as well. These conduct of the defendants were certainly not those of a defendant who was likely to remove assets or abscond.

41 In these circumstances, the Plaintiffs were entirely unjustified in asking for the Mareva injunctions. I was satisfied that the Plaintiffs` conduct was calculated to pressurize the defendants and bring them to their knees. It was wholly unjust to interfere with the ordinary business transactions of the defendants with their bankers. I was also satisfied that great harm has been done to the defendants` standing in the eyes of their bankers as a result of the service of the Mareva injunctions. For some two weeks the daily transactions of the defendants were brought to a grinding halt and one wonders the depth of the crisis of confidence which both the defendants have had to endure, seeing that they were themselves owed colossal sums of money and were facing acute liquidity problems. I found the conduct of the plaintiffs reprehensible.

42 I accordingly discharged the injunctions and ordered damages against the plaintiffs to be assessed by the registrar. ***Motion dismissed.***

Lai Kew Chai J

Yang Lih Shyng (Rodyk & Davidson) for the plaintiffs/applicants
M Karthigesu (Khattar Wong & Pnrs) for the defendants
