

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1991] SGCA 40

CA 53/1986

Between

Amixco Asia Pte Ltd

... Appellant

And

Bank Negara Indonesia 1946

... Respondent

GROUND OF DECISION

Civil Procedure — Mareva injunctions; Tort — Conversion

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Amixco Asia Pte Ltd v Bank Negara Indonesia 1946

[1991] SGCA 40

CA 53/1986

Chan Sek Keong J; Chao Hick Tin J; Yong Pung How CJ

24 October 1991

1 This was an appeal by the second defendants (`Amixco`) against the order of Coomaraswamy J made on 18 July 1986 continuing until the trial of this action or further order, a Mareva injunction obtained ex parte by the plaintiffs (`BNI`) against Amixco and the third defendants (`Kosin`).

2 BNI were bankers of PT Harapan Papa Plywood Industries (`HP`), an Indonesian company. On 20 September 1985, HP agreed to sell a quantity of about 10,000cu m of meranti plywood (`the said goods`) to the first defendants who, earlier on 10 September 1985, had contracted to sell the said goods to Amixco, who still earlier on had contracted to sell the said goods to a North Korean state-owned corporation (`Ilban`). Ilban in turn had agreed to sell the said goods to an Egyptian state-owned corporation (`Fabbas`) under a trade clearing account pursuant to a barter agreement between North Korea and Egypt.

3 Pursuant to an agreement amongst the first defendants, Amixco and HP that Amixco would pay HP directly for the said goods, Amixco on 17 October 1985 requested their bankers, Banque Paribas (`BP`) to issue an irrevocable

letter of credit (‘the L/C’) in favour of HP for an amount not exceeding US\$2,142,346.15, available by sight drafts. The L/C was duly issued.

4 On or about 22 October 1985, Kosin, a freight forwarding company, time-chartered the Atlantic Mariner (‘the vessel’) to carry the said goods from Pontianak, Indonesia to Alexandria, Egypt. The said goods were loaded on the vessel on or about 30 October 1985. A bill of lading dated 30 October 1985 (‘the true B/L’) was issued for the said goods by Kosin’s shipping agents at Pontianak. The true B/L named HP as the shipper, BNI or their order as the consignees, and Alexandria as the port of discharge.

5 In November, HP presented the shipping documents to BNI for payment and BNI discounted the draft for US\$2,142,346.15 drawn under the terms of the L/C and paid HP. BNI then forwarded the shipping documents to BP in Singapore for reimbursement. On 20 November 1985, BP notified BNI by telex of the following discrepancies in the documents: (1) the inspection certificate was not issued by Societe Commerciale du Bois as required; (2) the name of the shipper in the certificate of origin had the letters ‘LTD’ omitted; and (3) in the bill of lading, (i) the number of crates should have been 3,644 instead of 3,633, and (ii) the name of the shipper was ‘PT Harapan Papa Plywood Industries’ instead of ‘PT Harapan Papa Plywood Industries Ltd’. In their telex, BP also confirmed that they had sought Amixco’s instructions on the said discrepancies. On 4 December 1985, BP rejected the documents on the instructions of Amixco.

6 On 13 December 1985, Amixco wrote to BP as follows:

*Please be informed that we/ **final buyer** are not in a position to accept the discrepant documents presented under reference L/C and would appreciate it if you could still treat said bill as ‘on collection basis’.*

7 However, we have made arrangement with the **final buyer** for us to negotiate an L/C No 600517 for US\$2,364,099.40 is issued by Credit Lyonnais, Zurich, covering shipment of about 1,025 metric tons of cotton and the original L/C is attached for your retention. Upon completion of the cotton shipment under this L/C, we will present full set of original documents on behalf of beneficiary to you for negotiation. In this respect, we hereby request you to pay Bank Negara Indonesia 1946, Pontianak Branch for account of PT Harapan Papa Plywood Industries Ltd, Pontianak, in settlement of the referenced bill under your L/C No IL202171 for US\$2,142,346.15 only upon receipt of the proceeds pertaining to your negotiation under L/C No 600517 issued by Credit Lyonnais, Zurich.

8 Kindly note the above instruction by signing and returning to us the duplicate of this letter. (Emphasis added.)

9 This request was not accepted by BNI as on 16 December 1985, BP telexed BNI a message from Amixco to the effect that Amixco would accept the discrepant documents only upon Amixco receiving payment under the Credit Lyonnais letter of credit. BP asked BNI for further instructions on the matter. BNI's reply is not in evidence.

10 However, long before these events, unbeknown to HP and BNI, the fourth defendant ('Quek'), acting as director of Kosin had caused to be issued a bill of lading ('the false B/L') for the said goods on or about 21 October 1985, ie nine days before the true B/L was issued. The false B/L named Amixco as shipper, the order of Bancaire Saleh Salem Alexandria, a bank in Alexandria, as the consignee, and Alexandria as the port of discharge.

11 The vessel arrived in Alexandria in early December 1985. Kosin then instructed their agents in Alexandria to discharge and deliver the goods to Fabbas, the ultimate buyers, in exchange for a bank guarantee which was issued on 30 November 1985 by Bank du Caire, the bankers for Fabbas. The guarantee (‘the BDC guarantee’), when translated into English from the Egyptian language, read:

B/L No 1 - Kind meranti plywood - No pcs 5,612 Crts - CBM 10,010,663 - Guarantee 9643/5 - Value 4,084,478,86.

Date 30/11/85

Stamp + Sign of rcvers

Bank guarantee

In cons of yr releasing above consignment to the rcvers or to their order, we guarantee this indemnity and we agree to pay upon yr first demand any frt and/or any charges, amnt of which y will be asked for by the bearer of the orig B/L in conseq that B/L was handed over to someone else - This to be effected in the country and currency agreed upon between shippers, sellers and consignees.

Bank due Caire

Signature and stamp

Remarks: Indemnities with limited guarantees or bearing any qualifying remarks whatsoever cannot be accpted.

12 The BDC guarantee was at one time either in the possession of Kosin’s shipping agents in Alexandria or one Ammon, who might have been a servant of the ‘state agents’, as on 24 December 1985, Kosin sent him a telex instructing him not to release the said guarantee unless authorized by Kosin. At all material times, the BDC guarantee was not in the physical possession of Quek or Kosin. Quek had claimed that Kosin had not demanded payment under the BDC guarantee pending Amixco’s and Kosin’s attempt to discharge the Mareva injunction.

13 BNI commenced this action on 21 February 1986 against the four defendants for damages for conversion of BNI's goods, and alternatively, against Quek only for damages for conspiring with the other three defendants to convert the said goods. On the same day, BNI obtained ex parte the Mareva injunction against Amixco and Kosin only. The affidavit filed in support of this application contained only two material facts relevant to the cause of action: (i) that using the false L/C, a party (then unknown to BNI but which later turned out to be Fabbas) in Alexandria took delivery of the said goods and BNI were unable to recover possession of them; and (ii) that Quek was the managing director and majority shareholder of Amixco, and also a co-director and 50% shareholder of Kosin, and that Amixco and Kosin shared the same office.

14 Further affidavits filed prior to the hearing to continue the Mareva injunction contained the following additional facts: (1) that Quek claimed that he had signed the false B/L at the request of Ilban to enable Ilban to use as documentation (whatever that meant) under the trading account referred to earlier, but subject to the express condition that Ilban would not use it as a document of title without the consent of Kosin; (2) that Kosin had received the BDC guarantee in exchange for delivery to Fabbas; (3) that Amixco had received US\$790,000 from Ilban for the said goods and were waiting to be paid the balance on clearance of the barter account between the North Korean and the Egyptian governments.

15 Before Coomaraswamy J, counsel for Amixco and Kosin conceded that there was an arguable case for conversion against Kosin. She contended that there was no case against Amixco for conversion as (i) there was no conspiracy to injure, (ii) the issue of the false B/L was not a sufficient intent to injure as Amixco and Kosin could not have manipulated the discrepancies in the shipping documents, and (iii) the said goods were released to Fabbas under the BDC

guarantee and not the false B/L, ie there was no causal link between the issue of the false B/L and the delivery of the goods to Fabbas. It was also contended that the conduct of Amixco and Kosin was not sufficient to establish dishonesty or a probability of their assets being dissipated.

16 Coomaraswamy J continued the Mareva injunction. He found that there was an arguable case on conversion on the following grounds: (1) that Kosin had issued the false B/L at the request of Amixco acting through Quek who had a financial interest and role in Amixco and Kosin; (2) that Kosin, being carriers, had no interest in issuing the false B/L except to assist Amixco; (3) that this was prima facie evidence that Amixco and Kosin acted together in converting BNI's goods to their own use, which the judge found, was supported by Amixco having received US\$708,000 from Ilban. He also found that the conduct of Amixco and Kosin showed that they had no intention whatever of paying for the said goods.

17 After the Mareva injunction was continued, BNI amended their statement of claim on 8 August 1989 to plead as follows: (a) that Amixco acted in concert with Kosin in issuing the false B/L; (b) that, alternatively, Amixco, Kosin and Quek having had knowledge of the transactions between Amixco, Ilban and Fabbas, Kosin delivered the goods to Fabbas with the assent and facilitation of Amixco and Quek; (c) that the said delivery was to and did effect the said transactions, and thereby entitling Ilban to receive payment from Fabbas, and Amixco to receive payment from Ilban; (d) that, alternatively, Amixco, Kosin and Quek have conspired either by themselves or with Ilban and Fabbas to deprive BNI of the said goods.

18 Amixco and Quek amended their defence on 1 August 1990 in which they denied the allegations of BNI in the amended statement of claim. Kosin

filed a separate amended defence dated 28 January 1991 in which they alleged, inter alia: that the false B/L was issued by Quek without their authority; that in any case, the issue thereof was not wrongful; that they had no knowledge of the transactions between Amixco, Ilban and Fabbas; and that they did not conspire with Amixco and Quek, nor did they convert the goods which were discharged against a bank guarantee.

19 Only Amixco appealed against the order to continue the Mareva injunction. The appeal was founded on two grounds: (1) ***as originally pleaded***, BNI did not have a good arguable case for conversion against Amixco; and (2) there were no objective facts to support the finding that Amixco would remove or dissipate their assets to avoid satisfying any judgment against them. It should be noted that the appeal was against the cause of action as pleaded in the statement of claim and not as pleaded in the amended statement of claim. It was contended that as this was an appeal, BNI were not entitled to rely on the amended statement of claim to support an injunction founded on the original pleading.

20 **Good arguable case**

21 It was common ground that a good arguable case for the purpose of a Mareva injunction was one which was more than barely capable of serious argument, but not necessarily one which the judge considered would have a better than 50% chance of success: see ***Ninemia Maritime Corp v Trave S mbH & Co*** (***'The Niedersachsen'***)¹ at p 1471A-F.

22 Amixco`s appeal before us was based essentially on a point of pleading. It was that BNI had no claim in conversion against Amixco upon the plea that Amixco, Kosin and Quek had wrongfully delivered the said goods to Fabbas

under the false B/L, when the evidence showed that the said goods were delivered in exchange for the BDC guarantee. It was also contended that Amixco had never been in possession of the goods from the time they were loaded on board the vessel to the time the said goods were discharged at Alexandria. Accordingly, on these facts, Amixco could not have converted the said goods.

23 We were of the view that this argument had no merit, having regard to all the facts before us. The inadequacy of BNI's original pleading was excusable as when they commenced this action, and up to the time they filed the statement of claim, they were aware of only a few material facts. They were aware that their goods had been wrongfully released without their knowledge and consent by Kosin to Fabbas. They knew that a false B/L had been issued by Kosin, but not that it was signed by Quek to satisfy Ilban's needs, and that it had been indorsed in blank to Fabbas. They knew of the legal relationships between Amixco, Kosin and Quek, but not the precise role of Quek in the whole affair. On these known facts, they naturally inferred that the said goods must have been released against the false B/L as a result of the concerted acts of Amixco, Kosin and Quek. In the circumstances, BNI's case on conversion as pleaded was only technically incorrect in so far as it specifically alleged that the said goods had been released under the false B/L.

24 However, many other facts and considerations had since emerged from the affidavits filed before and after the hearing before Coomaraswamy J: (1) Amixco had sold the said goods to Ilban under an arrangement which made it necessary for Amixco to procure the false B/L, which Amixco did, through Quek, either with or without the knowledge of Chong, his co-director in Kosin; (2) before the arrival of the vessel in Alexandria, Kosin, Quek and Chong had already made arrangements with Fabbas for the BDC guarantee to be issued in

order to release the said goods to Fabbas; (3) there was no reason for Kosin to have performed the contract for Amixco unless Chong agreed to it or Kosin were merely an instrument in the hands of Quek, to effect the delivery; (4) after the wrongful delivery, Amixco received a substantial payment for the said goods from Ilban, thereby suggesting that Ilban had recognized that Amixco had performed their obligation to deliver the said goods to them, by effecting delivery to Fabbas; (5) Kosin had not made any claim under the BDC guarantee in spite of the commencement of this action against them and of the impediment of the Mareva injunction to their business; (6) Quek as a director of and 50% shareholder of Kosin, and a majority shareholder of Amixco, had not required Kosin to take any such action in spite of the same action and Mareva injunction against Amixco; and (7) there was evidence that Amixco, through Quek, had de jure or de facto control of Kosin. The above facts raised a seriously arguable case that BNI had indeed been deprived of possession of the said goods as a result of the concerted acts of Amixco, Kosin and Quek. Kosin, being carriers, had no reason to deliver the said goods to Fabbas except to assist Fabbas to obtain wrongful possession of them or to enable Amixco to perform their obligations to Ilban and thereby enabling Ilban, in turn, to perform their obligations to Fabbas. Similarly, Kosin's failure to claim under the BDC guarantee had not been explained and could not be satisfactorily explained.

25 BNI's original cause of action was not that Amixco alone converted the said goods but that Amixco, Kosin and Quek, jointly, had converted BNI's goods. Therefore the fact that Amixco themselves had never been in physical possession of the said goods was not relevant to the cause of action against them as one of three joint tortfeasors. In any case, even if Amixco had been sued alone as sole tortfeasor, that would also not have mattered as it is not necessary, in law, for a person to have physical possession of goods to be able to convert

them. The question was whether Amixco's acts alone or in conjunction with those of Kosin, had deprived BNI of their right to possession or amounted to a substantial interference with that right. Amixco was sued as a joint tortfeasor. If they were not liable as such, they could still be liable as the sole tortfeasor. As we have stated earlier, there was evidence from which it could be reasonably inferred that Amixco, through Quek, had control of Kosin. If Kosin had merely been used as an instrument in Quek's arrangements with Ilban and Fabbas, then Amixco could even be regarded as the sole tortfeasor.

26 After the Mareva injunction was continued, Quek disclosed several telex messages from Kosin to their representatives and the master of the vessel in Alexandria in connection with the release of the said goods to Fabbas. One telex, in particular, showed Kosin's perception of its role in the Amixco/Kosin/Quek axis. Kosin's telex of 7 December 1985 to their representative, one Jeffrey Koh, at his hotel in Alexandria, was as follows:

(2) The original B/L issued in Indonesia are congenbill charterparty B/L. These original charterparty B/L are still with our bank in Spore becoss L/C still not negotiated. This explains why we need rcvrs to disch cgo agnst bank guarantee.

...

(4) We will send u these `original` charterparty B/L as soon as we them return by the bank.

27 This telex would suggest that Kosin was either working hand in hand with Amixco or was merely a tool in the hands of Amixco. Otherwise, they would not have referred to BP as `our bank` or promised to send the true B/L when it was returned to them by BP.

28 Kosin had since then filed an amended defence on 28 January 1991 in which for the first time they denied that they had authorized Quek to issue the

false B/L. Chong has also filed an affidavit in these proceedings which, in our view, was a model of non-disclosure.

29 In our view, the evidence before Coomaraswamy J was capable of supporting a claim in conversion against Amixco either as a joint or sole tortfeasor. What was amiss was that BNI had thought the false B/L was the key to establishing the cause of action. It was probably not. All that was required at that stage of the hearing, and it should be remembered that this was only an interlocutory hearing, was a formal amendment to the statement of claim to plead (a) the various acts of Amixco, Kosin and Quek, or any one or more of them which had since come to light to substantiate the allegations that they had acted jointly, or Amixco had acted solely in having wrongfully converted the said goods; or (b) alternatively, a conspiracy between Amixco, Kosin and Quek in the wrongful delivery of the said goods to Fabbas, however it was done. That no amendment was requested or effected at that stage was not, in our view, such a serious irregularity that the Mareva injunction should have been discharged on this ground alone. It was not that BNI had pleaded the wrong cause of action but that they had pleaded the wrong act in support of the tort of conversion. We could and would have granted an application to amend the statement of claim for the purpose of pleading the said matters to support the existing cause of action if it had been necessary to have done so. It was not necessary to do so as BNI had already amended their statement of claim on 8 August 1989, shortly after the Mareva injunction was continued, to plead the said matters.

30 **Likelihood of dissipation**

31 Counsel for Amixco submitted that there was no objective evidence to show any real likelihood on the part of Amixco to dissipate their assets to avoid satisfying any judgment against them. In our view, there was overwhelming

objective evidence of prima facie dishonest conduct on the part of Amixco, Kosin and Quek. From the moment Quek became aware that BNI was in no position to draw under BP's L/C because of the discrepancies, the following events occurred. First, Kosin immediately, before the arrival of the vessel at Alexandria, arranged to deliver the said goods to Fabbas in exchange for the BDC guarantee (which was issued before the vessel's arrival). Second, Amixco and Quek refused to waive the discrepancies when the goods were in the course of being discharged into the possession of Fabbas. Third, Amixco and Quek on 13 December 1985 dishonestly informed BP that they and Fabbas could not accept the discrepancies when Fabbas had taken delivery of the said goods at Alexandria. Amixco also attempted to obtain the shipping documents `on collection basis` and when this attempt failed, they further suggested that they would accept the discrepant documents on condition that payment to HP would be effected only upon condition of their receipt of funds under the Credit Lyonnais letter of credit in their favour for a shipment of cotton. Fourth, Amixco and Quek had not disclosed what had happened to the shipment of cotton in respect of which they had expected to receive sufficient moneys to pay BNI. Fifth, Amixco had received a substantial payment for the said goods from Ilban, which they claimed was partial, but which they had not paid to BNI. Sixth, Amixco and Quek had not explained why they had not received the balance of the sale price or what steps they had taken to recover it. Seventh, Amixco, Kosin, Quek and Chong had not given any satisfactory reason why Kosin had not made a claim under the BDC guarantee.

32 With respect to this sum of US\$790,000, Quek had alleged in his affidavit affirmed on 27 August 1986, ie after the Mareva injunction had been continued, that Amixco had paid, out of that sum, about US\$700,000 to three banks, viz ABN Bank, BNP and Bangkok Bank, in order to avoid winding-up

proceedings. No documentary evidence was produced to support the alleged payments or the threats of winding-up. Even if these allegations were true, Amixco had used BNI's money to pay their other creditors. The remaining sum of US\$93,330 had not been accounted for.

33 The aforesaid acts and omissions could hardly be said to be those of a person who would be willing to preserve his assets to meet a potential judgment for well over US\$3m (if interest is taken into account).

34 Counsel for Amixco also submitted that Amixco was in good financial standing with four banks which had granted them credit facilities of more than \$10m, that Amixco had been operating for more than 12 years and had established a substantial import and export business, and that their unaudited balance sheet as at 30 June 1985 showed a sales volume of \$39,984,093.77 and a profit before tax of \$919,744. However, their audited accounts as at 30 June 1985 showed a very different picture. Quek failed to update counsel on the correct state of affairs. The paid-up capital was \$254,002. The retained profit was \$429,013. The profit for the year was \$76,422 before tax and \$8,982 after tax. Their main assets were in the form of an office unit and some apartment units with a book value of \$2,504,442 and quoted shares with a value of \$1,093,279. However, after deducting actual liabilities, the company had net assets of \$688,335 which did not include contingent liabilities in respect of a letter of credit amounting to \$3,295,170. The nature of these contingent liabilities was not disclosed in the accounts.

35 Having regard to the amount of BNI's claim, Amixco could not be said to be a company in good financial standing to be able to meet a judgment for the amount claimed by BNI.

36 In the circumstances, we were satisfied that there was a real risk of Amixco dissipating their assets to avoid satisfying BNI's judgment.

37 The appeal of Amixco was accordingly dismissed with costs.

38 **Outcome:**

Chan Sek Keong J
Chao Hick Tin J
Yong Pung How CJ

Helen Yeo Cheng Hoong and Loy Wee Sun (Chor Pee & Co) for the
appellants
Chelva Rajah and Chuan Wee Meng (Tan Rajah & Cheah) for the
respondents
