

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1991] SGHC 80

Adm In Personam 174/1991

Between

SSAB Oxelosund AB

... Plaintiff

And

Xendral Trading Pte Ltd

... Defendant

GROUND OF DECISION

Admiralty and Shipping — Admiralty jurisdiction and arrest; Words and Phrases

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SSAB Oxelosund AB v Xendral Trading Pte Ltd

[1991] SGHC 80

Adm In Personam 174/1991
Lai Siu Chiu JC
12 June 1991

1 The defendants in this case applied by Summons-in-Chambers entered No 1329 of 1991 on 4 March 1991 for the discharge of the ex parte interim injunction which the plaintiffs obtained on 19 February 1991 which, inter alia:

(i) prohibited the defendants, their servants or agents including their insurance brokers Lowndes Lambert and their mortgagees Hill Samuel Bank Ltd ('Hill Samuel') from disposing of, transferring, charging, diminishing in value or in any way dealing with any of their assets wheresoever the same may be situate including and in particular the proceeds of the insurance policy of the vessel Protektor save in so far as such assets or the value thereof exceed US\$3,573,495.50;

(ii) required the defendants by their directors within 72 hours of service of the order to swear an affidavit disclosing the nature, whereabouts and full value of the defendants' assets both in and outside Singapore including bank accounts.

2 Attendant with Summons-in-Chambers entered No 1329 of 1991, the defendants had also separately applied (vide Summons-in-Chambers entered No 1372 of 1991) for an extension of time until the hearing of the former, to comply with the order for discovery.

3 The plaintiffs' statement of claim averred that the plaintiffs as the owners and/or consignees and/or indorsees of bill of lading no 90314 dated 7 January 1991 had shipped iron ore concentrate ('the goods') on board the defendants' vessel Protektor ('the vessel') from Port Cartier, Quebec, Canada to Oxelosund, Sweden. The goods never reached their destination as the vessel sank with the loss of all 33 lives on board on or about 12 January 1991 in the North Atlantic Ocean off the Grand Banks of Newfoundland due to severe weather conditions caused by hurricane force winds.

4 The plaintiffs contended that although the weather and sea conditions experienced by the vessel at the time when she first reported taking in water and when she ultimately sank may have been severe, they were not abnormal or unforeseeable for a winter voyage across the North Atlantic Ocean and therefore the loss of the vessel and the cargo on board her were due to unseaworthiness of the vessel in being unable to withstand the normal sea and weather conditions of a winter passage across the North Atlantic Ocean. The plaintiffs therefore claimed against the defendants the FOB price of the goods including freight and insurance premium paid thereon which sum of US\$2,131,464.48 together with interest and costs added would approximate US\$3,573,495.50

5 The plaintiffs' application for the ex parte injunction was supported by an affidavit of their counsel, Belinda Ang-Fong Saw Ean, filed on 18 February 1991 and the relevant paragraph thereof was para 23 which stated:

The defendants' business is that of shipowning. The only vessel which they owned was the Protektor. I humbly submit that as the defendants' only trading asset is now a total loss, they are very likely to be so adversely affected that they could be led to discontinue business as a going concern in view of the fact that the plaintiffs' claim very probably exceeds the value of their assets by a substantial amount. I verily believe that there is in the circumstances just cause for the plaintiffs to infer from these facts that there is a real risk that the defendants might dispose

of or otherwise deal with their only remaining substantial asset, ie the defendants' claim on the hull policy or the unencumbered portion of the hull insurance proceeds so as to avoid the plaintiffs' claim and before the plaintiffs can obtain judgment and are in a position to levy execution against the defendants. The said proceeds are by their very nature easily dealt with or disposed. I therefore humbly submit that there are reasonable grounds for believing that unless the defendants are restrained in terms of the order to be made on the plaintiffs' application herein, any judgment in favour of the plaintiffs will remain unsatisfied.

6 The defendants contended, inter alia, that such a worldwide Mareva injunction ought not to have been granted as the evidence did not disclose any risk of dissipation of assets.

7 After hearing lengthy arguments from both counsel, I discharged the injunction in terms of Summons-in-Chambers No 1329 of 1991, ordered early trial dates for the suit and I made no order on Summons-in-Chambers entered No 1372 of 1991. I now give my reasons.

8 It was not disputed by either counsel that the plaintiffs have a good arguable claim for purposes of obtaining a Mareva injunction although in his earlier affidavit filed on 18 March 1991 counsel for the defendants had contended that the plaintiffs had failed to make out such a case. The only dispute was whether the facts disclosed showed that there was a real risk that the defendants would dissipate their assets, in particular, the vessel's hull insurance proceeds so as to deny the plaintiffs the fruits of their claim should they succeed.

9 Counsel for the defendants, in his affidavit filed on 2 May 1991 ('the affidavit') in support of his application to discharge the plaintiffs' injunction, had contended (and exhibited documents in support thereof) that the defendants, a Singapore company, were not entitled to any of the vessel's hull insurance proceeds for the following reasons:

(a) The defendants had purchased the vessel on 18 February 1989 with a loan of US\$5.3m ('the loan') from Hill Samuel which loan was secured by a first statutory Singapore mortgage ('the mortgage') dated 18 February 1989 in Hill Samuel's favour together with a deed of assignment of all the vessel's insurances. Attendant to the loan Hill Samuel addressed a facility letter to the defendants dated 9 February 1989 which the defendants countersigned on 15 February 1989 and both Hill Samuel and the defendants had executed a deed of covenants contemporaneous with the mortgage.

(b) Prior to the defendants' purchase of the vessel, namely, on 30 December 1988 by a charterparty ('the charterparty') in the New York Produce Exchange Form, the defendants had chartered out the vessel to a Swedish company, Cador AB ('Cador') for a period of between 32 to 34 months at a daily hire of US\$10,400. Subsequently on 17 February 1989, Cador and the defendants entered into an option agreement whereby the defendants granted to Cador an option to purchase the vessel for US\$10,000 by giving notice in writing to the defendants on or after the date of expiry of the charterparty.

(c) On the same date, viz 17 February 1989 the defendants, Hill Samuel, Cador and Wallem & Co Ltd ('Wallem') (the parent company of the defendants holding the entire 500,000 issued shares in the company) entered into a very complex agreement (the 'four-party agreement'), the salient provisions of which were:

(i) The defendants would deposit a sum of \$200 from the daily hire paid by Cador into an interest-bearing account with Hill Samuel.

(ii) Cador would continue to pay the daily hire until such time as the moneys accumulated in the defendants' account with Hill Samuel were sufficient to discharge Cador's obligation to pay hire for the remaining period of the charterparty whereupon the defendants would apply the accumulated funds in the account to the discharge of the charter hire payable by Cador for the remainder of the charterparty and Cador would cease payment.

(iii) If the vessel was sold at Cador's request (and Cador had the right to call for the vessel's sale under certain circumstances), Cador was obliged to pay to the defendants any shortfall between the sale price and the total of:

(a) the mortgage sum (including interest) due and outstanding to Hill Samuel;

- (b) the loan (together with interest) advanced by Hill Samuel to Wallem towards the paid-up capital in the defendants;
- (c) the operating costs and expenses incurred by the defendants and not fully reimbursed out of the charter hire;
- (d) Hill Samuel's costs in unwinding swap arrangements and/or liquidating or employing deposits/other funds to maintain the loans in (a) and (b) above;
- (e) three months' management fees payable to Wallem Shipmanagement Ltd, the managers of the vessel.
- (iv) The defendants were obliged to insure the vessel at a hull value of US\$6m. In the event of the vessel's actual or constructive loss, the agreed order of distribution as set out in (a) to (e) above would also apply to the hull insurance proceeds, and the surplus if any, would be paid to Cadon.
- (d) (i) As at 31 January 1991, US\$1.35m (inclusive of interest) was due to Hill Samuel under the mortgage.
- (ii) As at 31 January 1991, another US\$250,000 (inclusive of interest) was due to Hill Samuel for the loan advanced to Wallem to finance the defendants' paid-up capital.
- (iii) \$100,000 was due to Wallem Shipmanagement Ltd as management fees as at the date of the vessel's sinking.
- (iv) No fees and operating expenses were due and unpaid as at the date of the vessel's loss.
- (v) The balance of the vessel's hull proceeds after deducting (i) to (iii) above was payable to Cadon under cl 5 of the four-party agreement.

10 There was no documentation exhibited to the affidavit to substantiate the figures in items d(i) to d(iii).

11 Counsel for the defendants argued:

- (a) That by virtue of the four-party agreement the hull insurance surplus if any had been equitably assigned to Cadon, after payment first of Hill Samuel's and the managers' claims. Accordingly, the defendants had no assets within or outside jurisdiction to warrant the granting of the injunction.

(b) In the alternative, counsel for the defendants argued that the four-party agreement was at the very least a contract for valuable consideration between the defendants and Cadon and the defendants are entitled to pay the insurance surplus to Cadon in the ordinary course of business, and he cited in support of his proposition **Iraqi Ministry of Defence v Arcepey Shipping Co SA ('The Angel Bell')** [1981] QB 65. He pointed out that the injunction granted to the plaintiffs contained no provision to enable the defendants to pay their debts arising in the usual course of business.

(c) The granting of a worldwide Mareva injunction to the plaintiffs went against the grain of such authorities as **Republic of Haiti v Duvalier** [1990] 1 QB 202 and **Derby & Co Ltd v Weldon (No 1)** [1989] 2 WLR 276 (**Nos 3 & 4**),⁴ and (**No 6**),⁵ as:

- (i) the application was made pre-judgment;
- (ii) the plaintiffs' claim was not proprietary in nature being a commercial cargo claim and in any event, the vessel had been entered with a reputable P & I Club in respect of all cargo claims; and
- (iii) there was no evidence of any risk of dissipation of assets by the defendant; did they manifest any intention to defeat any judgment that the plaintiffs may obtain.

12 Counsel for the plaintiffs argued, inter alia, that:

(a) the deed of covenants prohibited the defendants from creating any security interest on the vessel over and above those created in favour of Hill Samuel; therefore the four-party agreement executed before the deed of covenants went against the grain of the prohibition and gave rise to suspicion;

(b) the various dates of the various security documents executed by the defendant with Hill Samuel were equally questionable;

(c) the four-party agreement was equally suspicious because firstly, no consideration had been provided by Cadon to the defendants to obtain the benefit of any insurance surplus; secondly, none of the other parties to the same had intervened in the proceedings; thirdly, there was no time frame stipulated for repayment to Hill Samuel of Wallem's loan of US\$250,000 nor for payment of the managers' fees;

(iv) the purported assignment was `a charge` which is registrable under s 131(3)(d) or 131(3)(f) of the Companies Act (Cap 50, 1990 Ed), and not being so registered it was void and unenforceable;

(v) even if the equitable assignment was valid, it cannot give the other parties to the four-party agreement any priority over the defendants` assets and at best they can claim against the defendants as unsecured creditors;

(vi) an adverse inference should be drawn against the defendants under s 116(g) of the Evidence Act (Cap 97) for failing to produce documents to substantiate the various sums due to the various parties under the four-party agreement;

(vii) even if the vessel was entered with a reputable P & I Club, the Club can still refuse to pay, citing ` **The Fanti and The Padre Island** `;6

(viii) the defendants, Hill Samuel and Wallem are all companies within the same group as, firstly, Wallem owned all the issued shares of the defendants; secondly, the four-party agreement provided (under cl 6.01) that the whole of the issued capital of the defendants shall be owned by a company within the group of companies of which Hill Samuel is a member and; finally, the defendants` annual report stated that the vessel is mortgaged to secure a bank loan provided by a fellow subsidiary company to finance its purchase, (citing the recent Court of Appeal decision in **Atlas Maritime Co SA v Avalon Maritime** [1991] 1 Lloyd`s Rep 563). The court should lift the corporate veil and see that the lender (Hill Samuel) is a company closely linked with the borrower (the defendants). Further, Wallem, not the defendants, borrowed US\$250,000 from Hill Samuel whilst the managers were not a party to the four-party agreement and therefore had no priority on their claim for management fees of \$100,000.

13 Counsel for the plaintiffs contended that the four-party agreement was a judgment-proof arrangement created by companies within the same group as an attempt to circumvent the claims of creditors including the plaintiffs`. Therefore the injunction should not even be varied let alone discharged since it cannot be said that any of the payments sought to be made under the four-party agreement were in the ordinary course of business (the **Angel Bell** [1981] QB 65 exception).

14 In reply to the submissions of counsel for the plaintiffs, counsel for the defendants produced, inter alia, the accounts of Trustees Savings Bank (TSB) Group plc which showed that Wallem is a wholly-owned subsidiary of TSB Group BV, a Dutch company which in turn is owned by Hill Samuel Insurance and Shipping Holdings Ltd, which in turn is a wholly-owned subsidiary of TSB plc. Prior to its sale to the private sector, the British government had a substantial interest in TSB plc. The defendants therefore made no attempt to hide the relationship between three of the four parties to the four-party agreement as alleged by the plaintiffs.

15 I was satisfied that the facts of this case and the conduct of the defendants were far removed from cases where the situation `cries out` as a matter of justice to the plaintiffs for the grant of a pre-judgment worldwide Mareva injunction (per Kerr LJ in **Babanaft International v Bassatn e** [1989] 2 WLR 232). I was also aware that the granting of a worldwide Mareva injunction is a draconian measure to be ordered in very exceptional circumstances - see **Republic of Haiti v Duvalier** [1990] 1 QB 202 and **Derby & Co Ltd v Weldon (No 1)** [1989] 2 WLR 276

16 There was no evidence here that the defendants had in fact secreted or attempted to secrete assets outside the jurisdiction so as to render nugatory any judgment to which the plaintiffs might ultimately be entitled. I was not convinced by the arguments of counsel for the plaintiffs that evidence of the risk of dissipation of assets exists in the four-party agreement itself. Whilst I accept that the defendants, their mortgagees (Hill Samuel) and Wallem (the defendants` parent company) all belong to one group, viz the TSB group of companies, their inter-relationships do not give rise to any sinister connotations. I considered the various security documents which they had executed to be strictly commercial arrangements, notwithstanding their close ties. Further, the

very fact that Cadon had the option to purchase the vessel upon the expiry of the charterparty for a nominal sum of US\$10,000 clearly showed that there was some element of a hire-purchase arrangement in the charterparty, and that Cadon had more than a charterer's usual interest in the vessel, hence its special rights under the four-party agreement. Even if the four-party agreement did not equitably assign the hull insurance surplus to Cadon (on which I expressed no opinion), I was of the view that the defendants should not be prevented from discharging their contractual obligations to Cadon as well as to the other parties to the same, made in the ordinary course of business. Counsel for the plaintiffs had neither disputed nor contradicted the statements in the affidavit of counsel for the defendants (filed on 18 March 1991) that the vessel's managers, Wallem Shipmanagement, are one of the five foremost ship management companies in the world, managing a fleet of over 100 vessels. As for the plaintiffs' argument that the defendants are a one-ship company, I would say that it is the norm rather than the exception in the shipowning industry.

17 I was also mindful of the fact that although they have a good arguable case, the plaintiffs have not yet proceeded to judgment but are merely claimants for unliquidated damages against a company. They do not, contrary to the assertions of their counsel, come within the definition of a 'creditor' under s 254(2)(a) of the Companies Act (Cap 50, 1990 Ed) for purposes of presenting a winding-up petition. It may well be that ultimately the plaintiffs may not succeed in their contention that the vessel was unseaworthy at the commencement of her last fateful voyage in which event her sinking being fortuitous (which was not disputed), the defendants would not be liable for damages and or the sum claimed.

18 I agreed with the arguments of counsel for the defendants based on the Privy Counsel decision in **Pao On v Lau Yiu Long** [1980] AC 614 that

performance of an existing duty by Cadon to a third party can be good consideration. Cadon's obligation under the four-party agreement was not only to the defendants to continue to perform the charterparty but also to Hill Samuel and Wallem, both of whom depended upon Cadon's payments to discharge the mortgage and loan amounts due and owing to Hill Samuel. Cadon's obligation to pay hire under the charterparty was separately secured by a guarantee furnished by another Swedish company to the defendants, under the terms of the facility letter dated 9 February 1991.

19 There was no evidence, let alone cogent evidence, that the defendants had foreign assets nor that there was a real risk of the defendants disposing of the same to defeat the plaintiffs' claim.

20 It appeared that the plaintiffs had invoked the machinery of a Mareva injunction to obtain security for their claim which is an abuse of the process. (See **'The Niedersachsen'** [1983] 2 Lloyd's Rep 660)

21 Finally, there was no reason to believe and certainly there was no evidence produced by the plaintiffs to that effect, that the vessel's P & I Club would not honour its obligations to the defendants (subject to the rules of the Club), in the event that the plaintiffs succeed in their claim, albeit on the 'pay and be paid' principle which require the defendants to meet the plaintiffs' claim first and then look to the Club for reimbursement.

22 For the above reasons therefore I granted the defendants' application, discharged the plaintiffs' injunction and awarded the defendants (taxed) costs thereof. I further certified that I required no further arguments.

23 **Outcome:**

24 Application allowed.

Lai Siu Chiu JC

Goh Kok Leong and Linda Chen (Ang & Partners) for the plaintiffs
Haridass Ajaib (Haridass Ho & Partners) for the defendants
