

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 185

Suit No 1503 of 1992

Between

Swee Hong Exim Pte Ltd

... Plaintiff

And

Saigon Shipping Company

... Defendant

GROUND OF DECISION

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Swee Hong Exim Pte Ltd v Saigon Shipping Company

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Suit No 1503 of 1992
Karthigesu JA
03 August 1993

1 Judgment:

2 Coram: Karthigesu J

3 GROUNDS OF JUDGMENT

4 On 29 July 1992 the plaintiffs obtained, on an ex parte application, a mareva injunction restraining the defendants from removing from the jurisdiction or disposing of assets up to the limit of US\$1,127,212. The plaintiffs filed a motion on 23 September 1992 for the continuation of the mareva injunction and the defendants applied by motion on 15 October 1992 for its discharge. I heard both motions together. On 29 March 1993 I dismissed the defendants' motion with costs; ordered the continuation of the mareva injunction (order of court dated 29 July 1992) until trial or further order; granted the plaintiffs the costs of their motion; ordered that the aggregate sum to cover the terms of the injunction order dated 29 July 1992 be a sum equal to the amounts of the plaintiffs' claims together with interest thereon and costs, all to be agreed between the parties; gave both parties liberty to apply; directed an early trial and that the evidence recorded by me at the hearing of the two motions are to be

treated as evidence at the trial; and finally that the trial of this action may be fixed before me. I also ordered that the defendants pay the plaintiffs the costs of these proceedings for the 26 January 1993 and 12 February 1993 hearings.

5 The defendants have appealed against the orders I made on 29 March 1993. I now give my written reasons which are but an amplification of the oral judgment I delivered on that day.

6 The plaintiffs are a company incorporated in Singapore, carrying on business inter alia as exporters, importers and general traders. The defendants are a Vietnamese company which inter alia carries on the business of general importers into Vietnam through its service import and export division called 'Serimex'.

7 The plaintiffs' claim is under an agency agreement dated 2 July 1990 whereby it was agreed, inter alia, that the defendants would act as the plaintiffs' agents in Vietnam; that the plaintiffs would pay the defendants a trading commission of 1.5% of the contract value of each transaction; that the defendants as the plaintiffs' agents would undertake the reception and distribution of goods to the respective buyers in Vietnam and collect payment from the buyers for remittance to the plaintiffs.

8 Pursuant to the agency agreement the plaintiffs sold various consignments of goods to customers in Vietnam, through the agency of the defendants who collected payments from the buyers in Vietnam and from time to time remitted sums of money to the plaintiffs. Among these were transactions between Vietnamese buyers known as Cotimex and Docimexco which the plaintiffs contend are covered by the agency agreement and which the defendants contend are not. The plaintiffs according to the account maintained

by them and rendered to the defendants claim that there is due to them US\$783,722.91 (of which US\$186,143.49 is interest) and Vietnamese Dong 3,844,810.00 as at 16 December 1991.

9 Apart from the agency agreement the plaintiffs and the defendants entered into a separate agreement on 8 October 1990 concerning urea fertilizer. Pursuant to this agreement the plaintiffs shipped to the defendants on 27 and 29 October 1990 6,600 metric tons of urea fertilizer for the aggregate sum of US\$1,363,770.97 which the plaintiffs contend the defendants have not accounted for.

10 On 28 November 1990 the plaintiffs and defendants entered into yet another agreement for the 'mutual cooperation' for the purchase and resale in Vietnam of motor gasoline and fuel oil. Under this agreement the defendants would be responsible for providing the means of transportation of the motor gasoline and fuel oil to Vietnam; attending to import and customs clearance and the marketing in Vietnam whilst the plaintiffs would provide the capital for the purchase of the motor gasoline and fuel oil. The agreement was to share the nett profits as to 70% to the plaintiffs and as to 30% to the defendants. There were two shipments. The first incurred an unexpected loss of US\$78,000 which the plaintiffs and the defendants agreed to share equally. The second shipment valued at US\$699,391.11 has not been accounted for by the defendants to the plaintiffs.

11 In respect of the urea and motor gasoline matters the plaintiffs claim an account to be taken but in respect of the agency claim the plaintiffs claim judgment for US\$783,722.91 and VND3,844,810 interest and costs.

12 The plaintiffs commenced these proceedings on 29 July 1992 on which date they obtained the interim mareva injunction ex parte. In fact the plaintiffs timed the commencement of this action when the defendants' vessel 'Thanh Da' had arrived at the port of Singapore. Hence the defendants had property within the jurisdiction when this action was commenced. The injunction order dated 29 July 1992 was served on the 'Thanh Da' and accordingly enjoined from leaving Singapore. On the application of cargo owners of cargoes aboard the 'Thanh Da' she was freed from the terms of the injunction order dated 29 July 1992, without objection from the plaintiffs, on 1 August 1992. Two other vessels of the defendants, the 'Nha Trang' and 'Gia Dinh' came into port shortly thereafter and they were duly enjoined with the terms of the injunction order. The combined value of these two ships is estimated to be about S\$380,000 which is very much less than what the plaintiffs' claim can reasonably be expected to be.

13 The defendants in applying for the discharge of the mareva injunction relied principally on a question of law. It is that, 'Serimex' is a separate and distinct legal entity from 'Saigon Shipping Company'. The agency agreement which described the Vietnamese contracting party as 'Serimex/ Saigonship' did not detract from their contention that the agency agreement was with Serimex and not with Saigon Shipping Company as Saigon Shipping Company by the decree which incorporated it, limited its activities to ship owning and ship management. Serimex was then incorporated by decree on the application of Saigon Shipping Company as its subsidiary but nevertheless as a separate and distinct legal entity from Saigon Shipping Company to undertake importation of goods and trading. It was contended that this was known to the plaintiffs prior to the date of the agency agreement. Accordingly the plaintiffs have sued the wrong party.

14 On the other hand the plaintiffs contended that what they knew and what they were told by Huynh Du Phuoc, the director of Saigon Shipping Company, was that Serimex was the import and export division of Saigon Shipping Company and as such was directly under his control. The manager of Serimex was one Nguyen Tan Trung. The plaintiffs contended that Serimex was not a separate and distinct legal entity from Saigon Shipping Company but merely a division of Saigon Shipping Company.

15 When this matter first came before me on 26 January 1993 the plaintiffs' motion was supported by the affidavits of its managing director, Chang Soei Liang and the affidavits of two Vietnamese lawyers. The defendants' motion was supported by the affidavits of its director Huynh Du Phuoc and a Vietnamese lawyer named Ngo Van Tan. It was clear to me that the principal question to be decided by me was whether Serimex was a separate legal entity or not according to Vietnamese law. The expert evidence on this question as contained in the respective affidavits for the plaintiffs and the defendants were not only in conflict but the views expressly particularly by the defendants' expert Ngo Van Tan was brief. I readily accepted defendants' counsel's application for cross-examination of the expert witnesses and directed for their attendance at the hearing.

16 On 12 February 1993 counsel for the parties appeared before me to raise a delicate question following my direction given on 26 January 1993. It appeared that the Vietnamese authorities whilst permitting Ngo Van Tan, the defendants' expert from travelling to Singapore to give evidence would not permit the plaintiffs' two expert witnesses to leave Vietnam. Accordingly I ordered that no adverse inference is to be drawn should the two expert witnesses of the plaintiffs fail to attend to be cross-examined on their affidavits which shall nonetheless be admitted in evidence.

17 In the event the plaintiffs' two expert witnesses, Trieu Quoc Manh and Nguyen The Chuong were prevented by the Vietnamese authorities from supporting the affidavits they had filed on the Vietnamese law relating to the incorporation of companies in Vietnam.

18 I did not see any conflict in the evidence of Ngo Van Tan given at the hearing and the affidavit evidence of Nguyen The Chuong, who is a graduate of Cambridge University (1970) as to the incorporation of Saigon Shipping Company as a state owned corporation. Both are agreed that Saigon Shipping Company was established by a decree of the People's Committee and that only the People's Committee has the authority to establish state owned corporations which can be regarded under Vietnamese law as separate legal entities.

19 The conflict arises when they consider and interpret document No. 356/TC-VTB dated 29 March 1988 and document No. 153/QD-TCNSTL dated 7 April 1988. Nguyen The Chuong explained these two documents in his affidavit as follows:

20 ` It is clear on the face of document No. 356/TC-VTB dated 29.3.88 ... that it did not originate from the People's Committee. It originates from SSC (Saigon Shipping Company) itself, which does not have the power to form companies having independent legal status ... I next refer to document No. 153/QDB-TCNSTL dated 7.4.88. Although this is a decision of The Bureau of Transport and Communication of Ho Chi Minh City, it does not at all purport to establish Serimex as an independent legal entity. It is clear from the fourth item at the preamble that the People's Committee, having considered SSC's proposal (No. 356/TC-VTB) for the setting up of a "Department of Maritime Service", had decided to permit SSC to set up such a Department.'

21 Ngo Van Tan spent a considerable period of time in the witness box trying to explain to me the intricacies of Vietnamese corporate law. He could not explain to my satisfaction how on the plain reading of documents 356 and 153 it can be said that Serimex is a separate legal entity from Saigon Shipping Company. I got more help from the two paragraphs of Nguyen The Chuong's affidavit I have quoted than from the evidence I heard from Ngo Van Tan in understanding documents 356 and 153. Ngo Van Tan maintained as a last resort that since Serimex was permitted to have its own bank account, and own accounting system, in particular, it must be considered to be a separate legal entity as these are the attributes under Vietnamese law of a separate legal entity. I found this reasoning unconvincing.

22 There is no common ground between Nguyen The Chuong's affidavit and Ngo Van Tan's evidence on the legal status of Serimex. In the end I was driven to interpreting documents 356 and 153, from the translations, with the aid of what I considered to be the correct approach taken by Nguyen The Chuong in his affidavit. Quite clearly document 356 is a proposal made by Saigon Shipping Company to the ministry under which it is, namely The Bureau of Transport and Communication of Ho Chi Minh City, for setting up Serimex as a separate legal entity. Obviously the proposal was considered by the People's Committee (4th item of preamble in document 153) and the decision is conveyed by the Ministry granting permission to set up a Department of Maritime Services which is then set up and called Serimex.

23 In my view the fact, if it be so, that Serimex is allowed to operate as an autonomous department within Saigon Shipping Company would not by that reason alone make it a separate legal entity from Saigon Shipping Company, and nothing that Ngo Van Tan said in evidence detracts from the view I formed. I am fortified in approaching this question in the way that I have from what

Whyatt CJ said in *N. V. De Bataafsche Petroleum Maatschopij & Ors v The War Damage Commission* < 1956 > 22 MLJ 155. He said:

24 ` There was, unfortunately, practically no common ground between the experts on any of these topics, many of which involved legal concepts unfamiliar to an English lawyer. In these circumstances, it seems to me appropriate to recall the words of Lord Greene in *Rouyer Guillet & Co v Rouyer Guillet & Co Ltd* < 1949 > 1 AER 224 (Court of Appeal, England) when speaking on the construction of foreign statutes: "When you come to the statute law itself", he said, "although it is right that *prima facie* what must be considered is the evidence of the experts and not the text of the law, when the experts differ as to its meaning on English Court is entitled and if it is to perform its function properly, is indeed, bound, to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks ought to be given to it, to the text itself and to examine it in order to make up its mind on the question of interpretation as between the two sets of witnesses."

25 For these reasons I reached the conclusion that Serimex was not a separate legal entity from Saigon Shipping Company and accordingly that the plaintiffs had correctly sued Saigon Shipping Company, the defendants. This finding disposes of the matter, indeed the only defence, of the defendants.

26 The other defences taken by the defendants are that the plaintiffs' action on the agency claim is founded on the plaintiffs' own accounts is erroneous and that the urea fertilizer transaction and the motor gasoline and fuel oil transactions were transacted not with the defendants but with Nguyen Tan Trung, the manager of Serimex. This was the evidence of the defendants' director, Huynh Du Phuoc, both on affidavit and orally at the trial. His evidence was challenged in every material particular by Chang Soei Liang, the plaintiffs'

managing director, also both on affidavit and orally at the trial. Having observed both men giving evidence I have no hesitation in accepting the evidence of Chang Soei Liang to that of Huynh Du Phuoc. I found Huynh Du Phuoc prevaricating and his evidence and explanations unconvincing even allowing for the difficulties in translating his evidence from the Vietnamese to English. Chang Soei Liang gave his evidence in English. Furthermore there was no dispute but that goods were shipped pursuant to the agency agreement. If the accounting of the plaintiffs was in error because the Cotimex and Docimexo transactions were included in the plaintiffs' accounting which according to the defendants had already been settled, then, in my view it was a question to be tried. This error neither made the claim bad in law nor does it amount to material non-disclosure of a fact, as somewhat bewilderingly to me, it was so contended by defendants' counsel. In so far as the urea fertilizer and motor gasoline transactions were concerned I accepted Chang Soei Liang's evidence that he was dealing with Nguyen Tan Trung as an employee of the defendants and not with him as principal. I found further support for this finding from a document dated 28 September 1989 signed by Huynh Du Phuoc for the defendants, Saigon Shipping Company, which was admitted in evidence as exhibit P1. The substance of this document is an acknowledgement of US\$88,865 as at 28 September 1989 due to Swee Hong Investment Pte Ltd made by Huynh Du Phuoc 'on behalf of Saigon Shipping Company as manager of Import Export Department ...' and is in respect of '... transactions our service has done in the course of our trading business in co- operation with Swee Hong Investment Pte Ltd, Singapore'.

27 I apprehend that these transactions done in co- operation with Swee Hong Investment Pte Ltd are the urea fertilizer and motor gasoline transactions. In the agency agreement the Singapore party named is Swee Hong Exim Pte

Ltd, the plaintiffs. Admittedly Swee Hong Investment Pte Ltd at the date I heard this matter were not parties to this action. However plaintiffs' counsel assured me that steps were being taken to join Swee Hong Investment Pte Ltd as a plaintiff. For the purposes of determining whether the plaintiffs had a good arguable case I was prepared to accept this assurance. In any event even if the urea fertilizer and motor gasoline transactions were struck out on which an account was claimed it still left a substantial claim on the agency agreement on which there clearly was a good arguable case.

28 All the necessary pre-requisites for maintaining a mareva injunction were present in this case. The High Court certainly had jurisdiction to hear this case as at the date the action was commenced the defendants had property within the jurisdiction, namely their vessel, 'Thanh Da'. They still have property within the jurisdiction namely their vessels, 'Nha Trang' and 'Gia Dinh'. I have found that the plaintiffs have a good arguable case. I am satisfied that if not prevented by the injunction the 'Nha Trang' and the 'Gia Dinh' would have sailed out of Singapore and the plaintiffs would be left with no assets belonging to the defendants within the jurisdiction to execute a judgment. I was not persuaded by defendants' counsel argument that by maintaining the mareva injunction would cause real hardship to the defendants. The balance of convenience was clearly against the plaintiffs and hence the necessity for the mareva injunction granted by the order of court dated 29 July 1992.

29 It was for these reasons that I made the orders I did on 29 March 1993.

Karthigesu JA

Yang Lih Shyng with James Lau (Koh & Yang) for the plaintiffs
Randhir Chandra (Haridass Ho & Partners) for the defendants
