IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 203

Suit 1503/1992

Between

Swee Hong Exim Pte Ltd

… *Plaintiff*

And

Saigon Shipping Co (1 & 2)

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Injunctions; Evidence — Admissibility of evidence — Foreign law

Version No 1: 29 Oct 2026 (23:45 hrs)

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Swee Hong Exim Pte Ltd v Saigon Shipping Co (1 & 2)

[1994] SGHC 203

Suit 1503/1992
Karthigesu JA
03 August 1994

1 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.

2 **The injunction**

3 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.

4 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`.

5 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.

6 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

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US$783,722.91 (of which US$186,143.49 is interest) and Vietnamese Dong 3,844,810.00 as at 16 December 1991.

7 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.

8 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.

9 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.

10 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.

11 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 Co`. 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 Co as Saigon Shipping Co 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.

12 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 Co, was that Serimex was the import and export division of Saigon Shipping Co and as

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such was directly under his control. The manager of Serimex was one Nguyen Tan Trung. The plaintiffs contented that Serimex was not a separate and distinct legal entity from Saigon Shipping Co but merely a division of Saigon Shipping Co.

13 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 expressed particularly by the defendants` expert Ngo Van Tan were brief. I readily accepted defendants` counsel`s application for cross-examination of the expert witnesses and directed for their attendance at the hearing.

14 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, to travel 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.

15 In the event the plaintiffs` two expert witnesses, Trieu Quoc Manh and Nguyen The Chuong were prevented by the Vietnamese authorities from

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supporting the affidavits they had filed on the Vietnamese law relating to the incorporation of companies in Vietnam.

16 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 Co as a state owned corporation. Both are agreed that Saigon Shipping Co 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.

17 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:

> *It is clear on the face of document No 356/TC-VTB dated 29 March 1988 ... that it did not originate from the People`s Committee. It originates from SSC (Saigon Shipping Co) 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 April 1988. 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****.*

18 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 Co. I got more help from the two paragraphs of Nguyen The Chuong`s affidavit

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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.

19 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 Co to the ministry under which it is, namely, 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 (fourth 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.

20 In my view the fact, if it be so, that Serimex is allowed to operate as an autonomous department within Saigon Shipping Co would not by that reason alone make it a separate legal entity from Saigon Shipping Co, 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 ***NV De Bataafsche Petroleum Maatschoppij & Ors v War Damage Commission*** . He said:

> *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*

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> *Lord Greene in* ***Rouyer Guillet & Co v Rouyer Guillet & Co Ltd*** *[1949] 1 All ER 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 an 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.`*

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

22 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 Docimexco transactions were included in the plaintiffs` accounting which according to the

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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, was 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 Co, which was admitted in evidence as exh 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 Co 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`.

23 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.

24 All the necessary pre-requisites for maintaining a Mareva injunction were present in this case. The High Court certainly had jurisdiction to hear this

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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 have been left with no assets belonging to the defendants within the jurisdiction to execute a judgment. I was not persuaded by defendants` counsel argument that 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.

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

26 [Having set out the facts and referred to his grounds of decision set out above, the learned judge continued.] At the trial which was on 31 January, 1, 2 and 3 February 1994 I heard more evidence on Vietnamese law from Do Le Vien, a Vietnamese lawyer, attached to the Singapore office of the Australian law firm of Freehill Hollingdale & Page who have a Vietnamese practice, for Swee Hong and Le Kim Que, a Vietnamese lawyer from Hanoi for the defendants. Without having to rehearse their respective evidence I found that Do Le Vien confirmed the view I had taken of Vietnamese law in my written grounds of judgment of 3 August 1993. I also found that Le Kim Que was not able to advance the legal arguments of the defendants any further. His evidence did not detract from the view I had taken. The whole question turned on whether Serimex by the Decree by which it was `incorporated` was given `phap nhan` status, that is, separate legal entity status. Report 356 was the defendants` application for a `service import and export` division or department. The two decrees in question were 153 and 159. Le Kim Que`s opinion was that looking

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at these three documents it appeared to him that Serimex had been given `phap nhan` status. But in questions put to him by Mr Yang for Swee Hong he gave the following answers:

27 **The trial**

> *Put: The people who had to decide on 356 knew about `phap nhan`. If they wanted to confer `phap nhan` on Serimex they could have used these words in 153.*
>
> *Ans: They could have.*
>
> *Put: Look at 189. It could have been done in that way.*
>
> *Ans: There is no standard form.*
>
> *Put: Looking at 153 there could be doubt that Serimex was not given `phap nhan` status.*
>
> *Ans: Agree.*
>
> *Put: An ordinary person looking at 159 by itself would also have some doubts.*
>
> *Ans: Agree.*
>
> *Put: Would it be reasonable to say that 356 sought for `phap nhan` status but the Service of Communication and Transport did not give full `phap nhan` status.*
>
> *Ans: Do not agree. But I agree that there are some defects in drafting.*

28 Great emphasis was laid on two particular indicia of `phap nhan` status - the ability to operate a bank account and thus the ability to raise the start up capital and ability to use a rubber stamp of its name. Serimex did indeed have its own internal accounting system and did operate a bank account. However there was no evidence of Serimex having raised its own start up capital. This led me to infer that Serimex was more likely a division or department of the defendants than a separate legal entity independent of the defendants. There was, however, evidence that Serimex had taken loans for its business transactions. The evidence of Luong Dan Ich, the chief accountant of Serimex

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at the material time, was that the loans were repayable with interest. The ability to take loans, in my view, was consistent with the degree of autonomy given to Serimex but that did not make it a separate legal entity.

29 The other indicia of the rubber stamp is best illustrated by quoting the evidence of Le Kim Que, the defendants` expert witness. He said:

> *Put: CB2 Serimex/Saigon Shipping. Looking at this who was entering into this contract.*
>
> *Ans: Looks like a relationship between the two. The rubber stamp should have been Serimex. A separate entity has to have a rubber stamp.*
>
> *Put: Could Saigon Shipping be the contracting party.*
>
> *Ans: Yes, could be.*
>
> *Put: CB26-28 - Saigon Shipping the contracting party where buyer is Saigon Shipping (Serimex).*
>
> *Ans: Yes. This shows that Serimex is accountable to Saigon Shipping.*
>
> *Put: Officers in Saigon Shipping were concurrently the officers of Serimex.*
>
> *Ans: Quite common in Vietnam to hold two positions at the same time.*
>
> *Put: A person dealing with Phuoc would not know whether he was dealing with Saigon Shipping or Serimex.*
>
> *Ans: The issue would determine. I would expect Phuoc to disclose his interest. I would expect Serimex to have used its own rubber stamp on the contract. Why they did not have one or why they did not use it, I cannot say.*
>
> *Put: If Serimex does not have a rubber stamp is it still a `phap nhan`.*
>
> *Ans: Rubber stamp is only one characteristics of `phap nhan`.*
>
> *Put: What would you say of the status of a body which has to use the rubber stamp of its superior body.*
>
> *Ans: I have to conclude that it has no legal status.*

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30 I would note that the signature of all documents emanating from Serimex had the form as given hereunder.

> *Serimex/ Saigonship - typewritten*
> *Saigon Shipping Co rubber stamp*
> *Ho Chi Minh City*
> *(signature)*
> *Subdirector - part of rubber stamp*

31 The view I formed from Le Kim Que`s evidence was that at the time in question the law in Vietnam was in a state of flux. They were trying to adapt to free market economy but still subject to the controls of the regime. Thus hybrid institutions were permitted. Serimex was one of them. It was in effect a division or department of the defendants but was given a certain degree of autonomy. In my view this fell short of incorporating Serimex as a separate legal entity from the defendants.

32 Having considered the evidence of Do Le Vien and Le Kim Que I saw no reason to alter the conclusion I had arrived earlier as stated in my written grounds of judgment of 3 August 1993. Accordingly this defence of the defendants failed.

33 I can now deal with the accounting matter quite shortly. The defendants only witness was Luong Dan Ich who said he was the chief accountant of Serimex from April 1988 to April 1991. After that and until September 1993 he was chief accountant of Katrans Shipping, an entity not connected with the defendants. From September 1993 he was employed by the defendants and undertook the liquidation of Serimex.

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34 The defendants` case on the accounts was based on the evidence of Luong Dan Ich. I did not, however, attach much value to his evidence. I found his evidence most unsatisfactory as the cross-examination by Mr Yang revealed.

35 [The learned judge then set out the passages from the cross-examination of the witness and the judge`s valuation of the claim and concluded, the defendants having agreed to the conversion of all moneys due in Vietnamese dong to US dollars, that the total amount due was US$557,812.84. There was an arithmetical error when judgment was given on 3 February 1994 and the plaintiffs were invited to apply to the learned judge for the error to be corrected vide O 20 r 11 of the Rules of the Supreme Court.] The learned judge continued:

36 The foregoing are the reasons why at the conclusion of the trial on 3 February 1994 I gave judgment for the plaintiffs and ordered that the judgment sum which should be US$557,812.84 (and not US$577,862.84) carry interest at the rate of 6% pa from the date of the writ to the date of judgment and ordered that the defendants pay the costs of this action and all other costs reserved during the proceedings.

37 I also ordered that the injunction order made on 29 July 1992 and which I confirmed on 29 March 1993 restraining the defendants from removing from the jurisdiction or disposing of assets up to the limit of US$1,127,212 continue in aid of execution of the judgment herein. On 8 February 1994 at the instance of the parties and by consent I varied the value of the assets to be retained within the jurisdiction to be limited to US$750,000.

38 ***Plaintiffs` claim allowed; injunction continued.***

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Karthigesu JA

Yang Lih Shyng and James Lau (Koh & Yang, later Khattar Wong & Partners) for the plaintiffs
Randhir Chandra and Jeya Putra Pacharatnam (at the trial) (Haridass Ho & Partners) for the defendants

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