

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 227

S1933/1993

Between

Wirana Pte Ltd

... Plaintiff

And

Tourist International
Investment Company Limited

... Defendant

GROUND OF DECISION

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**Wirana Pte Ltd v Tourist International Investment Company
Limited**

[1994] SGHC 227

S1933/1993
Lai Siu Chiu J
31 August 1994

1

Judgment:

2 Coram: Lai Siu Chiu J

3 **GROUND OF DECISION**

4 The defendants applied by summons in chambers entered no. 6673 of
1993 (the

application) for inter alia the following orders:

5 1. the writ of summons and the statement of claim be struck out under
Order 18 r 19 of

the Rules of the Supreme Court; 2. the plaintiffs' application be dismissed; 3.
the Mareva

injunction granted ex-parte on 23 September 1993 as varied by another order of
court on 29

September 1993 be discharged; 4. the plaintiffs do pay damages (to be assessed)
sustained

by the defendants by reason of their undertaking contained in the injunction
order: 5. the

bank guarantee provided by the defendants to the plaintiffs for the release of the

defendants' vessel Ghadeer (the vessel) be returned forthwith to the defendants
and or to

their solicitors.

6 After hearing the submissions of both counsel, I dismissed the
application with costs

to the plaintiffs and certified that I did not require further arguments. The
defendants

have appealed against my decision.

7 The background

8 According to the statement of claim, the plaintiffs are a Singapore company which deals in the buying and selling of vessels for demolition. They alleged that the defendants are in breach of an agreement dated 10 September 1993 whereby the defendants agreed to sell the vessel to the plaintiffs for the sum of US\$806,620. It was alleged that the sale and purchase was concluded in an exchange of telexes on 9 and 10 September 1993 between the parties' brokers in London namely Cleaves Shipbroking Ltd (Cleaves) representing the plaintiffs and Pahlsson Shipping Limited (Phalsson) representing the defendants.

9 Cleaves had faxed to the plaintiffs as well as to Pahlsson on 10 September 1993 a draft memorandum of agreement (MOA) in the Norwegian Shipbrokers' Association Saleform 1987. On

13 September 1993 Phalsson informed Cleaves that the crew of the vessel

refused to sail

from Butterworth, Penang to the port of delivery under the MOA namely Alang,
India, and

inquired whether the plaintiffs could take delivery at Butterworth; the
defendants also

requested for 48 hours to revert on the draft MOA. Cleaves verbally informed
Pahlsson on

14 September 1993 that the plaintiffs required delivery at Alang but would
consider taking

delivery at Butterworth against a reduction in the contract price from US\$168
per long ton

to US\$115 per long ton. Neither Pahlsson nor the defendants reverted to Cleaves
on their

telex dated 13 September 1993. Instead on 16 September 1993 Phalsson
informed Cleaves that

the vessel had been sold to another party that day at US\$700,000 with delivery
at

Butterworth.

10 Concurrent with the negotiations with the defendants the plaintiffs were negotiating

separately to sell the vessel to a sub-buyer in India at a price which would have yielded

a profit of US\$75,435 to the plaintiffs. Due to the defendants' breach the plaintiffs were

in turn unable to deliver the vessel to their own sub--buyer and were obliged to

compensate the party in Bombay the sum of US\$50,000. They claimed against the defendants

the sum of US\$125,435 representing loss of profits etc, alternatively damages.

11 After leaving Penang, the vessel came into Singapore on or about 19 September 1993. The

plaintiffs applied for and obtained the Mareva injunction on 23 September 1993 to detain

the vessel in Singapore on the ground that it was the only asset of the defendants, a

Maltese company, within jurisdiction. As the vessel had been sold for scrap it was also

unlikely that the vessel would call at Singapore again once it left.

12 The defendants applied and obtained an order of court on 23 September
1993 to furnish

security by way of a banker's guarantee in the amount of US\$185,469 for the
vessel to be

released to enable her to leave Singapore.

13 In support of the application, the defendants' director Ali Armoush filed
an affidavit

wherein he asserted that no contract had been concluded with the plaintiffs for
the sale

of the vessel. Armoush said he was in charge of negotiations on the sale on the

defendants' behalf and instructed Pahlsson accordingly. To support his
contention, Armoush

referred to the exchange of telexes exhibited in the affidavit of the plaintiffs'
director

Rakesh Tulshyan filed on 23 September 1993. In Cleaves' telexed offer to
Pahlsson dated 9

September 1993, the following material terms were stated:

14 1. Price -- US\$154 per long ton lightweight;

15 2. Laycan/cancelling date -- the vessel to be delivered under its own
power at the

anchorage at Alang at a date in defendants' option during the period 15/30
September 1993

with a cancelling date (in plaintiffs' option) of 30 September 1993;

16 12. Subject mutual agreement terms contract with arbitration London
and English law to

govern MOA.

17 Pahlsson counter-offered to Cleaves on the same day the following
terms:

18 1. Price -- US\$160 per long ton:

19 2. Vsl to be delivered the period 30 Sep to 10 Oct 1993 with
cancelling date (in

buyer's option) of 15 Oct 1993.

20 Cleaves responded by telex also on 9 September 1993 as follows:

21 Many thanks for counter. Buyers principal already retired for the evening, however we

are authorised to repeat last offer except

22 1. Price --US\$155 per longton lightweight less three centum total commission here.

23 followed by another telex from Cleaves to Pahlsson which stated:

24 Have managed to arouse Singapore from their slumbers. Subreply here within 1630 BST

today

25 1. Price -- your discretion upto maximum US\$156 per longton lightweight less three

centum total commission here;

26 2. Delivery dates 28 Sept/15 Oct with 15/10/93 cancelling; 6. 5,170 longtons LWT

agreed.

27 Pahlsson responded to the above telex as follows:

28 Can confirm the deal US\$156. Laycan 28.9-15.10 in seller's choice with 15.10.93

cancelling. Cancelling in buyer's choice. Sellars to endeavor to get the ship to place of

delivery as soon as practically possible. You can not sell any ship for demolition to

India without a port worthy certificate. All sellars should appoint and contact an experienced agent at place of deli. Please contact such agent now order clarify matters

from your side. Probably most experienced are Ericson Richards.

29 Pahlsson sent another telex to Cleaves on 10 September as follows:

30 Confirm deal as per exchange fixed on main terms sub detls.

31 According to Armoush, it was clear from Pahlsson's telex of 10 September 1993 that the

agreement was 'subject to details'. As far as the defendants were concerned a fully

concluded agreement would only be reached once all the other details had been subsequently

agreed. Therefore the plaintiffs do not have a cause of action against the

defendants let

alone any justification to obtain a Mareva injunction. The plaintiffs were well aware

there was no concluded contract as their own brokers' telex of 9 September 1993 stated

that the offer would be 'subject mutual agreement terms contract with Arbitration London

and English law to govern the MOA' and they continued to make fresh proposals and or

changes to the draft MOA.

32 Armoush pointed out a fallacy in the telex of the plaintiffs' solicitors dated 16

September 1993 where it was stated

33 Please note that unless the vessel is delivered to our clients in accordance with the

terms of the memorandum of agreement dated 10 September 1993 which has been duly accepted

by our clients we shall take all necessary steps to prevent her disposal to any

other

parties.

34 As only a draft MOA had been sent to the parties then and the plaintiffs
were still

suggesting amendments to the draft the defendants could not have delivered the
vessel 'in

accordance with the terms of the MOA'.

35 A director of Cleaves Robert Miller who negotiated with Pahlsson's
director Magnus

Pahlsson on the sale of the vessel affirmed an affidavit to rebut Armoush's
contentions.

Miller deposed inter alia to the following:

36 a. he had been in the ship sale business since 1955. The majority of such
sales are

concluded by exchange of telexes or faxes through brokers, sometimes sales are
concluded

verbally over the telephone with the parties formalising the agreement in the
form of a

MOA already reached between the parties;

37 b. in this case upon receipt of Pahlsson's telex dated 10 September 1993
confirming the

deal he immediately sent a telex to Pahlsson recapitulating the full terms agreed
and

concluded asking for the full name and address of the seller, their bankers, the
gross and

net tonnages of the vessel as well as the details of any hired or equipment
excluded from

the sale;

38 c. at that point in time the defendants had agreed they would sell the
vessel to the

plaintiffs for demolition purposes at a price of US\$156 per longton lightweight
less three

centum total commission;

39 d. this was followed by his sending the draft MOA to Pahlsson on 10
September 1993. On

13 September 1993 he received a telephone call from Magnus Pahlsson requesting 48 hours in

which to revert on the draft MOA as the defendants were having problems with their crew in

that the crew were refusing to sail to Alang. The request for more time was confirmed in

Pahlsson's telex to Cleaves of the same date. He was given no indication that the deal to

sell the vessel to the plaintiffs was cancelled;

40 e. Cleaves then sent a telex to Pahlsson on 14 September 1993 as follows: Buyers happy

to maintain the sale on delivered basis, however, should sellers decide the vsl is not fit

to be steamed to delivery port then, subject to locating a suitable tug, buyers indicate a

price of US\$115 per lton LWT basis delivery as is Butterworth. Instead of reverting on the

draft MOA within the agreed 48 hours, Pahlsson on 16 September 1993 telexed Cleaves to say

that the vessel had been sold to a third party on 10 September 1993.. In the telex

Pahlsson stated '...when the captain was ordered to steam towards WC India,
after we

agreed sale terms, he refused to do so.'

41 f. Pahlsson conducted themselves in a manner consistent with the
defendants having sold

the vessel to the plaintiffs which sale in his view was concluded on 10
September 1993.

This was confirmed in Pahlsson's subsequent telex also of 16 September 1993
to Cleaves

where it was stated The only reason why sellars could not continue with the deal
with your

buyers is that it was confirmed to them that the ship could not perform the
voyage at any

speed. This was not known to slrs until the ship was ordered to proceed towards
the

intended place of delivery. Indeed the telex showed that the defendants
themselves

believed that an agreement had been concluded with the plaintiffs. It is not unusual for

parties after concluding an agreement to leave details to be worked out in a MOA.

42 In response to Miller's affidavit, the defendants filed another affidavit by Armoush.

He contended that the plaintiffs had obtained the injunction without disclosing to the

court the existence of the 'subject mutual terms contract' and 'subject to details'

clauses. Counsel for the defendants argued that on the principles enunciated in Bank

Mellot v Nikpour < 1985 > FSR 87 and *Brink's - Mat Ltd v Elcombe* < 1988 > 3

AER 188 and adopted by Singapore courts in *Png Siaw Luan v Wong Tui San* < 1990 > 3

MLJ 340, the plaintiffs had abused the process of the court and the injunction ought to be

discharged.

43 Further if indeed there was a concluded contract, why was there a need
for amendments

to be made to the draft MOA as proposed by the plaintiffs? It was incorrect to
say the

defendants had sold the vessel on 10 September 1993 to another party, the telex
from

Pahlsson to Cleaves informing of the sale was dated 16 September 1993,
meaning the sale

was made that day itself. The defendants dissociated themselves from
Pahlsson's telexes

(2) to Cleaves dated 16 September 1993 which contents can only be attributed
to Pahlsson.

He was surprised that an experienced broker like Miller could say that the
plaintiffs'

offer to purchase the vessel at US\$115 per longton on an 'as is where is basis'
subject to

the plaintiffs finding a suitable tug was only a suggestion -- it cannot be other
than a

new offer. Therefore, counsel for the defendants contended, the plaintiffs do not

have a

case at all and their action should be dismissed or struck out (see *Star Steamship Society*

v Beogradska Plovidba (The Junior K) < 1988 > 2 LLR 583 and *CPC Gallia*
<1994>

1 LLR 68.

44 Miller filed a reply to Armoush's second affidavit. He said the
amendments proposed to

the draft MOA referred to operational matters pertaining to delivery of the
vessel and did

not detract from the agreement already reached between the parties -- cl 7
referred to the

navigational equipment on board the vessel which should be included in the sale
if it

belonged to the defendants. In any case the price of the vessel was based on the
vessel's

nett long ton lightship displacement and the presence or absence of radio
equipment would

not make a difference to the price. Clause 18 referred to the plaintiffs' requirement to

test the engines at the port of delivery prior to beaching the vessel, after the vessel

had sailed to Alang from Butterworth; it was not a pre-condition to the sale of the

vessel.

45 In reply to his opponent's submission on the point of non- disclosure, counsel for the

plaintiffs said that when he applied for and obtained the exparte injunction he had drawn

the judge's attention to the 'subject to' clauses and to the draft MOA. As for the other

points raised by counsel, he said:

46 1. the issue is whether on 10 September 1993 the defendants had agreed to sell the

vessel to the plaintiffs. It is clear from the exchange of telexes that there was a

concluded agreement for the sale of the vessel and the plaintiffs ought not to be

shut out

from seeking the appropriate relief from court;

47 2. a signed formal MOA is not necessary -- the draft MOA only goes
further in providing

for the documentation required for the sale it being a standard requirement in
any ship

sale;

48 3. it is not correct for the court to apply the meaning to the phrase 'subject
details'

as decided in *The Junior K* and *The Nissos Samos* < 1985 > 1 LLR 378 as the
meaning

must be ascertained against the contextual scene (per Steyn J in *The Junior K*).
In our

case the meaning as decided in the two cases is displaced by the fact that
agreement had

already been reached between the parties;

49 4. the court must make a distinction between essential and non-essential
terms (see

Wirana Pte Ltd v Tourist International Investment Company Limited [1994] SGHC 227

Trietel on The Law of Contract 8 ed (1991) and Pagnan SpA v Feed Products Ltd < 1987

> 2 LLR 601). In this case the following essential terms had been agreed:

50 (i) subject matter -- the vessel;

51 (ii) parties to the contract;

52 (iii) purchase price;

53 (iv) place of delivery;

54 (v) mode of payment;

55 (vi) broker's commission;

56 (vii) lay/can.

57 There was nothing further and essential to the formation of a contract.
The matters

raised by Armoush regarding the draft MOA were not conditions precedent to the formation

of any contract. Even if there are matters not expressly agreed upon, so long as the

uncertainty can be resolved by the courts with reference to the concepts of
'reasonableness' 'implied terms' and 'custom' courts will strive to uphold
bargains;

58 5. apart from belatedly seeking to distance themselves from their broker
the defendants

did not address the references made by Pahlsson to a 'sale' in the correspondence
with the

plaintiff's broker;

59 6. the application to strike out is ill-founded as there are issues of facts
and law

which can only be determined after full discovery. The powers conferred by O
18 r 19 'will

only be exercised where the case is clear beyond doubt' and 'it is not permissible
to try

the action on affidavits when the facts and issues are in dispute' (commentary
on 18/19/4

in The Supreme Court Practice 1993).

60 The decision

61 I dismissed the application as there was no doubt that the plaintiffs had more than a

good arguable case as to warrant the granting of a Mareva injunction and the continuance

of such an injunction once granted. On the affidavit evidence, whilst it cannot be said

that the plaintiffs had a strong prima facie case or one that would entitle them to

summary judgment, the fact remained that there was a fair chance that they may succeed in

their claim.

62 Whilst it is true that the phrase 'subject to details' has been interpreted in cases

such as *The Junior K* and *CPC Gallia* to mean there was no binding contract, it is the

factual matrix in which the phrase is used that ultimately determines whether a contract

has or has not been concluded. Counsel for the plaintiffs had also cited a different line

of authorities (*Pagnan v Feed Products* < 1987 > 2 LLR 601 and *The Blankenstein*

<1985> 1 LLR 93) which supported his argument that parties were in law capable of

making an interim agreement and later sort out the details against the background of a

concluded contract. The mere fact that the parties intended that there should be a formal

contract in the agreed standard form (MOA) signed by the parties did not mean that a

binding contract of sale had not come into effect on 10 September 1993. In the present

case, apart from the defendants' bald statement by their director Armoush that they

dissociated themselves from their brokers' telexes (2) dated 16 September 1993 there was

no other evidence to contradict Pahlsson's said telexes which can only be understood to

mean that the defendants instructed the master of the vessel to steam to Alang
(the port

of delivery) in compliance with the agreement reached with the plaintiffs; the
defendants

changed their mind on the contract after they found out that the vessel could not
perform

the voyage.

63 It was not disputed, indeed it was admitted by the defendants that
Pahlsson were their

agents for purposes of negotiations with the plaintiffs through Cleaves. Whilst
Miller as

the director in Cleaves who dealt with Pahlsson had sworn two affidavits
deposing to what

transpired in his negotiations with the latter, there were no corresponding
affidavits

from Magnus Pahlsson to deny or rebut what Miller had alleged took place
between the two

brokers.

64 There were clear disputes of facts and law involved and it cannot be said
that the

plaintiffs' action was so clearly unsustainable as to warrant that it should be
struck out

under O 18 r 19 of the RSC as frivolous and vexatious and an abuse of the
process of the

court. I agreed with counsel for the plaintiffs that this was not an appropriate
case for

the court to exercise its discretion under that rule which should only be done
sparingly

in line with such authorities as *Ko Teck Siang v Low Fong Mei* < 1992 > 1 SLR
454.

Lai Siu Chiu J

Srivathsan (Haridass Ho & Partners) for the plaintiffs
Danny Chua (Khattar Wong & Partners) for the defendants
