

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 349

Suit 920/1998, SIC 4971/98

Between

Glencore International A G

... Plaintiff

And

Petromar Energy Resources
Pte Ltd

... Defendant

GROUND OF DECISION

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Glencore International A G v Petromar Energy Resources Pte Ltd

[1998] SGHC 349

Suit 920/1998, SIC 4971/98

S Rajendran J

20 October 1998

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Judgment :

2 **(a) (i) Good arguable case.**

3 3. The Defendants submitted at length that the Plaintiffs did not have a
good

arguable case. Amongst the matters they raised was that in order to bring a claim
in

conversion the Plaintiffs must show that they had title to the goods at the time
of

alleged conversion. The Plaintiffs in their response submitted on the authority
of *Dynacast*

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(S) Pte Ltd v Lim Meng Siang & Ors [1989] SLR 840 that since the Anton Piller

order had been executed (apart from some disputed documents which will now
have to be

disclosed in the ordinary course of discovery) there was no purpose in obtaining
the

discharge of the Anton Piller order at this stage and that the merits of the

Plaintiffs' case could be better dealt with at trial. Miss Belinda Ang, Counsel
for

the Defendants, objected to such a course of action and pointed out that this
court would,

in any event, have to deal with the disputed documents seized in the course of
the

execution of the Anton Piller order and would have to deal with the lifting of
the Mareva

injunction. She, however, indicated that in order to shorten the proceedings she
was

prepared to forego her submission that the Plaintiffs did not have a good
arguable case

with the rider that the court would nevertheless have to consider the merits of the

Plaintiffs' case when considering the other matters raised, in particular the question of risk of destruction of documents/dissipation of assets.

4 4. I would note here that the thrust of the Plaintiffs' submission was that a company called Metro International Trading Inc ("Metro") which operated a storage facility at Fujairah, where the Plaintiffs stored their oil, had, by the issue of

false documents, diverted a large quantity of oil belonging to the Plaintiffs that was to

be stored at Fujairah to the Defendants. In support of this allegation, the Plaintiffs,

besides producing the alleged false documentation, also produced an agreement dated

7 February 1998 ("Agreement") reached between one Stamatis John Kilakos,

John Kilakos and a group of companies called the Kilakos group (listed in the schedule to

the Agreement) on the one hand and the Plaintiffs on the other wherein the
Kilakos group

acknowledged that it was unable to account for approximately 1.4 million
metric tonnes of

oil valued at US\$175 million stored by the Plaintiffs at the Fujairah facility. By
this

Agreement the Kilakos group agreed that it would jointly and severally be liable
to the

Plaintiffs for the unaccounted amount and agreed to co-operate with the
Plaintiffs in

ascertaining the exact quantity involved for this purpose give the Plaintiffs full
access

to the books of the Kilakos group.

5 5. Metro was one of the companies that was listed in the schedule as
part of the

Kilakos group and so was the Defendant Company. Apart from signing the
Agreement as

guarantors, Stamatis John Kilakos and John Kilakos signed the Agreement on

behalf of six

(including Metro) of the companies named in the schedule as Kilakos group companies. Metro

was described as 100% owned, while the Defendant Company was described as 65% owned, by

the Kilakos group. There was no signature on behalf of the Defendant Company on the

Agreement. In the Agreement the Kilakos group undertook to promptly transfer the net asset

value of the Defendant Company to a Kilakos group company. Evidence was led by the

Plaintiffs to the effect that it was because the Defendants were not wholly owned by the

Kilakos group that this undertaking was asked for and agreed to. The Plaintiffs submitted

that it was because the Defendants were substantially controlled by the Kilakos group that

Stamatis John Kilakos and John Kilakos were able to give this undertaking.

[illegible]

Plaintiffs' oil from the facility at Fujairah. Evidence was led that in correspondence, in brochures and in the oil trade, the Defendants and Metro were treated

as being part of the same group. Evidence was also led that Michael Tziolas, the managing

director of the Defendant Company, also simultaneously attended to matters on behalf of

Metro as an official of Metro. The documentation seized from the Defendants also indicated

that Metro was the major supplier of the Defendants. The Plaintiffs led evidence (which

included documents seized from the Defendants under the Anton Piller order)
that six

shipments of oil, belonging to the Plaintiffs, that had been diverted from Fujairah, _____ were

shipped by Metro to the Defendants.

7 7. The Defendants, while admitting a business relationship with Metro, denied the

suggestion that they were part of the Kilakos group and they denied any complicity in any

wrong-doing that Metro may have been involved in. Evidence was adduced by the Defendants

that whilst John Kilakos had previously had an interest in the Defendant Company, he had,

in late 1997, divested himself of that interest.

8 8. Whilst it may be that the link between Metro and the Defendants was a purely

commercial one and that, with respect to these shipments, the Defendants were dealing with

Metro on an arm's length basis and in entire ignorance of any wrong-doing by Metro,

it is not the court's function, at this stage, to make a final determination of that

issue: that is a matter for the court conducting the trial to determine. I was,

however,

satisfied, on the evidence before me, including the evidence adduced by the Defendants,

that there was a strong prima facie case that the relationship between the Defendants and

Metro went beyond a close commercial relationship and was so close that a strong prima

facie case existed that the Defendants were knowingly involved in the alleged wrongful

diversion by Metro to the Defendants of the Plaintiffs' oil intended to be stored at

the Fujairah facility.

9 9. The Defendants also raised another matter - that there was no basis to the

Plaintiffs' claim against the Defendants in conversion because at the relevant time

the title to the goods was not with the Plaintiffs. The Defendants denied this. Whether

the Defendants are correct in their submission is a matter for the trial judge to determine. My role at this stage was to assess whether the Plaintiffs had a good arguable

case. I was satisfied that they had.

10 **(a) (ii) Risk of destruction of documents/dissipation of assets.**

11 10. Given the very close relationship between Metro and the Defendants, and given

the fact that large quantities of the disputed oil were shipped to the Defendants, it was,

in my view, reasonable for the Plaintiffs to form the view that incriminating documents

would be in the possession of the Defendants. The Defendants submitted that it would not

be in their interests to destroy documentation since, if they did so, they would be

hard-put to defend any action brought against them in respect of these cargoes by the

Plaintiffs or by the Receivers of Metro. And, it was pointed out, that the Plaintiffs did

not apply for the court orders until June 1998, some four months after the alleged

misappropriation by Metro had come to the Plaintiffs' notice. In the circumstances of

this case, although there was no direct evidence that the Defendants would destroy any

documents or remove assets out of jurisdiction, I formed the view that the

Plaintiffs' fears that these events would occur was a reasonable one. In view of the

complexity of this case, I did not consider the delay on the part of the Plaintiffs in

applying for the orders to be such that the orders should not have been issued.

12 **(b) Material non-disclosure.**

13 11. Miss Belinda Ang brought up a litany of matters which she claimed were

1998 Agreement.

Plaintiffs in which Metro had claimed that the Plaintiffs had taken advantage of the

inexperience of the officers of Metro and had obtained their signatures on the Agreement

by deception and threats and that the Agreement was consequently totally illegal and

contrary to moral ethics. Miss Belinda Ang submitted that this failure by the Plaintiffs

to inform the court of a fact known to the Plaintiffs, namely, that Metro had denied the

validity of the Agreement, was a material non-disclosure and was by itself sufficient to

set aside the ex parte injunctions.

16 13. The Plaintiffs did not dispute that a writ had been filed against them in

Greece by the Defendants. They pointed out, however, that the writ was not served on them.

What is more, the Plaintiffs in February 1998 had themselves commenced proceedings in

England against Metro for the sums due under the Agreement. This writ was served on Metro.

Metro had attended appearance and had, through leading Counsel, even attended a hearing in

court on 3 March 1998 when an application by the Plaintiffs for the appointment of a

Receiver against Metro was heard. The Plaintiffs adduced evidence to show that at no stage

in the English proceedings had Metro given any indication of any intention to

challenge

the validity of the Agreement. This was not disputed by the Defendants.

17 14. In the light of the fact that no challenge was made on the validity of the

Agreement in proceedings that were being actively pursued in England, it seems to me that

failure on the part of the Defendants to disclose the contents of the writ in Greece - a

writ which had not even been served on the Plaintiffs - was understandable and would not

constitute a material non-disclosure.

18 **(b) (ii) The Plaintiffs use of an outdated ROC search to support their argument**

that Metro and the Defendants were one and the same.

19 15. In their affidavit in support of the ex parte application dated 12 June 1998,

the Plaintiffs had enclosed an ROC search dated 9 February 1998 in which

Ionnis

Kolakos

(John Kilakos) was stated to be a director of the Defendants. The Defendants submitted

that had a more current ROC search been disclosed to the court, the true state of affairs,

ie that John Kilakos was not on the Board of the Defendants, would have been disclosed.

The Defendants submitted that by disclosing an out of date search the Defendants had

deceived the court.

20 16. Miss Vivian Ang, Counsel for the Plaintiffs, explained how this

"deception" came about. In an affidavit filed by her she stated:

21 17. I accepted the submissions of Miss Vivian Ang that the non-disclosure in this

case was not wilful. I also accepted her submission that the contents of the latest ROC

search would not have made any material difference to the issue of the ex parte

orders and
that, if at all, it would have strengthened the need for the orders in that it went
towards showing that the Defendants were attempting to distance themselves
from Metro and
the Kilakos group.

22 (b) (iii) Failure

to disclose that John Kilakos had no shares in Metro.

23 18. The Defendants submitted that the Plaintiffs were aware that John
Kilakos had

no shares in Metro and had failed to disclose this fact. It was alleged that it was

because John Kilakos had no shares in Metro that the Plaintiffs had, in a
document dated

10 February 1998, agreed to drop John Kilakos as a guarantor in the Agreement.

It was not

clear from the affidavit of Michael Tziolas on what basis he made the assertion
that the

Plaintiffs knew that John Kilakos had no shares in Metro but Miss Belinda Ang drew the

court's attention to the Greek writ where there was a reference to John Kilakos not

having any involvement in the stock or administration of Metro in the context of the

Plaintiffs agreeing on 10 February 1998 to releasing John Kilakos as a guarantor of

the Agreement.

24 19. The Plaintiffs' position, however, was that it was precisely because

John Kilakos was involved in the ownership and management of companies in the Kilakos

group that he signed the Agreement as a guarantor. And, it was submitted, the fact that

John Kilakos signed on behalf of some of the companies in the Kilakos group indicated that

he was involved in their administration. The Plaintiffs asserted that they agreed to the

removal of John Kilakos' name as a guarantor not because John Kilakos had no interest

in the Kilakos group but because his father, Stamatis John Kilakos, had pleaded with the

Plaintiffs to give his son, who was relatively young, a chance to re-build his career.

25 20. It seemed to me that the factual basis on which the Defendants mounted this

submission of failure to disclose was very thin. I was not satisfied that it

constituted a material non-disclosure.

26 **(b) (iv) Failure to disclose denials by the Defendants that it is part of Metro.**

27 21. The Defendants had from February 1998 made public statements that they were

not in the Metro group. It was submitted that failure by the Plaintiffs to disclose this

fact constituted a material non-disclosure. I could not accept that submission. I agreed

with Miss Vivian Ang that these were self-serving statements made after the
loss of the

oil at Fujairah had been discovered and therefore had little evidentiary value.

I also agreed with the Plaintiffs' submission that these disclaimers could also

be viewed as attempts by the Defendants to distance themselves from Metro in
order to try

and avoid liability for the oil supplied to it by Metro.

28 22. Besides the above instances of alleged non-disclosure, Miss Belinda
Ang drew

the court's attention to a number of other instances where, she submitted, the

Plaintiffs did not make any, or any sufficient, disclosure of material information.

I will

not set them out. Having heard both parties on the matters raised, I am satisfied
that

there was no merit in these submissions. In my view, the alleged non-disclosures
either by

themselves or in combination would not have materially affected the decision

of the
learned judicial commissioner who granted the ex parte orders.

29 (c) **Breach of undertaking by the Plaintiffs' solicitors in the
execution of
the orders.**

30 23. In response to the submission by Miss Belinda Ang that the
Plaintiffs'

solicitors had removed documents outside the purview of the Anton Piller order,
Miss

Vivian Ang took me through the Supervising Solicitors' Report and referred me
to some

of the documents in question. It was apparent from his records that the
Supervising

Solicitor was meticulous in ensuring that only documents covered by the Anton
Piller order

were removed. Towards that end the Supervising Solicitor had established a
protocol where

no document would be removed without the express approval of the Defendants’

authorised representative. Where parties could not agree whether the removal of a document

was authorised, the document was retained by the Supervising Solicitor as a disputed

document.

31 24. Having gone through the records kept, I am satisfied that all documents

removed by the Plaintiffs were removed only with the consent of the Defendants’

representative. There was, in my view, no merit in the Defendants’ complaint that

solicitors for the Plaintiffs had acted outside their authority and in breach of

undertaking.

32 **(d) Abuse of process.**

33 25. The Defendants complained that the Plaintiffs, in taking out the ex parte

orders, were acting mala fide. It was alleged that the ex parte orders were sought because

otherwise the Plaintiffs would have had insufficient evidence to support their claim

against the Defendants.

34 26. The Plaintiffs' response was that the Plaintiffs, when they took out the

applications, already knew and had stated what their case was. Their purpose in taking out

the orders was to preserve the evidence and the assets. I accepted the Plaintiffs'

submissions. This did not appear to me to be a case of a plaintiff abusing the process of

court by embarking on a "fishing" exercise.

35 **Hearsay.**

36 27. Miss Vivian Ang, after the Defendants had made their submissions,
objected to

a considerable part of the affidavit of Michael Tziolas on the grounds that it
contained

hearsay and was therefore inadmissible in evidence unless the source of the
hearsay was

specifically identified. She pointed out that the source of the hearsay was in all

probability Metro and the identification of the source would go towards
establishing that

there was an extremely close link between the Defendants and the Kilakos
group.

37 28. The affidavit of Michael Tziolas did contain a considerable amount
of

hearsay. Hearsay is admissible in affidavits filed in interlocutory proceedings
provided

the source of the hearsay is disclosed. In the drafting of Michael Tziolas'

affidavit, insufficient attention appears to have been paid to the need to
specifically

identify the source of hearsay evidence. But although the source was not identified with

the precision that one would expect, Miss Belinda Ang was able to demonstrate that the

source of the information was discernible from the affidavit and from the documents

exhibited.

38 29. Where hearsay evidence is being adverted to, it is unsatisfactory to be

indirect or vague about the source of the hearsay. The other parties to the suit and the

court should not be left to infer the source from the exhibits annexed to the affidavit.

In this particular case, however, I was, in the light of Miss Belinda Ang's

explanations, prepared to give the benefit of the doubt to the Defendants. I therefore

overruled the objection.

40 30. In *Computerland Corp v Yew Seng Computers Pte Ltd* [1991] 3 MLJ
201,

The headnote to the case states:

41 There was, in my view, a real risk of justice being thwarted in this
case. Balancing the Plaintiffs' rights in the matter against the violation of the

privacy of the Defendants, I formed the view that the Anton Piller order and the Mareva

injunction in this case had been properly applied for and issued. Accordingly, I dismiss

with costs this application to set aside the two orders.

42 S Rajendran

43 Judge

S Rajendran J

Belinda Ang SC with Hong Heng Leong (Ang & Pnrs) for the
appellants/defendants
Vivian Ang with Corina Song (Allen & Gledhill) for the
respondents/plaintiffs
