Tribune Investment Trust Inc v Soosan Trading Co Ltd
[2000] SGCA 33

Case Number : CA 91/1999

Decision Date : 07 July 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Jude P Benny and Ung Tze Yang (Joseph Tan Jude Benny) for the appellants; Belinda Ang Fong SC and Hong Heng Leong (Ang & Partners) for the respondents

Parties : Tribune Investment Trust Inc — Soosan Trading Co Ltd

Civil Procedure – Mareva injunctions – Inquiry into damages – Whether injunction wrongly granted – Whether damage caused to party against whom injunction granted

Commercial Transactions – Sale of goods – Breach – Proof of existence of contract – Whether formal written contract exist – Intention to contract inferred from correspondence and contemporaneous conduct of parties – Objective determination of intention to contract – Fundamental mistake as to contracting party

Evidence – Witnesses – Whether adverse inference drawn for failure to call witness – s 116(g) Evidence Act (Cap 97, 1997 Rev Ed)

Tort – Inducement of breach of contract – Elements of tort – Existence of contract -Knowledge of existence of contract – Intention to interfere

Tort – Conspiracy – to injure by lawful means – Elements of tort – Predominant purpose by conspirators to cause injury to plaintiff

(delivering the grounds of decision of the court): This was an appeal against the decision of GP Selvam J dismissing the appellants` claims against the respondents in both tort and contract. The proceedings in the court below disclosed numerous disputes of fact between the parties. In similar vein, a large part of this appeal was again centred on such disputes and what the appellants in effect sought to do was to urge this court to overturn the factual findings of the learned trial judge. At the end of the hearing, we found that there was absolutely no basis for such a course and dismissed the appeal accordingly. We now give our reasons.

Background facts

The appellants were a company called Tribune Investment Trust Inc. They were one of many shell companies in the Greek corporation, George Moundreas & Company SA (`GMCO`), a leading shipbrokering firm in Greece. GMCO was effectively controlled by one George Moundreas (`GM`).

The respondents were Soosan Trading Co Ltd, a company incorporated in Korea. They are part of the Soosan Group of companies which includes Soosan Heavy Metal Industries (`SHI`), and Soosan Shipbuilding (`SS`). SS is a Chinese subsidiary of SHI which was established for the purpose of facilitating SHI`s entry into the ship repair business in China.

Around December 1995, SS decided to purchase a floating dock for its ship repair business in China. It did not however have the necessary technical or other expertise to source for the dock by itself. The respondents on the other hand, had a licence (which was required under Korean law) to engage in negotiations and to purchase equipment from foreigners. As such, it was decided that the respondents would look for and purchase a suitable dock and thereafter on-sell it to SS.

The respondents approached various ship brokers to assist them in searching for an appropriate dock. One of those approached was a certain W J Park of Dasan Corporation, a Korean shipbrokering company. Another shipbrokering company which they contacted was FEMAS.

Sometime in September 1996, the respondents became aware through one or more of its brokers, including Dasan, of a certain floating dock PD 177 owned by Dalzavod, a Russian company, which appeared to meet their requirements. Thereafter, numerous correspondence by fax and by telex, were exchanged between WJ Park and GM concerning the possible sale of PD 177. According to GM, Dalzavod had approached GMCO to buy or to find a buyer for PD 177 in August 1996. The appellants` intention, he claimed, was to purchase PD 177 from Dalzavod directly and thereafter to resell it to a sub-buyer for a profit. Dasan`s name was suggested to GM as a potential buyer of the dock whereupon GM contacted W J Park and allegedly told the latter of the intended arrangement.

On 20 September, an in-principle agreement was signed between Dalzavod and the appellants for the sale and purchase of PD 177 at USD$6.5m. GM signed on behalf of the appellants. This was a bare agreement which contemplated the drawing-up of a more formal and detailed document at a later stage. This latter document was eventually drawn up in the form of a Memorandum of Agreement (`the first MOA`), which was signed by Dalzavod and the appellants on 30 September 1996. Clause 4 of the first MOA stipulated that the contract would become null and void if notice of acceptance of the dock`s classification records and the dock was not received by Dalzavod within ten working days from the date of afloat inspection of the dock by the appellants. No afloat inspection of the dock or its records was ever conducted after the date of the first MOA. Nevertheless, notice of acceptance, albeit an apparently qualified one, was given by the appellants on 9 October 1996.

None of the events described in the preceding paragraph however were ever conveyed to Dasan or to the respondents in writing, whether via fax or telex. The following are pertinent verbatim excerpts of part of the series of written correspondence exchanged between GM (on behalf of GMCO) and W J Park (on behalf of Dasan) concerning the sale and purchase of PD 177 set out in chronological order:

> *19 September 1996 - Telex from Dasan to GMCO*
>
> *But they (Soosan) want to know clearly this dock can be sold without problem with Singapolian hire, which he heard this dock is now engaged in hire and may be extended for another two years.*
>
> *If it is true it will be difficult for `Soosan` to take this dock even though contract signed between Russian owner/broker and `Soosan`.*
>
> *23 September 1996 - Fax from GMCO to Dasan*
>
> *... We are now in a position to fix the sale with your good clients Messrs Soosan at a price of USD 10/12 mill ... the Russians instructing the master of the dock to assist our/Soosan`s inspectors with their task.*
>
> *27 September 1996 - Telex from GMCO to Dasan*
>
> *As regards negotiation and price, please note that USD 10 mill should go eventually to the Russian side (in a rather complicated way). On top of USD 10 mill we must add our commission USD 500,000, your commission and address*

commission to Soosan.

1 October 1996 - Telex from Dasan to GMCO

... Soosan want you to cut down the price from Russian owner.

7 October 1996 - Telex from Dasan to GMCO

I sincerely request you to do your best to reduce the price from Russian owner

8 October 1996 - Fax from GMCO to Dasan

... After extremely hard efforts and strong persuasion we have obtained sellers` reconfirmation. Therefore the deal is now final and definite. We are now preparing sales contract, ie memorandum of agreement nsf 87...

9 October 1996 - Telex from Dasan to GMCO

Congratulation for getting agreement from Russian seller with USD 9.4 mil as contract amount... date of MOA will be discussed when I meet the president of Soosan ... I will reply further development to you after meeting with the president of Soosan ...

9 October 1996 - Telex from Dasan to GMCO

Soosan want to sign the contract with russian owner directly. If above not possible, Soosan can sign with GMCO in Singapore or Vladivostok together with Russian owner who also sign as witness. If above ... not possible, Soosan can sign the contract with GMCO having power of authority given by Russian owner or equivalent contract signed between GMCO and Russian owner

The respondents for their part contended that they had all along proceeded on the basis that they would only contract with the original, existing owners of the floating dock, ie Dalzavod. They were adamant about not wanting to go through agents or brokers for the sellers because of a prior bad experience with another broker called Meyersale, who had acted for another Russian seller, Severny in respect of the sale of a different dock some time back. According to the respondents, the arrangement then was for Meyersale to purchase the dock from Severny and thereafter to sub-sell it to the respondents. It turned out that the sale to Meyersale did not go through and Severny eventually sold the dock to a Chinese buyer instead. As such, the respondents lost the chance of buying that dock and also became weary of sub-sale arrangements conducted through brokers. Hence, the respondents intended at all times to contract with Dalzavod directly. To them, GM was merely a conduit or channel of communication between the respondents and/or Dasan on the one hand and Dalzavod on the other. Their intention was to contract with Dalzavod only, not GM, GMCO, and certainly not the appellants of whom they had had absolutely no knowledge and whose name was never mentioned in any of the written correspondence between Dasan and GM. In fact, the appellants` name surfaced for the very first time only when the draft copy of the intended

Memorandum of Agreement (`the second MOA`) between the appellants and the respondents was faxed by GM to Dasan on 9 October 1996, wherein the seller was described as `Tribune Investment Trust Inc.`, ie the appellants. It appeared that this was the first time in which the respondents were suddenly made aware that they might not be purchasing the dock from Dalzavod directly but that some third party, namely, the appellants, were also involved.

Subsequently, FEMAS, the other shipbroker commissioned by the respondents, arranged for Dalzavod to meet the respondents at the latter`s office in Korea. One Lawrence Goh of Lita Shipping, the then charterer of PD 177, also flew to Seoul for the meeting. The minutes of the meeting held on 16 October 1996 recorded that Dalzavod`s representative informed the respondents that their MOA with the appellants dated 30 September 1996 (ie the first MOA) had become null and void as a result of certain `non-fulfilment` by the appellants.

On 18 October 1996, it was agreed that the respondents would purchase PD 177 from Dalzavod for USD$10.8m, out of which USD$2.8m would be paid to Lita Shipping for the purpose of discharging their existing charterparty.

The appellants subsequently commenced Suit 2178/96 in the High Court against Dalzavod for breach of the first MOA, and for inducing a breach of the purported contract made between the appellants and the respondents for the sale and purchase of PD 177. The matter was fixed for hearing before Justice MPH Rubin but a trial never took place as the appellants and Dalzavod managed to reach a settlement. Consent judgment in the amount of USD$1,674,934.54 was entered in favour of the appellants.

At or around the same time, the appellants also commenced Suit 2400/96 against the respondents, advancing the following three main causes of action:

(i) in tort, for inducing a breach of the first MOA;

(ii) in tort, for conspiring with Dalzavod to injure the appellants; and

(iii) in contract, for a breach of the purported contract for the sale and purchase of PD 177 between the appellants and the respondents respectively.

GP Selvam J who heard this latter action dismissed all of the appellants` claims. It was against that decision that the appellants appealed to this court.

The claim in tort for inducing a breach of contract

Before moving on to consider the law in this area, we should mention that it appeared that the appellants had in the court below, attempted to advance an alternative claim in tort for the unlawful interference by the respondents of the first MOA. This action for `unlawful interference` is different in substance from and should not be confused with a claim for inducement of a breach of contract. The elements required to satisfy both causes of action are separate and distinct. In other words, they are two substantively different torts and should be treated as such. In this appeal, it again appeared that the appellants had conflated both the issues for inducement of a breach of contract and unlawful interference. It seemed to us that their main line of argument was in the claim for inducement although in discussing that claim, they had quite unwittingly imported a host of arguments and cases relating to the tort of unlawful interference. This, we found, was both misleading and confusing and should not have occurred. For the purposes of this judgment, we propose to deal only

with the claim for inducing a breach of contract.

The law relating to most of the economic torts is clear. To knowingly procure or induce a third party to break his contract to the damage of the other contracting party without reasonable justification or excuse forms the basis of the tort of inducing a breach of contract.

An act of inducement per se is not by itself actionable. The plaintiff must satisfy a two-fold requirement in order to found a sustainable cause of action: First, he must show that the procurer acted with the requisite knowledge of the existence of the contract (although knowledge of the precise terms is not necessary); and second, that the procurer intended to interfere with its performance. Intention in this case is to be determined objectively. It is not sufficient that the resulting breach of contract was a mere natural consequence of the defendant`s conduct. In addition, the contract in question must also be shown to be a valid one: it must not be illegal or in restraint of trade, nor must be it capable of being rescinded, although it has been held that the tort is applicable to contracts of all kinds: see ***Clerk & Lindsell on Torts*** (1995, 17th Ed), at pp 1177-1183.

The relevant mental state is thus that of intention: the defendant must intend to interfere with the plaintiff`s contractual rights, in the sense of doing so knowingly. Malice or spite in the form of a personal animus against the defendants or an illegitimate motive however is not required. It is sufficient if the defendant knows of the existence of the contract or turns a blind eye to its existence or is reckless as to the consequence of his actions in the sense of being indifferent whether or not a breach happens: see eg **Emerald Construction Co Ltd v Lowthian** [1966] 1 All ER 1013[1966] 1 WLR 691; **JT Stratford & Son v Lindley** [1965] AC 269 and **Thomson v Deakin** [1952] Ch 646. It is not necessary that the defendant should have been aiming to hurt or injure the plaintiff although some deliberate conduct on the defendant`s part is normally required to ground liability. Mere negligent invasions of contractual rights however are not actionable. The normal form of the tort involves direct persuasion being brought to bear on the contract-breaker, but it is possible to commit it where A and B enter into a contract which, to A`s knowledge, is incompatible with B`s contract with C: see eg **British Motor Trade Association v Salvadori** [1949] Ch 556[1949] 1 All ER 208.

Was there a valid contract between the appellants and Dalzavod in this case?

In order to sustain an action for inducement, the first thing that needs to be proved is thus whether or not there was even a valid contract between the appellants and Dalzavod which was capable of being breached. GP Selvam J in the court below appeared not to have made a specific finding in this respect. The learned judge`s discourse on the appellants` claim in tort is contained in but a brief, single paragraph, in which he appeared to have merely assumed, without deciding, the existence of a valid contract between Dalzavod and the appellants. Senior counsel for the respondents on the other hand disputed that finding by pointing to the minutes of the meeting in Seoul on 16 October 1996 which recorded that Dalzavod had confirmed that the first MOA was null and void. Interestingly, despite the learned trial judge`s finding in their favour in this regard, the appellants had, in their skeletal submissions before the court, raised all sorts of, pre-emptive arguments relating to the validity and/or enforceability of the first MOA. These arguments include the applicable law of the MOA, the authority of Dalzavod`s representative to enter into the MOA, the notice of acceptance requirement in clause 4 of the MOA as well as the appellants` obligation to open a letter of credit in favour of Dalzavod pursuant to the terms of the MOA. Obviously the intention here was to show that the first MOA created a valid and binding contract between Dalzavod and the appellants in which Dalzavod agreed to sell and the appellants agreed to buy PD 177 at a price of USD$6.5m. In presenting these arguments, the appellants had to a large extent relied on documents and affidavits which were filed in a completely separate action, namely Suit 2178 of 1996. It will be recalled that this action, between the appellants and Dalzavod, never proceeded to trial as the parties reached a

settlement after private negotiation through their lawyers.

It was our opinion that the appellants` arguments on the validity and enforceability of the first MOA did not merit any consideration whatsoever for the simple reason that none of them were canvassed at the trial below and were in fact only being raised for the first time on appeal. It appeared that only passing references were made to the alleged contract formed between Dalzavod and the appellants in the trial below. No mention whatsoever was made of the authority of Dalzavod`s representative to enter into the contract, or of the notice of acceptance requirement or of the obligation to open a letter of credit. From this, it appeared to us that the approach taken at the trial stage of the proceedings was to pursue primarily the claim in contract. The claim in tort on the other hand was put in purely as a fall-back or alternative cause of action, and as it turned out, never really fully-developed by the appellants in argument in the court below. As a result, we did not think it was open to them to raise these new arguments in respect of the tort claim on appeal, especially when many of these arguments necessitated findings of fact by the court, a task which an appellate court is not well-placed to carry out. We also could not ignore the fact that a large part of the appellant`s arguments in this respect relied for their basis on affidavits and other documents filed in Suit 2178/96. These affidavits and other documents were not admitted at the trial below, and any attempt by the appellants to rely on these documents now amounted to an attempt to adduce fresh evidence on appeal, a course which was not open to the appellants to adopt without first obtaining the prior leave of the court which clearly they had not done. In our view, it is trite law that evidence adduced in a separate suit, unless specifically admitted, is not automatically admissible or relevant in a suit involving different parties. Similarly, it is a general rule of evidence that save for matters of a public nature, no one should be affected by a judgment to which he was not a party or privy.

What the appellants were in effect attempting to do in this case was to urge the Court of Appeal to make findings of fact in respect of a completely different suit involving different parties. More specifically, the appellants were seeking the court`s ruling on many of the substantive issues raised in Suit 2178. In our view, this is not the function of the High Court nor that of the Court of Appeal, for the action before us concerned only the appellants and the respondents. Dalzavod was not and never was a party to this action nor was it ever called to give evidence in this action. As such, it was not open to GP Selvam J, and a fortiori, to the Court of Appeal, to comment on the substantive merits of the appellants` case against Dalzavod in Suit 2178, especially when that action never proceeded to trial because of a settlement by the parties. The appellants further attempted to use the consent judgment entered in their favour in Suit 2178 as justification of the merits of their case against Dalzavod, and consequently, as being conclusive proof of the existence of a valid contract between Dalzavod and themselves. We found this manoeuvre to be completely untenable. It will be recalled that the consent judgment in Suit 2178 was one entered into without a determination by the court of the merits of each party`s case. The matter never went to trial, and as such, no court was given the opportunity to adjudicate or rule on the substantive merits of both the appellants` claim and Dalzavod`s defence. Whatever settlement was privately negotiated between the parties and their lawyers could have no binding whatsoever on a third party like the respondents who were neither privy to that arrangement nor a party to that action. It is trite law that a judgment inter partes, though binding between them, does not and cannot affect the rights of third parties. Further, a judgment is also not evidence of any fact which was neither directly decided nor a necessary ground of the decision. As such, given that the judgment entered in Suit 2178 was a consent judgment, the appellants` postulations of the reasons why Dalzavod agreed to settle that action in the appellants` favour were pure baseless speculations which did not merit any consideration.

Having dismissed the new arguments raised by the appellants before us, we were left only with the evidence which was in fact properly adduced before the court below to determine if the appellants had proven the existence of a valid contract between themselves and Dalzavod on a balance of

probability. Looking at all the objective evidence admitted before the trial judge, we were of the view that they had not. It is important to remember that the appellants were the plaintiffs in this case. As such, the burden was on them to establish every element of their claim to the requisite standard of proof. The only evidence adduced in the court below of a valid contract between the appellants and Dalzavod was the first MOA dated 30 September 1996 and the appellants` apparent acceptance of it via a fax transmission. No evidence however was led regarding the authority of the signatories to the first MOA to bind their respective principals. Neither was any documentary evidence adduced to show if or when Dalzavod received the notice of acceptance from the appellants. In addition, no witness from Dalzavod was called to testify as to the existence of a contract between them and the appellants. On the contrary, the minutes of the 16 October 1996 meeting in Seoul seemed to indicate that so far as Dalzavod was concerned, they had taken the view that any purported contract between themselves and the appellants was null and void. A look at the purported notice of acceptance also revealed that it was not unconditional. As such, there was the question of whether the notice, even if received, constituted good or valid notice under cl 4 of the MOA. In light of the foregoing doubts, we found that the appellants had not satisfied the burden of proving the existence of a valid contract between Dalzavod and themselves which was capable of being breached.

The appellants further made the argument that counsel for the respondents failed to cross-examine GM at the trial on his evidence relating to the appellants` claim against Dalzavod. In our view, accepting this argument would mean placing too onerous a burden on the respondents as the appellants themselves did not fully develop their argument on the tort claim at the trial below. The gist of their case was grounded mainly in contract (ie breach of the contract between the appellants and the respondents). GM`s own affidavit made only cursory or incidental references to a possible claim in tort. In the premises, it is unreasonable to expect the respondents to lead evidence from the appellants` witness in order to prove the latter`s case in tort for them. The burden is at all times on the plaintiffs, in this case the appellants, to prove their cause of action on a balance of probability, a burden which we found not to have been discharged in the present case.

In the result, we found that the appellants had not proven the existence of a valid and binding contract between themselves and Dalzavod which was capable of being breached by the latter, at the respondents` instigation. On this ground alone, the claim in tort for inducement of a breach of contract could not be sustained.

Nevertheless, we propose to go on to consider what the position would be had a valid contract been found to exist between Dalzavod and the appellants. In this connection, the next question to be asked is whether or not the respondents had, at the material time, knowledge of this contract.

Did the respondents have knowledge of the contract between the appellants and Dalzavod?

In our view, questions relating to the actual state of mind of a person are essentially questions of fact. The law relating to the treatment of findings of fact by an appellate court is clear and beyond doubt. For the sake of brevity, it suffices to say that an appellate court, not having heard the evidence first-hand, and not having had the opportunity of observing the witnesses on the stand, should be slow to overturn findings of fact made by the trial judge. Such a course should only be taken in cases where the findings reached were clearly beyond the weight of the objective evidence before the court or were plainly wrong.

Turning to the facts of the present case, the trial judge found that there was no evidence whatsoever to show that the respondents were aware or had knowledge of any contract between the appellants and Dalzavod. In arriving at this view, the learned trial judge must have accepted the evidence of the respondents` witness, one Mr SK Hyun. Mr Hyun, a Team Leader in SHI at the

relevant time, had stated in his affidavit of evidence-in-chief that at the meeting between Dalzavod and the respondents in Seoul on 16 October 1996, the respondents` representatives, including himself, had specifically questioned Dalzavod`s representatives as to the apparent contract between Dalzavod and the appellants concerning the sale of PD 177. The answers given by Dalzavod at this meeting were threefold: namely, that Dalzavod was still the legal owner of PD 177, that the MOA entered into between Dalzavod and the appellants and dated 30 September 1996 had been cancelled, and that Dalzavod and Lita (the charterers) were the only parties entitled to make any decisions concerning the sale of the dock. All this was amply corroborated by the minutes of that meeting which recorded categorically that Dalzavod `explained and clarified` that the first MOA was null and void due to `non-fulfilment by the Buyer` and that Dalzavod was absolutely free to `develop this deal` with the respondents. The appellants themselves impliedly admitted to this when GM, in his affidavit, averred that Dalzavod did not mention to the respondents about the first MOA because they (Dalzavod) were intent on disregarding their obligations to the appellants. Certainly the respondents cannot be faulted if Dalzavod was bent on refusing to paint a true picture of their contractual relationship with the appellants. Moreover, if there was ever any doubt about what had transpired at the meeting in Seoul, the appellants could have cross-examined Lawrence Goh of Lita, a perfectly independent witness, on it as the latter was present at that meeting throughout. This however, they failed to do, and in consequence, must now be taken to have accepted that Dalzavod did in fact assure the respondents that they did not have a valid contract with the appellants.

The appellants also sought to place huge emphasis on the fact that S K Hyun might have seen the first MOA sometime between 10 and 12 October 1996, that is, at a time before the meeting between Dalzavod and the respondents. To this end, they relied on a fax sent by GMCO to Dasan dated 10 October 1996 enclosing a copy of the first MOA, and a corresponding reply from Dasan to GMCO of even date stating that Hyun `noticed and agreed that [GMCO] have contracted with russian owner formally`. As a result of this exchange of correspondence which the appellants contended the trial judge overlooked, they submitted that the respondents must have known that there was a valid contract between Dalzavod and the appellants. In our view, this argument misses the point altogether. The fact that Hyun had sight of the MOA is insufficient to impute knowledge of the contract between Dalzavod and the appellants to the respondents for two reasons: firstly, the first MOA on its own does not evidence a concluded contract between Dalzavod and the appellants as notice of acceptance by the appellants is further contemplated. In this respect, there was no evidence to show that S K Hyun was ever informed by the appellants that the requisite notice of acceptance had been given to Dalzavod. Secondly, it was precisely because the respondents had sight of the first MOA that they made the effort to check and clarify with Dalzavod during the meeting in Seoul regarding the true status of that MOA. It was perfectly reasonable for the respondents to rely on Dalzavod`s representation and assurance at the meeting that the first MOA had been cancelled. There was no reason for the respondents to doubt Dalzavod as Dalzavod was known to the respondents to be the original Russian owners of PD 177. Moreover, Dalzavod had also taken the trouble to fly all the way from Moscow to Seoul to discuss the sale of the dock and had even brought along a representative from Lita to facilitate the negotiations. The meeting which took place was neither a clandestine nor secret affair arranged between Dalzavod and the respondents to the exclusion of the appellants. SK Hyun gave evidence that he twice invited the appellants, via Dasan, to attend the meeting in Seoul so as to clarify the position altogether, but the appellants did not show up. This evidence was not challenged by the appellants in cross-examination. Counsel for the appellants sought to explain before us that such an invitation could not have been extended to GM as it would have been embarrassing for him, the purported middle-buyer who stood to make a huge profit from the transactions, to attend a meeting between the end-supplier and the end-buyer of the dock. In our view, this argument simply could not stand. Whether or not GM might be embarrassed would have been of no concern to either Dalzavod or the respondents. In fact, it might have been precisely because both Dalzavod or the respondents had started to suspect that

something was amiss that they decided to call all three parties together to clear matters up. That GM himself might have felt embarrassed about attending the meeting in Seoul did not mean that Dalzavod or the respondents could not have invited him to attend it. It was further unreasonable to expect, and perhaps even impossible for, the respondents to have liased with the appellants directly when they had had no prior information about the latter at all! It will be recalled that all the correspondence emanating from Dasan relating to the purchase of PD 177 had been with GM on behalf of GMCO. The appellants` name only appeared for the first time when the first MOA was sent to Dasan on 10 October 1996. As such, when GM failed to turn up for the meeting, the respondents had every reason to believe Dalzavod when the latter told them that the appellants, a hitherto non-existent participant in this whole episode and who must have been a complete stranger to the respondents, had not fulfilled their obligations to Dalzavod. In our view, it was further reasonable for the respondents to trust the assurance given to them by Dalzavod, the original owners of the dock, rather than the word of any of their brokers particularly after their bad experience with Meyersale in respect of the earlier, aborted sale of the previous dock.

Taking all of the above considerations into account, we found that there was nothing to impugn the trial judge`s finding that the respondents had no knowledge of the contract between the appellants and Dalzavod. It must be remembered that this was not a case in which the respondents did not know of the exact terms of the contract, which if so, would not be a valid defence to the tort of procuring a breach of contract. The fact of the matter here was that the respondents did not even know of the ***existence*** of the entire contract to begin with. At the same time, the lack of knowledge in this case also did not amount to an indifference on their part as to whether or not a breach might be caused. The fact was that it was perfectly reasonable for the respondents not to have applied their minds to the issue at all when they had heard from the proverbial horse`s own mouth that there was no contract to begin with.

Did the respondents intentionally induce a breach of the contract between Dalzavod and the appellants?

Again, it will be recalled that questions of intention are primarily questions of fact for the trial judge as a result of which the usual rules relating to their treatment on appeal apply with full force. In this regard, the learned trial judge has found that no such intention had been proven by the appellants. With respect, we found that this conclusion must be right. First, the evidence showed that it was Dalzavod who had solicited the respondents and not the other way round. This was in fact admitted to by the appellants themselves. GM, in his affidavit of evidence-in-chief, averred that Dalzavod had solicited an invitation to attend discussions in Seoul. The appellants for their part relied on the fax dated 7 October 1996 from FEMAS to Dalzavod suggesting a meeting between the respondents and Dalzavod to discuss the possible purchase of the dock. This, they contended was clear evidence that it was the respondents who had solicited Dalzavod and who had induced Dalzavod to breach their contract with the appellants. In our view, this contention placed undue emphasis on one single piece of correspondence and ignored the larger context in which the correspondence was made. The respondents gave evidence, which was amply supported by documentary proof as well as independent evidence from Lawrence Goh, that FEMAS had written to Dalzavod about the respondents` interest in PD 177 from as early as June 1996. The fax of 7 October 1996 was thus merely a follow-up to their earlier contacts relating to the sale and purchase of PD 177. It was not something which arose out-of-the-blue or unexpectedly. In any case, by the appellants` own evidence, the respondents only had sight of the first MOA at the earliest, on 10 October 1996. The FEMAS` fax was sent on 7 October 1996. Hence, on that date, the respondents could not possibly have had any inkling of the existence of any apparent contract between Dalzavod and the appellants, in which event they could not also possibly have written to Dalzavod with the intention of inducing them to breach their contract with the appellants.

Scrutiny of the subsequent conduct of the parties also revealed that it was Dalzavod who participated more actively in the negotiations with the respondents which eventually culminated in the signing of the MOA between them on 18 October 1996. First, Dalzavod wrote to FEMAS requesting that the respondents send an invitation to them as well as to Lita. Next, it was Dalzavod who took the trouble and expense to fly all the way to Seoul to meet the respondents. They even bothered to bring Lawrence Goh of Lita along for this purpose, a move which clearly exemplified that they, of their own volition, were bent on securing a deal with the respondents. The respondents did not in any way apply any pressure or force on Dalzavod. Neither was any inducement held out as the price for the dock was never once discussed prior to the meeting between the parties in Seoul. If Dalzavod chose to ignore their contractual obligations to the appellants because of motivations of price, the respondents should not be faulted for that.

In the light of the foregoing, we found that the appellants had not proven both the elements of knowledge and intention on the part of the respondents. The case of ***Emerald Construction Co Ltd v Lowthian*** (supra), relied on by the appellants can easily be distinguished from the present. In that case, officials of a trade union called upon building contractors to end their system of `labour-only` sub-contracts whereby the plaintiffs supplied workers to them. Various industrial action tactics were used to pressurise the building contractors into terminating their sub-contracts with the plaintiff company. The trade union officials knew of the existence of the sub-contracts but did not know what its precise terms were until after the action had started. One of those terms gave the contractors the option to cancel if the plaintiffs did not maintain reasonable progress. The plaintiffs` claim for an interlocutory injunction succeeded against the trade union. It was held by the English Court of Appeal in that case that the trade union officials had deliberately sought to get the sub-contracts terminated, regardless of whether or not such termination would result in a breach. At least three points of distinction can be drawn between that case and the one before us. First, the proceedings in the ***Emerald Construction*** case concerned an application for an interlocutory injunction. As such, all that the plaintiff needed to show was an arguable case or a serious issue to be tried. Second, it was never disputed by the trade union in that case that they had known all along of the existence of the sub-contracts. In fact, it was precisely because they knew of these labour-only contracts that they wanted them terminated. Finally, the evidence of an intention to procure the termination of the sub-contracts was both obvious and compelling in that case. The trade union had written two letters of ultimatum to the main contractors setting out a clear and unequivocal demand that the sub-contracts be terminated almost immediately, failing which a strike by the workers would occur. As it turned out, the ultimatums were not complied with and the workers did eventually go on strike, at the instigation of their union. In these circumstances, the inference was irresistible that the trade union`s clear objective was to procure the discharge of the sub-contracts. It would seem that the union itself did not really dispute this. In fact, their primary argument in resisting the application for the injunction was merely that they had assumed, mistakenly as it turned out, that the sub-contracts could be lawfully terminated at short notice. Unlike the facts of the case before us, the union officials in ***Emerald Construction*** had the means of finding out the actual terms of the sub-contract but did not bother to do so before calling on its workers to go on strike. Even when those terms were eventually brought to their attention, the union officials persisted in doing nothing to end the strike, evincing a clear intention on their part to bring the sub-contract to an end, by whatever means possible. On our facts on the other hand, the respondents had, by checking with Dalzavod directly and by inviting GM to come up to Seoul clear things up, done all that was within their power to ensure that there was no valid subsisting contract between the appellants and Dalzavod. With scarce knowledge of who the appellants were, the respondents in this case did not have the means to check or to clarify with them what the true position was. In the premises, there was absolutely nothing to show that the respondents had knowledge of any contract nor possessed the requisite intention to induce a breach of it.

Finally, it is proposed to say a word or two on policy. It must be remembered that the respondents were not fiduciaries of the appellants. As such, there was no duty on their part to act in the utmost interest of the appellants to their own detriment. The events which took place in this case were all part of the normal course of everyday commercial transactions conducted between large business enterprises at arm`s length. The law does not and should not impose a duty of due diligence on businessmen who conduct large-scale buying-and-selling transactions on a daily basis. While the economic torts exist to protect persons in relation to their trade, business and livelihood, as well as proscribe the infringement of valid and subsisting legal rights, this must be balanced against the need to promote free competition in a free market economy which, without doubt, is instrumental to the success of every capitalist nation. The courts must be slow to make strict laws which could potentially stifle common and ordinary trade practices. Viewed in this light, it will be seen that the respondents in this case did nothing to warrant the imposition of tortious liability on them. They were genuine prospective buyers of a floating dock, had a legitimate purpose for wanting one, and had been pursuing their object from as early as ten months before they finally concluded the deal with Dalzavod. There was nothing sinister or surreptitious in their actions, and what they finally obtained was in effect the result of their own legitimate efforts. From the facts as found by the trial judge, there was absolutely nothing to support the appellants` allegation that the respondents had `hijacked` the contract for the sale of PD 177 from them. In fact, if it had really been the case that the appellants had a valid contract for the sale of an unencumbered PD 177 to the respondents at US$9.4m, then it is unfathomable why the respondents would have forked out an additional US$1.4m for the exact self-same dock when no further advantage or benefit would accrue to them from doing so (given that the respondents eventually paid US$10.8m for the dock). A fortiori, if all that they had was only a mere suspicion that the appellants might also be negotiating to buy the dock from Dalzavod, then in a laissez-faire commercial environment, surely there is nothing to stand in their way of making a better offer to the sellers and securing the contract for themselves. While a defendant who shuts his eyes to the obvious will not be protected, the court will not and should not on the other hand `bedevil the tort` of inducement with equitable doctrines of constructive notice and the like: see Browne-Wilkinson J in **Swiss Bank Corp v Lloyds Bank Ltd** [1979] Ch 548 at p 572.

For the foregoing reasons, we found that the appellants` claim for inducement of a breach of contract could not be upheld.

The claim in tort for conspiracy to injure

Moving on to the allegation that the respondents had conspired with Dalzavod to injure the appellants, we also found, for much of the same reasons alluded to above, that the appeal on this head of claim was without merit and dismissed it accordingly.

The tort of conspiracy comprises conspiracy by unlawful means and conspiracy by lawful means. Again, the appellants were not entirely clear as to exactly which of the two they were proceeding under. The cases cited in their bundle of authorities related to both forms of the tort. It would seem however that their main argument before us was premised on the tort of conspiracy to injure by lawful means. As such, we propose to consider only this form of the tort.

As before, the law in this area is both clear and beyond doubt. A conspiracy by lawful means is constituted when two or more persons combine together with the aim of injuring the plaintiff, resulting in damage. The crucial requirement is that the plaintiff must prove a `predominant purpose` by the conspirators to cause injury or damage to the plaintiff: see eg **Quah Kay Tee v Ong & Co Pte Ltd** [1997] 1 SLR 390 .

Applying the above principles to the case at hand, it will be seen that any conspiracy between the respondents and Dalzavod to injure the appellants could only be founded if it was first shown that the respondents knew of a valid and existing contract between Dalzavod and the appellants. Without knowledge of this contract, it becomes completely absurd to suggest that the respondents conspired with Dalzavod to harm the appellants. In this regard, the findings and views made in the earlier section of this judgment on the claim for procurement of a breach of contract apply with equal weight and we will not repeat them here. Suffice it to say that the appellants had not adduced sufficient evidence to show, firstly, that there was even a contract between the appellants and Dalzavod, and secondly, that the respondents had knowledge of this contract. As such, it was impossible to show any predominant purpose on Dalzavod and the respondents` part to cause injury or damage to the appellants. Even if the above had been proven, we are of the view that the respondents would have been entitled to rely on the defence of justification to avoid liability anyway on the ground that their purpose in contracting with Dalzavod was to legitimately further their own self-interest. They had had a bad experience arising from the Meyersale incident, and now wished to contract with the original sellers directly instead of having to go through an intermediate sale to a middleman. For this peace of mind, they were willing to pay a premium, which also afforded them the added assurance that the Lita charterparty would be taken care of and the dock be delivered free from encumbrance as quickly as possible. This was important to the respondents as it was pertinent that SS`s business in China could commence without further delay. In our view, all this was done purely for the sake of enabling the respondents to pursue their own private commercial interests, which they were fully entitled to do. There was neither a motive nor reason for the respondents to want to injure the appellants when the appellants were, at that time, virtual strangers to them, bearing in mind that the name `Tribune Investment` had appeared from out of the blue on the copy of the second MOA that was enclosed to the respondents on 10 October 1996. If anything, such an occurrence would indeed have given the respondents much cause for concern, suspicion and doubt, especially after their bad experience with Meyersale, and would all the more have inclined them towards wanting to contract with Dalzavod directly. We thus found the claim in conspiracy to be completely without merit and dismissed it accordingly.

The claim in contract

The central issue in this claim was whether or not a valid contract for the sale and purchase of PD 177 was ever reached between the appellants and the respondents in the first place. There was no doubt that no formal written agreement was ever entered into or signed by the parties at any time. The existence of any contract must thus be culled from the written correspondence and contemporaneous conduct of the parties at the material time.

The principles of law relating to the formation of contracts are clear. Indeed the task of inferring an assent and of extracting the precise moment, if at all there was one, at which a meeting of the minds between the parties may be said to have been reached is one of obvious difficulty, particularly in a case where there has been protracted negotiations and a considerable exchange of written correspondence between the parties. Nevertheless, the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring consensus ad idem is objective. Thus, the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would reasonably be understood by the other.

In a recent local decision, **SAL Industrial Leasing Ltd v Teck Koon (Motor) Trading (a firm)** [1998] 2 SLR 325 , this court held to the same effect that the question whether or not there was an

intention by the parties to enter into a legally binding contract is an objective one. The following passage from **R v Lord Chancellor`s Department, ex p Nangle** [1991] ICR 743 at p 751 was quoted with approval:

> *... [T]he question whether there is an intention to create legal relations is to be ascertained objectively, and where the terms of the relationship are, as here, to be derived solely from the documents, depends upon the construction of those documents. It is possible for a party to believe mistakenly that he is contractually bound to another when in fact he is not, and conversely to believe that he is not when he is. His belief is immaterial. While this remains a subjective belief uncommunicated to the other party, this is plainly correct. But where such a belief is expressed in the documents it must be a question of construction of the documents as a whole what effect should be given to such a statement.*

Before us, the appellants did not challenge the trial judge`s statement of the law in this area. As before, their only discord appeared to us to be one of fact, cleverly disguised nevertheless in the form of an allegation that the trial judge had misinterpreted the facts and thus applied the law wrongly. In our view, the trial judge`s exposition of the law was sound, its application correct, and there was absolutely no basis for any of the appellants` contentions.

The material pieces of correspondence between the parties have been described and set out in the earlier part of this judgment and do not bear repeating. Taking an objective look at the faxes which were exchanged, we found that it was beyond doubt that the respondents, through Dasan, had clearly proceeded on the basis that any contract, if or when made, would be between themselves and the `russian owners or sellers` of the floating dock. The written communication is replete with references to `Russian owners and/or sellers`. At the same time, Dasan was constantly asking GM to attempt to get the selling price of the dock reduced from the Russians. The reasonable inference to be drawn from this must be that GM was conducting himself as an agent for the Russians, who were the actual sellers and who were going to sell the dock to Dasan`s principals, ie the respondents. If the contract that was contemplated was indeed one between the appellants and the respondents, then whither the need for any reference to the Russians at all in any of the dealings between the appellants and the respondents? For surely whatever agreement reached between Dalzavod and the appellants would have been of no concern to the respondents who on their part would also have had no business querying it. Indeed, if the arrangement had in fact been as the appellants alleged it to be, ie a sale from Dalzavod to them followed by a subsequent re-sale to the respondents, it would have been so easy for GM to simply state so in any of his correspondence to the respondents. This however, he failed to do. Not once did he even mention the appellants` name in any of his correspondence with Dasan nor was any reason advanced for this shroud of secrecy. In fact, even when he finally faxed to Dasan the draft copy of the second MOA for the respondents` approval and signature on 10 October 1996, he did not bother to make any reference to the appellants whatsoever in the main text of his letter. He was content to slip the name `Tribune Investment`, a name which had hitherto never before appeared, insidiously into the body of the second MOA which was attached merely as an enclosure to the main letter. Certainly any reasonable person looking at the nature and content of the correspondence passing between the parties would have no difficulty or hesitation coming to the conclusion that GM was content on keeping up the faÃ§ade which he had created and to perpetuate what, he knew was an obvious mistaken assumption on Dasan, and therefore the respondents` part. Dasan`s diametrically opposing interpretation of the true state of affairs can further be seen in the fact that in their fax of 9 October 1996, they had congratulated GM for securing an agreement from the `russian sellers for USD$9.4m`. Clearly, Dasan, and hence the respondents had believed all along that they were contracting with the russians directly.

The most telling sign of GM`s deceit however can be gleaned from his fax of 27 September 1996, wherein he had stated that USD$10m would have to go to the Russian side and wherein he had asked for a commission for himself of USD$500,000. If indeed there was to be a separate sale from Dalzavod to the appellants first, then we fail to see any reason why the appellants should have had to trouble the respondents with a breakdown of how the purchase price of the dock from the respondents was going to be dealt with vis-Ã -vis Dalzavod. There can be absolutely no explanation why GM would talk about USD$10m going to the Russians at all if the respondents were not even going to be privy to any contract concerning the Russians. In any case, the statement about USD$10m going to the Russians was an outright lie, for GM knew fully well, after the in-principle agreement signed between Dalzavod and the appellants on 20 September 1996 that the latter had managed to secure the dock for a mere USD$6.5m. The fact that GM had in his fax of 27 September asked for a commission further showed that he had deliberately misled Dasan, and hence the respondents, into thinking that GM or his principal GMCO were merely acting as agents for the russian sellers. If GM or GMCO were going to be the sellers of the dock in so far as the respondents were concerned, then what need or basis was there for them, as sellers, to be asking for a commission (bearing in mind that the appellants were really only a shell company which was controlled wholly by GM)?

Looking at all the evidence as a whole, we surmised that the true factual scenario was probably this: Dalzavod had approached GMCO, a large shipbrokering firm in Greece, to look for a prospective buyer for PD 177. The respondents on their part had similarly approached several brokers, including Dasan, to source for a floating dock for them. They were clear however, after their earlier unpleasant experience with Meyersale, that they only wanted to contract with the owners directly. When GM learnt from Dasan of the respondents` interest in PD 177 and of their willingness to offer some USD$9.5m for it at the start, he, knowing that Dalzavod were willing to let go of the dock at a much lower price than that offered, decided to make a quick buck for himself by creating a sub-sale arrangement. He knew that if he had merely carried out his task as agent or broker for Dalzavod, his commission from the sale would only be in the region of around USD$500,000. If he could thus supplant a middleman into the picture to buy the dock from Dalzavod first before on-selling it to the respondents however, then his profit would soar to a whopping USD$2.9 to 3m. Thus the whole ingenious web of deceit which followed.

In view of the inescapable findings reached above, we found that at no time could there ever have been consensus ad idem between the parties. While GM`s intention might have been for the respondents to contract with the appellants, the respondents` intention was at all times to contract with Dalzavod only. Put simply, the parties were talking at cross-purposes, and as such could hardly be said to have come to a mutually binding agreement. Admittedly, the identity of the person with whom one is contracting or proposing to contract is often immaterial. Nevertheless, where the mistake is fundamental, and affects the entire foundation on which the formation of the contract is based, then it cannot be said that a contract was ever concluded between the parties for there was never at any time a meeting of the minds. It must be remembered that this was not a case of an over-the-counter cash sale or a sale concluded at a public auction. In these instances there is no doubt that the identity of the buyer would be completely irrelevant to the seller for the seller is only concerned with selling his wares at the agreed price. It does not matter to him who is buying the goods. The facts of this case on the other hand were fundamentally different. The respondents knew from the start that they only wanted to contract with the owners of the dock directly. This fact was communicated to the appellants via Dasan, who in all their correspondence with the appellants, had made it crystal clear that they as well as the respondents were acting in the belief and expectation that they would be contracting with Dalzavod. Admittedly, the test is not entirely subjective, ie the question is not simply `with whom did the offeror intend to contract?` but also `how would the offer have been understood by a reasonable man in the position of the offeree?`. We found however that it

was clear that any reasonable person would easily have gathered from a plain reading of Dasan`s faxes that the respondents intended to contract with Dalzavod only. Indeed it surprised us that GM actually made the protest of not knowing this fact. In our view, he probably did, and as such, the whole ploy to delude the respondents from the start. His explanation that he had orally informed Dasan at an early stage that he was acting for Greek principals was disbelieved by the trial judge and in our view, rightly so, for no where in the entire stack of written correspondence between Dasan and GMCO were the words `Greek principal` ever mentioned. It must not be forgotten that GM was a shrewd and experienced businessman who had been in the business of shipbrokering for a long time. If he had really been acting for Greek principals, then in light of the fact that the term `Russian sellers`, who were not even the intended contracting party, had appeared countless of times in the written communication, a fortiori the name of the alleged Greek principal should surely have been mentioned at least once in writing.

The case law in this area is again consistent with the principles set out above. To this end, the seminal case of **Cundy v Lindsay** [1878] 3 App Cas 459 is relevant. In that case, a letter was written by a fraudulent person named Blenkarn ordering a quantity of handkerchiefs from the respondents. He signed his name in a way which allowed it to be confused with an established firm named Blenkiron & Co who carried on a business in the same street. The goods were sent to Blenkiron & Co at the address given by the rogue Blenkarn, who quickly sold it off to the appellants and disappeared shortly after that. It was held that there was no contract between the rogue Blenkarn and the respondents for the latter`s intention had been to deal only with Blenkiron & Co. As such, the property in the handkerchiefs remained throughout with the respondents. To summarise, the principle espoused in that case is simply that a person cannot make another a contracting party with himself, when he knows or ought to know that the other intends to contract not with him but with another. In our view, this was exactly what GM tried to do in this case, as a result of which, no valid contract could possibly be said to have been formed between the appellants and the respondents, for when an offer meant for A is purportedly accepted by B, any apparent contract formed is void and cannot confer rights on anyone.

For the above reasons, we found that the appellants had not made out their claim in contract. In reaching the above conclusions, we had, to the benefit of the appellants, made the fundamental assumption that Dasan had the requisite authority to conclude a contract on behalf of the respondents. The trial judge for his part found that this was in fact so and held that Dasan had apparent or ostensible authority. With respect, we found that there was considerable doubt as to whether or not Dasan may be said to have had the requisite authority to finalise deals on the respondents` behalf. It seemed to us that the objective evidence pointed otherwise. Firstly, none of Dasan`s faxes to GM or GMCO were ever copied to the respondents. Next, it was also telling that not once did Dasan or W J Park ever sign off as agent for and on behalf of the respondents. The concept of ostensible or apparent authority was explained by Lord Keith in **The Ocean Frost; Armagas Ltd v Mundogas SA** [1986] 2 Lloyd`s Rep 109 at p 112 as follows:

> *Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance upon that representation. The principal in these circumstances is estopped from denying that actual authority existed. In the commonly encountered case, the ostensible authority is general in character, arising when the principal has placed the agent in the outside world is generally regarded as carrying authority to enter into the transaction in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it.*

It is clear from the above exposition of the law that the representation must come from the principal and not the agent. There is no concept of a self-authorising agent. Andrew Jamieson in ***Shipbrokers and The Law*** (1997) states the position as such:

> *The essential requirement is that there must be some sort of representation from the principal.* ***This requirement could not be satisfied solely by virtue of the fact that the principal had appointed a shipbroker. The position of shipbroker simply does not justify a finding that the broker has authority to bind his principal****. [Emphasis ours.]*

In our view, there was nothing in the evidence in this case to show that the respondents had ever at any time held out any representation to the appellants or to anyone that Dasan had the authority to contract on their behalf. Whatever WJ Park or Dasan may have conveyed or said to GM or GMCO is irrelevant in determining ostensible authority for what one must look for is a representation emanating from the principals, in this case, the respondents. Having considered the evidence, we found that like FEMAS and the other shipbrokers approached by the respondents, Dasan was probably only appointed as an agent of the respondents for the limited purpose of sourcing for a suitable dock. At no time were they given the authority nor were they represented as having the authority to enter into contracts on the respondents` behalf. The fact that more than one shipbroker was appointed by the respondents to search for a dock also militated strongly in favour of the finding that none of them could have been given the added power or authority to conclude a deal binding the respondents. Hence, we are of the view that no valid contract between the appellants and the respondents could have been found to exist.

Having found against the appellants on liability, we see no need to consider the question of damage suffered..

Before moving on to consider the last segment of the appellants` claim however, we should perhaps say a brief word on a constant strand of argument which had been run by the appellants throughout this appeal. The appellants took issue with the fact that the learned trial judge had not drawn an adverse inference against the respondents for their failure to call certain witnesses whom the appellants contended were material to the defence. The regime for drawing adverse inferences is derived from s 116(g) of the Evidence Act (Cap 97). Whether or not in each case an adverse inference should be drawn depends on all the evidence adduced and the circumstances of the case. There is no fixed and immutable rule of law for drawing such inference. Where, as was the case here, the trial judge is of the view that the plaintiffs themselves had not made out their claim to the requisite standard, then no drawing of an adverse inference against the defendants is necessary. The drawing of an adverse inference, at least in civil cases, should not be used as a mechanism to shore up glaring deficiencies in the opposite party`s case, which on its own is unable to meet up to the requisite burden of proof. Rather, the procedure exists in order to render the case of the party against whom the inference is drawn weaker and thus less credible of belief.

In this case, the trial judge had no doubt that the plaintiffs had failed to make out even a prima facie case on any of the numerous claims put forth by them. In particular, GP Selvam J, who had the opportunity of observing the demeanour of the witnesses on the stand, took the view that the plaintiffs` chief witness, GM, was unreliable as a witness, and whose evidence could not be believed. In the light of this observation, we are of the view that the learned judge was right in exercising the discretion not to draw an adverse inference against the respondents. In any event, there was nothing

to show that the respondents` primary witness, SK Hyun was not a material or relevant witness to the proceedings. Mr Hyun was a Team Leader in SHI at the material time and was also the person tasked with sourcing for a floating dock for the respondents. It was also Hyun who liased with Dasan throughout the entire episode concerning the sale and purchase of PD 177, and who was frequently referred to as the `President of Soosan` in most of the correspondence between Dasan and GMCO. In the light of these incontrovertible facts, there was nothing to suggest that the respondents had failed to call witnesses material to their defence or that an adverse inference should have been drawn by the trial judge against them.

The inquiry into damages in respect of the mareva injunction obtained by the appellants against the respondents

Soon after the commencement of this action, ie Suit 2400/96, the appellants on 13 December 1996, obtained an ex parte mareva injunction against PD 177 ownership of which had by then been transferred to the respondents. The injunction was discharged on 31 December 1996 following a discharge application by the respondents at which Choo Han Teck JC found that there was no risk of dissipation of assets by the respondents. GP Selvam J in the court below ordered that there be an inquiry as to the damages suffered by the respondents in consequence of the injunction. The appellants were dissatisfied with that order and contended before us that no such inquiry should have been ordered.

It is established practice that every applicant for a Mareva injunction is invariably required to give an undertaking to abide by any order for damages which may be made if the defendant suffers loss as a result of the Mareva order. The appellants in this case were not exempted from this requirement. Where the injunction is eventually discharged, as was the case here, then the parties covered by the undertaking have the right to ask the court to enforce the undertaking against the other party, and the court can do so either by assessing the damages summarily or by directing that the latter pay damages awarded on an inquiry as to damages. The trial judge in this case opted for the latter, more common alternative.

The court, in deciding whether or not to enforce a plaintiff`s undertaking, has a discretion. The discretion is to be exercised by reference to all the circumstances of the case. In determining whether or not an order for inquiry should be granted, the court should first deal with the question whether or not the injunction was rightly granted. The two factors which the court should consider when deciding whether to enforce the undertaking in damages by ordering an inquiry are firstly, whether or not the plaintiff has succeeded on the merits of his claim, and secondly, whether there was a real risk of dissipation of assets. Where the discretion is being exercised after judgment, then the fact that the plaintiff has lost his claim militates strongly in favour of an order for inquiry: see Steven Gee, ***Mareva Injunctions and Anton Piller Relief*** (4th Ed, 1998) at pp 157-164.

The only pertinent questions to be asked in this case are thus whether or not there was a real risk of dissipation of assets by the respondents at the relevant time, and whether or not the respondents had adduced at least some evidence to show an arguable case that they had in fact sustained a loss falling within the terms of the appellants` undertaking. With respect to the question of risk of dissipation, we found that no such risk had been shown by the appellants to exist, and this was the most likely basis on which the learned Judicial Commissioner Choo Han Teck allowed the respondents` application to discharge the Mareva injunction in the first place. A perusal of SK Hyun`s affidavit filed for the purposes of the discharge application clearly bore this out. There, it was described that the respondents were part of a large Korean multi-national group of companies engaged in diversified businesses spanning many countries. The assets of the Soosan Group total some USD$755m. The

Group, including the respondents, was, at least in 1996 when the action was commenced, highly capitalised and had a good name and reputation in Korea. In the circumstances, there was absolutely nothing to suggest that the respondents were going to dispose of their assets at the relevant time. The appellants` contentions to the effect that the respondents` only asset in Singapore at the material time was PD 177 and that a Singapore judgment would not be enforced by the Korean courts were also without merit for the simple reason that they knew from the start of the paucity of assets belonging to the respondents in Singapore. They further knew that the respondents had intended PD 177 to be used for related businesses in China. Yet in spite of all this, they nevertheless proceeded to commence proceedings against the respondents in Singapore knowing fully well that the parties to this case, being Greek and Korean respectively, had absolutely no connection to Singapore whatsoever. As such, we had no doubt that the appellants must be taken to have assumed the risk of obtaining a judgment which would eventually go unsatisfied or be content with securing but a Pyrrhic victory. It was through no fault of the respondents that they had no other asset in Singapore. This was the position well before the events in this case took place and remained so after the ensuing saga unfurled. It was certainly not something brought about by the respondents in a deliberate attempt to frustrate potential judgments obtained against them. In any case, even if it was true, as the appellants contended that it was, that a Singapore judgment will not be enforced by the courts in Korea, the appellants still had not shown that the respondents did not own other assets in countries in which a judgment of a Singapore court can and will be enforced. In the light of all these reasons, it was clear that the appellants had not shown that there was a substantial risk of dissipation of assets by the respondents at the time when the mareva injunction was sought. As for the question whether or not the respondents had made out an arguable case of loss consequent on the mareva, we found that they had. As a result of the injunction, the respondents lost the use of PD 177 for nearly three weeks. Surely this must have caused some loss to them, especially when it was undisputed at the trial that the respondents required the dock urgently for the purposes of SS` ship repair business in China. In the premises, we took the view that the order for inquiry should not be disturbed.

Conclusion

For the above reasons, we found this entire appeal to be completely devoid of merit and dismissed it accordingly.

Outcome:

Appeal dismissed.