AYK and another *v* AYM
[2015] SGHC 329

Case Number	: HC/Originating Summons No 98 of 2015 (HC/Summons No 2438 of 2015)
Decision Date	: 29 December 2015
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Andre Maniam SC, Adeline Ong and Ho Wei Jie (WongPartnership LLP) for the plaintiffs; Francis Xavier SC, Derek On and Tee Su Mien (Rajah & Tann Singapore LLP) for the defendant.
Parties	: AYK — AYL — AYM

Injunctions – Mareva injunction

29 December 2015

Judith Prakash J:

Introduction

1 This judgment gives my reasons for the Mareva injunction that I issued against the defendant on 22 July 2015.

2 The plaintiffs initiated these proceedings in January 2015 to obtain leave to enforce the Final Award dated 29 December 2014 of the arbitral tribunal in an arbitration commenced in 2013 in the same manner as a judgment of the High Court. The plaintiffs were the claimants in the arbitration proceedings leading to the Final Award and the defendant was the respondent in that arbitration. Where necessary, I will refer to the first plaintiff as BB PLC, to the second plaintiff as PT BB and to the defendant as Mr AA.

3 On 5 February 2015 and 9 March 2015, the plaintiffs obtained leave of court to enforce the Final Award as a judgment of the High Court or an order to the same effect, pursuant to s 19 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Order 69A r 6 of the Rules of Court (Cap 322, 2014 Rev Ed). The orders of court issued on those dates are collectively referred to as the Singapore Enforcement Orders.

4 On 17 April 2015, the defendant filed an originating summons seeking to set aside the Final Award. On 5 June 2015, he filed an application in these proceedings seeking to set aside the Singapore Enforcement Orders.

5 In the meantime, on 2 June 2015, the plaintiffs had filed their application in these proceedings asking for an injunction prohibiting the defendant from dealing with his assets pending satisfaction of the Final Award.

6 The three applications were heard before me. I dismissed the defendant's application to set aside the Final Award and, consequently, also dismissed his application to set aside the Singapore Enforcement Orders. The reasons for those decisions can be found in my judgment [2015] SGHC 300. Subsequently, I allowed the plaintiffs' application for the injunction in slightly modified terms and the

defendant is dissatisfied with that decision.

Background

7 The Final Award arose out of a Deed dated 26 June 2013 ("the Deed") entered into by the parties. The Deed was intended to settle disputes between the parties relating to the operations of an Indonesian mining company ("PTX") which Mr AA had previously been running and which was owned as to 90% of its shares (albeit indirectly) by PT BB which Mr AA also directed. PT BB and all companies in its group are now owned by BB PLC.

8 The Deed provided for certain cash and assets to be transferred by Mr AA to PT BB in accordance with the schedule of payments set out therein. Mr AA did not adhere to that schedule and, consequently, on 8 November 2013 the plaintiffs gave Notice of Arbitration pursuant to r 3 of the Rules of the Singapore International Arbitration Centre ("SIAC"), this being the mode of dispute resolution prescribed in the Deed. All parties participated in the arbitration proceedings that ensued and led to the issue of the Final Award.

9 By the Final Award, the tribunal ordered, among other things, that:

(a) Mr AA should transfer to PT BB assets equal in value to US$173m including:

(i) the transfer of a 49% shareholding in a company which I shall refer to as "PTY";

(ii) the payment or transfer of such amount in cash (in US dollars) as equals the difference between US$173m and the value of the 49% shareholding in PTY; or

(iii) alternatively, Mr AA should pay the sum of US$173m together with simple interest at 1% above the US prime rate.

(b) Mr AA should pay the plaintiffs' legal costs and other expenses incurred by them in the sum of £1,342,823.48; and

(c) Essentially, that the costs of the arbitration in the sum of $963,626.81 be paid by Mr AA.

10 By Sum 2438, the plaintiffs sought to prevent Mr AA from doing the following:

(a) Removing from Singapore any of his assets which are in Singapore, whether in his own name or not, and whether solely or jointly owned up to the value of the aggregate sum of US$173m, £1,342,823.48 and $963,626.81; and

(b) in any way disposing of or dealing with or diminishing the value of any of his assets whether they are in or outside Singapore, whether in his own name or not, and whether solely or jointly owned up to the same value.

11 The plaintiffs specified in their application that the prohibition was to include Mr AA's shareholdings in a named Singapore company and in two named Indonesian companies as well as his interest in a house and premises in Beverly Hills, USA ("the US House").

The legal requirements

12 Under s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed), this court has the power to grant an injunction in all cases in which it appears to the court to be just and convenient that such order

should be made. Section 12A(2) read with s 12(1)(*h*) of the IAA also empowers this court to grant an injunction. The plaintiffs cited *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 151 as an example of a case in which the court had exercised its power to grant a worldwide Mareva injunction in aid of enforcement of a foreign arbitration award. The defendant did not dispute the court's jurisdiction to make such an order.

13 All parties were in general agreement on the requirements that had to be met in order for the grant of a worldwide injunction. The defendant agreed with the three requirements put forward by the plaintiffs and said that, additionally, the plaintiffs would need a valid cause of action over which the court had jurisdiction. The defendant did not, however, contend that this requirement had not been met.

14 There was no dispute either regarding the requirement that the defendant's assets within the jurisdiction were insufficient to meet the plaintiffs' claim and that he had assets outside the jurisdiction. The defendant admitted that he had assets outside the jurisdiction.

15 The third requirement is that the plaintiffs must have a good arguable case for enforcement of the Final Award. Initially, the defendant submitted that this did not exist because he had applied for and was entitled to have the Final Award set aside because valid grounds for setting aside existed. This argument fell away when I decided that the defendant's application to set aside the Final Award had no merit and had to be dismissed. Additionally, I rejected the defendant's application to set aside the Singapore Enforcement Orders. Since the Singapore Enforcement Orders are valid and enforceable until and unless they are set aside by the Court of Appeal, the plaintiffs have much more than a good arguable case for enforcement of the Final Award.

16 The fourth requirement is the one that was most strenuously contested. This is the requirement that, in order to get the injunction prayed for, the plaintiffs must establish that there is a real risk of dissipation or secretion of the defendant's assets here and abroad so as to render the plaintiffs' judgment nugatory. I deal with this requirement in detail below.

Alleged systematic disposal of assets

17 The plaintiffs alleged that the defendant had been systematically disposing of his assets since the commencement of the arbitration proceedings. Although the defendant had provided an oral explanation for each such disposal, he had failed to put forward sufficient documentary evidence in support of his explanations. The plaintiffs said that the common thread amongst the disposals was that assets which were once known to the plaintiffs had been converted into either funds or assets which the plaintiffs were unable to trace and reach for the purposes of enforcement. The plaintiffs gave a number of instances. I agreed with them with regard to some of those instances, though not all.

18 Before I go on to deal with these various instances, I should mention that the defendant has obtained an order for redaction of certain information in order to maintain the confidentiality of the arbitration. The defendant is a very successful businessman with diverse interests in many companies and different types of properties. It is impossible for me to give each of these random initials as that would make the judgment quite unreadable and un-understandable. I am therefore going to refer to these entities by their correct names and direct that any of the parties or their solicitors who comes into position of this judgment shall redact all such names before passing on the judgment on to any person who is not a party or a legal advisor to that party. In regard to individuals connected to the defendant, however, I will refer to them by their initials.

PT Green Capital

19 First, PT Green Capital: The plaintiffs' allegation was that sometime between November 2013 and January 2015, the defendant had procured the transfer of his 99.95% interest in PT Green Capital to a close business associate, one Mr H I. This transfer took place during the period when the arbitration was afoot. The defendant responded that PT Green Capital was a shelf company with no assets when it was incorporated in October 2009 and that in April 2011 the interest in the company was transferred to Mr H I because the latter wanted to start a company without the hassle of going through the procedure of incorporation. It was only after that transfer took place that PT Green Capital became a founder shareholder of another company called PT Jet Asia.

20 I found the defendant's explanation for the transfer rather suspect. Usually it is not difficult to procure a shelf company and thus it seemed to me that there was no good reason for the defendant to transfer his interest to his friend, Mr H I. The assertion that PT Green Capital had no assets at the time of the transfer was not supported by any evidence.

Bank Pundi

21 The plaintiffs next pointed to media reports that the defendant might be selling or diluting his interest in Bank Pundi to another individual, one Mr H T, who was also the recipient of the defendant's shares in BB PLC, the first plaintiff, when the defendant was compelled to sell the same in December 2012. I did not set much store by this allegation. It seemed to me that it was speculation that the defendant's interest in Bank Pundi was going to be dissipated. Further, the reports related to a merger of Bank Pundi with another bank belonging to Mr H T. It appeared to me to be highly unlikely that two banks would merge simply to allow the defendant to place his assets beyond the reach of the plaintiffs.

Football clubs

22 I was more impressed by the evidence relating to the defendant's disposal of his interests in two football clubs: F.C. Internazionale Milano S.p.A ("Inter Milan") and DC United. The defendant transferred his stake in Inter Milan to a company owned by a close business associate, one Mr E T, in December 2013 shortly after the arbitration had commenced. The defendant's explanation for the transfer was that he was "compelled" to sell this interest by the club itself because of the negative media publicity that had been generated as a result of the arbitration commenced by the plaintiffs. The management of the club did not want its plans for the club to be jeopardised because of the defendant's involvement as a shareholder. I found this explanation for the sale of the asset to be wholly unconvincing. I could not see how a football club could compel one of its owners to dispose of his interest in it or even why it should want to do so. The football world has been surrounded by scandal and rumour-mongering for many years and has survived very well despite all this. Further, as the plaintiffs pointed out, the defendant had given no details about the sale. He did not indicate what the consideration for the sale was, whether the price had been fixed on a market value basis or what had happened to the funds, if any, that he had received upon the transfer of this asset.

23 There was also a newspaper report in May 2014 that the defendant had previously owned an indirect passive minority interest in the DC United Club which he had since sold back to the previous ownership group. The defendant explained that he had actually sold this interest on 1 December 2014 because his involvement in the arbitration had generated much negative publicity in the media and the club was in talks with the City Council of the District of Columbia, USA, to obtain land for the construction of its new stadium. The owners of the club, the same Mr E T and one other person, asked the defendant to sell his interest as they were afraid that the defendant's association with the club would adversely affect the negotiations with the City Council. Once again, I had difficulty

accepting this explanation. Once again, there was no disclosure of the sale price, how it had been fixed or what had been done with the sale proceeds.

The US House

24 In this application, the plaintiffs identified the US House as a specific asset to be frozen. The defendant responded to this portion of the application by stating that he had previously indirectly owned the US House through investment companies and that it had been financed by a mortgage of about US$5.07m from JP Morgan. In February 2015, JP Morgan, which was aware of the award, requested that he sell the US House to repay the mortgage. The property was then sold for US$8.9m out of which US$4.81m was utilised to repay JP Morgan, US$818,000 was utilised for costs and taxes and the balance of US$3.27m was refunded to his investment companies. The defendant went on to say that he had utilised this balance to satisfy other liabilities.

25 This explanation was not satisfactory. There was no documentary evidence of the mortgagor's alleged request that the property be sold nor as to the sale price or how the sale proceeds had been utilised. There was no evidence that the defendant had been remiss in paying any money due to the mortgagor. The plaintiffs were aware of this asset and, perhaps coincidentally, had issued proceedings in the USA in February 2015 to enforce the award against the US House. However, these proceedings could not be effected as the plaintiffs were unable to serve the papers on the defendant. It was significant that the defendant had disposed of an asset which the plaintiffs were aware of and used the proceeds to settle other indebtedness without any consideration in respect of his liability to satisfy the Final Award. Even if he received a net figure of US$3.7m, there was no evidence that he had been compelled to use that to satisfy other liabilities. As a result of the defendant's actions, the plaintiffs had been deprived of a known asset which they could have enforced the Final Award against. In my view, the defendant's dealings with the US House clearly indicated a propensity to remove his assets from the reach of the plaintiffs, like those in respect of the clubs.

RCapital Holding S.a.r.l (the Luxembourg company)

26 The defendant was the ultimate owner of the Luxembourg company. In February 2013, the Luxembourg company acquired two French chateaux for about €7.7m, most of which was borrowed (according to the defendant) from the defendant's Singapore company. The plan was to develop the two chateaux into hotels to be managed by one Mr R D. The defendant and Mr R D engaged a French architect for the project and, in September 2013, they were given a quotation of €27m as being the cost of developing just one of the chateaux into a hotel.

27 The defendant found the conversion cost to be "staggering" and decided to exit the project. Following discussions with Mr R D, around early October 2013, the latter agreed to assume responsibility for the project and all its liabilities including repayment of the loan from the Singapore company. The defendant then sold all his interest in the Luxembourg company to Mr R D and the sale was completed on 9 January 2014. No money changed hands. The sale was carried out on the basis that Mr R D assumed liability to repay the Singapore loan.

28 The plaintiffs submitted that the above disposal was entirely orchestrated to frustrate them and avoid settling his indebtedness to them at a time when the defendant was fully aware of the arbitration proceedings. The plaintiffs had issued their notice of arbitration just two months earlier (8 November 2013) and the sale was completed just a day before the preliminary meeting of the tribunal and parties. On 9 January 2014, the defendant was obviously fully aware of the arbitration proceedings and the possibility of an award being issued against him.

29 Additionally, the plaintiffs' suspicions were fanned by the fact that on 18 December 2013 they had obtained an attachment order from a Luxembourg Court against the defendant's shares in the Luxembourg company. This order was served on the Singapore company in January 2014 but neither the defendant nor the Singapore company informed the Luxembourg Court of the sale of the shares until May 2015. The plaintiffs had obtained the attachment order on the basis that there was an appearance of debt owing by the defendant to the plaintiffs in that he had failed to make payment of the first tranche of US$30m payable under the Deed on the due date.

30 I was not persuaded of the veracity of the defendant's reason for disposing of his shares in the Luxembourg company. There was no documentary evidence of the sale. There was no valuation of the two chateaux. There was no evidence of the outstanding loan to the Singapore company. There was no evidence of the basis on which the chateaux had been purchased in the beginning. It was hard to believe that the defendant, as a canny businessman, had not carried out a feasibility study before acquiring the two chateaux. I was not convinced that he should have been so taken aback by the cost of converting one of the chateaux as to immediately dispose of his entire interest in the Luxembourg company and thereby in both chateaux for no consideration at all. Indeed, there was no evidence of Mr R D's liability to repay the loan or the time frame in which this was to be done. The defendant's conduct was highly suspect.

Spanish golf club

31 The plaintiffs also stated that they had recently discovered that a Spanish golf club in which the defendant owned a indirect 28% interest had mortgaged its land for some €10m in March 2015. They considered the mortgage to be unusual behaviour for the company. I was not equally suspicious. The defendant's interest was indirect and a minority interest. It was highly unlikely that the company would mortgage its land and incur expense and a balance sheet liability (at the least) in order to devalue the interests of indirect minority shareholders.

Conclusion

32 After considering the evidence adduced by the plaintiffs, the defendant's explanations and the parties' submissions, I was satisfied that the plaintiffs had established that if the injunction was not issued, there was a real risk of the defendant dissipating his assets or moving them around so as to frustrate the plaintiffs in their attempts to satisfy their judgment.

33 I was not impressed by the defendant's conduct over the course of his dealings with the plaintiffs. He had voluntarily entered into the Deed in June 2013 and thereby undertaken obligations to the plaintiffs. He did not fulfil any of these obligations thus compelling the plaintiffs to begin arbitration proceedings against him in November 2013. When the Final Award was issued, instead of taking steps to satisfy it, he filed his setting aside application. His grounds for that application were flimsy and I had no hesitation in dismissing it. This behaviour, together with the evidence of the ways in which he had disposed of various assets since June 2013, was sufficient to convince me that it was just to issue the worldwide injunction order against the defendant applied for by the plaintiffs.