Malaysia Venture Capital Management Bhd v Teang Soo Thong & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-400–10 OF 2014
NOORIN BADARUDDIN JC
25 FEBRUARY 2016

Civil Procedure — Mareva injunction — Application for — Defendants entered into subscription agreement for investment with plaintiff — Defendants breached agreement — Plaintiff obtained summary judgment against defendants where first defendant ordered to pay amount owed to plaintiff — Defendants failed to comply with summary judgment — First defendant established another companies — Whether there was real risk of dissipation of assets by defendants — Whether plaintiff had good arguable case

This was an application by the plaintiff for mareva injunction ('encl 50') against the defendants pursuant to a summary judgment granted on 30 June 2015. The plaintiff entered into a subscription agreement with the defendants for an investment amounting to RM7.5m in the second defendant. However, the defendants breached the subscription agreement, in failing to list the second defendant in the SGX Bourse (in Singapore) and the Main Market of Bursa Malaysia; and the defendants were also alleged to have misused the plaintiff's monies. The plaintiff brought an action against the defendants and a summary judgment was granted whereby the first defendant was ordered to pay RM11,653,438.04 to the plaintiff. Up to this date, the defendants failed to comply with the said order. Subsequently, it was discovered by the plaintiff that the first defendant through a person by the name of Tang Chee Ling had established a company by the name of Spruce and Shine Sdn Bhd. Based on the facts, the plaintiff submitted that there was a real risk of dissipation of available assets and filed the present application. The plaintiff argued that the defendants failed to comply with the ex parte order granted by the court on 2 November 2015 by failing to disclose any bank account and making no full and proper disclosure of their respective assets. It was further submitted that the conduct of the defendants as a whole showed dishonesty and flagrant attitude towards court order and lack of probity on mareva and accounts. The defendants on the other hand submitted that the plaintiff did not have a good and arguable case. Further, the defendants also submitted that the plaintiff had failed to proof that they were trying to dissipate the plaintiff's assets as the allegations were merely assumptions and the plaintiff had failed to prove that the assets had been transferred into the other companies.

Held, allowing the plaintiff's application:

(1) It was obvious that the defendants had breached the ex parte order. Based on the first defendant's affidavit ('encl 58'), there was no disclosure of the assets held by the defendants as well as any bank accounts belonging to them in accordance with the ex parte order. The defendants' second affidavit ('encl 69') contained averments which opposed the merits of the judgment. The judgment was upheld by the Court of Appeal and there could no longer be any merits to oppose the plaintiff's application (see paras 29–30).

(2) The defendants did not come to court with clean hands. There was suppression of facts relating to the second defendant's accounts and trail of funds from the plaintiff. It is true that when a party is willing to lie on oath about their own accounts, there is a clear risk of dissipation of assets. Grounded on this, the court was of the considered view that the plaintiff's application was not without merit (see para 34).

(3) Given the fact that the defendants failed to disclose the respective bank accounts and the real trail of funds from the plaintiff, the risk of dissipation was real and not improbable. The matter in respect of investment from Perbadanan Nasional Bhd raised by the defendants did not change the fact that the conducts of the defendants were sufficient proof of a real risk of dissipation of assets (see paras 36–37).

(4) The plaintiff had a good arguable case as summary judgment was obtained and affirmed by the Court of Appeal. There was also a real risk that the defendants would dissipate their assets. The plaintiff ought not to be denied from obtaining the fruits of the judgment as the purpose of the mareva injunction was to prevent the defendants from removing their assets (see para 38).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif bagi injunksi mareva ('lampiran 50') terhadap defendan-defendan berikutan penghakiman terus yang diberikan pada 30 Jun 2015. Plaintif memasuki perjanjian penyertaan dengan defendan-defendan bagi pelaburan berjumlah kepada RM7.5 juta di dalam defendan kedua. Walau bagaimanapun, defendan-defendan melanggar perjanjian penyertaan kerana gagal untuk menyenaraikan defendan kedua di Bursa SGX (di Singapura) dan Papan Utama Bursa Malaysia; dan defendan-defendan adalah juga didakwa menyalahguna wang plaintif. Plaintif membawa tindakan terhadap defendan-defendan dan penghakiman terus diberikan di mana defendan pertama diarah untuk membayar sejumlah RM11,653,438.04 kepada plaintif. Sehingga tarikh ini, defendan-defendan gagal untuk mematuhi dengan perintah tersebut. Kemudiannya, ia didapati oleh plaintif bahawa defendan pertama melalui seorang yang bernama Tang Chee Ling telah menubuhkan syarikat yang dikenali dengan nama Spruce and

Shine Sdn Bhd. Berdasarkan fakta, plaintif berhujah bahawa terdapat risiko sebenar penyusutan aset yang ada dan memfailkan permohonan ini. Plaintif berhujah bahawa defendan-defendan gagal untuk mematuhi perintah ex parte yang diberikan oleh mahkamah pada 2 November 2015 kerana gagal untuk mendedahkan mana-mana akaun bank dan tidak membuat pendedahan penuh dan betul mengenai aset masing-masing. Ia selanjutnya dihujahkan bahawa tingkah laku defendan-defendan secara keseluruhannya menunjukkan sikap tidak jujur dan terang-terangan terhadap perintah mahkamah dan kekurangan kejujuran yang tidak diragui ke atas mareva dan akaun-akaun. Defendan-defendan sebaliknya berhujah bahawa plaintif tidak mempunyai kes yang baik dan boleh dipertikaikan. Selanjutnya, defendan-defendan juga berhujah bahawa plaintif telah gagal untuk membuktikan bahawa mereka mencuba untuk menyusutkan aset-aset plaintif kerana tuduhan-tuduhan tersebut hanyalah anggapan dan plaintif telah gagal untuk membuktikan bahawa aset-aset telah dipindahkan kepada syarikat-syarikat lain.

Diputuskan, membenarkan permohonan plaintif:

(1) Adalah jelas bahawa defendan-defendan telah memungkiri perintah ex parte. Berdasarkan ke atas afidavit defendan pertama ('lampiran 58'), tidak terdapat pendedahan mengenai aset-aset yang dipegang oleh defendan-defendan dan juga akaun-akaun bank yang dimiliki mereka mengikut perintah ex parte. Afidavit kedua defendan-defendan ('lampiran 69') mengandungi penghujahan yang menentang merit penghakiman. Penghakiman disahkan oleh Mahkamah Rayuan dan tidak lagi terdapat merit untuk menentang permohonan plaintif (lihat perenggan 29–30).

(2) Defendan-defendan tidak ke mahkamah dengan hati yang suci. Terdapat penindasan fakta berkaitan akaun-akaun defendan kedua dan aliran dana daripada plaintif. Ia adalah benar apabila pihak sanggup berbohong ketika mengangkat sumpah mengenai akaun-akaun mereka sendiri, terdapat risiko penyusutan jelas aset-aset. Berdasarkan ini, mahkamah berpendapat bahawa permohonan plaintif adalah bermerit (lihat perenggan 34).

(3) Mengambil kira fakta bahawa defendan-defendan gagal untuk mendedahkan akaun-akaun bank masing-masing dan aliran dana daripada plaintif, risiko penyusutan adalah benar dan dan tidak dapat dipercayai. Perkara berkaitan pelaburan daripada Perbadanan Nasional Bhd yang dibangkitkan oleh defendan-defendan tidak mengubah hakikat bahawa tingkah laku defendan-defendan adalah bukti yang mencukupi terhadap risiko penyusutan sebenar aset-aset (lihat perenggan 36–37).

(4) Plaintif mempunyai kes yang boleh dipertikaikan kerana penghakiman terus telah diperolehi dan disahkan oleh Mahkamah Rayuan. Juga

terdapat risiko sebenar bahawa defendan-defendan akan menyusutkan aset-aset mereka. Plaintif tidak patut dinafikan daripada mendapatkan hasil daripada penghakiman kerana tujuan injunksi mareva adalah untuk menghalang defendan-defendan daripada memindahkan aset-aset mereka (lihat perenggan 38).]

Notes

For cases on application for Mareva injunction, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 6179–6185.

Cases referred to

EHQ Projects Sdn Bhd & Ors v Equipro Sdn Bhd & Ors [2007] 7 MLJ 415; [2008] 7 CLJ 343 (refd)

Jet West Ltd and another v Haddican and others [1992] 2 All ER 545, CA (refd)

Stewart Chartering Ltd v C & O Managements SA and others; The Venus Destiny [1980] 1 All ER 718, QBD (refd)

Legislation referred to

Companies Act 1965

Justin Voon (Justin Voon Chooi & Wing) for the plaintiff.
Hazman bin Ahmad (Omar Ismail Hamzah & Co) for the defendants.

Noorin Badaruddin JC:

[1] The plaintiff filed an application for, inter alia, mareva injunction against the defendants vide encl 50.

BACKGROUND FACTS

[2] The plaintiff is a capital investment company established by the Government of Malaysia under the Companies Act 1965 having its' registered address of business at Level 11 Bank Pembangunan, Bandar Wawasan, No 1016, Jalan Sultan Ismail, 50300 Kuala Lumpur.

[3] The first defendant was a promoter, promoting investment in a company 'BSMART Technology Sdn Bhd' ie the second defendant whichat the material time was to be listed in the Catalyst Market (SGX Bourse) Singapore.

[4] At the material time, the first defendant was also a managing director and shareholder and having the control of the management of the second defendant.

[5] The plaintiff held 7,500,000 redeemable convertible preference shares in the second defendant. The plaintiff did not take an active role in the management of the second defendant and it was the first defendant (who held 1,275,000 ordinary share's in the second defendant) who manages the affairs of the second defendant.

[6] At about the end of 2010, the first defendant approached the plaintiff to invest in the second defendant. Upon the representation made by the first defendant, the plaintiff invested RM7.5m for the 7,500,000 redeemable convertible preference shares in the second defendant. The following agreements were entered between both parties for the purpose of the investment:

(a) subscription agreement dated 25 February 2011;

(b) shareholders agreement dated 25 February 2011; and

(c) put and call option agreement dated 25 February 2011

('the investment documents').

[7] Pursuant to cll 7.1 and 7.2 of the subscription agreement, the defendants jointly and severally agreed and undertake to indemnify and keep indemnified the plaintiff from all losses and liabilities arising out of any breach of any terms and conditions under the investment documents.

[8] It was not disputed that the sum of RM7.5m was paid into the second defendant.

[9] Pursuant to the investment documents, the plaintiff was promised a return of the investment sum including the profit in the form of 'interest rate of return' upon the listing of the second defendant.

[10] The defendants breached the investment documents by, inter alia, failing to list the second defendant in the SGX Bourse (in Singapore) and the Main Market of Bursa Malaysia. The defendants were also alleged to have misused the plaintiffs monies in breach of cl 8.2 of the subscription agreement.

[11] In essence, a substantial payment of the investment sum meant for the listing of the second defendant were said to be used for the defendants' own business purposes.

[12] The plaintiff alleged that the defendants demonstrated dishonesty and/or lack of probity in its dealings with the plaintiff.

[13] The present suit by the plaintiff and an application for summary judgment against the defendants were subsequently filed. On 30 June 2015, a summary judgment ('the judgment') was granted by this court wherein the first defendant was ordered to pay the plaintiff within 14 days from the date of the judgment, the 'put option price' of RM11,653,438.04pa, from 15 May 2013 until full settlement, and thereafter, the plaintiff will transfer its' shares in the second defendant to the first defendant.

[14] The judgment was served on the defendants on 14 August 2015 where the plaintiff demanded for the payment stated therein. The defendant failed to comply with the said order of 30 June 2015 to this date.

THE PLAINTIFFS CONTENTIONS

[15] The plaintiff found that the defendants lacked clean hands and honesty even before the judgment was obtained. The defendants were averred to have conducted themselves as follows:

(a) the defendants made untruthful statements in their defence which stated that the monies invested by the plaintiff is still in the defendants' accounts and/or part of it is in fixed deposit;

(b) at the same time, the defendants had previously shown to the plaintiff presentation slides that the monies had already been 'spent'; and

(c) that the defendants were misusing the investment sums contrary to and in breach of the investment documents where in the plaintiff's supporting affidavit ('encl 51'), the plaintiff averred that a sum of RM2,123,481.56 meant for IPO expenses was misappropriated for the second defendant's purported 'acquisition of South Africa (Pty) Ltd, 'Indonesia exhibition' and 'salary & related costs; and RM203,453.17 was overpaid for 'working capital.'

[16] The plaintiff further stated that in the midst of the proceeding of the application for the judgment, the defendants wrongfully 'suspended' the plaintiff's nominee director in the second defendant in breach of the shareholders' agreement, resulting to the plaintiff being excluded from any updates of the second defendant and the plaintiff's nominee director no longer invited nor informed of any meeting of the second defendant.

[17] After the judgment was obtained, there was a proposal for settlement made by the defendants. The plaintiff through its' solicitor wrote to the defendants' solicitor reminding them of the settlement proposed. There was no concrete news or letter from the defendants and the plaintiff was of the view that the defendants were trying to delay and/or stall the plaintiff with 'promises of settlement'. The plaintiff further stated that without any knowledge on their

part, the defendants had been approaching third parties for investments into the second defendant without informing them the judgment obtained by the plaintiff against the defendants.

[18] The plaintiff also received news that the defendants were in the process of moving its businesses and assets to new companies. The plaintiff averred that from a search done, it was revealed that the first defendant through his wife and/or a person close to him by the name of Tang Chee Ling has established a company by the name of Spruce and Shine Sdn Bhd around 12 June 2015 which happened not long after the judgment was obtained.

[19] The plaintiff submitted that there is a real risk of dissipation of available assets based on the aforesaid which prompted them to file this application for mareva injunction.

[20] An ex parte injunction ('the ex parte order') was granted on 2 November 2015 by this court and the defendants were, inter alia, ordered to give full disclosure of their respective assets and accounts as at 23 October 2014, 30 June 2015 and 2 November 2015, within eight days from the date of service of the said ex parte order. The ex parte order was served on the defendants. Thereafter the defendants filed an affidavit on the plaintiff purportedly disclosing their accounts and assets. The defendants failed to comply with the ex parte order by failing, inter alia, to disclose any bank account and making no full and proper disclosure of their respective assets.

[21] The plaintiff contended that the defendants did not come with clean hands and are in contempt of the ex parte order and failed to purge their contempt. An application for contempt had been filed against the first defendant where leave was granted to the plaintiff to commence committal proceedings on 8 December 2015. The plaintiff claimed that the conduct of the defendants as a whole shows dishonesty and flagrant attitude towards court order and lack of probity on mareva and accounts. Hence, it was submitted that there is a clear risk of dissipation of assets.

THE DEFENDANTS' CONTENTIONS

[22] The defendant's on the other hand submitted that the plaintiff does not have a good and arguable case. The plaintiff had entered into an application for a garnishee order against the defendants' banks on 2 September 2015 and the garnishee proceeding was set for hearing on 16 November 2015.

[23] The defendants contended that the garnishee order in itself is adequate for the plaintiff and that by obtaining a mareva injunction when the judgment had been executed by way of a garnishee order, it shows that the plaintiff is

trying to place itself in a position of a secured creditor. The defendants further contended that the plaintiff is acting mala fide when the garnishee order had been executed and continue to pursue this application for mareva injunction. According to the defendants, if injunction is granted, it will affect the business of the second defendant as their accounts would be frozen and they will be unable to receive payment from other investors and foreign companies and will not be able to make payments to the plaintiff.

[24] The defendants further submitted that the plaintiff had failed to proof that they were trying to dissipate their assets as the allegations in the affidavit filed by the plaintiff were merely assumptions/bare assertions and that the plaintiff had failed to prove that the assets or fund has been transferred into the other companies. In fact, the defendants are continuing to make investments from other companies such as Perbadanan Nasional Bhd which is seen to be profitable and that this shows the effort of the defendants to settle the judgment obtained by the plaintiff.

[25] Lastly, the defendants submitted that they are serious in settling the matter with the plaintiff and that a settlement proposal through a letter dated 30 November 2015 was prepared and addressed to the chief executive officer of the plaintiff. This proposal according to the defendant would only reach its purpose if the defendants are able to pay their debts if their accounts are not frozen and that they are free from the mareva injunction.

MERITS OF THE APPLICATION

[26] In order to succeed in this application, the plaintiff must show to the court that there exist a good arguable case and there is a real risk that the assets will be dissipated.

[27] In *Jet West Ltd and another v Haddican and others* [1992] 2 All ER 545 the English Court of Appeal held that the court has jurisdiction to grant or continue a mareva injunction in support of any judgment or order made by the court for the payment of money, whether or not the exact sum which will be payable has been quantified at the date of the order or the date on which the mareva relief is sought.

[28] In *Stewart Chartering Ltd v C & O Managements SA and others; The Venus Destiny* [1980] 1 All ER 718 which was referred to in *Jet West Ltd and another v Haddican and others* Robert Goff J stated at p 719 of the case that a court can also order that the mareva injunction continue in force after the judgment, in aid of execution and that the purpose of the injunction is to prevent a defendant from removing his assets from the jurisdiction so as to prevent the plaintiff from obtaining the fruits of his judgment.

[29] As submitted by the plaintiff, it is obvious that the defendants had breached the ex parte order. There was no disclosure of the assets held by the defendants as well as any bank accounts belonging to them in accordance with the ex parte order. In the first defendant's affidavit of 16 November 2015 ('encl 58'), the assets belonging to the defendants were not substantiated with particulars and documents.

[30] The defendants' second affidavit filed on 3 December 2015 ('encl 69') was objected to by the plaintiff as it was filed out of time. Even if consideration were to be given to the said second affidavit, this court found that the averments by the defendants lacked valid grounds to oppose this application. This court agrees with the submission by the plaintiff's counsel that in fact, encl 69 contains averments which attacks the merits of the judgment.

[31] This court found the plaintiff had successfully shown that there is a risk that the defendants had already contemplated to dissipate their assets to avoid the plaintiffs claim and the judgment. The plaintiff highlighted that in the statement of defence ('encl 6'), the defendants averred that the balance of plaintiffs investment was still intact in the defendants' account (paras 17–18 of encl 6). This averment was repeated in the affidavit in reply dated 30 January 2015 ie encl 19 during the summary judgment proceeding (even though encl 19 was expunged by the court on 4 June 2015, inter alia, due to defective jurat). It was the defendants' averment that the plaintiff's fund of RM2.5m remained in the fixed deposit in Hong Leong Bank amounting to RM1,318,724.82 and Exim Bank amounting to RM1,941,420.51.

[32] In exhs AA-14 of encl 72, it was shown that the RM1,941,420.51 in Exim Bank is not a 'fixed deposit' because this sum is collateral pledged by the second defendant for a substantial loan of about RM10m from Exim Bank. Exim Bank had also informed that the second defendant had defaulted in its repayment and judgment was obtained against the second defendant and the collateral sum of RM1,941,420.51 is set-off from the judgment sum of RM6,821,279.25 obtained by Exim Bank against the second defendant.

[33] The plaintiff's contention was further compounded by the fact that in exh AA16 of the same encl 72, Hong Leong Bank vide its letter dated 2 November 2015 confirmed that the balance in the second defendant's account was a mere RM19,600.69 only.

[34] Obviously, on the face of the records, the plaintiffs contention that the defendants did not come to court with clean hands in that they have lied to the court on two instances was justified. This court agrees with the plaintiff's submission that there is suppression of facts relating to the second defendants' accounts and trail of funds from the plaintiff. It is true that when a party is

willing to lie on oath about their own accounts, there is a clear risk of dissipation of assets. On this ground alone, this court is of the considered view that the plaintiff's application is not without merit.

[35] As to the garnishee applications against numerous banks filed by the plaintiff, it was revealed that out of the eight banks garnished, none of the banks reverted with accounts held by the first defendant and for the second defendant, only a sum of RM400,000 was disclosed. As stated by the plaintiff, the garnishee order has yet to be made absolute. The plaintiff also highlighted to this court that the plaintiff's funds previously represented by the defendants to be in the fixed deposits in Hong Leong Bank, in the sum of about RM1.3m, were hurriedly and surreptitiously withdrawn by the defendants although some has yet to reach its maturity. That has been done despite the assurance that the plaintiff's funds were still in the bank account of the second defendant.

[36] Given the fact that the defendants failed to disclose the respective bank accounts and the real trail of funds from the plaintiff, this court is of the considered view that the risk of dissipation is real and not improbable. The case of *EHQ Projects Sdn Bhd & Ors v Equipro Sdn Bhd & Ors* [2007] 7 MLJ 415; [2008] 7 CLJ 343 cited by the plaintiff is applicable in this present application. It was stated by the court that:

> Given that the RM1.5m were so hurriedly and surreptitiously withdrawn from the bank account of the first defendant by the second and third defendants and given the search conducted by the plaintiffs at the Registry of Companies had disclosed that the first defendant had not filed any financial nor any profit and loss statements since it was incorporated on 2 September 2005, the risk of dissipation is therefore real and not improbable.

[37] Further, this court is also of the considered view that the other matters raised by the defendant, inter alia, the investment from Perbadanan Nasional Bhd do not change the fact that the conduct of the defendants stated in the above are sufficient proof of a real risk of dissipation of assets.

[38] The plaintiff has a good arguable case as summary judgment was obtained. There is also a real risk that the defendants will dissipate their assets. The plaintiff ought not to be denied from obtaining the fruits of the judgment as the purpose of the mareva injuction is to prevent the defendants from removing their assets. The sole purpose of a mareva is to prevent a plaintiff from being cheated out of the proceeds of an action and in aid of execution of the said judgment, this court granted an order in terms of the plaintiff's application in encl (50).

Plaintiff's application allowed.

Reported by Dzulqarnain Ab Fatar