HCMP 1010/2017

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 1010 OF 2017

IN THE MATTER of sections 45(2) and (5) of the Arbitration Ordinance (Cap. 609)

IN THE MATTER of sections 21L and 21M of the High Court Ordinance (Cap. 4)

BETWEEN

CRETE MARITIME CORPORATION	Plaintiff
and	
EMIRATES SHIPPING LINE DMCEST	Defendant

Before: Hon Anthony Chan J in Chambers

Date of Hearing: 21 September 2017

Date of Decision: 21 September 2017

D E C I S I O N

---

1. This is the hearing of the Plaintiff's (Crete) Summons for continuation of an ex parte Mareva Injunction (Injunction) granted on 28 April 2017 in aid of arbitration proceedings in London (Arbitration)[1] between Crete and the Defendant (Emirates Shipping) until further order of the court.

2. The Injunction restrains Emirates Shipping from dealing with assets within Hong Kong up to the value of US$454,093.06, which comprised the amount of the Plaintiff's claim (US$265,149.34) and the legal costs incurred and to be incurred in the Arbitration in the sum of US$188,943.72.

Issue

3. The issue here is whether Crete has made out a case of real risk of dissipation of assets, which is an essential requirement for the Mareva relief. Crete's case on this aspect was (before the ex parte Judge) and is rested entirely on the allegation that Emirates Shipping is an entity of unacceptably low commercial morality.

4. The parties have agreed that the outcome of this application should determine the Originating Summons filed on 28 April 2017 by Crete (OS) which grounded the Injunction.

Background

5. The background facts can be briefly stated. Crete is a Liberian company and the owner of MV "CRETE 1" (Vessel). Emirates Shipping is a UAE company and the holding entity of the "Emirates Shipping Line" business, which is ranked within the 100 largest container/liner operators in the world.

6. The Arbitration relates to a charterparty dated 22 December 2016 (C/P) between Crete as owner and Emirates Shipping as charterer of the Vessel. Crete claims against Emirates Shipping for unpaid hire and the Vessel's repositioning costs as a result of the C/P's early termination. There is a counterclaim by Emirates Shipping of underperformance of the Vessel, which led to the termination of the C/P.

7. For the present purpose, Emirates Shipping accepts that Crete has raised a good arguable case on the merits of its underlying claim for breach of the C/P. On the other hand, Crete agrees that Emirates Shipping's underperformance allegations are factual matters which require expert evidence to resolve, and that it is not for this court to resolve those matters. The proper forum is the Arbitration.

8. It is undisputed that a London arbitral award is enforceable in both Hong Kong and the UAE because the UK, Hong Kong and UAE are all parties to the New York Convention.

Law

9. The applicable principles for granting interim relief in aid of foreign arbitrations under s.45 of the Arbitration Ordinance, Cap 609 and s.21M High Court Ordinance, Cap 4 were summarised in *CSSC Huangpu Wenchong Shipbuilding Co Ltd v Dry Bulk Services Ltd*, unrep., HCMP 1626/2016, 2 December 2016 at §§23-31. It is unnecessary to set them out here in light of the limited scope of the arguments.

10. The legal principles on risk of dissipation of assets are well-established. I agree with Mr Chain, who appeared for Emirates Shipping, that a useful starting point can be found in *Eastman Chemical Ltd v Heyro Chemical Co Ltd (No 2)* [2012] 3 HKLRD 307, §26 per DHCJ Winnie Tam SC (citation of authorities omitted) :

> "(1) Mareva injunctions put the recipient party in a seriously disadvantaged position right from the start, from which it may never recover. It is therefore essential for the court to carefully and critically scrutinise the materials placed before it before making such an order;
>
> (2) when considering whether there was unacceptably low commercial morality to infer a risk of dissipation of assets, the Court should scrutinise the evidence with care and should not too readily infer a real risk of dissipation from the defendant's conduct or commercial morality;
>
> (3) there must be "solid evidence" of the risk of dissipation of assets. The order, being a very serious infringement of rights and liberties of the defendant, can only be justified on appropriately clear and strong facts and risks. The standard of proof of the risk of dissipation is relatively high;
>
> (4) the fact that a defendant may be short of money to pay his debt is not itself a good reason for a Mareva injunction, the purpose of which is not to put the claimant in a better position over other creditors;

(5) the plaintiff cannot beforehand prevent the defendant from disposing of his assets merely because he fears that there will be nothing against which to enforce his judgment nor can he be given a secured position against other creditors. The dissipation of assets must be shown to be with an intention or for the purpose of defeating the plaintiff's claim, or otherwise "improper";

(6) the plaintiff is required to show that at least objectively, the effect of the defendant's conduct would be to frustrate the enforcement of any judgment. The conduct in question must be unjustifiable. There must be risk that the asset will be used otherwise than for normal and proper commercial purposes;

(7) the fact that the defendant has not been forthcoming with information of its financial position is neither here nor there, even where the claim against the defendant is strong;

(8) the burden is squarely on the claimant to adduce cogent evidence of commercially sharp practice. The failure of the defendant to give assurances of retention of assets to settle a debt, when the plaintiff is not entitled to such assurance in law, is irrelevant;

(9) equity does not act in vain. A court does not usually order injunctions where time has elapsed and an injunction would in effect be locking the stable door after the horse has bolted."

11. In *Grandview Industries Co Ltd v Leung Yiu Kei*, unrep., HCA 1617/2011, 10 September 2012, §§6-7 per DHCJ John Yan SC, it was made clear that the proper test is an objective one, and that the subjective intention of the defendant to dissipate assets to defeat the plaintiff's claim is not a prerequisite.

12. It was further held in *Arrow ECS Norway AS v Xin Cheng Holdings (International) Co Ltd*, unrep., HCA 239/2016, 12 May 2016, at §§48-49 per Au-Yeung J :

"48. The rationale behind points (5) and (6) in *Eastman Chemical* can be found in *TTMI Ltd of England v ASM Shipping Ltd of India* [2006] 1 Lloyd's Rep 401 at §§25-26:

> … the underlying purpose of the jurisdiction is not to provide a claimant with security for its claim but to restrain a defendant from evading justice by disposing of assets otherwise than in the ordinary course of business so as to make itself judgment proof with the result that any judgment or award in favour of the claimant goes unsatisfied … A defendant may be likely to make perfectly normal dispositions, such as the payment of ordinary trading debts, the effect of which may be that, when any award is made, it is, in whole or in part unsatisfied when, absent those payments, it might have been satisfied or satisfied to a greater extent. Something more than a real risk that the judgment will go unsatisfied is required.
>
> …

> The applicant must persuade the court by his material that the defendant is removing or there is a real risk that he is about to remove his assets[2] from the jurisdiction to avoid the possibility of judgment, or that the defendant is otherwise dissipating or disposing of its assets, in a manner clearly distinct from his usual or ordinary course of business or living.
>
> 49. The nature and financial standing of the defendant's business and the length of time it has been in business are relevant. Stronger evidence of potential dissipation will be needed where the defendant is a long-established company with a reasonable market reputation than where little or nothing is known or can be ascertained about it."

13. In cases of Mareva injunction granted in aid of arbitration proceedings, when assessing risk of dissipation the court will take into account whether or not the defendant has assets in other jurisdictions which are party to the New York Convention (under which arbitral awards are enforceable), in particular the home jurisdiction of the defendant: see *Mobil Cerro Negro Ltd v Petroleos De Venezuela SA* [2008] 1 Lloyd's Rep 684, §§45-46 per Walker J.

14. The Court will give no weight to complaints by a plaintiff about potential delays and difficulties which are routine to the legal system in the home jurisdiction of the defendant, as it was the plaintiff's choice to deal with a party from that jurisdiction. It was held in *IOT Engineering Projects Ltd v Dangote Fertilizer Ltd* [2014] EWCA Civ 1348, 16 October 2014, at §§14-15 per Tomlinson LJ:

> "14. What Flaux J there meant by "mak[ing] enforcement of an award or judgment more difficult" was, I have no doubt, more difficult than usual. Enforcement of an award or judgment is rarely straightforward unless there happens to be a secure and otherwise unencumbered fund against which enforcement can be sought. It is well known that enforcement in some jurisdictions is more difficult than in others. Some legal systems move at a greater pace than others. I do not consider that a party who contracts with a Nigerian company can legitimately pray in aid as justifying freezing order relief the difficulties routinely encountered by those who seek to enforce judgments or awards in that jurisdiction.

> 15. Nigeria is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and has enacted legislation which broadly mirrors our own domestic legislation which gives effect to our adherence to the Convention. IOTEP relies upon evidence from a practising Nigerian lawyer, Mrs Funke Agbor, to the effect that a well-resourced party who is desirous of frustrating the enforcement of a foreign award or judgment in Nigeria could do so successfully for many years. This evidence is unimpressive in its failure to explain the extent to which what is described by Mrs Agbor as "constitutional rights of appeal" are dependent upon the obtaining of permission to appeal the decisions of the inferior courts. Carried to its logical conclusion the contention of IOTEP is that any party who contracts with a Nigerian company and may in due course need to enforce against assets in that jurisdiction can without more assert a significant risk of dissipation arising out of delay in enforcement. This is self-evidently absurd. The ingenuity of lawyers in this jurisdiction is often successful in delaying enforcement for considerable periods of time, if not perhaps of the length described by Mrs Agbor."

15. In the light of the above principles, I turn to examine the evidence on which the allegation of real risk of dissipation was and is made.

Real Risk of dissipation

16. The entirety of Crete's case here is based on the allegation that Emirates Shipping is a party of "unacceptably low standard of commercial morality". That phrase was coined in the well-known case of *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] 1 HKLR 235 at 240H per Godfrey J (as he then was). This has become the go to authority for applicants struggling to put together a case of dissipation of assets.

17. It has to be accepted that an applicant will often be unable to put forward direct evidence of a risk of dissipation, and that the burden is often discharged by inferential evidence: see *Pacific Concepts (HK) Ltd v Michel Brennion*, unrep., HCA 2672/2008, 13 March 2009, at §§24-25 per A Cheung J (as he then was). However, it is self-evident that applying *Honsaico* too readily will result in grave injustice.

18. It was pointed out in *Pacific Concepts* that it is not a proposition of law that unacceptably low standard of commercial morality would constitute real risk of dissipation. Instead, it is a matter of common sense that there is a risk that a person of such morality may seek to render himself judgment proof. The task of the court is to assess that risk in light of all the evidence before it.

19. At the risk of stating the obvious, one must not overlook the fact that an ex parte order is an infringement of the rule of natural justice, and such infringement can only be allowed where: (a) it can be justified by the need to do justice, eg, where the defendant seeks to defeat the plaintiff's claim by making himself judgment proof; and (b) the evidence has been carefully scrutinised.

20. I respectfully agree with the observation made in *Pacific Concepts* that it is no more than a matter of common sense for unacceptable low commercial morality to be taken into account in the assessment of risk of dissipation. The propensity of a defendant of such disposition to make himself judgment proof is only one piece of evidence. In my view, it would be exceptional to be able to support a case of dissipation of assets based on that one piece of evidence.

21. I agree with Mr Chain that in the context of unacceptably low commercial morality the court deals with a spectrum of conduct. At one end, there are clear cases of fraud. A good example is internet fraud, which is quite prevalent in recent years. In those cases, the real risk of dissipation may be said to be self-evident. This sits with common sense because the fraudulent exercise is designed to deprive the plaintiff of his assets.

22. At the other end of the spectrum may be cases of sharp commercial practice. Whilst such conduct is reprehensible, it cannot by itself give rise to the inference of <u>real</u> risk of dissipation.

23. In between the two ends, the circumstances are infinitely variable and it would not be fruitful to try to categorise them.

24. However, I am in no doubt that where there is nothing more than propensity evidence, it would not be right to infer from it a real risk of dissipation unless the conduct of the defendant is at or very close to the fraud or dishonesty end of the spectrum.

25. The facts of *Honsaico* deserve a revisit. They involve something sinister on the part of the defendant in that, having signed a substitute contract to replace the one with the plaintiff, the defendant chose to keep the plaintiff in the dark despite being chased by it for the performance of the contract. It deliberately misled the plaintiff into thinking that the delay was due to circumstances outside its control. The delay of about 3 months in the discovery by the plaintiff of the true situation could only work to the advantage of the defendant. I believe that in such circumstances the defendant's behaviour was dishonest and took it outside the realm of sharp commercial practice. Godfrey J referred to the defendant's conduct as "devious".

26. In the present case, it is quite surprising that there is an absence of any conduct on the part of Emirates Shipping which may suggest that it was removing or there was a real risk that it was about to remove its assets with the aim of defeating an award in favour of Crete. In other words, Crete's case is based on nothing but propensity. I struggle to see the justification for Crete to invoke one the most drastic relief available in the civil court.

27. When the evidence is examined closely, the alleged unacceptably low commercial morality was and is based upon nothing more than the following: (a) Emirates Shipping had no proper ground for refusing to make hire instalments; (b) the dispute it raised on the performance deficiency of the Vessel was entirely unmeritorious and a poor excuse not to honour the C/P; and (c) ultimately Emirates Shipping abandoned the Vessel (and the C/P) on that poor excuse.

28. With respect, taking Crete's case at the highest, it was a case of a contracting party trying to get out of a bargain with the use of untenable excuse. Appearing for Crete, Mr Brown described the excuse as "disingenuous". Regrettably, such commercial behaviour is not uncommon. To say that a party with that behaviour should have his assets frozen because there is a real risk of dissipation is not supported by common sense.

29. The gravity of the conduct in this case, or the propensity of Emirates Shipping which it reflects, cannot by itself justify an inference of real risk of dissipation. I have no hesitation in discharging the Injunction or refusing to continue it.

30. However, the evidence is not all one way. As pointed out by Mr Chain, Emirates Shipping raised its complaint of underperformance immediately after it was known on 8 January 2017. There was prolonged exchange of email correspondence on the subject between the parties. The delay in the payment of the 5th and 6th instalments should be viewed in light of the dispute (Emirates Shipping says that it was entitled to a set off arising from the underperformance against the hire). The 7th instalment was paid on time. The C/P came to an end thereafter.

31. These circumstances (putting aside Emirates Shipping's evidence and Mr Chain's submissions on the merits of the counterclaim of under performance) suggest that it might be a case of misguided belief over the under performance of the Vessel (assuming that Crete is right on that issue).

32. The circumstances of this case or the gravity of conduct on the part of Emirates Shipping is not like those in *Honsaico*.

33. Further, Emirates Shipping is a substantial international company incorporated in 2006. It has headquarters in Dubai and Hong Kong, over 30 offices at various parts of the world, employs 250 full time staff and has an annual turnover of approximately US$280 million. Unsurprisingly, Emirates Shipping owns substantial assets, including the property in which its Dubai office is located which is valued at US$2.65 million.

34. In the premises, the suggestion that Emirates Shipping would dissipate its assets to evade an award of US$0.5 million is untenable.

Costs of the Arbitration

35. Finally, I must add that it is unusual to include in a Mareva injunction the costs of the applicant in the intended proceedings. No doubt Crete wanted to put itself into the position of a fully secured creditor. However, including its costs of the Arbitration in the Injunction amounts to providing a claimant with security for costs. Mr Brown has not provided any authority to support the proposition that the arbitral tribunal has the power to make that unusual order.

36. No authority was cited to the court (whether at this or the ex parte hearing) in support of an injunction which extends to the applicant's costs of intended proceedings. Apart from a schedule of costs, no assistance was provided to properly justify the quantum of costs.

37. In my view, a claim for costs should not be included in a Mareva injunction without sufficient justification both as to entitlement and quantum. The entitlement to the costs of the Arbitration will only arise if it is won by Crete. I have a good deal of reservation whether it was appropriate to cover the Arbitration costs in the Injunction when the dispute turns upon, inter alia, expert evidence to be ventilated in the Arbitration. However, I do not believe that the arguments were fully explored at the hearing, and it is unnecessary for this court to come to a conclusion on this issue in light of the decision to discharge the Injunction. On the other hand, I would respectfully make a few observations on such a claim.

38. Firstly, it must be remembered that the threshold for triggering the Mareva jurisdiction in respect of the merits of Crete's case is not very high, namely, a good arguable case. It is highly questionable whether it should follow or assume that Crete's good arguable case will prevail in the Arbitration. In hearing an ex parte application, the judge would not be able to examine the merits of the defendant's case in any real depth due to, primarily, the absence of the defendant and time constraint. That being the case, it would be wrong to ask the court to grant a relief which depends on an adequate evaluation of the merits of the opposing cases. Further, such an exercise is not for the ex parte judge.

39. Secondly, there are much uncertainties on costs entitlement. For example, the case may settle; a strong case may collapse due to, eg, the absence of a key witness; and a winning party may be penalised on costs due to unreasonableness in its conduct.

40. Thirdly, to include a costs element in an injunction has the effect of piling on the unfairness and prejudice for the recipient. He is likely to feel the pressure to settle the action quickly.

41. Fourthly, more often than not costs are reduced after taxation, and therefore it would not be right to simply include all the claimed costs in an injunction.

Conclusions

42. For these reasons, the Injunction is discharged with costs to Emirates Shipping, to be taxed if not agreed. The OS is dismissed with costs to Emirates Shipping.

43. I thank counsel for their assistance.

(Anthony Chan)
Judge of the Court of First Instance
High Court

Mr Toby Brown, instructed by Ince & Co, for the Plaintiff

Mr Christopher Chain, instructed by Howse Williams Bowers, for the Defendant

---

[1] At the time of the grant, the Arbitration had not begun.

[2] Emphasis added.