

Global Energy (Asia) Pte Ltd v McGraw-Hill Companies Inc Trading as Platt's
[2001] SGHC 247

Case Number : Suit 1058/2000/Z, RA 120/2001
Decision Date : 30 August 2001
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Alvin Yeo, S C , with Tay Peng Cheng (Wong Partnership) for the defendants/appellants; Vijay Parwani (Madhavan Partnership) for the plaintiffs/respondents
Parties : Global Energy (Asia) Pte Ltd — McGraw-Hill Companies Inc Trading as Platt's

Judgment:

1 This is the Defendants' appeal against the decision of an Assistant Registrar dismissing their application for a Further and Better List of Documents.

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THE BACKGROUND

2 The Plaintiffs are in the bunkering business and provides shipping and marine logistics to the marine industry. They are part of the Global Group comprising 12 companies, of which three are fully owned by the Plaintiffs. The Plaintiffs are shareholders in the other companies. The Global Group owns and manages 14 bunker tankers with three such vessels under the direct ownership of the Plaintiffs.

3 The Plaintiffs' paid-up capital is \$5.125 million. They have representative offices in Iran, Dubai and Hong Kong and have joint-venture partners in Malaysian and the Netherlands.

4 The Defendants are a specialist energy market reporting company of the McGraw-Hill Companies, reporting on the international energy market for the last 75 years.

5 On 7 September 2000, the Defendants published the following news release:

"Singapore's Global Energy to sell 2 bunker barges

Singapore (Platt's) – 7Sep2000/353 am EDT/753 GMT

Global Energy, a Singapore-based bunker supplier is planning to sell two bunker barges, industry sources said Thursday. The barges which are up for sale include the 1,600mt "Star Progress" and the 4,000mt "Global Excellence", said sources. The 26-year oil Star Progress is a Category B barge, which will be obsolete by end-2000. Singapore's Maritime Port Authority requires all bunker barges in Singapore waters to comply with Category A conditions which are a list of efficiency and operational standards set by MPA. Category B barges will not be allowed to operate in Singapore by Jan 2001. A high-sea bunker supplier was said to be keen

to buy "Star Progress". Sources said Global Energy is selling the barges due to cash-flow problems. But will charter her on spot basis. Global officials declined to comment.

--Platt's Global Alert--"

6 The Plaintiffs claimed the above news release's assertion that they were "selling the barges due to cash-flow problems" was malicious and false because at no time did they offer to sell their flagship "Global Excellence" and the "Star Progress" was only offered for sale to comply with the Maritime Port Authority's requirements. The Plaintiffs averred that their business reputation and credit had been severely injured by the defamatory news release which meant that the Plaintiffs:

- (1) were selling their barges because they were insolvent and/or temporarily insolvent;
- (2) had inadequate funds to meet their day to day operations and were planning to close down their business;
- (3) were unable to meet their financial obligations as and when they fell due; and
- (4) did not have sufficient financial standing to obtain credit lines to meet their financial obligations and had to resort to selling off their barges to raise funds.

7 The Defendants admitted publishing the words in question but denied defaming the Plaintiffs. They pleaded the defences of justification and qualified privilege.

8 The Plaintiffs then applied for particulars of the defence of justification. The Defendants filed their particulars on 30 March 2001, pleading that the Plaintiffs had suffered losses, *inter alia*, in their trading activities in the Middle East and Malaysia and had offered the barges for sale and/or sale and lease back through a ship broker named Thome & Partners for funds to ease their cash flow difficulties. The Defendants stated that those were the best particulars pending discovery.

9 The Plaintiffs then applied by SIC 874/2001/B for further particulars. On 27 April 2001, an Assistant Registrar ordered further particulars to be furnished within 10 days of discovery and inspection.

10 On 4 May 2001, at a Pre-Trial Conference, the Registrar directed the parties to file their respective lists of documents by 18 May 2001 and to complete inspection of documents by 25 May 2001, failing which the action be dismissed with costs or the defence be struck out and judgment be entered for the Plaintiffs with costs.

11 On 17 May 2001, the Plaintiffs filed their list of documents and served it on the Defendants' solicitors the next day. The documents listed by the Plaintiffs as being in their possession, custody or power were:

"S/N DATE DOCUMENTS

1. 07.09.2000 Copy of the Defendants' news alert
2. 08.09.2000 Copy of the Defendants' news alert
3. 04.10.2000 Copy of the Plaintiffs' solicitors letter to the Defendants
4. 10.10.2000 Copy of the Defendants' letter to the Plaintiffs' solicitors
5. 30.10.2000 Copy of the Plaintiffs' solicitors to the Defendants
6. 31.10.2000 Copy of the Defendants' letter to the Plaintiffs' solicitors
7. - Copy of the ROC Search on the Plaintiffs
8. - Copy of the ROC Search on the Defendants
9. - Copy of an extract from the Defendants web-page from the Internet
10. - Various correspondence between the Plaintiffs' solicitors and the Defendants' solicitors"

12 The Defendants' solicitors were of the view that the discovery by the Plaintiffs were incomplete and therefore wrote the following letter dated 22 May 2001 to the Plaintiffs' solicitors:

"Upon a review of your clients' List of Documents and the pleadings, we are of the view that your clients' discovery is incomplete. In particular, it is apparent that your clients would be in possession, control and/or power of the following documents (which are clearly of relevance to the issues in this matter), but which have not been disclosed:

- a. All accounting documents of the Global Group of Companies ("Global") for the financial years 1998, 1999 and 2000, including but not limited to the audited accounts, management accounts, general ledgers, cashflow statements, balance sheets and profit and loss accounts, whether done on a monthly basis or any period greater than a month;
- b. All accounting documents of Global for

the financial years 1998, 1999 and 2000 in relation to Global's business activities in Malaysia, Middle East, Netherlands, Iran, Dubai, and Hong Kong including but not limited to the management accounts, general ledgers, cashflow statements, balance sheets and profit and loss accounts, whether done on a monthly basis or any period greater than a month.

c. All documents, notes, correspondence and memoranda in respect of and/or in connection with Global's contacts with Thome & Partners in 2000 (if any);

d. All documents, notes, correspondence and memoranda in respect of and/or in connection with any inquiries or attempts relating to the sale, sale and leaseback and/or disposal in any other manner of the vessels "Star Progress" (or "Dunia Bintang") and/or "Global Excellence";

e. All documents, notes, correspondence and memoranda in respect of and/or in relation to the change of name of the vessel "Star Progress" to "Dunia Bintang".

Without limiting the reasons for the relevance of the aforesaid categories of documents, we would state that the aforesaid documents are clearly relevant from an examination of the pleadings, what transpired in various applications before the Court, and what had been stated in the Affidavit of your Mr Vijai Parwani filed on

17 April 2001.

Your clients are well aware that our clients would be providing further particulars of the Answers filed on 30 March 2001, within 10 days after the completion of discovery and inspection. Your clients are further aware that the order was made by the learned Assistant Registrar on the basis inter alia that the particulars would be contained in the discovery to be made available by your clients. Your clients' failure to provide complete discovery is thus prejudicial to our clients, particularly in the light of the obvious relevance of the requested documents.

In the circumstances, please let us know, by the close of business on 23 May 2001, whether your clients will be providing the Further and Better Discovery as requested. If your clients are unable to furnish any of the said documents, please do let us know with reasons.

..."

13 The Plaintiffs' solicitors replied on 23 May 2001 stating that it was evident the Defendants were "going on a fishing expedition", that the Plaintiffs had completed their obligations for discovery and demanding that the Defendants comply with the Order of Court made on 27 April 2001 by 28 May 2001, failing which they would apply to Court to strike out the Defence.

SIC 1230/2001/F

14 On 1 June 2001, the Defendants applied by way of SIC 1230/2001/F for the following orders:

"1 that the Plaintiffs do within three (3) days of the order herein file and serve a Further and Better List of Documents comprising documents requested by the Defendants' solicitors through their letter of 22 May 2001, and allow inspection of the documents listed therein within seven (7) days thereafter,

2 that unless the Plaintiffs' Further and Better List of Documents is filed within the time stipulated herein, the Plaintiffs' claim do stand

dismissed with costs to the Defendants;

3 that the time for the Defendants to comply with the Order of Court dated 27 April 2001 be extended to ten (10) days after the completion of the further discovery and inspection herein, and

4 that the costs of this application be paid by the Plaintiffs to the Defendants."

THE DEFENDANTS' AFFIDAVIT IN SUPPORT

15 In the affidavit filed in support of this application, the Defendants' solicitors stated that the Defendants would not be in a position to furnish the particulars ordered on 27 April 2001 without the documents requested by them. They asserted that such documents should be in the Plaintiffs' possession, custody or power and were documents which:

(1) the Plaintiffs would have to rely on in the trial;

(2) could adversely affect or support the case of the Plaintiffs or the Defendants; or

(3) could lead the Defendants on a train of inquiry resulting in the Defendants obtaining information which may adversely affect the case of the Defendants or the Plaintiffs.

16 The Defendants claimed that the accounting documents of the Global Group for 1998, 1999 and 2000 were clearly relevant in establishing the financial position of the Plaintiffs in the months leading up to the publication of the news release in September 2000 and whether the Plaintiffs were experiencing cash flow problems which necessitated the disposal of the two vessels. The Plaintiffs would have to rely on those documents to establish their own case on their financial position.

17 Where the second category of documents was concerned, the Defendants said they had pleaded in their particulars of 30 March 2001 that

the Plaintiffs suffered losses in their trading activities in Malaysia and the Middle East and that the sale of the vessels was to ease the cash flow problems. These documents would be relevant in establishing the financial results of the business activities in the areas in question and whether these had resulted in cash flow problems to the Plaintiffs. The Plaintiffs would have to rely on these documents to establish their own case on their financial position.

18 For the third and fourth categories of documents, the Plaintiffs had admitted there were attempts to sell the vessel "Star Progress" (renamed "Dunia Bintang") but had disclosed no documents relating to the sale. They would need to rely on these documents to support their own plea as to the purpose of the sale of this vessel. It was usual for sale of vessels to be effected through the assistance of a ship broker. If the Plaintiffs had effected the sale of the "Star Progress" through Thome & Partners, it would not be unreasonable to expect that the documents relating to contacts with Thome & Partners or another party would be in the possession, custody or power of the Plaintiffs.

19 Although the Plaintiffs had denied any attempt to sell the "Global Excellence", if they had documents relating to such disposal, they were obliged to disclose them.

20 The documents in these two categories would enable the Defendants to determine whether there were attempts at disposal of the two vessels and, if so, to embark on a train of inquiry as to the purpose of such disposal.

21 The last category of documents concerned the change of name of "Star Progress" to "Dunia Bintang". The Plaintiffs in their Reply pleaded that if the Defendants were diligent in their reporting they would have also realized that the name of the vessel had already been changed in January 2000. No document on such change of name was disclosed by the Plaintiffs who would have to show that the change took place in January 2000. These documents would also enable the Defendants to establish whether such change had taken place and to embark on a train of inquiry as to the purpose for such change.

THE PLAINTIFFS' AFFIDAVIT IN OPPOSITION

22 The Plaintiffs alleged that the Defendants had failed to mention that their list of documents was just as bare as the Plaintiffs' was said to be. The Defendants had no basis to say that the Plaintiffs were insolvent or were having cash-flow problems or that they had engaged the services of Thome & Partners. They also had no basis in alleging that the Plaintiffs suffered losses in the Middle East or any part of the world and that they were even attempting to sell the "Global Excellence", let alone doing that through Thome & Partners.

23 The documents pertaining to the purpose of the change of name were not relevant. Although the Plaintiffs had alleged that the Defendants lacked diligence in reporting their claim was for libel and not negligence. In any event, the Defendants published another report on 21 March 2001 in which they referred to the vessel by its correct name, thereby showing that they realized that the first report had referred to the vessel by its former name.

THE ASSISTANT REGISTRAR'S DECISION

24 On 8 June 2001, the Assistant Registrar dismissed the Defendants' application for further and better discovery. He then dealt with the

Plaintiffs' application in SIC 1254/2001 which sought to strike out paragraph 8 of the Defence (on justification). He denied the application, ordering that the Defendants comply with the Order of Court dated 27 April 2001 by 15 June 2001, in default of which the said paragraph 8 be struck out. The Assistant Registrar ordered costs fixed at \$1,500 in respect of both applications to be paid by the Defendants to the Plaintiffs.

THE DEFENDANTS' APPEAL AND MY DECISION

25 Before me, Counsel for the Defendants stated that he was not asking for the documents in the second category as they would be subsumed in the first. Similarly, he conceded that the third category of documents ought to be subsumed in the fourth. He argued that the Plaintiffs were an exempt private limited company and their accounts were not available to the public. The Defendants were therefore entitled to their accounting documents. He conceded, however, that the Defendants' request was rather too wide and was content to leave out the documents for 1998. As for the fifth category relating to the change of name, he argued that this issue was one of the particulars of malice alleged by the Plaintiffs and the Defendants were entitled to such documents because of their Defence of qualified privilege.

26 Order 24 rule 1 of the Rules of Court provides:

"Order for discovery (O. 24, r. 1)

1. (1) Subject to this Rule and Rules 2 and 7, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

(a)
the
documents
on
which
the
party
relies
or
will
rely;
and

(b)
the
documents
which
could

—

(i)
adversely
affect
his
own
case;

(ii)
adversely
affect
another
party's
case;
or

(iii)
support
another
party's
case.

(3) An order under this Rule may be limited to such documents or classes of documents only, or to only such of the matters in question in the cause or matter, as may be specified in the order."

27 Order 24 rule 2 concerns determination of an issue or question before discovery and is not relevant to the case here. Order 24 rule 7 mandates that discovery is to be ordered only if necessary. It states:

"7. On the hearing of an application for an order under Rule 1, 5 or 6, the Court may, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

28 In *Business Software Alliance & Ors v S M Summit Holdings Ltd & Anor* [2000] 2 SLR 733, the Defendants in the libel action there filed two applications for a further and better list of documents and specific discovery of certain documents from the Plaintiffs. At paragraph 33 of the judgment, the Court of Appeal said:

"33. We now come to the documents the defendants seek from the plaintiffs. The question is whether the documents sought satisfy the test of relevancy. ..."

The Court of Appeal then dealt with the *Peruvian Guano Co case* [1882 – 83] 11 QBD 55 and *McDonald's Corp. & Anor v Steel & Anor* [1995] 3 AER 616 and continued (at paragraphs 35 and 36):

"35. Mr Elias submits that the requirements set out above are satisfied on the facts. The particulars of justification state that Summit CD 'habitually accepted, processed and delivered orders for stampers and CD-Roms' from the alleged software pirates. These particulars were pleaded on the basis of the information provided by Pan and Shi and were therefore well grounded. The defendants are therefore entitled to discovery of documents to substantiate what they have pleaded.

36. We are unable to accept this argument. Whilst the particulars of justification do clearly refer to dealings with the alleged software pirates, this alone does not give the defendants carte blanche to empty the plaintiffs' filing cabinets. In defamation actions the *Peruvian Guano* principle is subject to the well established rule that a defendant is not permitted to mount a fishing expedition through the discovery process in the hope of finding something to justify his libellous words. The documents in category (1) are described as 'All the invoices, sales orders, delivery orders and/or correspondence' of Summit CD relating to the alleged software pirates. That is a remarkably wide class of documents which would encompass any letter or note on any matter whatsoever between Summit CD and the alleged pirates. The lack of specificity in this regard can only lead us to infer that, in fact, the defendants have no knowledge of any particular transactions which would substantiate their plea of justification. That being the case, they are clearly trying to empty the cupboards in the hope of finding something to substantiate their plea. This amounts to a fishing expedition. We do not read *McDonald's* case as saying that by merely pleading that a particular fact is true, a defendant in a libel action is entitled to obtain by discovery all the plaintiffs' documents to see whether there is anything in them to sustain the plea. All that case says is that a plea of justification will not be struck out before the trial on the basis that there is no 'clear and sufficient' evidence to sustain it, as some previous authorities seemed to suggest. In any event, that case did not concern the issue of relevancy of the documents sought in discovery and is therefore of limited assistance to the defendants."

34 Applying these principles to the Defendants' application here, the first category of documents (which includes the second category, as conceded by the Defendants) was indeed remarkably wide in that it covered all accounting records of the entire Global Group over three years. If the Defendants were correct in their assertion that they were entitled to all such documents, they would effectively be espousing the following proposition:

If Defendant is sued for defaming Plaintiff by alleging that Plaintiff is in financial difficulties and Defendant pleads the defence of justification, Defendant is entitled to ask Plaintiff to disclose all his financial records (including bank statements) for the preceding three years.

The above proposition is startling because it would in effect be reversing the burden of proof – i.e. the Plaintiff has to divulge all his

confidential financial matters to the Defendant to show that he is not in financial difficulties.

35 Merely stating that they believed that "the Plaintiffs had suffered losses in *inter alia* their trading activities in Malaysia and the Middle East" could not assist the Defendants in their unjustifiable quest to hopefully catch some fish of justification somewhere in the expanse of the Global ocean. It is akin to the situation where A says B is in financial straits as he has lost money in shares and, when sued for defamation, tells B to reveal all his and his family's financial records for the last three years.

36 Since the Plaintiffs' audited accounts were not available to the public at large, as an indulgence to the Defendants, I was prepared to order that only the Plaintiffs' (and not the Global Group's) audited accounts for financial years 1999 and 2000 be disclosed. I ordered such disclosure by the Plaintiffs within seven days from my order.

37 Where the third and fourth categories of documents were concerned, it was apparent from the Defendants' supporting affidavit that they had no basis in saying that the Plaintiffs or the Global Group had any documents pertaining to any dealings with Thome & Partners. Further, it was strange that the Defendants were asking for documents relating to the sale of "Global Excellence" when the Plaintiffs had pleaded that they had not offered that vessel for sale. These roaming searches could only lead to the inference that the Defendants lacked knowledge of any particular facts which would substantiate their plea of justification. I therefore affirmed the Assistant Registrar's refusal to order discovery of these categories.

38 The last category of documents was in relation to the change of name of "Star Progress" to "Dunia Bintang". From the pleadings, the only issue that arose from this was the assertion by the Plaintiffs that the change of name took place in January 2000. Although I affirmed the Assistant Registrar's refusal to order discovery of these documents, upon further reflection, I think it would have been fair to order discovery of documents evidencing the date of change and nothing else. The subsequent news release by the Defendants on 21 March 2001 merely referred to the new name without acknowledging that the change of name had taken place in January 2000.

39 The Defendants failed in their appeal by and large except for the documents mentioned in paragraph 36 of this judgment. I therefore ordered them to pay \$1,200 costs to the Plaintiffs in respect of the appeal. I do not think what I have said in the preceding paragraph about documents pertaining to the date of change would have affected my decision on the issue of costs.

40 On 19 July 2001, upon the request of the Plaintiffs, I granted them an extension of time until 20 August 2001 to furnish the documents ordered to be disclosed as their audited accounts for financial year 2000 were not available yet.

TAY YONG KWANG
JUDICIAL COMMISSIONER