

Toyota Tsusho (Malaysia) Sdn Bhd v United Overseas Bank Ltd & another
[2016] SGHC 74

Case Number : Originating Summons No 872 of 2015
Decision Date : 19 April 2016
Tribunal/Court : High Court
Coram : Lai Siu Chiu SJ
Counsel Name(s) : Nehal Harpreet Singh SC, Goh Rui Xian Elsa and Han Guangyuan Keith (Cavenagh Law LLP) for the plaintiff; Ng Yeow Khoon (KhattarWong LLP) for the first defendant; Kirpal Singh s/o Hakam Singh and Oh Hsiu Leem Osborne (Hu Shoulin) (Kirpal & Associates) for the second defendant.
Parties : TOYOTA TSUSHO (MALAYSIA) SDN BHD — UNITED OVERSEAS BANK LIMITED — VINTECH ENGRG PTE LTD

Civil Procedure – Discovery of documents – Pre-action discovery

19 April 2016

Lai Siu Chiu SJ:

Introduction

1 In this Originating Summons (“the OS”), Toyota Tsusho (Malaysia) Sdn Bhd (“the plaintiff”) applied for the following orders against United Overseas Bank Limited (“the first defendant”):

(a) That the first defendant shall, within seven (7) days from the date of the Order to be made hereon, file and serve on the plaintiff a List of Documents listing the documents set out in Schedule 1 herein which are in the first defendant's possession, custody or power;

(b) That the first defendant shall, within seven (7) days from the date of the Order to be made hereon, file and serve on the plaintiff an affidavit verifying the List of Documents referred to in paragraph 1 above, stating whether the documents listed there are or have at any time been in its possession, custody or power, and if the said documents have been but are no longer in its possession, custody or power, stating when it parted with and what has become of the same, including the parties to whom the said documents were transmitted and/or forwarded to;

(c) That the first defendant shall, within seven (7) days from the date of the Order to be made herein, provide the plaintiff with copies of all the documents listed in the List of Documents referred to in paragraph 1 above.

2 Schedule 1 of the OS states:

The following documents within the [first defendant]'s possession, custody or power relating to account number xxx-xxx-xxx-x held in the name of or beneficially owned by Vintech Engrg Pte Ltd (the "Vintech Account"):

a. All cheques drawn on the Vintech Account from 1 January 2014 to date;

- b. All bank statements in respect of the Vintech Account from 1 January 2014 to date; and
- c. All debit vouchers, transfer applications and orders in respect of the Vintech Account from 1 January 2014 to date. [emphasis in original]

3 The OS was opposed by Vintech Engrg Pte Ltd ("the second defendant") whose director Gan Teck Beng ("Gan") filed an affidavit (on 20 November 2015) setting out his objections. In fact, the second defendant went further and applied by Summons No 5446 of 2015 ("the Summons") for the following orders:

- (a) That proceedings in the OS be stayed in favour of Malaysian proceedings in Suit No 22NCC-216-07/2015; and
- (b) Further and/or in the alternative, that the OS be struck out under Order 18 Rule 19(1)(d) and/or under the inherent jurisdiction of this Honourable Court.

4 The OS and the Summons were heard together. I dismissed the Summons and granted an order in terms with some variation of the prayers set out in the OS (see [1(a)] to [1(c)]) above with the costs of compliance by the first defendant to be borne by the plaintiff. In particular, I gave the first defendant 14 instead of 7 days to comply with the prayers granted. Further, for documents in listed in category (c) of Schedule 1 of the OS, I limited discovery to transfer applications and standing orders in respect of the second defendant's account commencing from 1 January 2014.

5 As the second defendant has filed a notice of appeal (in Civil Appeal No 209 of 2015) against my decision, I now set out my reasons.

The background

6 The plaintiff had sued the second defendant (as the third defendant) in Suit No 753 of 2015 ("Suit 753") for *inter alia* damages for fraud, conspiracy, deceit, misrepresentation, breach of contract and monies had and received. The plaintiff had separately sued Gan in Suit No 834 of 2015 ("Suit 834") for the exact same claims as in Suit 753. In Suit 753 and Suit 834, the plaintiff had alleged that its employees working in concert with various external parties (including the second defendant and Gan) had defrauded the plaintiff of a staggering sum of RM179m (going as far back as 2011) by engineering a whole series of fraudulent transactions involving products known as "*super engineering plastics*" to induce the payment out of large sums of monies by the plaintiff to various suppliers who in turn shared the spoils with the plaintiff's errant employees. To evade detection of the fraud, gaps and weaknesses in the plaintiff's internal systems and controls were exploited to create fake purchase orders, records and other documents.

7 Once it discovered the fraud, the plaintiff commenced proceedings and obtained Mareva and Anton Piller orders against their errant employees as well as third parties such as the second defendant, Gan and others. Pursuant to the Mareva injunction granted on 27 July 2015 in Suit 753, Gan had filed an affidavit of assets and means on behalf of the second defendant on 14 August 2015 giving particulars of the second defendant's bank accounts including the Vintech Account maintained with the first defendant.

8 After numerous interlocutory applications by the parties, both Suit 753 and Suit 834 were stayed (in favour of Malaysian proceedings) by consent orders of court granted to the second defendant and Gan respectively on 23 September 2015 and 12 October 2015. The second defendant was joined as a party to the OS by order of court dated 30 October 2015 on its application.

9 The Malaysian claim instituted by the plaintiff in the High Court of Malaya at Kuala Lumpur is Suit No 22NCC-216-07/2015 (“the Malaysian suit”) which was referred to in the Summons. In the Malaysian suit, the plaintiff had similarly obtained a worldwide Mareva injunction against the second defendant on or about 24 July 2015 (“the Malaysian Mareva order”). In the Malaysian Mareva order, the UOB account set out in Schedule 1 of the OS at [2] was identified as one of the accounts to be frozen.

10 In his opposing affidavit alluded to at [3] above, Gan deposed that before Suit 753 was stayed, the plaintiff had requested the same documents set out in Schedule 1 of the OS (which the second defendant refused to provide) but the plaintiff did not apply for discovery thereafter. He also complained that the OS was taken out despite proceedings in Suit 753 and Suit 834 having been stayed. Gan alleged that the plaintiff is on a fishing expedition. Further, he deposed that the plaintiff must first succeed in the Malaysian suit before it is entitled to trace the proceeds of fraud (which Gan denies) against the second defendant and Gan. Gan also added that the plaintiff should make their discovery application in the Malaysian suit instead.

The Decision

11 It bears noting that the OS was filed pursuant to Order 24 r 6(1) and (5) of the Rules of Court, which states:

6 — (1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.

6 — (5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

12 In other words, the OS was an application for pre-action discovery against a non-party. In this regard, the commentary in the *Singapore Civil Procedure Volume 1* (G P Selvam gen ed) (Sweet & Maxwell, 2015) (“SCP 2015”) at para 24/6/7 is useful. There, the authors state (at page 555):

Pre-action discovery is for the plaintiff who is unable to plead a case as he does not know whether he has a viable claim and requires the discovery to ascertain the gaps in his case.

The plaintiff wanted to ascertain to whom the proceeds of the fraud allegedly committed by the second defendant and Gan had been transferred in order to determine if the plaintiff had causes of action in constructive trust against such parties. The OS has nothing to do with either the two Singapore suits or the Malaysian suit. Gan had conflated the issues by asserting that the plaintiff could apply for the same discovery in the Malaysian suit or could have done so in the two Singapore suits before the actions were stayed.

13 An application for pre-action discovery must be supported by an affidavit setting out the grounds for the application, the material facts pertaining to the intended cause of action and whether the person against whom the order was sought was likely to be a party to subsequent proceedings: see *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR (R) 39 (“the Bayerische case”) at [4].

14 The OS had been supported by an affidavit filed on 18 Sep 2015 by Toshihiro Sadowara ("Sadowara") who is the head of the legal department of the plaintiff's Thailand office which is responsible for providing *inter alia* legal and administrative support to the plaintiff. In his affidavit numbering 35 pages (excluding voluminous exhibits), Sadowara dealt *in extenso* with the *modus operandi* whereby Gan, through the second defendant and co-conspirators were able to perpetrate the massive fraud on the plaintiff.

15 Gan's affidavit in [7] revealed that most of the monies paid to the second defendant by the plaintiff's employees involved in the fraud had been transferred from the Vintech Account to other parties whose identities are unknown. The Vintech Account contained a sum of US\$21,168.72, which Sadowara deposed was less than 0.2% of the value of the monies deposited into the Vintech Account by the plaintiff's employees, according to the plaintiff's investigations. The recipients of monies from the Vintech account (or part thereof) may be liable to the plaintiff for knowing receipt, and/or as constructive trustees. The plaintiff would have to commence legal proceedings to recover the sums from the unknown recipients; hence the need for pre-action discovery.

16 The plaintiff had cited in support of the OS the House of Lords decision in *Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133 ("*Norwich Pharmacal*"). There, Lord Reid said (at 175):

...if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

This was the position of the first defendant in the OS. Subject to the plaintiff's obtaining the requisite order of court, the first defendant was willing to furnish information of the payees of the second defendant's cheques drawn on the Vintech Account.

17 In the *Bayerische* case, the pre-action discovery application allowed by the Assistant Registrar was reversed by Belinda Ang J on appeal. There, the four plaintiff banks had applied for pre-action discovery against Asia Pacific Breweries (Singapore) Pte Ltd ("APBS") because they did not believe that APBS had no knowledge of the unauthorized accounts and the unauthorized loans taken from the four banks by its finance manager Chia Teck Leng ("Chia") to the tune of \$135m. Chia had forged the signatures of the directors of APBS to various resolutions that purportedly signified the company's acceptance of the banks' loans and the appointment of Chia as the sole authorized signatory for the loans. Belinda Ang J held at [4] that apart from being relevant, the application must not be frivolous nor speculative or a fishing expedition. Further, the application must be necessary for fairly disposing of the proceedings or for saving costs. Accordingly, she held that the banks' disbelief of APBS's ignorance of Chia's misdeeds was not a sufficient reason to allow pre-action discovery.

18 Under s 47(1) of the Banking Act (Cap 19, 2008 Rev Ed), customer information is confidential. The relevant section states:

Banking secrecy

(1) Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act.

(2) A bank in Singapore or any of its officers may, for such purpose as may be specified in the first column of the Third Schedule, disclose customer information to such persons or class of

persons as may be specified in the second column of that Schedule, and in compliance with such conditions as may be specified in the third column of that Schedule.

(3) Where customer information is likely to be disclosed in any proceedings referred to in item 3 or 4 of Part I of the Third Schedule, the court may, either of its own motion, or on the application of any party to the proceedings or the customer to which the customer information relates —

(a) direct that the proceedings be held in camera; and

(b) make such further orders as it may consider necessary to ensure the confidentiality of the customer information.

19 The plaintiff's application was based on an exception to s 47(1) of the Banking Act as set out in Part 1 of the Third Schedule of the Banking Act. Item 7 of the Third Schedule states:

Disclosure is necessary for compliance with an order of the Supreme Court or a Judge thereof pursuant to the powers conferred under Part IV of the Evidence Act (Cap. 97).

20 Section 175 in Part IV of the Evidence Act (Cap 97, 1997 Rev Ed) which refers to banker's books states:

(1) On the application of any party to a legal proceeding, the court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank 3 clear days before the same is to be obeyed unless the court or judge otherwise directs.

Conclusion

21 Consequently, there was no merit in Gan's objections to the OS or in the Summons application for a stay of the OS based on *forum non conveniens* which I accordingly dismissed. Gan and/or the second defendant had no *locus standi* to object to the OS notwithstanding the latter being allowed to be joined as a party to the OS. To force the plaintiff to wait until the successful outcome of the Malaysian suit before commencing proceedings against third parties may well be a case of "too little too late". By then, the recipients of the plaintiff's monies in the Vintech Account may have dissipated the monies. It bears remembering that the plaintiff had been allegedly defrauded of a huge amount of RM179m which approximated S\$62.15m (@ S\$1.00 to RM2.88).

22 The information to be furnished by the first defendant by the order granted by this court would enable the plaintiff to determine against which third parties (if any) the plaintiff could pursue proprietary remedies for receipt of monies from the Vintech Account of the second defendant.