

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 46

Civil Appeal No 165 of 2015

Between

Simgood Pte Ltd

... Appellant

And

- (1) MLC Barging Pte Ltd
- (2) MLC Maritime Pte Ltd
- (3) Nantong Tongbao
Shipbuilding Co Ltd
- (4) Tan Ho Seng
- (5) Eng Chor Wah

... Respondents

ORAL JUDGMENT

[Tort] — [Conspiracy]

[Tort] — [Inducement of breach of contract]

[Companies] — [Incorporation of companies] — [Lifting corporate veil]

[Trusts] — [Constructive trusts]

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

**Simgood Pte Ltd
v
MLC Barging Pte Ltd and others**

[2016] SGCA 46

Court of Appeal — Civil Appeal No 165 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Judith Prakash J
7 July 2016

26 July 2016

Judgment Reserved

Chao Hick Tin JA (delivering the oral judgment of the court):

Introduction

1 The appeal before us arises out of a complex factual matrix which pertains, in the main, to a shipbuilding contract which had been entered into between the appellant, Simgood Pte Ltd (“Simgood”) and the first defendant in the suit below, MLC Shipbuilding Sdn Bhd (“MLC Shipbuilding”). Under the terms of the contract, the latter was to construct and deliver a vessel with hull number 5282 to Simgood (“Contract 5282”). MLC Shipbuilding failed to deliver this vessel.

2 Apart from a cause of action in contract against MLC Shipbuilding, Simgood also brought claims against eight other defendants in the suit below. Simgood alleged that these defendants had contributed, in some way, to MLC Shipbuilding’s failure to deliver the vessel. A key allegation made by Simgood

was that the seventh to ninth defendants (who were either shareholders or directors of MLC Shareholding or its affiliate companies) had dishonestly swapped the hull numbers of two vessels and this had, according to Simgood, resulted in the non-delivery of the vessel under Contract 5282.

3 In the decision below, the Judge found that while the seventh to ninth defendants' acts were dishonest, the reason they swapped the hull numbers was to postpone the repayment of a loan facility with DBS Bank Ltd and the swap did not have a bearing on MLC Shipbuilding's failure to deliver the vessel to Simgood. The Judge eventually held that only MLC Shipbuilding was liable for failing to deliver the vessel to Simgood and therefore ordered specific performance of Contract 5282, failing which MLC Shipbuilding would have to pay damages to Simgood. The Judge additionally held that the fifth defendant ("Nantong MLC"), which was the Chinese company actually constructing the vessel, was liable in the tort of detinue. Nantong MLC was therefore also ordered to deliver up the vessel to Simgood, failing which it would be liable to pay damages to Simgood. It was subsequently revealed that the vessel had already been sold to an unknown third party although it is not clear who had sold the vessel.

4 This led Simgood to commence the present appeal as against five of the nine defendants in the suit below ("the Respondents"). The Respondents consist of the following:

- (a) MLC Barging Pte Ltd ("MLC Barging"), an affiliate company of MLC Shipbuilding (the second defendant in the suit);
- (b) MLC Maritime Pte Ltd ("MLC Maritime"), an affiliate company of MLC Shipbuilding (the third defendant in the suit);

(c) Tan Ho Seng (“Tan”), a shareholder and/or director of MLC Shipbuilding, MLC Barging, MLC Maritime and Nantong MLC (the seventh defendant in the suit);

(d) Eng Chor Wah (“Eng”), the wife of Tan Ho Seng, who is also a shareholder and director of MLC Maritime (the eighth defendant in the suit); and

(e) Nantong Tongbao Shipbuilding Co Ltd (“Nantong Tongbao”), a Chinese company which initially owned 56% of the shares in Nantong MLC although this may have been reduced to 40% pursuant to a shareholder’s resolution in June 2008 (the sixth defendant in the suit). Nantong Tongbao did not participate in the trial.

For ease of reference, Tan and Eng will be referred to collectively as “the Tans”.

5 According to Simgood, the Judge should have found the Respondents liable under four heads of action: (a) the Respondents had committed the tort of conspiracy by unlawful means; (b) the Respondents had committed the tort of inducing the breach of Contract 5282; (c) the corporate veil should be pierced such that several of the Respondents should be concurrently liable for the wrongs committed by Nantong MLC; and (d) a remedial constructive trust should be imposed over the vessel.

6 We heard the parties on 7 July 2016, and reserved judgment to consider certain factual issues which had arisen in the course of the hearing. Having considered the matter further, we dismiss Simgood’s appeal in Civil Appeal No 165 of 2015 (“CA 165/2015”). A comprehensive exposition of the facts may be found in the Judge’s decision of *Simgood Pte Ltd v MLC*

Shipbuilding Sdn Bhd and others [2015] SGHC 303 (“the GD”) at [1]–[49]. For present purposes, we preface the reasons for our decision with a summary of the facts which are germane to the determination of this appeal.

Summary of facts

7 In April 2008, Simgood and its affiliate companies entered into a series of shipbuilding contracts with MLC Shipbuilding. Apart from Contract 5282, another relevant contract in this series of contracts was that entered into between MLC Shipbuilding and PT Indoliziz (*ie*, an affiliate company of Simgood) for the former to construct and deliver to the latter a vessel with hull number 5284 (“Contract 5284”). Prior to these contracts being entered into, the keel for a vessel which bore hull number 5282 had already been laid. This vessel was referred to as “Vessel A” in the GD.

8 In July or August 2008, the Tans formulated a plan with Redzuan Goh Bin Mohammed Karian (“Redzuan”), their then son-in-law and the ninth defendant in the suit below, to change the hull number of Vessel A from 5282 to 5284. At that time, Vessel A was at an advanced stage of construction. In September 2008, the keels for a further two vessels were laid. One of these vessels was assigned hull number 5282. This vessel was referred to as “Vessel B” in the GD. With Vessel A now bearing hull number 5284 and Vessel B bearing hull number 5282, this meant that Contract 5282 was further from completion.

9 According to the Judge, the Tans and Redzuan switched the hull numbers between Vessel A and Vessel B in order to take further advantage of a loan facility extended by DBS Bank Ltd (“DBS”) that was attached to a vessel bearing hull number 5282. By making the switch, the loan facility

would no longer be tied to Vessel A, which was closer to completion at that time (see [114] of the GD).

10 As part of the plan, the Tans and Redzuan also engineered a series of contracts which, *inter alia*, altered the ownership of Vessel B. The purported effect of these contracts was the interposition of MLC Barging into the contractual picture such that it was to be regarded as the seller of Vessel B to MLC Shipbuilding, and MLC Shipbuilding would then on-sell the Vessel to Simgood. The Judge found that the reason for the creation of this contractual chain was so that DBS would not be aware of the change in hull numbers between Vessel A and Vessel B (see [118] of the GD). The Judge further found that these contracts were sham contracts and gave no effect to them (see [96] of the GD).

11 Vessel A was subsequently completed in March 2009 and was delivered under Contract 5284. MLC Shipbuilding, however, failed to deliver Vessel B to Simgood by the stipulated date of delivery under Contract 5282, *ie*, 7 June 2009. This led Simgood to issue a letter of demand to MLC Shipbuilding and various other defendants on 7 October 2010 demanding for the delivery of Vessel B. The events which transpired between June 2009 and October 2010 are murky, to say the least, although it would appear that there was some correspondence between MLC Barging and Simgood from January 2010 wherein MLC Barging took the position that because MLC Shipbuilding failed to make payments to it for Vessel B, it had no obligation to deliver Vessel B to MLC Shipbuilding, and in turn no obligation as well to deliver Vessel B to Simgood. Simgood eventually commenced action in January 2011.

Our decision

12 We turn now to address each of the four causes of action relied upon by Simgood in the present appeal.

Unlawful means conspiracy

13 As noted recently in the Court of Appeal decision of *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 (“*EFT Holdings*”) at [112], to succeed in a claim of unlawful means conspiracy, the plaintiff has to show the following:

- (a) there was a combination of two or more persons to do certain acts;
- (b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;
- (c) the acts were unlawful;
- (d) the acts were to be performed in furtherance of the agreement;
and
- (e) the plaintiff suffered loss as a result of the conspiracy.

14 Simgood’s case in this regard rests entirely on the fact that the Respondents’ acts of switching the hull numbers of Vessel A and Vessel B without its consent and creating the sham contractual structure amounted to unlawful acts, and that these acts were carried out with the intention to injure Simgood. However, this assertion was not accepted by the Judge who found that those acts were committed *not* to injure Simgood, but to abuse the loan facility from DBS (see [118] and [180] of the GD).

15 We see no reason to disturb the Judge's finding. The conclusion reached by the Judge is supported by two internal emails between the Tans and Redzuan. The first email, dated 11 August 2008, was sent from Eng to Redzuan, with Tan copied, and it showed that the reason for switching the hull numbers was so that they could continue benefiting from the DBS loan facility:

Dear Redzuan,

As we are selling the MLC 5281 & 5282 to Alam & Steven, we need to consider the two options mentioned below:-

Option One:-

Before Delivery, we will pay DBS for USD 9,700,00.00 being the loan taken till date for both vessels.

Option Two:-

Continue with the vessel financing from DBS. Each vessel DBS finance us USD5,950,000.00 Total USD11,900,000.00 for both vessels. If we choose this option, we have to get Jiangsu Soho Marine to extend the Refund Guarantee to next year which they have verbally agreed & *we have to swap the Hull No. MLC 5283 to MLC 5281 & Hull No MLC 5284 to MLC 5282.*

Should we take option one or two? Please advice (sic) as soon as possible as we need to make the necessary changes with Jiangsu Soho & DBS.

[emphasis added]

Redzuan replied to this email to endorse Option two.

16 The next relevant email, dated 1 October 2008, was also from Eng to Redzuan and copied to Tan, and it pertained to why they had to create the sham contractual structure:

The Hull No. of these two vessels have been changed to MLC 5283 (from MLC 5281) & 5284 (from MLC 5282). Since MLC 5283 & 5284 belong to [MLC Shipbuilding], [MLC Shipbuilding] would have to assist in servicing these two loans.

The problem is how to show in our books that [MLC Shipbuilding] is paying to MLC Carrier (Owner for MLC 5281) & MLC Maritime (owner for MLC 5282) as the hull no. now has been changed to MLC 5283 & 5284 and these two hull no belong to [MLC Shipbuilding].

We cannot inform DBS of the changes in Hull No because the loan has been drawn down & all the security documents have been executed. In view of this, we are currently building two new hulls (MLC 5281 & 5282) for replacement. So far we have drawn down US\$4,850,000 for each vessel. The loan for each vessel is US\$5,950,000.00. ...

In my opinion is [MLC Shipbuilding] pay the whole monthly loan amount of USD178,528 to MLC Maritime and we will treat this as deposit for MLC 5282 since this vessel has been sold to Steven, [MLC Shipbuilding] would buy this vessel from MLC Maritime when it is ready for delivery. By then, we will inform DBS bank that MLC 5282 vessel has been sold to [MLC Shipbuilding]. MLC Maritime would then loan MLC Carrier half of the amount to service the loan for MLC 5281.

[emphasis added]

Redzuan replied on the same day agreeing with the above proposal.

17 In our judgment, from the above, the Judge was correct in making the finding that the dishonest conduct of the Tans and Redzuan in switching the hull numbers and creating the sham contractual chain had everything to do with concealing the state of affairs from DBS, and had nothing to do with any alleged intention to injure Simgood. This conclusion is further fortified by the fact that MLC Shipbuilding did perform its obligation under Contract 5284 and delivered Vessel A to Simgood’s affiliate company. If it were truly the Respondents’ intention to cause loss to Simgood right from the outset, one would have expected MLC Shipbuilding to not deliver Vessel A either. It should be emphasised that in *EFT Holdings*, the Court of Appeal held (at [101]) that to establish the tort of unlawful means conspiracy, a claimant “would have to show that the unlawful means and the conspiracy were targeted or directed at the claimant” and that “[i]t is not sufficient that harm to

the claimant would be a likely, or probable or even inevitable consequence of the defendant's conduct." In other words, "[i]njury to the claimant must have been intended as a means to an end or as an end in itself". Like the Judge below, we do not think that when the Tans had embarked on their unlawful course of conduct in 2008, they had this requisite intention.

18 In the course of the hearing before us, however, counsel for Simgood sought to pitch its case at a different level and argued that the Tans' and MLC Barging's *reliance* on the sham contractual structure to refuse delivery of Vessel B in 2010 constituted the unlawful act and that by this time, they had formed the intention to injure Simgood. While this *could* have been a viable argument, we could not ignore the fact that this was not Simgood's pleaded case. Even during the cross-examination of the Tans, the case that was put to them was that they had formed the intention to injure Simgood in 2008. No argument was advanced at the trial below on the basis that the acts which constituted the tort occurred in 2010. It was for this precise reason, as noted above, that the evidence on the events which transpired in 2010 was patently lacking.

19 Accordingly, we uphold the Judge's finding that the tort of unlawful means conspiracy has not been established.

Inducing breach of contract

20 It is for the same reasons detailed above that we cannot hold the Respondents liable for the tort of inducing breach of contract. Simgood's pleaded case was that the Tans' acts of switching the hull numbers and creating the sham contractual chain in 2008 had induced MLC Shipbuilding to breach Contract 5282. We are, however, unable to find a causal link between the Tans' actions in 2008 and MLC Shipbuilding's failure to deliver Vessel B

from 2009 to 2010. While again, it *might* have been viable to suggest that it was the Tans’ act of *relying* on the sham contractual structure in 2010 which induced MLC Shipbuilding’s breach of contract, this was not Simgood’s pleaded case. In any event, there was a dearth of evidence which would allow us to satisfactorily come to the conclusion that the Tans’ acts in 2010 had the effect of “influencing” MLC Shipbuilding’s breach of Contract 5282 (see Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at para 15.012). Again, this is unsurprising since the evidence which was elicited from the Tans on cross-examination pertained mainly to the events in 2008 and not 2010.

21 We therefore find that the Judge was correct in dismissing Simgood’s cause of action in the tort of inducing breach of contract.

Piercing the corporate veil

22 As for Simgood’s allegation that the corporate veil should be pierced, we note from the Appellant’s case that Simgood seeks to pierce the veil in two ways: first, that “[t]he Judge ought to have pierced the corporate veil, so as to find [Nantong Tongbao] concurrently liable with [Nantong MLC]” and secondly, that “the Judge ought to have pierced the corporate veil, to find the Tans ... liable to [Simgood] for the tortious acts of [Nantong MLC]”. We are unable to agree with Simgood that the corporate veil could be pierced in either of the suggested ways.

23 Regarding piercing the corporate veil from Nantong MLC to Nantong Tongbao, we are of the view that there is no merit in Simgood’s argument that Nantong Tongbao was not a separate entity from Nantong MLC. Nantong MLC is a joint venture between Nantong Tongbao and the Tans and in that regard, one would expect that there would be a certain level of

interconnectedness between Nantong Tongbao and Nantong MLC. However, the evidence adduced before us did not establish that this interconnectedness rose to the level necessary for us to pierce the corporate veil.

24 In fact, Simgood’s argument in this respect is undermined by the second basis in which it sought to pierce the corporate veil. In advancing the submission that the Tans should be liable for the tortious acts of Nantong MLC, Simgood argued that the Tans had control over Nantong MLC. To suggest that Nantong Tongbao and Nantong MLC were one and the same, and to argue in the same breath that the Tans had control of Nantong MLC, is in our judgment, a contradiction. It should be emphasised that the Tans and Nantong Tongbao are entirely separate personalities; Nantong Tongbao is owned by two Chinese individuals with no personal relationship to the Tans.

25 Furthermore, Simgood’s argument that the Tans had control of Nantong MLC is contradicted by the fact that there had been disputes between the Tans and Nantong Tongbao’s representative in Nantong MLC (*ie*, Zhu Jian Hua) regarding the running of the company (see [38]–[41] of the GD). Their disagreements culminated in Zhu Jian Hua trying to oust the Tans from all involvement in Nantong MLC in 2010 and it was pursuant to Tan’s legal action in China that he was reinstated as a director of Nantong MLC. This state of affairs, which has not been contradicted by Simgood, hardly evidences the Tans having control over Nantong MLC.

26 Accordingly, we find that the corporate veil should not be pierced so as to find either Nantong Tongbao or the Tans liable for Nantong MLC’s tortious acts.

Remedial constructive trust

27 Finally, the claim for remedial constructive trust over Vessel B may be disposed of briefly. For one, it is not even clear as to who exactly Simgood is suggesting should be treated as constructive trustee of the Vessel. More importantly, Simgood has not provided any legitimate reason or basis to say that the doctrine of remedial constructive trust should apply in the present case.

Conclusion

28 For the reasons above, we dismiss Simgood’s appeal in CA 165/2015. Having so ruled, we by no means suggest that we condone the Tans’ business behaviour. While their sharp practice, as pleaded, may not be sufficient to substantiate the various causes of action which Simgood has brought against them, we find it imperative to express our disapproval of the same.

29 We will hear the parties on the issue of costs.

Chao Hick Tin
Judge of Appeal

Andrew Phang Boon Leong
Judge of Appeal

Judith Prakash
Judge

Avinash Vinayak Pradhan, Kwek Choon Lin Winston and Lim Zhi Ming Max (Rajah & Tann Singapore LLP) for the appellants;
Troy Yeo Siew Chye (Chye Legal Practice) for the first, second, fourth and fifth respondent; and
The third respondent in person.