SUN MOBILITY
Insurance and Claims Services Limited
新移動保賠顧問有限公司

3 Nov 2017
Ref : Chans advice/202

To: Transport Industry Operators

Dissipation of assets

The High Court of Hong Kong issued a Decision on 21/9/2017 dealing with the principles in respect of the real risk of dissipation of assets in a case of Mareva Injunction involving a shipowner and a charterer. [HCMP 1010/2017]

Introduction

This was the hearing of the shipowner's Summons for continuation of an ex parte Mareva Injunction (Injunction) granted on 28 April 2017 in aid of arbitration proceedings in London (Arbitration) between the shipowner and the charterer until further order of the court. The Injunction restrained the charterer from dealing with assets within Hong Kong up to the value of US$454,093.06, which comprised the amount of the shipowner'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

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

Background

The shipowner was a Liberian company and owned MV "CRETE 1" (Vessel). The charterer was a UAE company and the holding entity of the "Emirates Shipping Line" business, which was ranked within the 100 largest container/liner operators in the world.

The Arbitration related to a charterparty dated 22 December 2016 (C/P) between the shipowner and the charterer of the Vessel. The shipowner claimed against the charterer for unpaid hire and the Vessel's repositioning costs as a result of the C/P's early termination. There was a counterclaim by the charterer of underperformance of the Vessel, which led to the termination of the C/P.

The charterer accepted that the shipowner raised a good arguable case on the merits of its underlying claim for breach of the C/P. On the other hand, the shipowner agreed that the charterer's underperformance allegations were factual matters which required expert evidence to resolve, and that it was not for the Court to resolve those matters. The proper forum was the Arbitration.

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

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.

The legal principles on risk of dissipation of assets are well-established. The Judge agreed that a useful starting point could be found in Eastman Chemical Ltd v Heyro Chemical Co Ltd (No 2) [2012] 3 HKLRD 307, §26 per DHCJ Winnie Tam SC:

"(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."

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.

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 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."

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.

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.

Real Risk of dissipation

The entirety of the shipowner's case was based on the allegation that the charterer was a party of "unacceptably low standard of commercial morality". The 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.

An applicant will often be unable to put forward direct evidence of a risk of dissipation, and 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. However, applying Honsaico too readily will result in grave injustice.

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.

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 judgement proof; and (b) the evidence has been carefully scrutinised.

The Judge agreed 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 the Judge's view, it would be exceptional to be able to support a case of dissipation of assets based on that one piece of evidence.

The Judge agreed 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. 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 real risk of dissipation. In between the two ends, the circumstances are infinitely variable and it would not be fruitful to try to categorise them.

However, the Judge was in no doubt that where there was 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 was at or very close to the fraud or dishonesty end of the spectrum.
The facts of Honsacio deserved a revisit. They involved 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. The Judge believed 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".

In the case in question, there was an absence of any conduct on the part of the charterer which might 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 the shipowner. In other words, the shipowner's case was based on nothing but propensity. The Judge struggled to see the justification for the shipowner to invoke one the most drastic relief available in the civil court.

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

Taking the shipowner'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. The shipowner described the excuse as "disingenuous". 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.

The gravity of the conduct in the case in question, or the propensity of the charterer which it reflected, could not by itself justify an inference of real risk of dissipation. The Judge had no hesitation in discharging the Injunction or refusing to continue it.

However, the evidence was not all one way. The charterer 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 (The charterer said 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.

These circumstances (putting aside the charterer's evidence and submissions on the merits of the counterclaim of under performance) suggested that it might be a case of misguided belief over the under performance of the Vessel (assuming that the shipowner was right on that issue).

The circumstances of the case in question or the gravity of conduct on the part of the charterer was not like those in Honsaico.

Further, the charterer was a substantial international company incorporated in 2006. It had headquarters in Dubai and Hong Kong, over 30 offices at various parts of the world, employed 250 full time staff and had an annual turnover of approximately US$280 million. The charterer owned substantial assets, including the property in which its Dubai office was located which was valued at US$2.65 million.

In the premises, the suggestion that the charterer would dissipate its assets to evade an award of US$0.5 million was untenable.

Costs of the Arbitration

The Judge added that it was unusual to include in a Mareva injunction the costs of the applicant in the intended proceedings. No doubt the shipowner wanted to put itself into the position of a fully secured creditor. However, including its costs of the Arbitration in the Injunction amounted to providing a claimant with security for costs.

No authority was cited to the Court in support of an injunction which extended to the applicant's costs of the intended proceedings. Apart from a schedule of costs, no assistance was provided to properly justify the quantum of costs.

In the Judge's 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 would only arise if it was won by the shipowner. The Judge had a good deal of reservation whether it was appropriate to cover the Arbitration costs in the Injunction when the dispute turned upon, inter alia, expert evidence to be ventilated in the Arbitration. The Judge made a few observations on such a claim.

Firstly, the threshold for triggering the Mareva jurisdiction in respect of the merits of the shipowner's case was not very high, namely, a good arguable case. It was highly questionable whether it should follow or assume that the shipowner's good arguable case would 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.

Secondly, there were much uncertainties on costs entitlement. For example, the case might 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.
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.

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

For the above reasons, the Injunction was discharged with costs to the charterer, to be taxed if not agreed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Decision.

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096
E-mail: gm@smicsl.com Website: www.sun-mobility.com
A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS
香 港 保 險 顧 問 聯 會 會 員