Mediterranean Feeders L P v Bernd Meyering Schiffahrts [1997] APP.L.R. 06/05

CA on appeal from on order by Tuckey J, before Evans LJ; Hobhouse LJ. 5th June 1997.

MR JUSTICE EVANS:

1. This is an application for leave to appeal from an order made by Tuckey J. on 22nd May. He discharged a Mareva injunction which had been ordered ex parte by Timothy Walker J. on 11th April.

2. The dispute arises in relation to an arbitration which is being held in London between the Applicants, who were at the time charterers of the vessel *"Lyme Bay",* and the Respondents, a German partnership, who are its registered owners.

3. The vessel loaded containers at Damietta and made the short voyage to Alexandria. After arriving at Alexandria she developed a substantial list to port. The Master reacted to that emergency by ballasting the vessel on the starboard side, with disastrous results; the vessel capsized. There is a substantial salvage operation in progress and substantial cargo damage, and in the first instance the cargo owners are claiming damages from the Applicants, time charterers. We are told that the charterers are not able to limit their liability in Egypt and that the liability may be of the order of some $6 million; certainly a very substantial amount.

4. The vessel in her present state appears to be a constructive total loss and is worthless. Her sound value was of the order of $4 million; insured value $6.45 million but with outstanding mortgages of say $2.45 million. Net insurance proceeds therefore can be expected to be of the order of $4 million.

5. On the material before us we must assume that those proceeds will be payable in Germany and will be paid in the first instance to the German bank mortgagees. In due course thereafter the sum of approximately $4 million will become available to the owners of the vessel, the present Respondents.

6. We have formal details of the nature of the Respondent partnership. These show that the body has the legal form of a limited partnership incorporated in Meccan in Germany. The general partner is Captain Burnd Meyering who, on the evidence, has an unlimited personal liability. There are limited partners, four in number, who are shown as the holders of certain numbers of shares. Captain Meyering was also the Master of the vessel.

7. The Applicant's contention, as claimants in the arbitration, is, first, that the Respondents, as owners, are liable for the cargo damage. It is not disputed, for present purposes, that they show a good arguable case in that respect.

8. The Applicant's second contention is that the owners are not entitled to limit their liability owing to what they allege was reckless behaviour on the part of Captain Meyering in his dual capacity as Master of the vessel and alter ego of the ship owners; that is in issue.

9. The learned judge recorded the issue in his judgment but reached no conclusion upon it. This was on the basis, no doubt, that unless an injunction was to be ordered it was unnecessary to consider what the amount should be.

10. Mr Gee today has emphasised that this issue has a further relevance, that is to the risk of dissipation which is the point he raises on this application for leave to appeal.

11. As regards dissipation, the learned judge dealt with the matter on this basis: he stated the law, correctly, as Mr Gee accepts, in the following terms. He quoted Mr Gee in identifying the requirement of the law as to whether there is a sufficient risk of dissipation to justify the granting of the injunction. The judge continued: *"He submits, and I accept, that in determining whether there is a real risk, nefarious intent is irrelevant. What is required is a real risk that a judgment or reward will remain unsatisfied if injunctive relief is refused. One is therefore looking at the effect of anticipated conduct rather than the motives underlying it.*"

12. The learned judge proceeded to set out various considerations which on any view were relevant to that issue. Again, recording Mr Gee's submission, the judge said: *"The Respondent is a one purpose partnership with no substantial asset other than the hull proceeds. There is a single partner with unlimited liability, namely a sea captain who has lost his ship. The ship is worthless and there are enormous claims. Therefore the temptation to deal with the residue will be substantial and that there is an obvious risk that Captain Meyering will want to spend the money*".

13. There was then a reference to the fact that no salvage security has been provided either by the owners or by their club.

14. The learned judge then quoted Mr Gruder QC's submission for the Respondent. His first submission is that if Mr Gee is correct: *"In any case where you have a large claim and someone that is apparently going to be unable to meet all of them, you can infer a real risk of the kind required. We may all be subject to temptation. The question", Mr Gruder submitted was, "...whether the person will yield to that temptation.*"

15. There is then a reference to what is perhaps a beguiling side-track, but in my judgment of limited relevance for present purposes, that is to say a possible risk that a defendant might put the money to some wholly illegitimate and personal extravagance, such as fast cars or gambling. That possibility is mentioned only to be dismissed. There is no suggestion of such a risk in the present case.

16. Mr Gruder's submission continued that it would be legitimate for a defendant to use the money to buy a ship or to invest in another business asset which would be available to his creditors. He submitted that one cannot spell out a real risk of the kind required on the facts of this case.

17. The learned judge accepted those submissions. He said the defendants are not "*a 'fly-by-night' organisation.*" They are incorporated in Germany where judgments can be enforced under the Brussels Convention. They do not have nominee directors, the beneficial ownership is not hidden. They have not arranged their affairs in such a way as to facilitate the evasion of liability. They have produced evidence of a satisfactory trading history.

18. Then the judge said: *"There must be a temptation to do something with the money to put it beyond reach, but there is no evidence to show that the Respondents will yield to that temptation to make it unavailable to the Applicants and the other creditors the Applicants may have. In truth, this is an application to obtain security for the claim. This is not enough to satisfy the test."*

19. Mr Gee's second submission, which I will consider first, is that the learned judge, having stated the test correctly, there misapplied it. He said that the learned judge's suggestion that there should be evidence to show that the particular defendants would yield to the temptation, was betraying the basic principle that the risk has to be objectively assessed, and that there should not be any concern (as he puts it) with the specific, personal or subjective intent, nefarious or otherwise, of the particular defendant.

20. In my judgment there is no indication that the learned judge misdirected himself. Given the nature of the Mareva jurisdiction and given the fact that it is not, as the learned judge says: "*a means of obtaining advance security for a claim",* it is inevitable that before the court can be satisfied that there is a risk of dissipation, in the sense in which that term has been used, the court must consider whether there is any evidence that in the particular case the asset will be dissipated rather than otherwise. If there is no such evidence then, in my view, it would be wrong for the injunction to be granted.

21. Subject to what I shall say about Mr Gee's first point, it is abundantly clear that in this case the learned judge stated and applied the correct test. He set out the relevant factors and it seems to me to be a case where it is clearly unarguable that the Court of Appeal should interfere with his conclusions.

22. Finally, therefore, I return to the first point which was to this effect: before the learned judge the question of recklessness in relation to limitation was argued as going to the amount of an injunction if one was ordered. The learned judge reached no conclusion on that matter.

23. Mr Gee submits that the learned judge should, and that we should, take account of the evidence on that issue because it is also relevant to the risk of dissipation. He has taken us in some detail through the evidence which, as he submits, shows that the Master, Captain Meyering, was responsible for calculating the stability of the vessel given the quantity and weight of the containers which the Applicant sought to load upon it.

24. He says that the Master, and apparently the Chief Officer also, informed the Applicants that the intended cargo could be loaded safely. He says that the evidence of the expert employed by the Applicants shows that that could not be correct, and that any attempt to make that calculation using the computer methods which were available would have shown that the IMO stability standards were not complied with.

25. The matter is aggravated, he says, because the evidence shows that what the Chief Officer and the Master have said about that subsequently has not been consistent. He says in short that the Master has been less than frank; he may have been untruthful about it; and above all he acted irresponsibly in allowing the vessel to sail with the cargo loaded, that in fact was loaded.

26. I should record that these submissions seem to be complicated by the fact that the Master complained shortly after loading that the cargo appeared to be substantially some 7 to 8 percent heavier than the charterers had said that it would be. The Master would gain that information from the draughts for the vessel. I say no more than that does seem to be a complicating factor.

27. I would also add, a point not expressly brought out in argument, that whether these matters are directly relevant to the capsize which in fact occurred, which seems to have been due primarily at least to the Master's decision with regard to ballasting at Alexandria, seems to be a matter which will have to be considered in due course.

28. Putting all that on one side, even if it was accepted that the evidence demonstrated that the Master acted irresponsibly in relation to the loading of the cargo, as Mr Gee submits that it does, it seems to me that that does not begin to influence the question whether there is shown to be a risk of dissipation of the proceeds of the insurance claim when the balance of those proceeds becomes available to this partnership.

29. Mr Gee defines the risk of dissipation as a risk that the money would be used in a way contrary to the object of the Mareva injunction. I would say that that implies that there must be a risk that it will be used otherwise than for normal and proper commercial purposes.

30. Nothing that we have seen, with regard to the behaviour of Captain Meyering as Master in the course of this voyage, even begins to be relevant to the question of what business decisions the partnership might or might not take with regard to the use of these funds once they have been received.

31. In other words, I would reject Mr Gee's submission that the judge's exercise of his discretion should be looked at again in the light of these further considerations. For those reasons I would refuse this application for leave to appeal.

MR JUSTICE HOBHOUSE: I agree that the points placed before us by Mr Gee, both in writing and orally, do not point to show that the charterer have any reasonable prospect of successfully appealing against the order of the judge. Accordingly, it is not a case for the grant of leave to appeal.

Order: Application was refused and an order for costs was granted.

MR S GEE QC (instructed by Sinclair Roche & Temperley, London, EC2V 7LE) appeared on behalf of the applicant.
MR J GRUDER QC (Holmes Hardingham, London, EC3R 5AQ) appeared on behalf of the respondent.