

L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd
[2001] SGHC 284

Case Number : Suit 600131/2000, RA 600154/2001
Decision Date : 28 September 2001
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Sean Tan and Michael Low (J Koh & Co) for the plaintiffs/appellants; Rama Kasi (Raj Kumar & Rama) for the defendants/respondents
Parties : L & M Concrete Specialists Pte Ltd — United Eng Contractors Pte Ltd

Civil Procedure – Vacation of trial dates – Relevance of pending appeal from interlocutory application for security for costs – Whether to vacate trial dates pending outcome of such appeal

: This was an urgent appeal by the plaintiffs against the directions made by the Registrar at a pre-trial conference (‘PTC’) held on 12 September 2001, the day before this appeal.

Registrar’s directions

The Registrar made the following directions:

- (1) Leave be granted for affidavits of evidence-in-chief to be exchanged on or before 19 September 2001. Objections to the said affidavits to be taken and the plaintiffs to set down the action for trial on or before 26 September 2001.
- (2) The action be fixed for trial from 1 to 12 October 2001.
- (3) For failure to comply with any direction given herein, the action be dismissed with judgment for the defendants in the counterclaim with costs or the defence be struck out and the counterclaim be dismissed with judgment for the plaintiffs with costs.

Essentially, the plaintiffs in this appeal were seeking an order that the above trial dates be vacated in the circumstances stated below.

Chronology of events

Counsel for the defendants prepared a very helpful synopsis of the salient events in these proceedings and I reproduce it below:

CHRONOLOGY OF EVENTS IN RESPECT OF SUIT NO. 600131/2000		
DATE	EVENT	REMARKS
1.2.2000	Writ of Summons	
24.3.2000	Defence & Counterclaim	

12.4.2000	Reply & Defence to Counterclaim	
25.4.2000	Amended Defence & Counterclaim	
11.10.2000	Amended Reply, Defence to Counterclaim and Counterclaim to Counterclaim	
	Directions Made:	
	List of Documents by 25.10.2000	
	Inspection by 1.11.2000	
	Objections to Contents by 29.11.2000	
2.12.2000	Notice for Further Directions by Plaintiffs	
	FH: 6.12.2000	
	Prayers:	
	1. Leave to call expert witness on delay	
	2. To vacate hearing dates (fixed for 2.1.2001 [AElig] 12.1.2001)	
	3. To extend time for exchange of AEICs	
	ORDER Made:	
	-	
	- Objections to Contents by 5.9.2001	
	-	
	-	
9.7.2001	Eng`s Affidavit (filed/served) in respect of security for costs hearing.	
26.7.2001	Further Affidavit by Plaintiff in respect of security for costs hearing	
NOTE: Security Hearing adjourned from 4.7.2001 to 11.7.2001 to 25.7.2001 and finally to 8.8.2001		
8.8.2001	Security for costs hearing before A.R.	
	Order made for Defendant to furnish security in the sum of \$50,000.00 within 7 days	
29.8.2001	Appeal hearing on security for costs before Justice J. Prakash	
	- Appeal allowed	
	- Order below set aside	

	- Defendant to pay 40% of setting down fee	
	- Each party to bear costs below and of Appeal	
12.9.2001	Urgent PTC before Registrar	
	As per request of Plaintiff	
	-	
	- Objections to Contents by 26.9.2001	
	-	
	-	

3.10.2000 Summons-for-Directions AEICs exchange by 22.11.2000 Set Down Action by 2.12.2000 Trial fixed for: 2.1.2001 [AElig] 12.1.2001 Court: Parties to sort out all outstanding matters by June 2001 PTC adjourned to June 2001 26.6.2001 Plaintiff`s Application for security for costs fixed for hearing 4.7.2001 27.6.2001 Orders made at further PTC: AEICs exchange by 29.8.2001 Set Down (by Plaintiffs) by 7.9.2001 Trial fixed for 10 days: 1.10.2001 [AElig] 12.10.2001 AEICs exchange by 19.9.2001 Set Down by 26.9.2001 Trial dates fixed for 1.10.2001 [AElig] 12.10.2001 to stand. Factual background

This action concerned construction work at a project called Hilltops Apartments. The plaintiffs were the main contractors and the defendants were their sub-contractors for that project. The defendants` counterclaim is in respect of a project at the Sinsov Building where they were again the plaintiffs` sub-contractors.

The plaintiffs` application for security for costs was in respect of the defendants` counterclaim and was made pursuant to s 388 of the Companies Act or, in the alternative, under O 23 r 1 of the Rules of Court, principally on the ground that the defendants were in financial straits. There is a pending petition to wind up the defendants (CWU 174/99).

Security for costs at \$50,000 was ordered against the defendants by the assistant registrar.

On 29 August 2001, Judith Prakash J allowed the defendants` appeal against the assistant registrar`s decision on security for costs. On 11 September 2001 (two days before the present appeal), the plaintiffs lodged an appeal against the judge`s decision and have instructed Mr Michael Hwang, SC as counsel for the hearing before the Court of Appeal. I was told that the plaintiffs would be seeking to proceed by way of expedited appeal pursuant to O 57 r 20.

The plaintiffs submitted that since the defendants had admitted that they were in no position to put up security for costs, it was obvious that should any costs be ordered against the defendants in the counterclaim, those costs would not be paid. The plaintiffs accepted that an appeal to the Court of Appeal did not operate as a stay of proceedings but argued that they were not seeking such a stay but were merely asking the court to exercise its discretion in the interests of justice so as not to render their appeal on security for costs nugatory (**Wilson v Church (No 2)** [1879] 12 Ch D 454). They submitted that the trial should therefore not proceed pending the outcome of their appeal.

Although the plaintiffs only took out the application for security for costs some 15 months after the filing of the counterclaim, they argued there was no inordinate delay and that, in any event, there were numerous interlocutory applications during the first half of 2001. The plaintiffs had also asked for further and better particulars on 23 October 2000 but no response was made by the defendants until 9 March 2001 and that was to refuse to furnish the particulars sought. When particulars were finally furnished by consent in May 2001, it was then that the plaintiffs were able to say that the counterclaim was not a strong one.

Further, the plaintiffs argued, they would suffer grave prejudice as the action concerned a complex construction matter in which the plaintiffs would be calling 11 witnesses including an expert and the costs for the ten-day trial would be in the region of \$120,000, with about eight days to be taken up by the defendants' counterclaim. In contrast, the defendants were calling only one witness for the entire action. Counsel for the plaintiffs had also indicated to the Registrar at the PTC that they were ready to exchange affidavits of evidence-in-chief before 1 October 2001 but the Registrar stipulated a deadline two weeks earlier. As an alternative, the plaintiffs suggested that their claim proceed for trial while the defendants' counterclaim, which was in respect of an unrelated project, be held over until after the appeal.

Counsel for the defendants reiterated that they were ready with their clients' affidavit of evidence-in-chief. He informed me that the winding-up petition against the defendants had been held over for more than two years because the defendants' creditors supported that course of action pending the defendants' counterclaim against the plaintiffs. He was agreeable to having the trial dates pushed back by two weeks but would like all the other directions to remain.

Decision of court

I dismissed the plaintiffs' appeal against the Registrar's directions with costs fixed at \$500 to be paid to the defendants. The plaintiffs have lodged an appeal against my decision on 25 September 2001.

In **Dickson Trading (S) v Transmarco** [1989] 2 MLJ 408, the plaintiffs there applied for an interlocutory injunction to restrain the defendants from disposing of certain shares. Chan Sek Keong JC dismissed the application. The plaintiffs then applied for an interim injunction pending appeal against the dismissal, relying on **Erinford Properties v Cheshire County Council** [1974] Ch 261[1974] 2 All ER 448. The judge distinguished cases concerning applications for stay of execution of final judgments after full trials from the application before him which was in effect a stay of an interlocutory order. In his view, there was a difference in substance and not merely in degree between the two situations. He was also of the opinion that the likelihood of an appeal, if successful, being rendered nugatory, was a sufficient ground for a stay of execution. However, the judge refused the plaintiffs the limited injunction sought fundamentally because the plaintiffs' action, if ultimately successful, would not be affected by their failure to obtain an interlocutory injunction.

The plaintiffs here submitted that while they were not asking for a stay of execution, the principles set out in the above case could be relied upon to assist the court in exercising its discretion whether or not to vacate the trial dates.

I do not disagree with the principles stated but it should be noted that in cases like **Dickson Trading** above, granting the interim relief sought would still permit the wheels of litigation to roll on. In

contrast, the plaintiffs here were effectively asking that I apply the brakes and park the action by the wayside (or at least the counterclaim) until such time as the brakes were released by the Court of Appeal. This I was not willing to do in the circumstances of this case.

The plaintiffs only took out their application for security for costs some 15 months after the filing of the defendants' counterclaim. If one reckoned the time from the filing of the amended defence and counterclaim on 25 April 2000, it would still be 14 months. Even if they were justified in not doing so until after further and better particulars had been provided by the defendants, they had nevertheless taken some six months from the filing of the amended defence and counterclaim to ask for particulars. Further, they ought to have known, at the time they commenced this action on 1 February 2000 or at least soon thereafter, that the defendants were the subject of a winding-up petition. They were therefore responsible for at least a six-month delay.

In addition, their application for security for costs has already been considered by a High Court judge and such an application involved an exercise of discretion. There are other interlocutory applications the outcome of which could affect the trial process itself; for instance, an application to make substantial amendments to a claim or an application to call additional evidence at the trial. Such applications, decided one way or the other, could be said to prejudice one of the parties to the proceedings. Yet, in such cases impinging on the trial process itself, it would be highly unlikely that the court would either vacate the trial dates or stop the trial at that stage in order to await the outcome of an appeal. Here, any prejudice to the plaintiffs would only arise if the defendants' counterclaim was dismissed with costs. The trial process would not be affected at all. The litigation process would become most unsatisfactory if all such interlocutory applications must first receive the attention of the highest court in our system of justice before the next step could be taken.

Outcome:

Appeal dismissed.

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