Ooi Ching Ling Shirley v Just Gems Inc
[2002] SGCA 38

Case Number : CA 15/2002, NM 26/2002

Decision Date : 14 August 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : Benjamin Goh (Arthur Loke Bernard Rada & Lee) for the appellant; Philip Ling (instructed) and Mohamed Gul (Peter Low, Tang & Belinda Ang) for the respondent

Parties : Ooi Ching Ling Shirley — Just Gems Inc

Civil Procedure – Costs – Security for costs – Application for further security for costs – Applicable test and considerations in granting such applications – Whether circumstances warrant making order for further security – O 57 r 3(4) Rules of Court

Words and Phrases – 'Fit' – O 57 r 3(4) Rules of Court

Finance [1999] 3 SLR 229 meant that enforcing a judgment for costs against the appellant's property would entail undue delay and expense.

Held,

granting the respondents' application:

(1) The power granted to the court by O 57 r 3(4) confers an unfettered discretion to the court to make orders as it deems "fit". This concept of "fit" must encompass the notion of what is just in all the circumstances (see 17-18)

(2) Foreign residency is a ground warranting the imposition of further security for costs if there would be undue delay and expense in enforcing an order for costs, since the whole point of ordering a foreign plaintiff or appellant to furnish security is to ensure that a fund would be available within the jurisdiction of this court against which a successful defendant or respondent could enforce the order for costs (see 19, 27), *De Bry v Fitzgerald* [1990] 1 All ER 560 and *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 followed.

(3) The merits of the appeal are also a valid factor for consideration in determining whether it is just to order that further security be furnished. Here, it had been assumed that there could be some merits in the appeal. (see 29)

(4) Another factor to be considered is if the application is so late that the bulk of the costs have already been incurred by the appellant. The court would look at whether there was a satisfactory explanation by the appellant, in the absence of which the application may be refused. (see 20)

(5) In the present case, the appellant's previous conduct evidenced an intention to resist vigorously an order for costs if made against her and it was likely that she would make it difficult for any enforcement of such order to take place. It was notable that in her affidavit filed to oppose the application, she was silent concerning the respondents' allegations that she did not intend to satisfy the judgement debt and/or costs awarded against her. In addition, her conduct in relation to the attempts by the respondents' to satisfy their judgment debt gave the impression that she was trying to evade enforcement action. (see 14, 24-25)

(6) The respondents had only made their application when it became clear from the appellant's conduct that she was likely to resist enforcement of an order for costs against her; hence, there could not be said to be a delay in the making of the application (see 21,22)

(7) Enforcement of an order for costs against the appellant was also likely to give rise to undue delay and expense for two reasons: Firstly, there is no arrangement for reciprocal enforcement of judgments between Singapore and USA, where the appellant is resident; secondly, the ruling in *Malayan Banking* meant that the fact that the appellant was a joint tenant of a private residential property in Singapore would not obviate there from being difficulties in enforcement of an order for costs (see 26)

(8) It was also clear that the appellant was a person with means, hence there was no danger of her appeal being stifled by an order to furnish security. In view of all the circumstances, an order to the appellants to furnish further security of $30,000 was appropriate and just. (see 27-28)

Case(s) referred to

De Bry v Fitzgerald

[1990] 1 All ER 560 (folld)

Lek Swee Hua v American Express International Inc

[1991] 2 MLJ 151 (refd)

Malayan Banking Bhd v Focal Finance Ltd

[1999] 3 SLR 229 (refd)

Porzelack KG v Porzelack (UK) Ltd

[1987] 1 WLR 420 (folld)

Legislation referred to

Rules of Court O 57 r 3(4)

Rules of the Supreme Court (1965) [UK] O 59 r 10(5)

Judgment

GROUNDS OF DECISION

1 This was an application by way of a motion, filed by the respondent, in Civil Appeal No. 15/2002 for an order to require the appellant to furnish further security for the costs of the appeal. After hearing the parties, we allowed the motion by ordering that a further security of $30,000 be furnished by the appellant. The standard security of $10,000 was already furnished when the notice of appeal was filed. We now give our reasons.

Background

2 The appellant, Shirley Ooi Ching Ling (Shirley Ooi), is a substantial shareholder in a British Virgin Island company, Pacific Rim Trading Ltd (Pacific Rim). It is an investment company. Pacific Rim, in turn, held shares of a Californian company, Agate Technologies Inc (Agate), which is involved in the development of software technology. Shirley Ooi is a shareholder of Pacific Rim and a director of both Pacific Rim and Agate.

3 In June 1996, Shirley Ooi offered to sell to one Jamilah Binti Abu Bakar (Jamilah) 750,000 shares in Agate. The respondent company, Just Gems Inc (JGI), was incorporated by Jamilah also in British Virgin Island to hold the Agate shares for Jamilah. Some two months later, Shirley Ooi offered to Jamilah about 22% of Pacific Rim shares (or the equivalent of 1,000,000 Agate shares) for a sum of US$500,000. This latter offer was accepted. Payment was to be by instalments. Jamilah claimed that on 16 September 1996, she paid US$200,000 into Shirley Ooi's Citibank account. This was followed by US$250,000 on 6 November 1996 and US$100,000 on 20 November 1996. In total, US$550,000 was paid. It was explained that an excess of US$50,000 was paid by mistake. The Pacific Rim shares so bought by Jamilah were to be registered in the name of JGI.

4 On the other hand, Shirley Ooi asserted that only US$450,000 had been paid. Eventually, a total of 126,001 shares in Pacific Rim were, by mistake, registered in the name of Jamilah. Following a capital restructuring, this shareholding of Jamilah became 900,007 shares, representing slightly more than 20% of the shares in Pacific Rim. Despite numerous requests, and Shirley Ooi's promise that the shares would be transferred and registered in the name of the respondent, JGI, this was never done. JGI instituted the present action seeking a declaration that the contract between JGI and Shirley Ooi was void for a total failure of consideration, as JGI never became a shareholder of Pacific Rim. It also asked for the return of the US$550,000 paid to Shirley Ooi.

5 The trial judge, Judith Prakash J, found that a contract was concluded between JGI and Shirley Ooi; that the contract was void due to a failure of consideration, and that Shirley Ooi should return the US$550,000 to JGI. Shirley Ooi was dissatisfied with the decision and has appealed, and which appeal is pending.

6 On 21 May 2002, JGI applied by motion for further security for costs in a sum of S$100,000. On 2 July 2002, this was refused by a single Judge exercising the powers under s 36(1) of the Supreme Court of Judicature Act (SCJA). Following that refusal, JGI applied to this Court to review the decision of the single Judge and asked that the application for further security be granted.

Grounds for application

7 The grounds upon which JGI sought to obtain further security for costs fell under three main heads.

(i) Shirley Ooi is not ordinarily resident in Singapore;

(ii) the conduct of Shirley Ooi showed that she was evasive and did not want to satisfy the judgment debt owed by her and was likely to resist any enforcement of any order for costs; and

(iii) although she has an asset in Singapore, in the form of a flat jointly owned with her husband, enforcement of any order on costs would be protracted and expensive.

8 It was not in dispute that Shirley Ooi was and is ordinarily resident in California, USA. According to her solicitors, she has been residing in USA "for at least the past six years", if not longer. She is the Chief Financial Officer of Agate.

9 JGI also referred to the following facts regarding the residential address of Shirley Ooi. In her affidavit of evidence-in-chief she stated her address to be care of 519 Montague Expressway, Milipitas, CA 95035, the company address of Agate. At the trial she stated on oath that she resided at 1600 Carmentia Road, Cerritos, California 90703, which was not the case. In her certificate for security for costs, the address 16000 Carmentia Road was given as a "care of" address. Then, by a search through the INTERNET, for the purposes of levying execution on the judgment obtained against Shirley Ooi, JGI discovered the correct address to be "16000 Carmenita Road", and not "16000 Carmentia Road" and that the address was the address of Agate.

10 On 6 March 2002, JGI's solicitors, M/s Peter Low, Tang & Belinda Ang (PL), requested Shirley Ooi, through her Singapore solicitors, M/s Arthur Loke Bernard Rada & Lee (AL), to pay up the judgment sum. It drew no response whatsoever. On 26 April 2002, JGI served a copy of an order to examine the judgment debtor on Shirley Ooi's Singapore solicitors. On the same day, PL asked AL if they had instructions to accept service of a statutory demand on Shirley Ooi. On 29 April 2002 AL replied to advise that they had no instruction to accept service of the order to examine the judgment debtor or the statutory demand.

11 On 10 May 2002, PL sought to serve a garnishee application on Shirley Ooi's solicitors, AL. Again, AL replied stating that they had no instructions to accept service.

12 JGI submitted that by her conduct, Shirley Ooi clearly evinced an intention not to pay the judgment sum and also intended to make it as difficult and/or costly as possible for JGI to enforce the judgment sum or any order on costs. AL were and are, at all times, acting for her in relation to her appeal and could very well have accepted service on her behalf. Yet she chose not to instruct them to do so.

Appellant's contentions

13 In her affidavit filed to oppose the application, Shirley Ooi, after giving her address, as "care of 895 Dove Street, 3rd Floor, Irvine CA 92660", made the following points:-

(i) The notice of appeal was lodged on 28 February 2002. If JGI required further security, the request should have been made, and the application should have been filed, earlier. JGI's solicitors only wrote to AL asking for further security for the costs of the appeal on 15 May 2002.

(ii) As she often travelled in relation to her work, and as the assigned mailbox for her apartment was invariably small, it was convenient that her mailing address be her office address. Because she had always used Agate's office address as her address for general correspondence, she adopted the same for the purposes of the action and this appeal. Thus the indication "care-of".

(iii) She had to change her place of residence whenever the office of Agate moved. She wanted to live near to her place of work so that less time would be spent on commuting. Sometimes she moved because the place she was staying was not satisfactory.

14 We would observe that what was significant about Shirley Ooi's affidavit was not what she said but what she did not say. We were aware that she did insert this caveat in her affidavit: "the mere fact that I have not commented on a particular paragraph or part thereof should not be taken to mean that I agree with its contents." Apart from the allegation about her address, the other main point raised by JGI was the accusation that she did not intend to satisfy the judgment debt and/or the order on costs and this was exemplified by the fact that she refused to appoint her solicitors to accept service of enforcement process on her behalf. Her caveat was that her silence must not be

taken as agreement. But her failure to rebut the accusation, or explain her conduct, certainly left us with the impression that there was probably no satisfactory explanation.

15 Before us, Shirley Ooi made the following two main arguments against the ordering of any further security:-

(i) the application for further security was made too late and the appellant had already incurred substantial costs of the appeal;

(ii) the appellant, though resident in USA for the last six years, is a Singapore citizen and is a joint owner, with her husband, of a private residential property here worth many times more than what JGI asked as further security. It was purchased some twenty years ago for S$200,000.

The Law

16 Order 57 r 3(4) provides that the Court of Appeal may "at any time, in any case where it thinks fit", order further security for costs to be given. The power given to the Court here is clearly wider than the corresponding rule in England then (before the introduction of the English Civil Procedure Rules 1998). The then English O 59 r 10(5) provided that the Court of Appeal might "in special circumstances, order that such security shall be given for the costs of an appeal as may be just."

17 Under the then English requirement, the following were considered to be "special circumstances" , e.g., insolvency or impecuniousity; difficulty or expense in enforcing costs order; abuse of the process of the Court. Of course, even if an applicant for costs established a recognised head of "special circumstances", it did not follow that the court must grant the further security asked for. The court still had a discretion in the matter. Here, we would like to quote from the *Supreme Court Practice (1999 Edn) at para 59/10/39*:-

The approach which the Court adopts is that, if one of the heads of special circumstances is established and the appellant is able to furnish security for costs (either from his own resources or with financial assistance from someone else), then security should be ordered. The view taken is that if the appellant can furnish the security, then he should be ordered to do so in fairness to the respondent, and there is no good reason for invoking the residual discretion.

Where, however, an appellant contends that security should not be awarded because it would prevent him pursuing his appeal, he has to satisfy the Court not only that he is unable to furnish security for costs from his own resources, but also (and the onus of proof is on him on this issue), that he is unable to raise the money elsewhere; in assessing whether he could raise the money elsewhere the Court adopts the same rigorous approach as in the O 14 case of *York Motors v Edwards* [1982] 1 WLR 444 at 449 and 450; [1982] 1 All ER 1024, at 1027 and 1028, HL. In addition, the appellant has to demonstrate that his appeal has a sufficiently good chance of success to justify exposing the respondent to the injustice of having to bear his own costs win or lose. The appeal does not have to be bound to succeed, but to satisfy the merits test for the exercise of the residual discretion the grounds of appeal must be "real and substantial".

18 In view of the fact that our rule is worded more widely than the then English rule, it must follow that a respondent who asks for further security from the appellant under our provision need not necessarily show "special circumstances". The rule gives an unfettered discretion to the court to make such orders as it thinks "fit". It seems to us that the term "fit" must encompass the concept of what is "just" in all the circumstances. We do not think it would be desirable, nor possible, to

circumscribe such a wide discretion by any specific categorisation or criteria, other than the broad concept that further security should only be ordered where in all the circumstances it is "just" to do so.

19 Under our rules, foreign residency is a factor which may warrant the imposition of security for costs of a trial (O 23) or further security in respect of an appeal. But it also does not follow that just because an appellant is resident abroad, that security must be ordered against him. The rationale for such an order against a foreign resident is the delay or expense that will arise in enforcing the costs order abroad: see *De Bry v Fitzgerald* [1990] 1 All ER 560 at 565, CA.

20 Finally, every application for further security should be made promptly. If it is made so late that the bulk of the costs have already been incurred, the application might well be refused. Of course, if the delay is satisfactorily explained, then the position could be different.

Our determination

21 We now turn to consider the two main contentions of Shirley Ooi. First is the question of delay. It is necessary to restate the essential facts. The notice of appeal was filed on 28 February 2002. On 6 March 2002 JGI's solicitors demanded the payment of the judgment sum. There was no response. Then between 26 April to 10 May 2002, PL, sought to take out enforcement proceedings and asked AL if they had instructions to accept service on behalf of Shirley Ooi. In each instance the reply was a negative. Then on 15 May 2002, PL wrote to AL asking for the provision of a sum of $50,000 as further security within 2 days. An interim reply was given by AL on 17 May 2002 querying the urgency and stating that the solicitor in charge, Mr Benjamin Goh, was then overseas and would revert upon his return. But it would appear, whatever might be the reasons, he never reverted. So on 21 May 2002 JGI applied by motion for further security, which motion was on 2 July 2002 dismissed by the single Judge. On 10 July 2002, the present motion was filed pursuant to s 36(3) of SCJA.

22 In this regard, it must be pointed out that this application for further security was not made on the ground of poverty or impecuniosity of Shirley Ooi. It was on the ground that her conduct evidenced an intention on her part to vigorously resist any costs awarded against her and it was likely that she would deliberately make it more difficult and expensive for enforcement action to be taken against her. This ground only surfaced on account of her conduct in April/May 2002. Thus, we found that there was really no delay on JGI's part in making the application.

23 Turning to the second point of Shirley Ooi, that she is the joint owner of a property, while this may, on the face of it, show that she has assets within jurisdiction to satisfy any costs order, the circumstances would indicate that any enforcement of a costs order against her would not be without delay or unnecessary expense.

24 First, even accepting her explanations on why she often had to change her residence, or her postal address, this would mean that a third party like JGI would have great difficulty in tracing her, unless she keeps her solicitors informed and permits them to notify others, like JGI, of her updated address.

25 Second, having regard to her previous conduct, she is likely to take every step to delay and/or place obstacles in the way of the execution of a cost order. She did not apply for a stay of execution of the High Court judgment, and yet she resisted the request to pay up the judgment sum. She refused to instruct her solicitors to accept service of the enforcement actions which PL intended to pursue. We could not help feeling that she was trying to evade enforcement action. The case *Lek Swee Hua v American Express International Inc* [1991] 2 MLJ 151 is illustrative. There, there had

been difficulties in effecting service of bankruptcy notices on the appellant-plaintiffs in other proceedings and security for costs was accordingly ordered.

26 Thirdly, enforcement of a costs order against Shirley Ooi would necessarily give rise to undue delay and expense. Again, looking at the previous behaviour of Shirley Ooi, we thought it was likely that JGI would have real difficulties in enforcing such an order against her. Orders of this Court are not enforceable in USA as there is no arrangement on reciprocal enforcement of judgment between Singapore and USA. This then brings us to the flat which she co-owns with her husband. In *Malayan Banking Bhd v Focal Finance Ltd* [1999] 3 SLR 229, the High Court held that a writ of seizure and sale issued under O 47 r 4(1)(a) is not enforceable against an immovable property in which the judgment debtor is a joint tenant. This is because a joint owner does not have a distinct and identifiable share in the property for so long as the joint tenancy subsists. Instead, the High Court indicated that in such a situation the judgment creditor could proceed by way of equitable execution through the appointment of a receiver (under O 30 and O 51 of the Rules of Court). However, as a receiver is not empowered to sell the property, it is clear that satisfaction of the judgment sum owing by the judgment debtor would entail further difficulties, or at least further delays, assuming that incomes received by the receiver are utilised to satisfy the costs order. We have referred to *Malayan Banking Bhd v Focal Finance Ltd* only to show the difficulties that *could* be encountered. We have assumed the decision to be correct as no appeal was taken against it. These difficulties, coupled with the fact that Shirley Ooi is not likely to cooperate, could only further enhance the impediments which JGI would encounter.

27 In view of all the foregoing, it was our opinion that the circumstances warranted the making of an order for further security. The whole point of ordering a foreign plaintiff or appellant to furnish security is to ensure that a fund would be available within the jurisdiction of this court against which the successful defendant or respondent could enforce the judgment for costs: see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 at 422. Without such further security there is a real risk that JGI could be left with a costs order which would be unenforceable or only enforceable with great difficulty and expense, plus delay.

28 Moreover, it was clear that Shirley Ooi is a person with means. There was no suggestion that she would have difficulties in furnishing such additional security which the court might reasonably order. Neither had it been said that if such security were ordered, her appeal would be stifled.

29 Before we conclude, we ought to mention that another factor which is relevant in the equation of determining whether it is just to order further security is the question of the merits of the appeal. For the purpose of the present motion, we had assumed that there could be some merits in the appeal.

Sgd:

CHAO HICK TIN TAN LEE MENG

JUDGE OF APPEAL JUDGE