Wishing Star Ltd v Jurong Town Corp
[2003] SGHC 276

Case Number : Suit 31/2003, RA 315/2003

Decision Date : 08 October 2003

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Edmund Kronenburg (Drew & Napier LLC) for the plaintiffs; Ho Chien Mien (Allen & Gledhill) for the defendants

Parties : Wishing Star Ltd — Jurong Town Corp

Civil Procedure – Costs – Security – Exercise of court's discretion to order security for costs

Civil Procedure – Costs – Security – Whether plaintiff company "ordinarily resident out of jurisdiction" – O 23 r 1(1)(a) Rules of Court (Cap 322, R 5, 1997 Rev Ed)

1 This was an appeal by the defendants against the order of the assistant registrar dismissing the defendants' application for security for costs to be provided by the plaintiffs. The plaintiffs are a company registered in Hong Kong with a registered branch in Singapore. The defendants applied under O 23 r 1(1)(a) of the Rules of Court for security for costs in the sum of $400,000 to be furnished because they say that the plaintiffs are 'ordinarily resident out of jurisdiction'. Mr Kronenburg, counsel for the plaintiffs submitted before me that an order for the provision of security for costs should not be made because the plaintiffs are not ordinarily resident out of jurisdiction, and in any event, the court ought not exercise its discretion to order security in this case.

2 In regard to the first issue, Mr Kronenburg's argument was simply that a company that has a registered branch in Singapore cannot be described as one that is ordinarily resident outside its jurisdiction. Mr Kronenburg submitted that once a branch is registered in the jurisdiction, one need not look further to enquire where the seat of governance is. The branch, in other words, establishes the residency of the company. He further argued that not only did the plaintiffs register a branch in Singapore, it was carrying on business in Singapore, unlike the plaintiffs in *Re Little Olympian Each Ways* [1994] 4 All ER 561. Mr Ho, counsel for the defendants, argued that whether a company is 'ordinarily resident' is determined by where the 'central management and control' of the company is located.

3 A branch is but a part of the company. When reference is made to the term 'ordinarily resident' it applies to the company and not to its branches. The question arises as to whether a company can be ordinarily resident in a jurisdiction where its branches is located. Generally speaking, it would do violence to the language to hold that anyone, whether a body corporate or an individual person, may be said to be ordinarily resident in more than one place at a time. A person or a company may always set up more than one residence in as many jurisdiction as they can afford - but a house is not a home. Support for this view can be gleaned from the judgment of the court in *Jones v Scottish Accident Co* (1886) 17 QBD 421, 423: 'An individual carrying on business in Scotland with branches in England is resident at the place where he carries on his business; why should we adopt a different rule for a company'. Security for costs may be sought against a corporation under the Companies Act only if that corporation is not 'ordinarily resident' in Singapore. Having a registered branch does not necessarily satisfy that criteria. It is no more than having another address, another house. We want to be satisfied that the corporation has deeper roots than that so that it may be excused from providing security for costs in the event that it fails in the action. Hence, having registered an office or even carrying on some of its business through that address may not be sufficient in this regard. There are also authorities from the Canadian courts that support the proposition that a mere presence of a branch within the jurisdiction (when the parent is outside

jurisdiction) still entitles the defendants to security for costs. See, for example, *Canadian Railway Accident Co. v Kelly* (1907) Vol XVI, Manitoba R. 608.

4 Therefore, in itself, the mere fact that a company has a branch within the jurisdiction does not confer any special reason to deny a defendants from getting security for costs. It is possible that a company who has a registered office elsewhere prefers to operate principally from its branch. In such a case, it is possible that the company may be said to be ordinarily resident in the jurisdiction where that branch is located. Thus, courts have preferred to apply 'the central management and command of the company' test. The central management and control test is also applied in revenue cases and although it is, in my view, desirable that the same test be applied uniformly in respect of the residency of a company (see *De Beers Consolidated Mines Ltd v Howe* [1906] AC 455), liability for tax purposes and liability for providing security for costs are essentially very different matters and some exceptions must be recognised. An example would those cases in which the management and control is divided. It is, of course, possible that a company comprising of, say three main shareholders and directors, may have three equally dominant centres of management if each of the three operate in like manner and extent in different jurisdictions. In such cases, the company may be said to be ordinarily resident in each of the three jurisdictions for the purposes of an application for security for costs. On the affidavit evidence, it does not appear that Wishing Star Ltd falls into this category. It has a branch, and a reasonably active one involved in a major construction project here. But the seat of management of the company is still in Hong Kong.

6 I now turn to the question as to whether this court ought to have exercised its discretion in ordering the plaintiffs to provide security for costs. The assistant registrar did not think so and declined to make the order. I am of the same opinion and therefore dismissed the defendants' appeal. The plaintiffs' case was for wrongful termination of their employment as a nominated sub-contractor in a major construction project called 'The Biopolis'. The contract awarded was valued at $54m. The plaintiffs were engaged to design, produce, and install curtain wall cladding for the building to be constructed. The defendants terminated the contract on the grounds of misrepresentation, and launched a counter-claim for damages arising from their having to engage new contractors. The counter-claim was launched from the same springboard as its defence, that is to say, that the facts which they found to justify the termination of the plaintiffs' employment are also being relied upon for their counter-claim for damages. And some of which are also now used to support their application for security. This is the sort of situations we call 'over-lapping claims' and they are capable of providing a nasty twist consequent upon an order for security. If security is ordered but the plaintiffs do not or are incapable of providing it, its claim will be stayed but the counter-claim will proceed. The result will be that the plaintiffs are prevented from pursuing his claim but the trial largely on the same facts will proceed with an obvious advantage to the defendants. This was a factor that was taken into account in *B J Crabtree (Insulation) Ltd v G P T Communication Systems Ltd* [1994] 59 BLR 43. But Mr. Ho submitted on behalf of the defendants before me that *Crabtree* is different because the plaintiffs in that case was impecunious so that the severe consequences would almost certainly have befallen on it, the plaintiffs in the present case, on the other hand, are not impecunious and are able to pay. If that were so, the only question really, is whether there is any reason to suppose that the plaintiffs would not pay in the event that they fail in their claim and lose the counter-claim. I note that counsel for the defendants made various allusions to deliberate concealment of the plaintiffs' current financial position. He argued that the plaintiffs' assertion that it has assets of HK$29m was out-dated. But either the defendants accept that the plaintiffs can pay or it does not. In view of the conflicting arguments, I am not inclined to accept that the plaintiffs were deliberately concealing its impecuniosity, and thought it fairer to regard the circumstances as one in which the issue was whether there were grounds to believe that the plaintiffs would not pay should they lose the case.

7 Mr. Ho relied on some of the evidence that the defendants hoped to adduce at trial, namely

that the plaintiffs have no substantial assets in either Singapore or Hong Kong. Allusions were also made, hinting that the plaintiffs were not honest and therefore unlikely to honour any court order as to costs. However, I was unable to be fully convinced that this would be the case. The plaintiffs are, after all, a reputable Hong Kong company with business interests in Singapore and there was no reason to suppose that a company like that would not pay its costs if ordered to do so. Any petulant refusal to pay costs at the end of trial may be too high a price for a viable commercial company because the ensuing loss of reputation on that account would probably be far more severe than paying the costs. It is not disputed that there is reciprocal enforcement of judgments between Singapore and Hong Kong. I accept that ordinarily, a successful party ought as far as possible not be put to the extra expense of enforcing a judgment. But this is not an intractable rule. On the pleadings, the plaintiffs had an ostensibly viable claim and the defendants an equally viable defence and counter-claim. I was therefore hesitant in giving too much weight to the expense of having to enforce a judgment in Hong Kong, considering also that the defendants are not an individual, but a large institution itself. Furthermore, this application for costs was made a little too late and the amount asked for a little too large. Even a wealthy company may not produce security of $400,000 that the defendants were asking for in a short time. The suit was commenced on 13 January 2003 but security was applied for only on 15 August 2003. The trial commenced on 3 November 2003. The appeal against the registrar's decision was heard on 18 and 25 September 2003 and further arguments on the point regarding the definition of 'ordinarily resident' was heard on 27 October 2003 at the request of Mr Ho. In other circumstances, the court may order a smaller amount to be provided, or that a longer time be given to the plaintiffs to raise the money, or may impose both conditions. In the overall circumstances of this case, however, I would not make an order for the provision of security for costs.

8 On the whole, I was not convinced that an order for security ought to be made, and therefore dismissed the defendants' appeal. The grounds herein do not include material and evidence adduced at the trial presently proceeding before me.