PT Bumi International Tankers v Man B&W Diesel S E Asia Pte Ltd and Another (No 2) [2004] SGHC 99

Case Number : Suit 149/2001, RA 367/2003

Decision Date : 14 May 2004

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Philip Tay (Rajah and Tann) for plaintiff; Charles Lin (Donaldson and Burkinshaw) for defendants

Parties : PT Bumi International Tankers — Man B&W Diesel S E Asia Pte Ltd; Mirrlees Blackstone (S.E Asia) Pte Ltd

Civil Procedure – Costs – Security – Security for costs provided by plaintiffs' solicitors by way of solicitors' undertakings – Whether application to be released from undertakings ought to be granted

14 May 2004

Choo Han Teck J:

1 This was an appeal by the defendants against an order by the assistant registrar discharging two undertakings given by the plaintiffs' solicitors to the defendants in respect of security for costs. The plaintiffs were required to provide security for costs pursuant to an application by the defendants on the ground that the plaintiffs were foreign plaintiffs. The order for security was not an issue. However, instead of providing security in the more conventional way by payment into court or in the form of a banker's guarantee, the plaintiffs provided security by way of undertakings given by their solicitors to the defendants in the terms set out in their letters of 12 March 2002 and 18 June 2002. The wording is identical in both letters. The total amount of security in the two letters of undertaking was $250,000. The first letter of undertaking provided as follows:

> **LETTER OF UNDERTAKING FOR PROVISION OF SECURITY FOR COSTS PURSUANT TO ORDER OF COURT DATED 19 FEBRUARY 2002 FOR DEFENDANTS IN SUIT NO 149 OF 2001Y**
>
> Whereas pursuant to an Order of Court dated 19 February 2002 in the captioned Suit, the Plaintiffs were ordered to provide security for the Defendants' costs in the Suit in the sum of S$150,000.00.
>
> We, Rajah & Tann, Solicitors for the Plaintiffs in High Court Suit No 149 of 2001Y, hereby undertake to pay to Man B & W Diesel S E Asia Pte Ltd and Mirlees Blackstone Ltd, the Defendants in the aforesaid Suit such sum of costs which the said Plaintiffs may be ordered to pay to Man B & W Diesel S E Asia Pte Ltd and Mirlees Blackstone Ltd as taxed or fixed by the High Court in the Suit and/or such costs which may be payable pursuant to any agreement between the parties in relation to the Suit PROVIDED ALWAYS that the total payable hereunder shall not exceed the sum of SINGAPORE DOLLARS ONE HUNDRED AND FIFTY THOUSAND ONLY (S$150,000)
>
> This undertaking shall be discharged and be of no further effect upon payment of the sum above and/or if the Defendants are paid all their costs without having to call on this undertaking, whichever is earlier.

2 The plaintiffs succeeded in their claim at trial and judgment was handed down in their favour on 18 July 2003. The defendants filed an appeal against that judgment, but in the meantime, on

15 October 2003, the plaintiffs applied to the assistant registrar to be released from their undertakings in respect of security for costs. The assistant registrar discharged the undertakings and also disallowed the defendants' application for a stay of execution of her order. The defendants appealed against the assistant registrar's orders, and the appeal was heard in this court on 29 October 2003 and dismissed. The defendants subsequently asked to present further arguments. They were notified on 17 November 2003 that the court would hear further arguments.

3 The parties appeared and made further arguments on 9 January 2004. The defendants' counsel presented an enlarged argument based on *Hawkins Hill Consolidated Gold Mining Company Limited v Want, Johnson, and Co* (1893) 69 LT 297. In the course of arguments, counsel indicated that the argument would require time and a special date was then given for the hearing. At the resumed hearing, counsel suggested that the further arguments be heard after the substantive appeal by the Court of Appeal had been dealt with. If that appeal was dismissed, the registrar's appeal before me would become irrelevant. In the event, the Court of Appeal allowed the defendants' appeal. The registrar's appeal thus remained relevant and counsel were directed to present written submissions (in respect of the further arguments that had been adjourned). The submissions were filed on 20 April 2004. On 21 April 2004, the registrar's appeal was allowed and the assistant registrar's orders were set aside. *Hawkins*' case, in so far as it is relevant here, lies in its emphasis that undertakings are serious assertions and would be strictly enforced. In that case, the liquidators who gave an undertaking as to the defendants' costs were held to be bound even though the undertaking specified neither an amount, nor that it was to be discharged after trial. In that case, the defendants, who lost at first instance, succeeded on appeal.

4 Mr Philip Tay, counsel for the plaintiffs, argued that the plaintiffs were entitled to be released of all their obligations as to security for costs unless there was an order of court that specifically prevented them from being so released. There was no such prohibition at the time when the plaintiffs' solicitors applied to be discharged from their undertakings. Hence, his main argument was that the order by the assistant registrar was a matter of discretion and that there were no good grounds to disturb the exercise of that discretion. That was the approach this court had taken when the appeal was initially dismissed.

5 However, upon considering the matter further pursuant to the further arguments by both sides, this court was persuaded that a solicitor's undertaking to a party in the present circumstances must be governed by the terms set out in the undertaking itself. In the present case, the solicitors' letter provided that the undertaking "*shall be discharged and be of no further effect upon payment of the sum above and/or if the defendants are paid all their costs without having to call on this undertaking*". These are clear words. The solicitors are bound until the amount stated in the letter of undertaking is paid, or if the defendants were paid their costs without having to call on the undertaking. The court would not intervene in an undertaking given in such circumstances. Hence, even if there was no express prohibition against the plaintiffs applying to the court for an order discharging their solicitors from their undertakings, the court should not interfere and allow such an application because it runs against a clear and express undertaking freely given. The sample letters of undertaking provided to the court by Mr Tay had entirely different wordings. It is manifestly prudent for a party, when requesting a guarantee for costs, to ensure that it covers the trial and any subsequent appeal. But the words of the present undertakings operated in a different context in that they provided that the specific sums are guaranteed until all costs are paid. That is sufficient to hold that the party who gave those undertakings should adhere to them. Mr Tay relied on the case of *The Bernisse and the Elve* [1920] P 1 in which the English Court of Appeal rejected an unsuccessful defendants' application for security for costs to remain in retention in court, pending the defendants' appeal. In that case, the defendants had also obtained an order for a stay of execution pending

appeal. The Court of Appeal held that the money paid into court as security for costs of the trial should be returned to the plaintiffs. Lord Sterndale P held that the effect of ordering that money to remain in court would be to give the defendants either security for the costs of their appeal, or security for the satisfaction of the judgment which may be given on appeal. Holding that the defendants were entitled to neither, the court ordered that the money be paid out. There was no mention as to the terms and circumstances in which security for costs was provided in that case. Hence, it is of no assistance in cases where the payment for security was made specifically to cover the trial as well as any appeal arising from it. Equally, it would have little relevance to a situation such as the present where the parties were bound by the terms of an undertaking for security.

6 Mr Tay relied on the case of *Eagleview Ltd v Worthgate Ltd* [1998] EWCA Civ 1232; [1998] EGCS 119 for the proposition that an order by the court in respect of payment out of security for costs is an exercise of judicial discretion and that it ought not to be disturbed. Payments into court pursuant to an order of court may also be paid out by a further order of court. That would be the *Eagleview* situation. But where a party has given an undertaking to another, the court may only relieve a party from his undertaking in exceptional circumstances. Where none is evident, the undertaking must be observed as nearly as possible to the terms upon which it was made.

Appeal allowed.