

Metalfarm Asia Pte Ltd v Holland Leedon Pte Ltd
[2009] SGCA 29

Case Number : CA 48/2006, SUM 1498/2009
Decision Date : 01 July 2009
Tribunal/Court : Court of Appeal
Coram : Andrew Ang J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA
Counsel Name(s) : Chelva Retnam Rajah SC, Chew Kei-Jin, Moiz Haider Sithawalla and Lavinia Rajah (Tan Rajah & Cheah) for the appellant; Steven Chong SC, Lee Eng Beng SC and Low Poh Ling (Rajah & Tann LLP) for the respondent
Parties : Metalfarm Asia Pte Ltd — Holland Leedon Pte Ltd

Civil Procedure – Injunctions – Creditor applying to vary injunction on ground that Escrow Sum in excess of claim of debtor – Whether court had power to vary injunction on ground of material change in circumstances

Injunctions – Purposes for grant – Restraint of proceedings – Debtor obtained injunction restraining creditor from winding up debtor on ground that debtor had cross-claim – Cross-claim secured by Escrow Sum held in Claims Escrow Account to meet claims of debtor under sales transaction – Escrow Sum to be released only upon joint written instructions of parties

1 July 2009

Judgment reserved.

Chan Sek Keong CJ (delivering the judgment of the court):

Introduction

1 This application in Summons No 1498 of 2009 is a sequel to the decision of this court in Civil Appeal No 48 of 2006 (“CA 48”) (see *Metalfarm Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR 268 (“the Judgment”)) to grant an injunction to Metalfarm Asia Pte Ltd (“MA”), restraining Holland Leedon Pte Ltd (“HL”) from commencing winding-up proceedings against MA for an unpaid and undisputed debt on the ground that MA had a genuine cross-claim against HL which could equal or exceed the undisputed debt.

2 The present application by HL seeks the following relief:

That the injunction granted by [this court] in [CA 48] be varied such that its continuation shall be conditional upon [MA] agreeing to the release of the sum of US\$5,254,877.97 (as at 25 March 2009) to [HL] from the Claims Escrow Account [*ie*, the account into which a sum of S\$25m was deposited as security] held by Allen & Gledhill LL[P] pursuant to a Claims Escrow Letter dated 13 June 2004.

As the injunction granted by this court was to restrain HL from presenting a winding-up petition against MA, it is evident from the relief sought in the application that HL is not really seeking to vary the injunction as such, but the basis on which, or the factors that led, the court to grant the injunction.

Background facts

3 The background facts to the present application are fully set out in the Judgment. In summary,

the parties had entered into a sale and purchase agreement dated 13 June 2004 (which was later amended) ("the SPA"), pursuant to which MA purchased the business and assets of HL for the sum of about US\$267m. Of that sum, a US-dollar equivalent of S\$25m ("the Escrow Sum") was paid pursuant to the terms of the SPA to Allen & Gledhill LLP ("the Escrow Agent") to hold as security to meet any claims by MA for breach of warranties by HL. Any such claim had to be made by 30 September 2005, failing which the Escrow Sum would be released to HL.

4 A letter from MA and HL dated 13 June 2004 ("the Escrow Letter") and addressed to the Escrow Agent sets out the terms on which the Escrow Sum would be held and released. Paragraph 2.1.5 of the Escrow Letter provides as follows:

[I]f [HL] admits all or any part of the Amount Claimed or there is a determination of the amount payable in respect of the Relevant Claim by a final arbitral award made pursuant to clause 21 of the [SPA], the Escrow Agent shall pay to [MA] the amount so admitted or determined (in the latter case less any money previously paid under paragraph 2.1.4 in respect of the Relevant Claim) out of the amount standing to the credit of the Claims Escrow Account in accordance with the joint written instructions of [MA] and [HL] pursuant to paragraph 2.3.

5 On 28 September 2005, MA made a warranty claim against HL which was quantified at S\$34,472,740. In December 2005, MA commenced arbitration proceedings against HL ("the Arbitration"). Based on its current pleadings in the Arbitration, MA is claiming a sum of at least S\$30,993,960.18 plus interest and costs.

6 Prior to this date, HL had served a statutory demand on MA under s 254(2)(a) of the Companies Act (Cap 50, 1994 Rev Ed) requiring MA to pay an undisputed debt of US\$11,100,206.60 and S\$112,667.17 ("the Undisputed Debt") in respect of steel supplied by HL to MA between July 2004 and June 2005. In response, MA applied for an injunction in Originating Summons No 1996 of 2005 to restrain HL from commencing winding-up proceedings against MA on the basis that MA had a genuine cross-claim against HL for damages in excess of the Undisputed Debt for breach of warranties under the SPA, and that the commencement of the winding-up proceedings would cause irreparable damage to MA which had an ongoing business. The High Court dismissed MA's application. MA appealed to this court which allowed the appeal and granted the injunction. This court found, *inter alia*, that MA had a genuine cross-claim against HL which might or might not be less than S\$34m and that the security of S\$25m for the cross-claim did not reduce the amount of the cross-claim and could not be treated as payment of the cross-claim. Accordingly, until the cross-claim was decided in the Arbitration, it was not possible to conclude that MA's cross-claim was not equal to or in excess of the Undisputed Debt. Apart from the Undisputed Debt, there was also no evidence then that MA was insolvent.

HL's reasons for this application

7 HL's application is based on a material change in circumstances concerning, *inter alia*, the amount claimed by MA in the Arbitration and its financial condition. HL has made the following points in support of this application:

(a) Even if MA were to succeed in the Arbitration with respect to its cross-claim currently assessed at S\$30,993,960.18, there would be at least US\$5,254,877.97 ("the Balance Sum") left of the Escrow Sum, without taking into account the accrued interest to the Escrow Sum, after the Undisputed Debt has been set off against the cross-claim. (This is not disputed by MA.)

(b) MA is now insolvent as its total liabilities exceed its total assets by US\$236,527,949 as at

30 June 2006, and by US\$241,365.691 as at 30 June 2007, and MA has been unable to pay all moneys owing to and demanded by its bankers since October 2006. (Again, MA has not disputed this statement, except to say that the bank creditors have not taken any step to wind it up.)

(c) MA has agreed that it would set off any recovery for its warranty claim against the Undisputed Debt first, which would thereby leave the Balance Sum in the escrow account held by the Escrow Agent.

(d) At the hearing before the High Court and the Court of Appeal on MA's application for the injunction, MA had offered to agree to the release of the sum of S\$10m from the Escrow Sum to notionally equalise the cross-claim with the Undisputed Debt. There is no reason why, with the change in circumstances, MA should not agree, or be ordered by this court to agree, to the release of the Balance Sum to HL.

Essentially, HL's reason for the present application is that it is wholly unjust and inequitable that HL be deprived of its right to immediate payment of the Balance Sum, and that this court should therefore grant its application. It bears noting that the Escrow Sum belongs to HL as it was part of the sale consideration under the SPA, although it is currently held by the Escrow Agent to meet MA's warranty claim which is the subject of the Arbitration.

8 HL has argued that the court has inherent jurisdiction to set aside an injunction, whether perpetual or interlocutory, should it become appropriate to do so, citing I C F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (Lawbook Co, 7th Ed, 2007) at p 382. HL contends that the present case is an appropriate one for this court to vary the injunction it has granted.

MA's objections

9 MA's position is that this court may not, and in any event should not, grant HL's application for the following reasons:

(a) The injunction granted by this court is the result of a final judgment, and this court is *functus officio* in the matter, according to *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) at para 42/1/9, and also *Godfrey Gerald QC v UBS AG* [2004] 4 SLR 411. Counsel for MA accepts the principle that a court has power to clarify or to make consequential or incidental orders in relation to a final judgment, but submits that HL's application is not such a case. MA also contends that there is in fact no change in circumstances as alleged by HL, but even if there were, it would not be a ground to vary the final judgment. Furthermore, MA contends that there is no change in the circumstances that have led this court to grant the injunction against HL.

(b) Even if this court has the power to vary the judgment, HL is estopped from seeking a variation as the release of the Balance Sum was an issue which could have, and so ought to have, been raised at the hearing of CA 48 (see *Singapore Court Practice 2006* at para 18/19/14, pp 466–467 and the authorities cited therein). The issue of the release of the Escrow Sum was raised by the parties and considered by this court in the context of HL's argument that the Escrow Sum of S\$25m had reduced MA's claim of about S\$34m to about S\$9m, thereby causing MA's cross-claim against HL to be reduced to less than the Undisputed Debt. In view of this argument, MA was prepared to agree to the release of the sum of S\$9m (or S\$10m as computed by this court) in order to equalise the cross-claim and the Undisputed Debt (with the consequence that HL would not be able to justify commencing winding-up proceedings against

MA). HL rejected this offer. However, this court went on to hold that as the Escrow Sum was held as security, it could not constitute payment, and therefore there could be no reduction in the amount of the warranty claim in fact and in law.

(c) Whether or not HL is entitled to the release of the Escrow Sum or any part thereof before the final determination of MA's warranty claim is a question which properly ought to be referred to arbitration in accordance with the terms of cl 21 of the SPA and the terms of the Escrow Letter. In any event, this court ought not to interfere with a matter which has been referred to arbitration, following *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565, which held that the court's jurisdiction in matters that have been referred to arbitration was limited, and that it would not intervene in any matter which had been referred to arbitration unless the arbitral tribunal had no jurisdiction to grant the relief in the matter at hand.

(d) The Balance Sum does not accurately represent the sum that would remain of the Escrow Sum if MA were to succeed in its entire warranty claim as MA is also claiming unliquidated damages and interest thereon, and until the claims are finally determined in the Arbitration, it would not be known how much would be left of the Escrow Sum.

Our decision

10 We do not propose to examine in detail any of the grounds or reasons which HL has given to justify this application or any of the arguments advanced by MA by way of rebuttal, as HL's application is misconceived. In our view, it is clear from para 2.1.5 of the Escrow Letter (see [\[4\]](#) above) that, unless it has been jointly instructed in writing by MA and HL, the Escrow Agent has no obligation to release the Escrow Sum or any part thereof. This is simply a matter of contract between the parties and the Escrow Agent and the court has no power to order the Escrow Agent to release the Escrow Sum or any part thereof to either HL or MA unless the Escrow Agent is in breach of its obligations as an escrow agent.

11 HL has contended that the injunction should be varied as MA has agreed to set off any recovery for its warranty claim against the Undisputed Debt first, which would thereby leave the Balance Sum in the escrow account held by the Escrow Agent. However, HL has not argued that MA's agreement in this respect amounted to a variation of the terms of the escrow arrangement under the SPA that obliges MA, as a matter of contract, to agree to the release of the Balance Sum from the Escrow Sum. Even if that were the case, this court would not have the jurisdiction to hear such a claim. HL would have to commence separate proceedings against MA to enforce its contractual rights.

12 HL is ostensibly asking this court to vary the injunction to make it conditional upon MA agreeing to the release of the Balance Sum to HL. However, in truth, it is not so much an application to vary an injunction but an attempt to entreat the court's assistance to order MA to agree to the release of the Balance Sum against the latter's wishes. The injunction granted by this court was to restrain HL from commencing winding-up proceedings against MA. The court has the power to dissolve or revoke this injunction where there is a material change of circumstances affecting its continuance, for example, where HL can produce evidence to show that MA is insolvent, which entitles HL to file an application to wind up MA. HL has not done so, although its counsel has stated that it is something that HL will seriously consider. But whether HL is entitled to have the existing injunction revoked is an issue which we need not consider as it is not before us.

13 It may well be that, looking at the matter in the round, it may not seem fair or equitable to HL, as it claims, for it to be kept out of its money in the present situation where it is certain, or at least highly probable, that HL would be entitled to payment out of the Balance Sum when MA's warranty

claim is finally determined in the Arbitration. However, in our view, that is not a relevant consideration because it is a natural outcome of HL's bargain with MA. HL has no equitable basis upon which it can complain. Indeed, it can even be said that the predicament that HL is now in is of its own making. In the previous proceedings, MA had offered to agree to the release of S\$10m from the Escrow Sum to HL, but HL rejected it because it was of the view that it had good grounds to wind up MA. Unfortunately for HL, this court did not agree, and now HL is placed as a supplicant *vis-à-vis* MA for the release of the Balance Sum.

14 MA has argued that this court has no power to vary the injunction as it is a final order and not an interlocutory order, as contended by HL. It is not necessary for us to decide on this issue for the disposition of this application. In our view, the injunction is in substance a final and not an interlocutory injunction in the sense that it was the only relief that was sought in the proceedings, and was not a relief granted as part of ongoing proceedings. It is, however, a provisional order in that, if the basis of the injunction disappears or can no longer support it, such as if the arbitrator made an award on MA's cross-claim that is less than the Undisputed Debt to HL, there would be nothing to prevent HL from issuing another statutory notice to MA to pay the amount outstanding, failing which it would be entitled to take proceedings to wind up MA.

15 MA has also contended that HL is estopped from raising this issue since the issue was argued by the parties and considered by the court in the previous proceedings. In our view, issue estoppel does not apply because there was no issue before the court in the previous proceedings which required the court's decision. MA's offer to agree to the release of S\$10m from the Escrow Sum was within its contractual right and the rejection of the offer was also within the contractual right of HL. Nevertheless, HL has not been able to point out to us any principle of law that the court has the power to vary the existing injunction by imposing a condition on MA such as to interfere with its bargain with HL as to how and when the Escrow Sum should be paid. In fact, HL recognises the court's lack of judicial power to vary the injunction, as HL is not applying to have the injunction varied, but is persuading the court to order MA to agree to the release of the Balance Sum to HL as a condition for continuing the injunction.

16 The issue can be considered from another perspective. The application is to vary a final injunction to a conditional injunction (*ie*, conditional upon MA agreeing to the release of the Balance Sum to HL). Suppose MA does not perform the condition, what follows then? Presumably, the injunction would not continue, *ie*, it would be discharged. But, if it had that effect, it would be contrary to the purpose of the existing injunction, which is to restrain HL from winding up MA because HL has not been able to prove that MA is unable to pay its debt to HL.

17 We therefore agree with the general submission of counsel for MA that the circumstances in which this court granted the injunction have not changed. The Escrow Sum is still held as security for the cross-claim which has yet to be determined in the Arbitration. The Escrow Agent cannot release any part of the Escrow Sum to HL without the joint written instructions of HL and MA. This court could not interfere in the previous proceedings, and cannot interfere now, with the escrow arrangements between the parties. Although HL may consider it unjust that MA is now grossly over-secured with respect to its cross-claim, that, however, is a contingency inherent in any arrangement where security is given for an unliquidated claim which itself is also based on a contingency. The fact is that HL agreed to provide the Escrow Sum and it cannot now complain that it has provided too much.

Conclusion

18 For the above reasons, we dismiss HL's application with costs and the usual consequential

orders.

Copyright © Government of Singapore.