Mycitydeal Ltd (trading as Groupon UK) and others *v* Villas International Property Pte Ltd and others
[2014] SGHC 81

Case Number : Suit No 281 of 2012 (Registrar's Appeal No 77 of 2014)

Decision Date : 21 April 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Navinder Singh (Navin & Co LLP) for the plaintiffs; Nazirah K Din and Rasanathan s/o Sothynathan (Colin Ng & Partners LLP) for the defendants

Parties : Mycitydeal Ltd (trading as Groupon UK) and others — Villas International Property Pte Ltd and others

Civil Procedure – Interim orders – Security for costs

21 April 2014 Judgment reserved.

Choo Han Teck J:

1 This is an appeal against the assistant registrar's decision to dismiss the plaintiffs' application for security for costs, in the sum of $100,000, against the defendants.

2 In Summons No 812 of 2014, the plaintiffs applied for security for costs against the defendants, by virtue of s 388 of the Companies Act (Cap 50, 2006 Rev Ed) and Order 23 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). They seemed to proceed on both s 388 and O 23, presumably in the alternative. On 26 February 2014, before the assistant registrar, Ms Una Khng ("AR Khng"), counsel for the plaintiffs clarified that the security for costs application was against only the first defendant. AR Khng dismissed the plaintiffs' application, and fixed costs at $2,200, to be paid by the plaintiffs to the defendants. The plaintiffs appealed to this court, seeking that AR Khng's decision be wholly reversed, and that the plaintiffs be granted security for costs pursuant to their application in Summons No 812 of 2014.

3 The plaintiffs in this case are Groupon entities in various parts of the world. Groupon is a deal-of-the-day website that connects merchants and consumers by offering goods and services at discounted prices. The consumers usually purchase "coupons" through the respective website of each plaintiff, and subsequently redeem them from the merchants. The defendants are one of the merchants that deal with the plaintiffs. The third and fourth defendants are the shareholders and directors of the first defendant. They are in the business of promoting vacation packages in Thailand and Indonesia.

4 The first and second defendants entered into agreements with various properties in Thailand and Indonesia to promote vacation packages. They subsequently approached the plaintiffs to promote and sell these vacation packages online. The mechanism of the arrangement is as follows:

(a) first, the consumer purchases a coupon for a vacation package via one of the plaintiffs' websites;

(b) second, the respective plaintiff sends an e-mail to the consumer, attaching a copy of the

coupon as evidence of the consumer's purchase;

(c) third, the consumer then contacts the defendants directly to book his or her vacation package, by citing a code that is contained in the coupon received via e-mail; and

(d) fourth, once the consumer's booking has been confirmed, the coupon is deemed to have been validly redeemed. The defendants would then log in to the corresponding plaintiff's "Partner Portal" to input details of the coupons redeemed. At this point, pursuant to the agreement entered into between each of the plaintiffs and the defendants, the corresponding plaintiff will be required to make payment to the defendant within seven to ten working days.

5 Parties first appeared before the High Court as a result of the plaintiffs' suit against the defendants. The plaintiffs filed their writ of summons on 5 April 2012. One of their allegations was that the defendants had breached their agreement with each of the plaintiffs, as evinced by several customers having failed to secure their vacation packages through the defendants (the plaintiffs alleged 1998 coupons were sold, of which 743 were refunded). They also alleged conspiracy and fraud on the part of the defendants. The plaintiffs subsequently applied for, and were granted (on 10 April 2012), a mareva injunction against the defendants, which prohibited the latter from disposing of assets up to the value of $2,000,000. This injunction was discharged on 20 May 2013. On 21 June 2012, the defendants filed their defence. They amended it on 24 October 2012 and included a counterclaim, in which the first defendant argued the various plaintiffs owed it a total sum of $290,552.86 (which was the amount due after the defendants had input details of the coupons redeemed on each of the plaintiffs' "Partner Portal").

6 On 14 March 2013, assistant registrar Teo Guan Kee ("AR Teo") allowed the defendants' application for security for costs against the plaintiffs, for the amount of $50,000. The plaintiffs were to furnish the security within 14 days. On 22 May 2013, parties appeared before senior assistant registrar Cornie Ng Teng Teng ("AR Ng"). At that point, the plaintiffs had yet to furnish the security. AR Ng mentioned she was inclined to strike out the matter, at which point the plaintiffs requested two weeks to furnish the security. AR Ng ordered that unless the security was furnished by 5 June 2013 at 4pm, the plaintiffs' statement of claim would be struck out and the plaintiffs' action would be dismissed.

7 The plaintiffs' claim was eventually struck out as they had failed to furnish the security by 5 June 2013. On the plaintiffs' account, both in their written and oral submissions, this was a "commercial decision", as they "did not believe the [defendants] would be able to pay them substantive costs if they were to succeed due to the [defendants'] lack of assets". As such, the only issue that remained was the defendants' counterclaim. The trial of this matter has been scheduled for 25 to 27 June 2014.

8 I return now to 26 February 2014. Parties appeared before AR Khng. The plaintiffs, in a bizarre turn of events, sought security for costs from the first defendant. The main arguments raised by the plaintiffs were:

(a) that the first defendant was no longer a going concern (which was not contested by counsel for the defendants); and

(b) that the first defendant was not operating at its registered address.

9 The first defendant, in reply, argued that security should not have been ordered as:

(a) the application for security was taken out very late by the plaintiffs (a point raised by AR Khng as well); and

(b) the plaintiffs' failure to pay the sum owing to the defendants (which was the subject of the counterclaim) was the very reason for the first defendant's cash flow problems (this was disputed by the plaintiffs before AR Khng, and before me as well).

10 The plaintiffs' case was that security should have been ordered because the first defendant would not be able to satisfy costs should the plaintiffs succeed in defending the counterclaim. The first defendant's case was that it was inequitable to order them to furnish security, especially given the plaintiffs' conduct throughout the suit. AR Khng held in favour of the first defendant, and the plaintiffs appealed.

11 Before me, the arguments from either side were largely the same as those presented below. I repeat AR Khng's concerns, and find that there are three key issues before this court, namely:

(a) the delay;

(b) the conduct of the plaintiffs throughout these proceedings; and

(c) the first defendant's financial situation.

12 The law concerning security for costs requires that the respective condition under one of the four limbs of Order 23 r 1(1), or in s 388(1), must first be satisfied. If this condition is satisfied, the court can then exercise its discretion, having regard to all the circumstances of the case, to determine if the application for security should be allowed (See *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1999] 1 SLR(R) 112 ("*Creative Elegance*") at [13]). Much of this case concerned the exercise of the court's discretion, as it was generally not disputed that the pre-condition, whether in O 23 r 1(1)(*b*), (*c*), or s 388(1), has been satisfied. I now return to the three issues relating to the exercise of this court's discretion.

13 First, as AR Khng noted, the plaintiffs could have applied for security earlier, and that their delay can be a factor taken into account when the court exercises its discretion to grant security for costs (see *Tjong Very Sumito and others v Chang Sing En and others* [2011] 4 SLR 580 at [61]). Discovery had already been completed in early 2013. Directions for the exchange of affidavits of evidence in chief ("AEICs") were given on 28 November 2013, and the AEICs were supposed to have been exchanged on 7 February 2014. The plaintiffs wrote to the defendants only on 24 January 2014, two weeks before the deadline for exchange of AEICs, to request security for costs. At this point, the bulk of costs for the proceedings would have already been incurred. Counsel for the plaintiffs lamented the difficulty in communicating with each individual plaintiff, given geographical constraints and time differences, and cited this as a reason for their late application. I am not convinced by this reason. The plaintiffs also relied on *L&M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2001] SGHC 280 for the proposition (at [9] – [10]) that the "court had to take all the circumstances into account in deciding how its discretion was to be exercised". The plaintiffs expanded on this to argue that their delay alone should not necessitate the dismissal of their application (or appeal). I agree with the proposition cited, but find it is no answer to the question of the plaintiffs' delay. Further, the plaintiffs' attempt to draw the court to the other circumstances of the case, as I will elaborate below, is to their detriment.

14 Second, the conduct of the plaintiffs throughout this suit has been peculiar – they were the ones who commenced the action, and then sought and obtained one of the nuclear weapons of

litigation in the words of Donaldson LJ, namely, the mareva injunction against the defendants (see *Bank Mellat v Nikpour* [1985] FSR 87 at 90 – 92, and finally, having failed to furnish security to the defendants they had their claim struck out. Now they are seeking security from the first defendant, and defending against its counterclaim. The plaintiffs urged this court to look at the purpose of s 388 of the Companies Act, which, they argued, supported their application for security. They contended that the purpose of providing security was to protect defendants against unsatisfied costs orders should they succeed at trial against impecunious plaintiff corporations (in this case, the roles are reversed as it is a counterclaim). I agree that this is part of the purpose behind s 388. The other part, as encapsulated in the word "may" in s 388(1), involves allowing impecunious plaintiff corporations (or in this case, the first defendant), the right of access to court. The court should balance the right to have cost orders satisfied against the equity of a plaintiff pursing its claim (see *Frantonios Marine Services Pte Ltd and other v Kay Swee Tuan* [2008] 4 SLR(R) 224 ("*Frantonios*") at [54]). Notably, the availability of costs under s 388 has been observed to help "deter interested parties from trying their luck by fielding unmeritorious or dubious claims using the impecunious corporation as a shield which may then leave the defendant who ultimately emerges victorious with unpaid costs" (*Frantonios* at [54]). This case could not be further from that hypothetical. It was the plaintiffs who started this suit, and, as pointed out by counsel for the first defendant, they have not raised any significant change in circumstances of the first defendant over the course of the proceedings to show that security is now warranted in their favour.

15 Third, and related to the second point, an order for security may stymie the first defendant's counterclaim. It is undisputed between parties that the first defendant is facing financial difficulties. The plaintiffs rely on the first defendant's financial situation in mounting their appeal. While I agree that the first defendant's impecuniosity is a relevant factor to take into account, not to mention grounds upon which s 388 may be invoked, the court must also consider the first defendant's legitimate concerns, namely whether allowing an order for security would stymie the first defendant's claim (see *Creative Elegance* at [31] – [34]). The first defendant's counsel argued that, on the whole, the plaintiffs' conduct was indeed calculated to stymie the first defendant's counterclaim (based on their late application for security). In reply, the plaintiffs argued that "whether the plaintiffs were trying to stymie the [defendants' counterclaim] has to be viewed in light of the merits of the [defendants' counterclaim] and the strength of the [plaintiffs' defence]". In an interlocutory application such as this, the court should not conduct a detailed examination on the merits. An examination of each party's pleaded case, however, was sufficient to show that the first defendant's counterclaim is not without merit. More importantly, based on the history of proceedings thus far – notably the conduct of the plaintiffs – as well as the first defendant's financial situation, I am of the view that an order for security would indeed stymie the first defendant's counterclaim.

16 For these reasons, I agree with AR Khng that security for costs should not be awarded to the plaintiffs. The appeal is dismissed. Costs here and below will be costs in the cause.

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