Re Fineplas Holdings Pte Ltd (fka Tasinder Pte Ltd)
[2001] SGHC 20

Case Number : OS 600020/2001

Decision Date : 02 February 2001

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : William Jansen (Jansen, Menon & Lee) for the first, fifth, seventh, fourteenth, sixteenth and seventeenth applicants/defendants; Govind Asokan and Henry Heng (Rodyk & Davidson) for the respondents/plaintiffs;

Parties : —

Civil Procedure – Injunctions – Lifting interim injunction – Whether application could proceed without supporting affidavit -considerations to lift injunction-whether damages adequate remedy – burden of proof -Plaintiff to show Defendant unable to pay damages

: On 4 January 2001, Sitra Wood Products Pte Ltd (`Sitra Wood`) applied for and obtained, on an ex parte basis, an interim injunction ordering that:

(1) The third, fifth, seventh and fourteenth to eighteenth defendants whether by themselves or by their agents or servants or howsoever otherwise be restrained, and an Injunction is hereby granted restraining them from selling, transferring and/or otherwise disposing of their shares described in Schedule annexed hereto.

(2) The first, third, fifth and fourteenth to nineteenth defendants whether by themselves or by their agents or servants or howsoever otherwise from dealing with or howsoever otherwise acting on the first defendants` notices of offers of shares for sale in the first defendants dated 21 and 22 December 2000 until the determination or outcome of the action herein or until further order.

The defendants named in that injunction applied, on 18 January 2001, for the injunction to be set aside. That application was fixed for hearing before me on 19 January 2001. It was supported by affidavits sworn by the fifth and sixth defendants, namely, Wong Hong Hung (`Wong`) and Tan Kim Heng (`Tan`).

At the hearing before me on 19 January 2001, Mr Govind Asokan, who appeared for Sitra Wood, sought one week`s adjournment in order for his clients to file an affidavit in response to the affidavits of Wong and Tan. This application for adjournment was opposed by Mr William Jansen and Miss Molly Lim, counsel for the defendants, on the grounds that any delay would be prejudicial to their clients as a sale of shares in the company might, as a result, be aborted. In order to avoid any prejudice to Sitra Wood by reason of it not having had sufficient time to respond to the affidavits of Wong and Tan, counsel for the defendants were prepared to withdraw the two affidavits and continue with the hearing by reference only to the contents of the originating summons and the affidavit of Sitra Wood filed in support of the ex parte injunction.

Mr Asokan objected to this course of action. He submitted that for the hearing to proceed on that basis would be tantamount to this court re-hearing a matter that had been heard by the judge who granted the ex parte injunction. Such a re-hearing, Mr Asokan submitted, would be improper. He therefore urged the court to grant him the adjournment in order that his clients could respond to the two affidavits.

I saw no merit in Mr Asokan`s submission that it would be improper for this court to hear the

application without the affidavits of Wong and Tan. As the judge who issued the injunction did so on an ex parte basis, the defendants are entitled to apply to have that order set aside. I can see no reason why this court should curtail that right by requiring that such an application can only be heard if it is supported by affidavits. If the defendants felt confident enough to make the application without filing supporting affidavits, they should not, in my view, be precluded from doing so. I therefore overruled Mr Asokan`s objections and allowed the hearing to proceed on the basis that no reference will be made to the affidavits filed by the defendants.

The main ground relied on by the defendants in their application was that Sitra Wood`s claim (as contained in paras 4 to 7 of the originating summons) was only for damages arising from the alleged oppressive conduct of the defendants. And in para 8 of the originating summons, Sitra Wood was seeking an order that the second to sixteenth defendants purchase their shares in the company. Mr Jansen told the court that his clients were prepared to purchase the shares and that any dispute on price or the date on which the shares should be valued for the purposes of the sale were matters that could be determined by the court at the hearing of the originating summons. Mr Jansen submitted that since the only issues in the claim were damages for the alleged oppression and the price at which the defendants should buy out the shares held by Sitra Wood, the ex parte injunction should be set aside.

The relevance of the adequacy of damages in the grant of ex parte interlocutory injunctions was considered in ***The Supreme Court Practice*** (the ***White Book***) (1999 Ed) where at p 566 the authors state:

> *In **Fellowes & Son v Fisher** [1976] 1 QB 122 at 137, CA, Browne LJ set out Lord Diplock`s guidelines (in the **American Cyanamid** case) in an enumerated series (much relied upon by judges in subsequent cases) as follows:*
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> *(1) The governing principle is that the court should first consider whether, if the plaintiff succeeds at the trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. **If damages would be adequate remedy and the defendant would be in a financial position to pay them** , no interlocutory injunction should normally be granted, however strong the plaintiff`s claim appeared to be at that stage.*
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> *(2) If, on the other hand, damages would not be an adequate remedy, the court should then consider whether, if the junction were granted, the defendant would be adequately compensated under the plaintiff`s undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.*
>
> *(3) It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.*
>
> *(4) Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo.*

(5) The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.

(6) If the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party`s case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party`s case is disproportionate to that of the other party. [Emphasis is added.]

Mr Asokan cited that part of item (1) above emphasized in italics in support of his submission that the injunction should not be lifted. He submitted that it was the law that if damages was an adequate remedy there must be evidence that the defendants would be in a financial position to pay the damages. He submitted that since there was no evidence in this case that the defendants would be able to pay the damages the interlocutory injunction ought not to be set aside.

I saw no merit in that submission. If Sitra Wood was applying for the interlocutory injunction on the grounds that the defendants were not in a financial position to pay damages, it was incumbent on Sitra Wood to prove that allegation and even then it was a matter of discretion in the court whether the injunction should be granted. In the present case, the affidavit filed by Sitra Wood did not even allege that the defendants would be unable to pay. For the purposes of the granting of an interlocutory injunction, the burden is not on the defendants to show that they can pay the damages: it is on Sitra Wood to satisfy the court that the defendants cannot pay the damages.

Mr Asokan then went on to submit that, on the balance of convenience, the injunction ought not to be lifted. Balance of convenience needs to be considered only if the court had doubts about whether damages was an adequate remedy (see item (3) in the extract from the ***White Book*** quoted above). In this case, based on the prayers in the originating summons and the supporting affidavit of Sitra Wood, I was of the view that damages would be an adequate remedy. It did not appear to me that, for the purpose of assessing damages, it was necessary to restrain any of the defendants from disposing of their shares.

I therefore granted the application and set aside the ex parte interlocutory injunction that had been granted.

Outcome:

Application allowed.