Jurong Town Corp v Wishing Star Ltd
[2004] SGCA 14

Case Number : CA 126/2003

Decision Date : 31 March 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J

Counsel Name(s) : Ho Chien Mien and J Sathia (Allen and Gledhill) for appellants; Edmund Kronenburg and Celina Chua (Drew and Napier LLC) for respondents

Parties : Jurong Town Corp — Wishing Star Ltd

Civil Procedure – Appeals – Interlocutory appeals – Whether court has discretion to allow admission of further evidence – Whether Ladd v Marshall principles applicable – Order 57 r 13(2) Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Civil Procedure – Costs – Security – Plaintiff ordinarily resident out of jurisdiction – Relevant factors to consider in court's exercise of discretion – Order 23 r 1(1)(a) Rules of Court (Cap 322, R 5, 1997 Rev Ed)

31 March 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against a decision of the High Court (reported at [2004] 1 SLR 1) refusing the application of the defendant-appellant, Jurong Town Corporation ("JTC"), for the plaintiff-respondent, Wishing Star Limited ("WSL"), to furnish security for costs in the sum of $400,000 in respect of the action. We dismissed the appeal. For the purposes of the appeal, JTC also sought, by way of a motion, the admission of certain fresh evidence. We disallowed that too. We now give our reasons.

The background

2 WSL, a construction company incorporated in Hong Kong, is engaged in the business of manufacturing and constructing curtain walls for buildings. JTC is a statutory board established under an Act of Parliament. On 14 June 2002, JTC awarded WSL a contract in respect of the façade works for seven tower blocks at the JTC Multi-User Biomedical Research and Development Complex at North Buona Vista Drive ("the Biopolis Project" or "the project") pursuant to a tender submitted by WSL. The value of this contract was some $54m. Indeed, in accordance with the terms of the contract, WSL started work on the project on 23 May 2002 even though the formal award was only made on 14 June 2002.

3 On 9 September 2002, JTC terminated the contract on the main ground that WSL had made material misrepresentations in its tender submission.

4 On 13 January 2003, WSL commenced the present action against JTC claiming, *inter alia*, payment for work done and damages for the wrongful termination of the contract. In the alternative, WSL claimed on a *quantum meruit*. In its defence, JTC pleaded that it had lawfully rescinded the contract and, instead, counterclaimed for certain damages which it had suffered. The trial of the action and the counterclaim are now part-heard in the High Court.

5 After the pleadings were closed, various interlocutory issues arose *eg*, the obtaining of

further and better particulars and discovery, which resulted in several applications being made to court.

6 In the meantime, on 7 April 2003, pursuant to a summons for directions, the Registrar set the date for the trial of the action and counterclaim to commence on 3 November 2002 and it was to continue until 28 November 2003. No question of security for costs was raised by JTC.

7 It was only on 6 August 2003 that JTC's solicitors wrote to WSL's solicitors asking for security for costs in the sum of $400,000. In response to a request from WSL as to the basis of the demand, JTC furnished the following grounds:

(a) WSL was ordinarily resident out of the jurisdiction;

(b) it was believed that WSL did not own fixed and permanent assets in Singapore; and

(c) it was believed that WSL did not own fixed and permanent assets in Hong Kong either, its place of incorporation.

8 This request for security was resisted by WSL, saying that it had a registered office here and was therefore not ordinarily resident out of Singapore. WSL did not give any information regarding its assets either in Singapore or Hong Kong.

9 On 15 August 2003, JTC made a formal application for security in the sum of $400,000. Upon its dismissal by the assistant registrar, an appeal was lodged to a judge in chambers who, in turn, also dismissed it on 28 October 2003. On 6 November 2003, JTC lodged its appeal to the Court of Appeal. In the meantime, on 5 November 2003, the trial of the action commenced before the High Court and the hearing was adjourned on 13 November 2003. The resumed hearing is now scheduled to start on 5 April 2004.

10 Before the assistant registrar and the judge, one of the contested issues was whether WSL could be considered to be ordinarily resident out of the jurisdiction when it has a branch office here which is registered under our Companies Act. On this point, both the assistant registrar and the judge held against WSL, who no longer pursued it in its Case before us.

11 In deciding not to order security for costs, the judge took into account the following main considerations:

(a) WSL was a reputable Hong Kong company with business interests in Singapore and there was no reason to suppose that such a company would not pay its costs if ordered to do so;

(b) there was reciprocal enforcement of judgments between Singapore and Hong Kong; and

(c) the application for security for costs was made too late and the quantum was too large.

The law

12 The application by JTC for security was made pursuant to O 23 r 1(1)(a) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("r 1(1)(a)") which reads:

> Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court that the plaintiff is ordinarily resident out of the jurisdiction, then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

13 JTC argued that following from this provision, once it is shown that WSL is ordinarily resident out of jurisdiction and has no assets of a fixed nature within jurisdiction, security for costs should normally be awarded unless it is shown to be unjust, having regard to all the circumstances.

14 It is settled law that it is not an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The court has a complete discretion in the matter: see *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534. It seems to us that under r 1(1)(a), once the pre-condition, namely, being "ordinarily resident out of the jurisdiction", is satisfied, the court will consider all the circumstances to determine whether it is just that security should be ordered. There is no presumption in favour of, or against, a grant. The ultimate decision is in the discretion of the court, after balancing the competing factors. No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the fact situation. Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff.

15 We are fortified in this view by the comments of Browne-Wilkinson V-C in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 at 1077 on the identical English provision:

> Under Ord 23, r 1(1)(a) it seems to me that I have an entirely general discretion either to award or refuse security, having regard to all the circumstances of the case. However, it is clear on the authorities that, if other matters are equal, it is normally just to exercise that discretion by ordering security against a non-resident plaintiff. The question is what, in all the circumstances of the case, is the just answer.

Our assessment

16 In our opinion, in the context of this case, two critical factors weigh heavily in favour of WSL. First is the delay in JTC taking out the application. Second, the counterclaim of JTC is based entirely on its defence to the claim of WSL.

17 It would be recalled that this action was commenced on 13 January 2003. JTC was obviously not concerned with the fact that WSL is a foreign company when it took various steps in the proceedings, including the filing of pleadings and further particulars and the discovery of documents. The trial was fixed to be heard commencing 3 November 2003 at the summons for directions hearing on 7 April 2003. There was not a squeak then that JTC was concerned about its costs in defending the action.

18 According to JTC, it only instructed an investigative agency, Pinkerton (Hong Kong) Ltd ("Pinkerton"), to look into the assets of WSL in July 2003. Pinkerton submitted its report in early August 2003. Thereafter, on 6 August 2003, JTC wrote to WSL asking for security. By then substantial work had already been undertaken by the solicitors of both parties.

19 Next, it is undeniable that JTC's defence to the claim and its counterclaim are launched from the same platform. The time and work required for the trial of the counterclaim would be substantially

the same, whether or not the claim of WSL is stayed. In short, no significant additional costs would be incurred by JTC if we were to allow the action to proceed. In such circumstances, we were unable to see what purpose it would serve in staying the action of WSL. Costs incurred in defending the action could be regarded as costs necessary to prosecute the counterclaim. Indeed, granting security in this situation could amount to indirectly aiding JTC to pursue its counterclaim.

20 This is a factor which could be taken into account and is supported by authorities. In *B J Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43, a case under the UK Companies Act 1985, the English Court of Appeal, in reversing the decision of the court below, emphasised that "there can be no rule of thumb as to the grant or refusal of an order for security". Among the reasons advanced by Bingham LJ to refuse an order for security was this (at 53):

> I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim.

21 Another case which showed that such overlapping claims could be taken into account as a factor in not ordering security is *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307, although the fact situation there was the reverse. There, the plaintiff applied for security for costs to defend the defendant's counterclaim. The court there declared that if security were awarded in a case where the defendant's counterclaim was essentially akin to his defence to the plaintiff's claim, the court would be indirectly granting costs to aid the plaintiff in advancing his initial claim. However, in *Hutchinson*, the court granted security to the plaintiff to defend the counterclaim because it held that the counterclaim was quite distinct from the defence to the claim.

Intention to pay

22 At this juncture, we would refer to the observation of the judge that there were no grounds to believe that WSL would not pay the costs should WSL lose the case. Counsel for JTC argued that to thrust this burden on JTC was unjust. However, it is important to bear in mind how this observation arose. JTC's counsel had submitted that *Crabtree* was distinguishable because the plaintiff in *Crabtree* was impecunious, but not so in the present case. It was in response to counsel's submission that the judge noted that the point resolved itself into whether there was any reason to suppose that the plaintiff would not pay in the event that it should fail in its claim and lose the counterclaim. The judge also noted that JTC seemed to be blowing hot and cold when it suggested that WSL could well be unable to pay. Inability to pay is of course different from having an intention not to pay. If it could be shown by objective facts that WSL would not be likely to pay the costs, that would be a relevant factor for the consideration of the court. But in the context of this case, there was really nothing to indicate whether WSL would or would not pay if it should lose the action. That being the position, it was really a neutral point and was not a factor which was relevant to the balancing exercise. To this extent, we would respectfully differ from the judge.

Where the balance lies

23 We recognised that WSL did not have any meaningful assets in Singapore other than holding a 55% share in a company in Singapore with a paid-up capital of $10,000. Neither was it shown that WSL had any substantial assets in Hong Kong, its place of incorporation. Thus, there could well be difficulties in enforcing a Singapore judgment on costs in China where WSL has most of its assets. These are, no doubt, factors on the other side of the scale. But balancing these against the two factors mentioned above, namely, lateness in the application and the overlap between the claim and

the counterclaim, and their consequent effects, we had no hesitation at all in concluding that the situation favoured the refusal of any security for costs. It would not be just to make the order.

24 The judge also referred to the fact that the amount requested for security was very large. Of course, the court is not bound to grant the amount asked for. It could grant a lesser amount. However, if due to the weight of the factors on the other side of the scale, the amount that ought to be given is greatly reduced, this would be a factor which the court could no doubt consider in determining whether it is at all meaningful to grant security.

Fresh evidence

25 We now turn to the application in the motion to introduce fresh evidence which we had disallowed. It would be recalled that trial of the action had commenced on 3 November 2003 and is now part-heard. The fresh evidence which JTC sought to admit was the evidence given at the trial by WSL's managing director, Ms Carol Wen, during cross-examination where she was alleged to have admitted that WSL was being dishonest. The alleged dishonesty was in respect of the following which we quote from JTC's written submission:

> (a) Carol Wen admitting that WSL had lied to JTC's consultants on 10 May 2002 about having engaged 15 designers when in fact WSL had not engaged them.
>
> (b) Carol Wen admitting that WSL had, on 23 May 2002, rounded up people who were not designers (including 4 from a temporary employment agency) to pretend to be part of WSL's design staff. This is to fool Nick Chang, Principal Architect of JTC's consultants, who had asked for a meeting at WSL's offices to verify WSL's total design staff.
>
> (c) Carol Wen admitting that although she subsequently found out about the deception being perpetrated on JTC's consultants – but before the award of the subcontract – she did not do the honest thing by owning up to the deception to JTC's consultants.

26 Following from this admission of dishonesty, JTC submitted that WSL was thereby unlikely to honour any costs order that might be made against WSL. JTC argued that this evidence would be germane to the observation made by the judge (at [6]):

> 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.

27 This application by JTC was made pursuant to the power conferred on this court under O 57 r 13(2) of the Rules of Court. As the present appeal was not one against "a judgment after trial or hearing of any cause or matter on the merits", it was clear that this court was entitled, if it thought it appropriate, to admit the fresh evidence. The strict principles in *Ladd v Marshall* [1954] 1 WLR 1489 would not be applicable. But this is not to say that in such an appeal a party is entitled as of right to have the fresh matter admitted. The discretion rests with the court. The court should guard against attempts by a disappointed party seeking to "retrieve lost ground in interlocutory appeals" by relying on evidence which he could or should have put before the court below: see *Electra Private Equity Partners v KPMG Peat Marwick* [2001] 1 BCLC 589 at 620.

28 We would first observe that the examination of Carol Wen at the trial is not completed. She will be re-examined by counsel for WSL when the trial resumes. It would be premature for this court to reach any conclusion on the point. It would be inappropriate for us to come to any conclusion based on partial evidence. Indeed, it could even be prejudicial as that would be a point which the trial judge will have to make a finding in the light of all the evidence adduced before him. We did not have all the evidence. Neither did we wish to usurp the function of the trial judge.

29 In any event, the effect of this evidence in relation to the appeal would hardly be of any significance. Even assuming that WSL did make the misrepresentation as regards the 15 design staff, we did not think it would necessarily follow that WSL would not be willing to pay the costs if it should fail in the action. It will be for the trial judge to assess the reasons advanced for the misrepresentation.

Appeal dismissed.