

Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd
[2003] SGCA 8

Case Number : CA 89/2002, Suit 438/2002/J
Decision Date : 04 March 2003
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Tan Lee Meng J
Counsel Name(s) : Intekhab Khan, Nicholas Narayanan (J Koh & Co) for the Appellants; Tang Gee Ni (Chia & Tang) for the Respondents
Parties : Cheng Poh Building Construction Pte Ltd — First City Builders Pte Ltd

Civil Procedure – Judgments and orders – Stay of execution – Counterclaim arising out of separate transaction from that which forms subject matter of action

Delivered by Chao Hick Tin JA

1 This was an appeal against a decision of the High Court staying execution of a summary judgment granted in favour of the appellant-plaintiffs on the ground that the respondent-defendants had a counterclaim against the plaintiffs which surpassed the amount of the summary judgment. We heard the appeal on 19 February 2003 and allowed it, lifting the stay of execution. We now give our reasons.

The facts

2 The plaintiffs, Cheng Poh Construction Pte Ltd ("Cheng Poh"), were a Singapore incorporated company carrying on the business of a general contractor undertaking building construction and major upgrading works. The defendants, First City Builders Pte Ltd ("First City"), were also a Singapore incorporated company involved in the construction business.

3 First City were the main contractors of a part single/part three-storey building project at No. 51 Shipyard Road ("Shipyard Road project"). The employers were Comfort Resources Pte Ltd. Cheng Poh were appointed by First City as the sub-contractors in respect of the entire project for a lump sum of \$1,895,250, excluding GST.

4 Pursuant to the terms of the main contract and the sub-contract, payments to Cheng Poh would be effected on a "back-to-back" basis. The employers would pay First City for works done in accordance with the certificates issued by the Architect. First City would then pay Cheng Poh the sums received from the employers less 5% as retention monies and less a further 5% as the profit of First City.

5 The Architect duly issued the certificates in respect of the Shipyard Road project and First City were paid by the employers accordingly. But First City, having paid Cheng Poh the sum of \$603,735.08 in respect of the first seven certificates, refused to pay the remainder. Cheng Poh claimed against First City for \$1,147,740.62, being the remaining sum due. First City admitted the claim, but alleged that they had a counterclaim which in total exceeded Cheng Poh's claim and which they were entitled to set-off against Cheng Poh's claim. A part of the counterclaim related to this project and that part amounted to \$565,958.62. But the other part of the counterclaim was in respect of other projects which had nothing to do with the Shipyard Road project, the details of which were as follows:-

Tuas	Ave	Project
\$130,118.83		

Lorong Limau Project
\$543,361.04

Days Works(relating to these two projects) \$ 84,682.52

T o t a l
\$758,162.39

6 On an application for summary judgment, the Senior Assistant Registrar granted Cheng Poh judgment for \$580,782.00, being the difference between the claim of Cheng Poh and the portion of the counterclaim of First City arising out of the same project. In respect of this portion of the counterclaim by First City, leave to defend was given to the latter.

7 The judge dismissed First City's appeal but ordered that there be a stay of execution on the judgment sum. He also ordered that costs be in the cause.

8 Cheng Poh appealed to the Court of Appeal only against that part of the decision which ordered a stay of execution and the consequential order on costs. From his written grounds of decision, the Judge took into consideration the following facts and circumstances in ordering a stay:-

(i) Both parties had been carrying out work for and supplying materials to each other and they had, in effect, been maintaining a very "loose and informal running account" between them, which allowed them to set-off each other's claims.

(ii) First City's business would suffer grave disruption if there was no stay because Cheng Poh had allowed their claims to be accumulated to such a large sum.

(iii) Any prejudice caused by a stay would not be significant because under the present case management in the High Court, the action would come up for hearing very soon.

Issue

9 The only issue raised before us was whether the judge, in ordering a stay of execution, had correctly exercised his discretion under the Rules of Court ("the Rules").

The Law

10 Order 14 r 3(2) of the Rules provides that the court, in granting a summary judgment, may "by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant ... until after the trial of any counterclaim made or raised by the defendant in the action."

11 It is settled law that where claims and counterclaims arise out of the same transaction, and while the claims are admitted and the counterclaims are disputed, then so long as the counterclaims are plausible, the correct order to make would be that while judgment should be entered in respect of the claims, it should be stayed pending trial of the counterclaims: see *Sheppards & Co v Wilkinson & Jarvis*

(1889) 6 TLR 13. But where a counterclaim does not arise from the same transaction, or is not connected therewith, different rules apply: e.g., *Anglian Building Products Ltd v W&C French (Construction) Ltd* (1978) 16 BLR 6 and *AB Contractor Ltd v Flaherty Brothers Ltd* (1978) 16 BLR 10.

12 In the *Anglian Building Products* case, suppliers of bridge beams issued a writ against a construction company for £88,664.75 for beams supplied for the construction of bridges over the M6 and M4 motorways. The construction company, while admitting that judgment should be awarded to the suppliers, contended that the execution of the judgment should be stayed as they had a counterclaim arising out of similar beams supplied for the M3 motorway. Lord Denning MR, delivering the main judgment for the Court of Appeal, held that the counterclaim in respect of the M3 could not be used as a ground for staying the action in respect of the beams supplied for the use in M4 and M6.

13 In *AB Contractors*, where the facts were quite similar to our present case, the plaintiff-contractors completed work at a building site called Winchester Way. There was a dispute between the plaintiffs and the defendants over measurement and/or pricing of the works. The plaintiffs issued a writ to claim for £18,839.58. At the O 14 proceeding, the defendants conceded that they were liable for £12,000. Judgment was accordingly entered for £12,000, with leave to defend in respect of the remaining portion of the claim. However, in their affidavit the defendants averred that they had a counterclaim against the plaintiffs for an amount exceeding the judgment sum in relation to works at another site at Hersden. Because of this, the District Registrar ordered a stay of judgment. On appeal, Forbes J lifted the stay on the ground that he could not see why there should be a stay on one contract if there was a dispute on another and his decision was affirmed by the Court of Appeal. Cumming-Bruce LJ said (at 12):-

"I cannot see that there is such a connection between the contract at Winchester Way and the contract at Hersden as to make it just and equitable for the plaintiffs to be kept out of the money for which they have obtained judgment pending the resolution by the Court or by negotiation of the dispute arising on the Hersden contract.

14 While Stephenson LJ would not go so far as to say that there could, in no case, be a stay on one contract if there was a dispute on another, as the judge below seemed to have stated, he did not think on the facts in the case that the two contracts were so closely linked that it would be fair and equitable to deprive the plaintiffs of the fruits of the judgment.

15 *AB Contractors* was applied in *Drake & Fletcher Ltd v Batchelor* (1986) 83 LSG 1232 where the plaintiffs claimed against the defendant for the sum of £13,530.41, being for goods sold and services rendered. The defendant admitted liability for £10,061.51 and disputed the balance. The defendant also counterclaimed alleging loss suffered, exceeding £40,000, in respect of an allegedly defective machine sold to him by the plaintiffs. Judgment for £10,061.51 was given, with leave to defend for the balance. A stay of execution was refused by the District Registrar. On appeal, the refusal was affirmed by Sir Neil Lawson, who was of the view that there was no connection between what was claimed in the writ and the alleged counterclaim.

16 In *Koshida Trading (S) Pte Ltd v Limco Products Manufacturing Pte Ltd* [1990] SLR 294, relying on *Drake & Fletcher v Batchelor* and *AB Contractors*, Chan Sek Keong J said (at 299):-

"... the counterclaims ... had no relation to the plaintiffs' claim. They were separate transactions from those in respect of which the defendants admitted liability. These counterclaims would not entitle the defendants to a stay of execution, much less unconditional leave to defend."

17 The law was summarized in the 1999 edition of the *Supreme Court Practice*, when the English rules of court were still in *pari materi* with ours, where the learned authors stated:-

"If, however, the counterclaim arises out of quite a separate and distinct transaction or it is wholly foreign to the claim or there is no connection between the claim and the counterclaim, the proper order should be for judgment for the plaintiff with costs without a stay pending the trial of the counterclaim."

18 In short, special circumstances must be shown for there to be a stay of execution. The mere fact that a defendant has a *bona fide* counterclaim arising out of another contract with the plaintiff, unconnected with the contract which forms the subject matter of the action, will not of itself constitute a "special circumstance" justifying a stay of execution.

Instant case

19 Reverting to the case in hand, there was nothing to suggest that the Tuas Ave and the Lorong Limau projects (and the Days Works relating thereto) had anything to do with the Shipyard Road project other than that they were between the same parties. In those two projects, First City were doing work for Cheng Poh. They were separate and distinct from the Shipyard Road project. Furthermore, in relation to the Tuas Ave project, which involved building works and the supply of materials for a factory extension, there were substantial disputes between the parties, including questions as to the applicable rates for formwork, the cost of variation works and contra charges. As regards the Lorong Limau project, which involved the erection of two blocks of ten-storey residential development and where First City's work related mainly to formwork, there were again serious disputes on various substantive matters, including the question of liability for liquidated damages. Indeed, on Cheng Poh's version, their claims in those two projects exceeded those of First City.

20 The only case cited by the court below for its decision was *Sheppards & Co v Wilkinson & Jarvis* (supra). But, as pointed out before, that was a case where the claim and the counterclaim related to the same transaction. There, the plaintiffs were stockbrokers who sued for an advance given to the defendant to enable the latter to purchase a company. The defendant alleged that in connection with that advance the parties had reached an agreement on certain matters and that the plaintiffs were in breach of that agreement. The defendant further alleged that there was fraud. The Master gave unconditional leave to defend. The judge gave leave to defend conditional on the defendant paying the sum claimed into court and this decision was affirmed by the Divisional Court. On further appeal, the Court of Appeal gave judgment for the claim, as that was not disputed, but ordered that execution on the judgment be stayed pending the trial of the counterclaim. We think the following report of what Lord Esher MR had stated is rather instructive:-

"A defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible, or there might be a counter-claim pure and simple. To shut out such a counter-claim if there was any substance in it would be an autocratic and violent use of Order XIV. The Court had no power to try such a counter-claim on such an application, but if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded. If the counter-claim was for a less sum than that claimed, then judgment might be signed if there was no real defence for so much of the amount of the claim as was not covered by the counter-claim; but if the

counter-claim overtopped the claim and was really plausible, then the rule, which had been often acted upon at Chambers, of allowing the defendant to defend without conditions was the right one. There were, however, circumstances which might call on the Court, as in the present case, to act differently. If it was clear that the claim must succeed, and there was really no defence to it, and the plaintiff would only be put to expense in proving his claim, then there ought to be judgment on the claim, but the matter must be so dealt with that defendants who had a plausible counter-claim must not be injured. That could be done by staying execution on the judgment until the counter-claim had been tried. In the present case there was no doubt that the plaintiffs were entitled to this £7,500, and there was no real defence to their claim, and although there might not be any great expense incurred in proving that claim, yet, in his opinion, they ought to have judgment for that amount. But, on the other hand, the defendants had a counter-claim which overtopped the amount claimed. He would express no opinion as to the counter-claim, but he would not say that it was absolutely impossible that it should succeed.."

21 However, in the present case, that part of the counterclaim in issue related to entirely different contracts. Thus, the principles elucidated by Lord Esher MR could have no application.

22 We now turn to consider the main points which made the judge below order a stay. First, he was of the view that the parties had "in effect been maintaining a very loose and informal running account, setting off or deducting each other's claims." Of course, if there was, in fact, such an arrangement, that would have indicated a connection between the claim and the counterclaim, warranting a stay. However, as counsel for Cheng Poh quite correctly pointed out, there was nothing in the pleadings, nor in the affidavits filed by both parties, which suggested that there was such a "loose and informal running account". Whereas, in respect of the Shipyard Road project, payments to Cheng Poh were to be in accordance with the Architect's certificate, there was no such certification procedure in respect of the Tuas Avenue and Lorong Limau projects. First City themselves did not suggest that there was some sort of running account. The mere fact that the same parties entered into several separate transactions does not *ipso facto* suggest that there was a running account. Upon specific enquiry by this court, counsel for First City was unable to point to any fact which indicated the existence of such an arrangement. In the circumstances, it was our respectful opinion that it was not open to the Judge to infer that there existed such an arrangement.

23 Second, the court below felt that there was delay on the part of Cheng Poh to pursue their right to payments. Counsel for Cheng Poh pointed out that the delay was only some five months. First City started to withhold payment commencing from the 8th certificate dated 8 November 2001. The last certificate (the 12th certificate) was dated 7 March 2002. Action was commenced on 15 April 2002. There was no inordinate delay. It was not unlikely, as was suggested by counsel for Cheng Poh, that the parties engaged in discussions to persuade First City to pay without resort to litigation.

24 In the building industry, prompt payment to contractors/sub-contractors is the lifeblood of their trade. The fact that a sub-contractor has exercised some restraint is no reason to deny him his just due.

25 Third, the court below was of the view that the grant of a stay would not cause significant prejudice to Cheng Poh as, under the present case management in the High Court, the action would come up for hearing very soon. We did not think this was a relevant consideration. A stay should only be granted where there are special circumstances warranting it, e.g., the several transactions are in

some ways connected, such as where there is the maintenance of a running account.

Judgment

26 It is clear that when a court grants a stay of execution it is exercising a discretion. It is also settled law that an appellate court should not interfere with the exercise of this discretion unless the Judge below has misdirected himself on a matter of principle or took into account matters which he ought not to have done or failed to take into account matters which he ought to have done or the decision is plainly wrong, e.g., *The Vishva Apurva* [1992] 2 SLR 175; *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 4 SLR 46. Applying these principles, and for the reasons given above, there was plainly no basis to order a stay of execution. With respect, it was our opinion that the Judge below had erred on facts and had taken into account matters which he ought not to have taken into account.

27 In the result, we allowed the appeal and lifted the stay, with costs to Cheng Poh both here and before the High Court.

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