Wonda Kitchareon Co Ltd *v* Greenlam Asia Pacific Pte Ltd
[2010] SGHC 355

Case Number	: Suit No 275 of 2010 (Registrar's Appeal No 400 of 2010)
Decision Date	: 08 December 2010
Tribunal/Court	: High Court
Coram	: Tan Lee Meng J
Counsel Name(s)	: Jagjit Singh Gill s/o Harchand Singh (Gurdip & Gill) for the appellant/defendant; Michael Moey Chin Woon (Moey & Yuen) for the respondent/plaintiff.
Parties	: Wonda Kitchareon Co Ltd — Greenlam Asia Pacific Pte Ltd

Civil Procedure

8 December 2010

Tan Lee Meng J:

1 The appellant, Greenlam Asia Pacific Pte Ltd ("Greenlam"), appealed against the decision of the Assistant Registrar ("AR"), who dismissed its application for security for costs to be furnished by the respondent, Wonda Kitchareon Co Ltd ("Wonda"), a company incorporated in Thailand. After hearing the parties, I affirmed the AR's decision and now give the reasons for my decision.

Background

2 Wonda is a Thai wholesaler of furniture fittings and furniture parts. Its clients are mainly developers, architects and designers. Greenlam, a Singapore company, manufactures and distributes laminate products.

3 On 21 April 2009, Wonda purchased 18,820 pieces of "New Mika" laminate and 13,700 pieces of "Liner" laminate from Greenlam. As Greenlam could not supply all the goods in one shipment, it was agreed that Wonda would issue letters of credit after the bills of lading for the goods shipped had been issued.

4 According to Wonda, the first shipment of goods by Greenlam created numerous problems for it. Among other things, 4,000 pieces of laminate were of the wrong colour, the thickness and dimensions of many sheets of laminate did not conform to the contract specifications, there were no shipping marks on the crates, many of the laminate sheets were damaged, and the shipping documents did not comply with the terms of the letter of credit. As a result, Wonda claimed to have suffered damage.

5 There were also problems with respect to the second shipment. Wary of Greenlam's goods after the first shipment, Wonda wanted to inspect the goods before paying for the goods. However, Greenlam insisted on receiving payment before the inspection of the goods. Wonda, which refused to pay without an inspection, subsequently informed Greenlam that it would not be accepting any further shipments of laminate from the latter.

6 On 20 April 2010, Wonda instituted the present proceedings against Greenlam. Initially, Wonda sought a refund of the US$69,926.14 that it paid to Greenlam as well as damages. However, it was now content to claim damages from Greenlam, which responded with a counterclaim as well as an

application that Wonda furnish $50,000 as security for costs.

7 Greenlam's application for security for costs was dismissed by the AR on 24 September 2010. It then appealed against the AR's decision.

The appeal

8 Order 23 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (the "Rules"), which governs the furnishing of security for costs states:

> 1 – (1) Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court –
>
> (a) 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 is 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.

9 Reference may also be made to s 388 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"), which states:

> Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is a reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

10 In *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR(R) 112 ("*Creative Elegance*"), the Court of Appeal referred to O 23 r 1(1)(a) of the Rules and s 388 of the Act and pointed out:

> There is, of course, a difference in the wordings of the two provisions, but the difference lies in the condition to be satisfied before the respective provisions can be invoked. Under O 23 r 1(1) (*a*) the condition which has to be satisfied before the court proceeds to exercise its discretion is: if it appears to the court that the plaintiff is ordinarily resident out of the jurisdiction. On the other hand, under s 388 the condition is as follows: if it appears by credible testimony that there is reason to believe that the plaintiff company will be unable to pay the costs of the defendant if successful in his defence. Once the condition under the respective provision is satisfied, the court's discretion is invoked, and in exercise of that discretion the court decides whether or not to order security for costs against the plaintiff.

11 In the present case, Greenlam has furnished no evidence whatsoever that there is reason to believe that Wonda will be unable to pay its costs if it is successful in its defence. On the contrary, in response to Wonda's complaint in a letter dated 18 June 2009 with respect to the supplying of more laminate sheets of a particular type than had been ordered, Greenlam had replied as follows:

> *You are a very big listed company*. 400 sheets is a very small quantity for you.
>
> [emphasis added]

12 It follows that Greenlam's application must be considered in the context of O 23 r 1(1)(*a*) of the Rules although it is worth noting that in *Creative Elegance*, the Court of Appeal added (at [13]) that "whether the discretion is one under O 23 r 1(1)(*a*) or under s 388 the same principles are applicable: the court considers all the circumstances and decides whether it is just to order the plaintiff to provide security for costs and the extent of such security".

13 It does not follow that a foreign plaintiff without an address or assets in the jurisdiction will be ordered to furnish security for costs. The fact that the plaintiff is ordinarily out of the jurisdiction merely means that the court's discretion to order security for costs is invoked. In *Jurong Town Corp v Wishing Star* [2004] 2 SLR(R) 427 ("*Wishing Star*"), Chao Hick Tin JA explained at [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.

14 In *Porzelack KG v Porzelack (UK)* [1987] 1 WLR 420 ("*Porzelack KG*"), Browne-Wilkinson V-C explained (at 422) that:

> Under O 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.

15 One of the factors to be taken into account by the court in the exercise of its discretion is whether the plaintiff has a *bona fide* claim with a reasonable likelihood of the success of the claim. In considering this factor, the court does not conduct a detailed examination of the merits of the case. In *Porzelack KG*, Browne-Wilkinson V-C explained at 423:

> This is the second occasion recently … in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at a n interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.

16 A similar approach was adopted in *Omar Ali bin Mohd v Syed Jafaralsadeg bin Abdulkadir Alhadad* [1995] 2 SLR(R) 407.

17 In the present case, there is a likelihood of Wonda's claim succeeding. After all, Greenlam had acknowledged a number of the shortcomings and defects in its shipments to Wonda and had suggested a number of ways to iron out the problems.

18 Apart from not alleging that Wonda would be unable to pay the costs of the action if it fails in

its claim, Greenlam's counsel, Mr Jagjit Singh ("Mr Singh"), merely asserted that Wonda is a foreign company and that Greenlam has "a *bona fide* defence on the merits". These are, without more, insufficient grounds to order Wonda to furnish security for costs.

19 Finally, it cannot be overlooked that Mr Singh pointed out that Greenlam has a counterclaim "arising out of the same subject matter and connected to the grounds of defence". That the counterclaim is intrinsically connected with the grounds of defence is evident from the affidavit dated 3 August 2010 of Mr Tiwari Uma Kant, Greenlam's Chief Operating Officer, who stated at para 14:

> The Defendants [Greenlam] have also raised a Counterclaim against the Plaintiffs [Wonda] *which is also a defence to the claim* as the Defendants content that the Plaintiffs do not have a basis to reject the goods and claim a refund. The Defendants are claiming their loss and damage as a result of the Plaintiff's refusal to accept delivery and unlawful repudiation of the sales agreement as particularized in paragraph 40 of their Defence and Counterclaim in the sum of US$15,980.00.

20 In *Wishing Star*, the Court of Appeal made it clear (at [19]) that where a defence to a claim and counterclaim "are launched from the same platform", the time and work required for the trial of the counterclaim would be substantially the same as that for defending the claim and costs incurred in defending the action could be regarded as costs necessary to prosecute the counterclaim. The Court added that in such a situation, granting security could amount to indirectly aiding the defendant to pursue its counterclaim. As such, in the present case, to allow Greenlam's application for security for costs would be to assist it in the prosecution of its counterclaim against Wonda.

21 If all the circumstances are taken into account, there can be no doubt that it is just that Wonda should not be ordered to furnish security for costs. I thus affirmed the AR's decision and dismissed Greenlam's appeal.