Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd [2008] SGHC 13

Case Number : Suit 150/2007, RA 208/2007

Decision Date : 28 January 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Adrian Tan Gim Hai (Drew & Napier LLC) for the plaintiff; Julian Tay and Yeo Lih Wei (Lee & Lee) for the defendant

Parties : Hawley & Hazel Chemical Co (S) Pte Ltd — Szu Ming Trading Pte Ltd

Civil Procedure

28 January 2008

Lai Siu Chiu J

1 Hawley & Hazel Chemical Co (S) Pte Ltd ("the plaintiff") applied for summary judgment on its claim for goods sold and delivered to Szu Ming Trading Pte Ltd ("the defendant") after the defendant had filed a defence to the statement of claim. The plaintiff's application in summons no. 2140 of 2007 ("the application") pursuant to O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) was heard and dismissed on 25 July 2007 by the assistant registrar.

2 The plaintiff appealed to a judge in chambers in Registrar's Appeal No. 208 of 2007 ("the Appeal") against the dismissal of the application. I heard and allowed the Appeal and awarded the plaintiff final judgment against the defendant in the sum of $6,452,012.47 ("the judgment sum") with interest at 5.33% per annum from the date of the writ (9 March 2007) to the date of judgment (21 September 2007). The defendant has now filed a notice of appeal (in Civil Appeal No. 124 of 2007) against my decision.

3 The plaintiff claimed the judgment sum in its statement of claim (filed on 9 March 2007). The defendant filed its amended defence and counterclaim two days before the hearing of the application. The defendant offered no defence to the plaintiff's claim in its original defence and counterclaim. Instead, the defendant focussed on its counterclaim wherein the defendant alleged that the plaintiff induced the defendant to continue with the distributorship of the products by representing that it would prevent/stop parallel imports and sales of the same into Singapore. The defendant alleged that the plaintiff failed to prevent and/or to stop parallel imports.

4 The defendant subsequently denied owing the judgment sum in its amended defence and counterclaim, and raised (for the first time) the issue of set-off of its counterclaim of $2,074,710.00 for loss and damage suffered, arising from the plaintiff's alleged wrongful termination of the distributorship arrangement.

The facts

5 The plaintiff is the manufacturer of toothbrushes as well as the Darlie brand of toothpaste (hereinafter referred to as "the products"). The defendant was the Singapore distributor of the products from 1951 until 24 January 2007 when its distributorship was terminated by the plaintiff. The reasons will become apparent later. I should add that there was no written distributorship agreement

between the parties. The arrangement was purely oral throughout the 35 years that the distributorship was in existence,

6 The relevant facts leading up to the application are to be found in the affidavits filed by the plaintiff and the defendant. The plaintiff's two affidavits were filed by its country manager Wong Tuck Fatt, also known as Kelvin Wong ("Wong"), while those filed by the defendant were affirmed by its managing-director Lee Peng Shu ("Lee").

7 Apart from deposing the fact that the defendant had raised no *bona fide* defence to the plaintiff's claim, Wong's first affidavit exhibited the exchange of correspondence between the parties that were relevant to my determination that the defendant had not raised any triable issues or plausible defences to the plaintiff's claim.

8 Wong disclosed the following correspondence in his first affidavit:

(a) A letter from the plaintiff dated 1 September 2006 (signed by the Palmolive Group Financial Director Paul Alton) making a final demand for payment of three outstanding invoices for 2004 (by 14 September 2006) and 14 outstanding invoices for 2005 (by 30 September 2006). The total outstanding sum demanded was $2,862,938.81. The letter warned (in bold print) that if the defendant failed to meet the first deadline of 14 September 2006, the plaintiff would take action, which included, but was not limited to, ceasing shipments and commencing legal proceedings.

(b) A letter from the defendant dated 13 September 2006 (signed by Kenneth Lai its operations manager) which, *inter alia*, stated "As for the current year's outstanding payment, I had already instructed our Accounts Manager to proceed with the remittance promptly from here on".

(c) A letter from the plaintiff to the defendant dated 18 September 2006 (signed by Paul Alton) stating that the plaintiff had received no payment of outstanding invoices from the year 2004 as of 15 September 2006, and as a result, the plaintiff had suspended shipments immediately;

(d) A letter from the defendant dated 20 September 2006 (again signed by Kenneth Lai) stating that the defendant was unable to come up with full payment of the outstanding sums due for 2004/2005 and 2006. Instead, the defendant proposed instalment payments of $700,000 per month from October 2006 to January 2007 to settle the outstanding sum. The defendant further promised to settle the outstanding invoices for 2006 by instalments payable between February 2007 and January 2008. There was a further promise to pay invoices for the year 2007 and promptly within the stated 30 days' credit period.

(e) A letter from the plaintiff dated 22 September 2006 (again signed by Paul Alton) requesting the issuance of post-dated cheques for the instalment payments proposed by the defendant and requiring that the defendant settle by the end of 2007 all amounts outstanding since 2006.

(f) A letter from the defendant dated 25 September 2006 (again signed by Kenneth Lai) accepting the plaintiff's conditions and attaching a schedule for the payment of the plaintiff's invoices for 2004 to 2006. The letter added that post-dated cheques would be submitted to Wong three months in advance of payment.

(g) A letter from the defendant dated 23 January 2007 (signed by Lee) addressed to Wong referring to a meeting in Hong Kong on 12 January 2007 between the parties where the issue of the plaintiff's subsidy to and performance incentives for the defendant were discussed. There were discrepancies between the parties' figures for subsidies. The defendant requested a 36

months repayment plan for the outstanding balance instead of 15 months on the basis that the latter would severely impair the defendant's ability to maintain cashflow. The letter added that the defendant was unable to obtain additional working capital of $3.8m from shareholders or potential investors and requested the plaintiff for 60 days credit plus a gross (profit) margin of 14.35% before a 1.1% incentive.

(h) A letter from the plaintiff dated 24 January 2007 (signed by Wong) expressing disappointment that the defendant had failed to comply with its own payment schedule (in (e) above). The plaintiff rejected the defendant's request for 36 months in which to repay the outstanding amounts. The letter concluded as follows:

> In view of your company (*sic*) inability to repay the outstanding amounts and meet current obligations, we regret to inform you that we have decided to cease further shipment and to terminate the relationship with your company with immediate effect as of 24 January 2007.
>
> Please proceed to make full payment of all outstanding amounts due to us by 31 January 2007, failing which we will have this matter in the hands of our solicitors.

Although the plaintiff was not obliged to (in view of its letter of demand dated 1 September 2006), it still sent a final warning on 6 March 2007 to the defendant for payment and reminded the latter to pay the outstanding invoices as, otherwise, it would commence legal proceedings.

9 Wong's first affidavit also deposed to the fact that the plaintiff continued to supply the products to the defendant in reliance on the defendant's promise in its letter dated 25 September (see [8(f)] above) to pay all the outstanding invoices. The plaintiff supplied six shipments of the products to the defendant between 3 November 2006 and 15 January 2007 totalling $834,177.23. The plaintiff also issued a credit note to the defendant for $332.83 for damaged goods.

10 Wong added that the defendant paid $$1,511,602.34 between 5 October 2006 and 7 December 2006 so that the sum owed to the plaintiff was reduced to the judgment sum as shown in the following breakdown:

Amount owing under the schedule in [8(f)]:		$7,129,770.41
Amount owed for further shipments made in [9]		$ 834,177.23
		$7,963,947.64
Amount paid by the defendant	$1,511,602.34	
Plaintiff's credit note	$332.83	
		$1,511,935.17
Net amount owed by the defendant:		$6,452,012.47

11 In his affidavit, Lee traced the history of the relationship between the parties to 1951, when his

father Lee Szu Yin obtained a distributorship from Hawley & Hazel Chemical (HK) Ltd ("the Hong Kong company") to promote a brand of toothpaste called Darkie in Singapore, Malaysia and South East Asia. Originally, the distributorship agreement was with a company called Kiauw Hin & Co Pte Ltd ("KH"). The distributorship agreement with KH was not in writing as well.

12 After Lee's father was asked to leave KH in 1971, KH gave up the distributorship of the Darkie brand of products to the former. Lee's father then started Szu Ming & Co to distribute and market the Darkie brand of products.

13 In 1985, the plaintiff merged with the Colgate-Palmolive group and renamed the Darkie brand to Darlie. The distributorship of Szu Ming & Co was restricted to Singapore and it was then that the defendant was incorporated. The Hong Kong company started the plaintiff in 1993 to manage the Singapore operations.

14 While the Darkie brand was the best selling toothpaste in Singapore up to 1984 (with a 56% market share), Lee deposed that sales declined thereafter and the brand faced increasing competition from 1995 onwards, due to a proliferation of other brands in Singapore. The problem was made worse by price wars in Thailand and Hong Kong which caused dental care products in those countries to fall drastically rendering them much cheaper than those in Singapore. This caused trading companies to engage in parallel importation of the products from Thailand and Hong Kong and selling them in Singapore at up to 40% below the prices charged by the defendant. Even so, until the demise of Lee's father in 2000, the defendant still managed to make reasonable profits despite the presence of parallel imports.

15 The plaintiff however, wanted to reduce the defendant's profit margins. After negotiations in 1995, it was agreed that the defendant's profit margin per unit would be reduced while its contribution towards trade and marketing expenses ("TME") would be capped annually at 2.5% of gross sales.

16 Lee alleged that in 2001, things changed as the plaintiff attempted to vary the terms of the defendant's distributorship arrangement. He deposed that the plaintiff wanted to vary the terms of distributorship by (i) reducing the defendant's profit margin per unit sold and (ii) by revising the cap (of 2.5% on gross sales) on the defendant's contribution to TME and replacing it with performance-based incentives (hereinafter, this proposal will be referred to as "the 2001 proposal"). The defendant, however, did not accept the 2001 proposal.

17 Instead, Lee claimed that at a meeting held in Hong Kong in March 2002 with the plaintiff's managing-director Eddie Niem ("Niem") whom he regarded as a friend, an oral agreement was reached ("the March 2002 agreement"). Lee had then informed the plaintiff of the defendant's difficulties in continuing to do business under the 2001 proposal and that the parallel import situation in Singapore had reached crisis proportions.

18 Lee asserted that Niem, *inter alia*, assured him that the plaintiff would take steps to prevent/stop parallel imports of the products into Singapore. Niem suggested that the defendant work within the 2001 proposal for one more year. In reliance on such representation, Lee alleged that the defendant continued to market the products in Singapore and to accept future shipments of the products.

19 However, the plaintiff took no steps to stop parallel imports into Singapore. Lee deposed that the defendant's sales managers told him supermarkets and other retailers were flooded with parallel imports of the products. When Lee reported back to the plaintiff, he alleged that the plaintiff took no

action apart from giving vague answers that it had given feedback to the Hong Kong company which would take firm steps to control the parallel imports. The situation worsened in 2005. The plaintiff had assured him in an email dated 28 March 2005 (which Lee exhibited as part of LPS-4 in his affidavit) that it would take steps to ensure no further arrivals of parallel imports of the products but failed to do so. I shall return to this email later. Lee claimed that due to parallel imports, the defendant's losses from 2002 to 2006 were estimated to be $2,182,961.25, based on the target tonnage of imports to be obtained by the defendant and actual tonnage achieved.

20 In the light of the plaintiff's alleged breach of the March 2002 agreement, Lee asserted that the defendant reverted to the pre-2001 terms of distributorship as he saw no reason why the plaintiff should be entitled to charge higher prices for the products. He therefore instructed the defendant's staff to pay the plaintiff based on pre-2001 terms.

21 Lee claimed that he was alarmed to receive the plaintiff's letter of demand dated 1 September 2006 (see [8(a)] above) but out of "goodwill", he made a concession and agreed that the defendant would pay the plaintiff's claim for the period April to May 2006 so that shipments could resume. He then referred to an email (exhibit LPS-5) dated 8 September 2006 from the defendant's Michael Lee to the plaintiff's "Ronald" which the plaintiff failed to disclose. I shall return to this email later (see [28(c)] below).

22 Lee then asserted that although his email of 8 September 2006 was forwarded to Paul Alton, the latter was in no mood to hear his explanations but merely said that since the defendant did not wish to pay the outstanding invoices for 2004 and 2005, the plaintiff would suspend shipments. Despite Lee's further attempt to explain that the plaintiff's calculations contained discrepancies because of TME due to the defendant, Paul Alton refused to entertain any discussions with the defendant. Lee claimed that it was to defuse the situation that the defendant's letter (see [8(b)] above) was sent to the plaintiff and it was not an admission of liability. It was also goodwill that prompted the defendant to pay almost $1m by three cheques to the plaintiff in September 2006. However, when he found that the plaintiff was not open to negotiations on the issue of TME, Lee said the defendant stopped payment after 14 September 2006.

23 Lee further claimed that at the meeting in Hong Kong on 12 January 2007, the parties had agreed that the plaintiff would pay the defendant a total sum of $2,064,438.14 comprising of incentives due to the defendant and TME subsidies for the years 2003 to 2006.

24 Lee therefore contended the application should be dismissed with costs because there were triable issues involved, *viz*, the plaintiff had a legal obligation to but did not stop parallel imports of the products. The plaintiff's immediate termination of the distributorship was also arbitrary and improper bearing in mind that the parties' business relationship had existed for over 30 years. He opined that at least two months' notice was a common requirement in standard distributorship agreements. Lee deposed that reasonable notice of termination would have enabled the defendant to avoid losses totalling $2,074,710 arising from lost sales, lost sales collections, extra rental costs, financial loss and increased trading expenses which the defendant claimed against the plaintiff.

The decision

25 The gravamen of the defendant's arguments in the court below (and which was accepted) was that it had a *bona fide* counterclaim which acted as a set off against the plaintiff's claim. Relying on the English Court of Appeal decision in *United Overseas Limited v Peter Robinson Limited (trading as Top Shop)* (Civil Division, 26 March 1991, unreported) counsel for the defendant argued that his client was entitled to unconditional leave to defend.

26 The plaintiff not unexpectedly adopted a contrary argument. Its counsel submitted that even if the defendant had a valid counterclaim, the plaintiff was still entitled to judgment on its claim and the court could grant a stay of execution pending trial of the counterclaim. I agreed with, and accepted, the plaintiff's submissions for reasons which I shall now set out.

27 It is noteworthy that what Lee alleged in his affidavit was not borne out in the correspondence I had referred to at [8] above. Indeed, the correspondence from the defendant often said the opposite of what Lee alleged.

28 The following facts were evident from the exhibits in the affidavits filed by Wong or Lee:

(a) Apart from his bare allegation, there was no document to corroborate Lee's claim of the existence of the March 2002 agreement nor was there any reference by the defendant to that agreement in any of its correspondence if indeed it was made orally. In any case, it was Lee's own case that the defendant reverted to pre-2001 terms because the plaintiff had breached the March 2002 agreement.

(b) There was no legal and/or contractual obligation on the plaintiff's part to stop parallel imports of the products into Singapore. Contrary to Lee's assertion, the plaintiff's email (see [19] above) dated 28 March 2005 did not promise him that the plaintiff would take steps to ensure that no further parallel imports would come into Singapore. All that the email said was that the Hong Kong company had assured the plaintiff (not the defendant) that the former would ensure full container loads of parallel imports would not be available but that it could not guarantee that dribs and drabs of parallel imports would not slip through as loose cargo. If the plaintiff had indeed promised that no parallel imports would be allowed into Singapore, the defendant would not in an email to the plaintiff dated 21 July 2005 (LPS-4) have merely stated "…the broader view regarding the PI [parallel import] problems we are facing, I really need you and your Hong Kong management's support to come out with a solid solution. The problem doesn't seem to be resolved, as we can witness from the above. With [*sic*] really need to discuss this and take a bolder steps [*sic*] to kill PI." One would have expected the defendant to have referred to the plaintiff's contractual obligation or undertaking to stop parallel imports instead of merely seeking its assistance to do so.

(c) Lee's claim that the defendant paid the plaintiff some of the outstanding invoices out of goodwill was not reflected in any of the defendant's letters (see [8] above). Instead, it was clear that the defendant complied unreservedly with the plaintiff's demand for payment to the extent that it agreed to issue postdated cheques and made three instalment payments. Lee had referred to his email dated 8 September 2006 (see [21] above). I was unable to appreciate how that email helped the defendant's case that it paid out of goodwill as all that the email said about the plaintiff's letter of demand dated 1 September 2006 was the following:

> Secondly, our accounts and auditors is [*sic*] revaluating your letter dated 1st September 2006 and schedule proposed by HnH. We are prepared to fulfil the outstanding for April '06 & May '06. However, we would need some time to provide a schedule for June '06 balance as we are 2004 & 2005 is still under discussion, we hope to proceed with this item next.

(d) The defendant also did not take issue with the plaintiff's notice (in its letter dated 1 September 2006) that shipments of the products would cease if the defendant failed to pay outstanding invoices. Neither did the defendant complain when the plaintiff, in Paul Alton's email dated 12 September 2006, renewed its threat to cease shipments with effect from 14 September 2006 due to the defendant's failure to pay all outstanding invoices for 2004 and 2005 by the

deadlines of 14 September 2006 and 30 September 2006 respectively.

(e) Even after the plaintiff's notice of termination (dated 24 January 2007) the defendant's conduct did not accord with Lee's assertion that the termination was arbitrary and/or improper and it had a claim against the plaintiff arising therefrom or any claims at all. To reinforce my observation, I set out the defendant's letter dated 7 February 2007 to the plaintiff in full:

> We are to hold a Shareholder meeting in a couple of weeks [sic] time, to discuss the future our company and in particular of the following:-
>
> 1 The termination of our agency by you;
>
> 2 The performance incentive fees and others reimbursements to be made to our company;
>
> 3 Repayment schedule.
>
> We deeply regret that you had decided to terminate our agency, since we had been serving you well for the past 30 years. It is therefore our sincere request that you could reconsider to allow us to continue to be your sole distributor/agent.
>
> It is important that you could finalise our accounts with you so that we would have clearer idea or basis to organize the repayment schedule. We are also making a request that if you could reconsider our agency, it would certainly help us to organize repayment schedule. We are looking into all the aspects of our company and we sincerely hope that you could help us to solve the problem with you amicably.

(f) The tenor of the above letter was not of a defendant who was aggrieved by the conduct of the plaintiff and who had and intended, to make claim(s). Rather, it was a plea to the plaintiff to reconsider its termination of the defendant's distributorship – in other words the defendant was begging for mercy. The defendant had implicitly accepted the plaintiff's claim even if one was to accept Lee's contention (which I do not) that earlier payments made by the defendant were done out of goodwill. Further, the defendant did not question the plaintiff's termination of the distributorship. The truth of the matter was that the defendant did not have the funds to pay the plaintiff and its attempt at raising more capital from shareholders or potential investors was unsuccessful

29 It bears reminding that the parties' relationship was never formalised in any written document. Hence, there could be no contractual notice of termination. However, the plaintiff's letter of demand dated 1 September 2006 in (see[8(a)] above) had unequivocally stated that the plaintiff would cease shipments and institute legal proceedings in the event the defendant failed to meet the payment deadlines for the outstanding invoices. Surely, the defendant would have been aware that its distributorship was in peril if it could not/would not pay the plaintiff's outstanding invoices, not to mention not being able to meet sales targets. The defendant in any case would not be able to physically carry on with distribution of the products in Singapore if the plaintiff ceased shipments.

30 As for the defendant's alleged counterclaim relating to TME expenses and performance incentives due from the plaintiff, the short answer is to be found in Paul Alton's email to Lee on 12 September 2006 where the former said:

> The outstanding invoices from 2004 and 2005 are for products we delivered to you. If you wish to

discuss Margin & Trade Marketing Expense that can be done, but it is separate from the obligation you have of paying for the products you received.

31 Consequently, the court below erred when it accepted the defendant's submission that it had a valid counterclaim which acted as a set-off of the plaintiff's claim. The defendant had never disputed the plaintiff's claim or raised any counterclaim prior to these proceedings. Even if I am wrong on this count, I made an order granting a stay when I awarded the plaintiff the judgment sum so as not to prejudice the defendant on its counterclaim.

32 I turn now to some of the authorities cited by the parties starting with *United Overseas Limited v Peter Robinson Limited (trading as Top Shop)* (supra [25]). In that case, the plaintiffs appealed against the Master's refusal to give the company summary judgment on their claim (for non-delivery of goods by the defendants) but instead granted the defendants unconditional leave to defend. The plaintiffs contended that the Master should at least have granted summary judgment with a stay, pending trial of the defendant's counterclaim. The plaintiffs' claim was for the return of £201,135 it had paid the defendants plus £100,000 damages for loss of profits arising from the non-delivery while the defendants' counterclaim was for £110,900 for the goods rejected by the plaintiffs plus storage charges of £54,600 for the same (and continuing at the rate of £7,000 odd per month).

33 In delivering the judgment of the appellate court, Bingham LJ elaborated on what was set out in the UK White Book (1991) (at pp 152 and 153) on the four classes of cases in the court's determination of whether summary judgment should or should not be granted:

> (a) The first class would be where the defendant can show an arguable set-off whether equitable or otherwise. To the extent of such set-off, the defendant would be entitled to unconditional leave to defend. It would be for the judge to decide whether such an arguable set-of is shown or not.
>
> (b) The second class would be where the defendant sets up a bona fide counterclaim arising out of the same subject-matter as the action and connected with the grounds of defence. In this class of case, according to the White Book, the order should not be for judgment on the claim subject to a stay of execution pending trial of the counterclaim, but should be for unconditional leave to defend even if the defendant admits the whole or part of the claim.
>
> (c) The third class would be where the defendant has no defence to the plaintiff's claim so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim. In such a case, the order should not be for leave to defend, but should be for judgment for the plaintiff on the claim and costs until the trial of the counterclaim.
>
> (d) The fourth class would be where the counterclaim arises out of quite a separate and distinct transaction, or is wholly foreign to the claim, or there is no connection between the claim and the counterclaim. The proper order should then be for judgment for the plaintiff with costs without a stay pending the trial of the counterclaim.

The plaintiffs in the present case sought to put their claim into the third or the fourth class.

34 The court below had placed the plaintiff's claim in the second class whereas I was of the view that it should go into the third class, adopting the position taken by the appellate court in *Cheng Poh Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR 170 at [17] and [18]. I should add that the pronouncements of Bingham LJ are also encapsulated in our own White Book (*Singapore Civil*

Procedure 2007, Sweet & Maxwell) at pp 144 and 145 in the commentary at O14/4/10 headed "Set-off and Counterclaim".

35 Counsel for the plaintiff submitted, and which I accepted, that the court should adopt the robust approach advocated in *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd* [1992] 1 SLR 884 to decide whether the plaintiff should be granted summary judgment in the light of the defendant's alleged counterclaim. Having closely examined the merits of the counterclaim and whether it operated as a set-off to the plaintiff's claim, it was my view that the defendant's case did not fall under either the first or the second class (see [33] above) such as to merit unconditional leave to defend.

36 Consequently, I granted the plaintiff judgment on its outstanding invoices as it should not be put to the trouble and expense of proving a claim that the defendant had never disputed before this suit was commenced. A stay was granted to enable the defendant to proceed to trial on its counterclaim even though I entertained grave doubts on its merits.