Barang Barang Pte Ltd v Boey Ng San and Others
[2002] SGHC 101

Case Number : Suit 161/2002, SIC 701/2002

Decision Date : 06 May 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Desmond Ong and Sean Say (J Koh & Co) for the plaintiff; Roslina Baba and Ng Li-Yen (Ramdas & Wong) for the defendants

Parties : Barang Barang Pte Ltd — Boey Ng San

Civil Procedure – Summary judgment – Determination of question of law or construction of document – Construction of clauses in sale and purchase agreement – Suitability for determination under O 14 r 12 Rules of Court – Requirements for applicant to satisfy – O 14 r 12 Rules of Court

Judgment

GROUNDS OF DECISION

1. This is an application by the plaintiff under O 14 r 12 of the Rules of Court for the construction of a term in a sale and purchase agreement between the plaintiff and the first and second defendants. The plaintiff is a company carrying on the business of selling furniture. The first and second defendants were the founders of the plaintiff company in 1994. The third defendant is a company presently owned by the first and second defendants and which the plaintiff alleges is now carrying on the business of selling furniture. The plaintiff's claim in this action is based on a non-competition clause in a service agreement (the "Service Agreement") signed by the first and second defendants on 10 September 1999. That non-competition term is found in cl 4 of the schedule reads as follows:

> "[The first and second defendants] will not within the South East Asia region and for the period of twelve (12) months after ceasing to be employed under [the Service Agreement] either alone or with (sic) or as manager, agent, consultant or employee of any person, firm or company, directly or indirectly carry on or be engaged in the business of (a) retailing home furnishing and lifestyle products and accessories and (b) engaging in any other retail business of a similar nature [as that of the plaintiff]."

The first and second defendants left the employment of the plaintiff on 19 July 2001. Thus the non-competition clause, if applicable, will be exhausted by effluxion of time by 19 July 2002.

2. The plaintiff, however, alleges in this action that in breach of the non-competition clause, the first and second defendants are carrying on the business of furniture retailing through the third defendant. It is therefore seeking damages for breach as well as an injunction to stop them from carrying on the third defendant's business until 19 July 2002. Miss Baba, counsel for all three defendants opposed this application on the basis that issue is not suitable for a determination under O 14 r 12. She submitted that there is too much intertwining of facts with law that prevents a straightforward disposition of the action.

3. Miss Baba's first objection is based on cll 11 and 12 of the Sale and Purchase Agreement dated 24 July 2001. This agreement was signed by KLW Ltd as purchaser and the first and second defendants as vendors of their shares in the plaintiff company. Counsel submitted that cll 11 and 12 "constitute mutual release releases granted by the plaintiff and the first and second defendants as against each

other in respect of the issues of shareholding, the first and second defendants' employment and directorship in the plaintiff." The issue under this summons-in-chambers taken out by the plaintiff calls for a determination as to whether cll 11 and 12 of the Sale and Purchase Agreement supersedes the Service Agreement. Clauses 11 and 12 provide as follows:

> "11. KLW and [plaintiff] confirm that save for the obligations set out in this Agreement, neither of them has any claim against [the first and second defendants] arising out of or in connection with the shares held by [the first and second defendants], each of their directorships in and employment with [the plaintiff].
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> 12. [The first and second defendants] confirm that save for the obligations set out in this Agreement, neither of them has any claim against KLW or [the plaintiff] arising out of or in connection with the shares held by [the first and second defendants], each of their directorships in and employment with [the plaintiff]."

4. Miss Baba submitted that on the true construction of the above clauses the non-competition clause in the Service Agreement no longer operates. She regards the words '*neither of them has any claim against [the first and second defendants] … in connection with … their directorships in and employment with [the plaintiff]*' to import the meaning and intention that all previous obligations including those arising under the Service Agreement (executed before the Sale and Purchase Agreement) are extinguished. Counsel further submitted that the interpretation of these words cannot be made without oral evidence. The second objection of Miss Baba is that the non-competition clause is a restraint of trade clause and by that reason cannot be enforced. Miss Baba's third objection is that the determination of the question as stated will not end the action because the defendants deny that they were in breach of the non-competition clause and even if they had, counsel further submitted, the defendants deny that the plaintiff had suffered any damage.

5. Mr. Say who appeared for the plaintiff began his submission by citing a statement from a passage in the UK Supreme Court Practice to the effect that an application under O 14 r 12 is appropriate if "a question of construction will finally determine whether an important issue is suitable for determination under [O 14 r 12] and where it is an important feature of the case a court ought to proceed to determine such issue". Counsel continues with the argument that the present issue concerns the construction of the relevant terms of the Sale and Purchase Agreement and the Service Agreement and that a determination in the plaintiff's favour will "finally dispose of the plaintiff's action". On the pleadings before me, this submission is not correct and must therefore fail. I shall first refer to the opening point of counsel's submission. The passage quoted by counsel and which I had set out above was taken from a brief account of several general principles enunciated in an unreported case, namely *Korso Finance Establishment Anstalt v John Wedge* (15 February 1994). The case itself was not produced before me, but it is obvious that it was cited out of context and applied beyond its force. The key does not lie on the words a "question of construction" but on the later words "whether an important issue is suitable for determination under [O 14 r 12]". What is suitable is eminently and clearly set out in the rule itself. *The construction of law or document must be such that it can be achieved without a full trial and such a determination will fully determine the entire cause of the matter*. I have placed emphasis on these words because they are the essence of O 14 r 12. They are clear and simple words but it seems that counsel sometimes mistake the final determination of a point of law or construction of document as the *only* requirement under this order. This is apparent in this case by the reliance placed by counsel on the words of Roskill LJ in *Verrall v Great Yarmouth Borough Council* [1981] 2 QB 202, 218: "Merely to order a trial so that matters can be re-argued in open court is to encourage the law's delays which in this court we are always trying to prevent". Order 14 r 12,

however, has a second component, namely, that the determination will finally dispose of the entire cause of matter. This component underscores what is already stated in r 12(1)(a) - that the question is only suitable for determination if a full trial of the action is not required. So, if there are issues of fact or mixed fact and law that requires trial, an application under O 14 r 12 would not be appropriate.

6. In this case, the plaintiff claims that the defendants are bound by a non-competition clause which it appears to regard as of wide import whereas the defendants argue that the clause is much narrower and, if applicable (which they say is not) prevents them only from carrying on retail business. Whether the conduct and business of the defendants was retail or otherwise is a disputed issue of fact that can only be determined at trial. Thus, in this case, an annunciation of the effect of the law - that is, whether the terms of the Sale and Purchase Agreement have superseded the Service Agreement - will only sound the bugle signaling the battle to determine whether there is in fact a breach. The construction of the terms is only *a* part and not *the* determinant part of the case. The cases relied upon by counsel for the plaintiff are cases in which the determination of the issue would have disposed of the entire action. In *Payna Chettiar v Maimoon bte Ismail* [1997] 3 SLR 387, for instance, the only issue was whether the plaintiff was wrong to have applied to set aside an earlier judgment against it by the defendant without informing the court that the rights of *bona fide* purchasers to the property in disputed are involved. Since the cause of action depended on the previous judgment, if that stood, the plaintiff's action there must fail. In that sense, therefore, if it was decided as a matter of law, that the judgment was wrongly set aside by reason of the plaintiff's non-disclosure the entire action by the plaintiff against the defendants cannot proceed.

7. Furthermore, the defendants in this case before me are also challenging the validity of the non-competition clause on the ground that it amounts to a restraint of trade and is, therefore, void and unenforceable. Whether such a clause is void on that ground may have to be determined as a mixed question of law and fact because the issue of reasonableness, always a question of fact in such circumstances, calls to be determined.

8. For the reasons above, prayer 1 of this application is dismissed. The determination of the other prayers is therefore unnecessary. I shall hear the parties on costs at a later date unless they are able to agree costs between themselves.

Sgd:

Choo Han Teck
Judicial Commissioner