Tan Wee Fong and Others v Denieru Tatsu F&B Holdings (S) Pte Ltd [2008] SGHC 238

Case Number : Suit 461/2008, RA 361/2008

Decision Date : 24 December 2008

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Ramesh Bharani (Straits Law Practice LLC) for the plaintiff; Lawrence Lim Cheng Hock (Matthew Chiong Partnership) for the defendant

Parties : Tan Wee Fong; Ng Seng Guan; Heng Boon Thai — Denieru Tatsu F&B Holdings (S) Pte Ltd

Civil Procedure

24 December 2008

Lee Seiu Kin J:

1 This is an appeal against the decision of the assistant registrar in Summons No 3607 of 2008 in Suit No 461 of 2008 in which he dismissed, with costs, the defendant's application for an order for the plaintiffs to provide security for costs in this action.

2 The three plaintiffs in this action (respectively, Tan, Ng and Heng) are Malaysians and residents in Malaysia. The defendant is a company incorporated in Singapore.

3 According to the statement of claim, Tan and Heng were single unit franchisees of Shihlin Taiwan Street Snacks ("Shihlin Taiwan") and its Quick Service System ("the Franchise") in Johor Bahru since November 2006. They have been operating the Shihlin Taiwan and the Franchise at City Square, Johor Bahru since December of that year. The defendant is the owner/franchiser of Shihlin Taiwan and the Franchise. After negotiations that commenced in late December 2007 or early January 2008, the plaintiffs entered into an agreement ("the Agreement") to purchase from the defendant the right to operate the Franchise in the whole of Malaysia for a period of eight years from 1 May 2008. In April 2008, pursuant to the Agreement, the plaintiffs paid the defendant a one-time partnership fee of US$100,000 and a further payment of US$105,000 being 60% of the outlet fee of US$7,000 for each of 25 outlets. The plaintiffs also incurred further expenses amounting to about $45,000, mainly in rental and equipment, in preparation for the launch of the business. However, on 29 May 2008, the defendant's solicitors wrote a letter that the plaintiffs construe as a repudiation of the Agreement. After unsuccessful attempts by the plaintiffs to contact the defendant, their solicitors wrote to the defendant on 27 June 2008 to accept the repudiation and terminate the Agreement. The plaintiffs filed this suit for damages amounting to $321,120.15 for wrongful repudiation. The plaintiffs also seek loss of profits amounting to some $5m as well as a refund of a payment of $77,541.60 made by the plaintiffs to the defendant on 26 May 2008 for stocks of food and packaging products that were never delivered.

4 In its defence, the defendant pleaded that the plaintiffs had breached a term of the Agreement that prohibited the plaintiffs from attempting to employ any of the defendant's employees and had tried to employ two of them on several occasions. The defendant counterclaimed against the plaintiff for liquidated damages in the sum of US$1,025,000 pursuant to clause 2.1 and clause 7 of the Agreement, or, alternatively, loss and damages by reason of the plaintiffs' breach of the terms of the

Agreement.

5 In its reply and defence to counterclaim, the plaintiffs deny that they had attempted to employ the persons as alleged by the defendant. The plaintiffs further averred that, in any event, such breach did not entitle the defendant to terminate the Agreement. The plaintiffs averred that the liquidated damages clause amounted to a penalty and was not enforceable.

6 In *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and Another* [1999] 1 SLR 600, the Court of Appeal refused an order for security for costs and held that in considering such an application, the court must examine all the circumstances of the case before concluding whether it was just to order security for costs. The court stated that the fact that the plaintiff was ordinarily resident outside the jurisdiction did not attract an order for security for costs as a matter of course, although this fact might tip the balance in favour of the order. One of the relevant factors was the strength or weakness of the plaintiff's claim and the court found that the plaintiff in that case had a *bona fide* claim against the defendants, with a reasonable prospect of success in their claim.

7 In the case before me, the plaintiffs had paid upfront fees of about $276,000 and paid another $77,000 to the defendant (or its allied company) for goods that had not been delivered. The alleged breach consists of soliciting the employment of two executives who do not appear to be of great seniority and certainly not alleged to be so by the defendant. Based on these alleged transgressions, the defendant asserted the right to terminate the Agreement after the plaintiffs had advanced them as much as $350,000 and further, the right to claim liquidated damages of more than $1m. The plaintiffs' submission that the liquidated damages clause is a penalty must certainly be seen in this light. I also note that the defendant's counterclaim is based entirely on its defence. I am satisfied that, as matters stand, the plaintiffs at the very least have a *bona fide* claim against the defendant with a reasonable prospect of success in both their claim and their defence to the counterclaim.

8 Another relevant factor is the fact that the Agreement provides, in clause 9.6, that the courts of Singapore have exclusive jurisdiction over any disputes except that the defendant may waive this in favour of Malaysian courts. This means that, unless the defendant consents, the plaintiffs have no choice but to pursue their remedies in Singapore. The availability of reciprocal enforcement of Singapore judgments in Malaysia is also a relevant factor to be considered.

9 I was of the view that, having regard to all the circumstances of the case, it would not be just to order the plaintiffs to provide security for costs.