PT Muliakeramik Indahraya TBK v Nam Huat Tiling & Panelling Co Pte Ltd [2006] SGHC 154

Case Number : Suit 96/2006, SUM 2713/2006

Decision Date : 28 August 2006

Tribunal/Court : High Court

Coram : Teo Guan Siew AR

Counsel Name(s) : Edmund Kronenburg (Tan Peng Chin LLC) for the plaintiff; Daniel Koh (Rajah & Tann) for the defendant

Parties : PT Muliakeramik Indahraya TBK — Nam Huat Tiling & Panelling Co Pte Ltd

28 August 2006

AR Teo Guan Siew:

1 This application concerns the principles governing the court's exercise of discretion in ordering security for costs when there is an overlap between the defence and the counterclaim by the same defendant.

Background

2 The plaintiff, a company incorporated in Indonesia, entered into various contracts with the defendant, under which the plaintiff supplied floor tiles to the defendant for use in HDB projects. The plaintiff commenced action claiming for amounts allegedly due for certain batches of tiles that were delivered to the defendant ("the material tiles").

3 The defendant did not deny that the material tiles were delivered, but resisted the claim on the ground that the tiles were defective in that they (a) did not comply with the contractual specifications, and/or (b) were in breach of the implied condition as to quality under s 14(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed). The defendant further counterclaimed for damages in respect of the alleged defects in the material tiles. In addition, the defendant sought recovery of payments which they made to the plaintiff for earlier batches of tiles ("the other tiles") on the basis that the plaintiff had misrepresented that the tiles would comply with HDB standards. The final aspect of the counterclaim was to recover sums which the defendant incurred in contributing to rectification works that were allegedly necessitated by the defects in the plaintiff's tiles.

The Present Application

4 The defendant applied for security for costs based on three main arguments, *viz* (a) the plaintiff is an Indonesian company with no assets in Singapore and there is no reciprocal enforcement of judgments between Indonesia and Singapore; (b) the defendant has a bona fide and arguable defence; and (c) it is undisputed that the plaintiff is a company with means such that an order for security will not stifle their claim.

5 In resisting the defendant's application for security for costs, counsel for the plaintiff, Mr Kronenburg, relied principally on *Jurong Town Corp v Wishing Star Ltd* [2004] SGCA 14 ("*JTC v Wishing Star*") for the proposition that where the defence is substantially part of the counterclaim, the court will not grant security for costs. He argued that in this case, the whole of the defence forms part of the counterclaim. Mr Kronenburg also emphasized the strength of the plaintiff's case on the merits, and that there is no reason to suppose that the plaintiff will not honour an order for costs.

6 It was not made clear whether the defendant was proceeding under O 23 r 1 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) or s 388 of the Companies Act (Cap 50, 1994 Rev Ed), but reference to the fact that the plaintiff is an Indonesian company would suggest that reliance was being placed on the former. Be that as it may, it did not appear to be in dispute that a basis for ordering security for costs exists. The focus of the inquiry was solely on the court's exercise of discretion, the governing principles of which are the same whether the application is under the Rules of Court or the Companies Act: see *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR 600 ("*Creative Elegance*").

Overlapping Defence and Counterclaim

Nature of Overlap

7 In *JTC v Wishing Star*, the defendant-appellant awarded the plaintiff-respondent a contract to build certain façade works for a major construction project. The defendant subsequently terminated the contract on the basis that the plaintiff had made material misrepresentations in its tender submission. The plaintiff commenced action for damages for wrongful termination. The defendant pleaded that it had lawfully rescinded the contract and counterclaimed for damages. An application for security for costs was taken up by the defendant. On appeal before the Court of Appeal, it was held that the defendant's defence and its counterclaim were "launched from the same platform", and that granting security would amount to indirectly aiding the pursuit of the counterclaim. In particular, the Court of Appeal was influenced by the practical consequence of making an order for security in such a situation, which was explained by Bingham LJ in *BJ Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* [1990] 50 BLR 43 ("*BJ Crabtree*") in the following way:

> It is however, necessary as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. It seems quite clear…that in the course of defending the counterclaim all the same matters would be canvassed as would be canvassed if the plaintiffs were to pursue their claim…

The Court of Appeal reasoned that in these circumstances, it will serve no purpose to stay the claim of the plaintiff in the event that security is not provided. The Court of Appeal went on to rely on this in denying the defendant security for costs.

8 In the application before me, counsel for the defendant, Mr Koh, sought to distinguish *JTC v Wishing Star* by submitting that in that case, the defence and the counterclaim were in fact identical, whereas his client's counterclaim covers much more than its defence. He argued that there should be complete overlap between the defence and counterclaim before the aforesaid principle in *JTC v Wishing Star* is operative. In support of this argument, he relied on *T Sloyan & Sons (Builders) Ltd and another v Brothers of Christian Instruction* [1974] 3 All ER 715 ("*T Sloyan*").

9 In *T Sloyan*, the contractor claimed from its employer £10,500 as the amount owing under a building construction contract. Arguing that the building had numerous defects, the employer cross-claimed for £65,548. The contractor who was admittedly impecunious did not dispute the employer's entitlement to security for costs. The only issue before the court was the quantum of security that should be ordered. On this, the court held that the appropriate amount of security should be determined by having regard to the employer's defence to the claim of £10,500, ignoring the amount

of the cross-claim which exceeded the claim. Therefore, the principle that can be extracted from the case is that when the defendant's cross-claim exceeds the plaintiff's claim, security can still be ordered but the quantum is to be decided based only on the value of the claim. In comparison, Mr Koh's argument is that the defence and the counterclaim must be identical before the considerations in *JTC v Wishing Star* are invoked, and not when the counterclaim exceeds the defence. Clearly, *T Sloyan* does not stand for such a proposition.

10 I noted that insofar as the ruling in *T Sloyan* suggests that security for costs can be ordered even though the defence forms part of the counterclaim, it would appear that the decision does not sit well with *JTC v Wishing Star* and *BJ Crabtree.* However, it must be borne in mind that the court in *T Sloyan* did not consider the practical implications in such cases once the security that is ordered is not paid. In fact, the parties before the court did not dispute that security was payable; they were only contesting the quantum.

11 It seemed clear to me that the principle in *JTC v Wishing Star* and *BJ Crabtree* arose to prevent the security ordered from indirectly securing the defendant's costs of prosecuting the counterclaim. That will be so when the whole defence forms part of the counterclaim. If it does not, then even though there is some overlap between the defence and the counterclaim, security can conceivably still be ordered to secure the costs of the defendant in putting up that part of the defence that is not being pursued positively as part of the counterclaim. Hence, the test should be whether *the entire defence is subsumed within the counterclaim*. It matters not that the counterclaim may be much wider than the defence and covering other aspects. That is immaterial since in any case, security for costs cannot be ordered in respect of those parts of the counterclaim which exceeds the defence.

12 Similar considerations apply in the converse situation when a plaintiff is asking for security from a counterclaiming defendant. If the counterclaim is in essence in the form of a defence and arises out of the same matter, security will generally not be ordered: see *Neck v Taylor* [1893] 1 QB 560.

13 In the case before me, although the counterclaim is also for defects in the other tiles and for costs incurred in rectification works, the entire defence in respect of the material tiles is reproduced in the counterclaim. Accordingly, the principle in *JTC v Wishing Star* and *BJ Crabtree* applied. I found *JTC v Wishing Star* indistinguishable and considered the overlap between the defence and counterclaim in this case as a factor against granting security.

Effect of Overlap

14 Mr Kronenburg, however, went one step further to invite me to regard the overlap of the defence and the counterclaim as a conclusive basis to deny the defendant security for costs. He argued that the overlap was fatal to the application. His argument was in response to Mr Koh's contention that in *JTC v Wishing Star*, the court merely regarded the linking of the defence and counterclaim as just one factor. Mr Koh argued that the Court of Appeal in that case was also heavily influenced by the lateness of the application for security for costs. In contrast, the defendant in the present application could not be faulted for any delay.

15 In supporting his submission that the overlap was a decisive factor, Mr Kronenburg equated the position of a defendant pursuing a counterclaim to that of a plaintiff, and the position of a plaintiff defending the counterclaim to that of a defendant. It is well established that a defendant can never be ordered to pay security for costs in order to be able to defend the action against him: *Naamlooze Vennootschap Beleggings Compaigne "Uranus" v Bank of England & Ors* [1948] 1 All ER 465. Hence, it

was argued, the defender of the counterclaim cannot be ordered to pay security.

16 While it is possible to analogise a defendant who is counterclaiming to a plaintiff, it may be quite a different matter to try and equate the two. A defendant is not the instigator of the litigation; he is instead the party brought into the proceedings and who has to defend himself against attack. The fact that he subsequently decides to take an extra step to pursue a counterclaim does not necessarily equate him to a plaintiff who has decided to take the first step to initiate legal proceedings.

17 It is very common for a defendant to plead by way of counterclaim similar matters that are found in the defence. Typically, under the counterclaim, the defendant will repeat the paragraphs found in the defence. Mr Kronenburg's submission, if accepted, will mean that in all these cases, regardless of the respective merits of the parties' case and the circumstances in each individual case, such a defendant will invariably be deprived of security for costs.

18 The courts in *JTC v Wishing Star* and *BJ Crabtree* were concerned that even if the plaintiff's claim is stayed in the event that the order for security is not complied with, the same matters raised in the claim will still be tried because of the counterclaim. While that is true, the other scenario where security for costs is provided should also be considered. The effect of that would be that the defendant's costs for defending the plaintiff's action will be secured. If the plaintiff's claim is a weak one and other circumstances exist such as difficulties of enforcement, it is arguably justifiable that the defendant's costs should be protected, albeit the security may go indirectly to supporting the defendant's counterclaim at the same time.

19 In my view, the fact that the defence is entirely subsumed within the counterclaim cannot be a decisive factor against ordering security. It remains a mere factor to be taken into account in the court's exercise of discretion. This conclusion is supported by O 23 r 1 itself, which says that security should be ordered only if it is just having regard to all the circumstances of the case. In fact, the conclusion is also supported by the decisions in *JTC v Wishing Star* and *BJ Crabtree*. In the former, the overlap of the defence and counterclaim was expressly stated by the Court of Appeal to be just one of the two critical factors that weighed heavily against ordering security. In the latter, Bingham J said:

> At the outset it is right to record, as had been held on a number of occasions, that the question whether any order should be made is a discretionary question…, and it is a discretion to be exercised in the interests of justice having regard to the peculiar features of the case before the court. It cannot be too firmly emphasised that *there can be no rule of thumb as to the grant or refusal of an order for security* in these circumstances. [emphasis added]

20 As such, even though the defence is based on the alleged defects in the material tiles which also form the ground for the counterclaim for damages, I did not regard it as fatal to the defendant's application for security.

Merits of the Claim

21 The strength or weakness of the plaintiff's claim is certainly a factor that can be taken into account in determining the issue of security for costs: *Creative Elegance*, *L&M Concrete Specialists v United Eng Contractors* [2001] 4 SLR 524. The plaintiff is claiming for payment for the material tiles which were not disputed to have been delivered to the defendant. The defence is that the material tiles were defective, hence entitling the defendant to withhold payment and treat the contract as terminated. The first point is whether the alleged defects amounted to a breach that allowed the

defendant to treat the contract of sale as terminated. Notably, the evidence presented thus far was that there were defects in relation to the other tiles. No tests had been conducted on the material tiles that formed the subject matter of the claim, and there was no direct evidence of any defects in the material tiles. Moreover, the defendant faced the further difficulty in that they had not returned the alleged defective material tiles to the plaintiff. The question that arises is whether the right to reject the goods and to treat the contract as repudiated might be regarded as lost.

22 I was wary of entering into a detailed examination of the merits of their respective cases at this stage of the proceedings, but on the materials before me, I was satisfied that the plaintiff's claim did bear a reasonably good prospect of success.

Conclusion

23 It is true that the plaintiff is an Indonesian company, and that no reciprocal enforcement of judgments exist between Indonesia and Singapore. That consideration must however be balanced against the fact that the plaintiff appeared to be a reputable public company with business links to Singapore. It was not strongly suggested that the plaintiff would not honour costs orders made by our courts. Taking into account the overlap between the counterclaim and the defence, as well as the relative merits of the parties' cases, I found that it was not just in all the circumstances to order the plaintiff to pay security for the defendant's costs. Accordingly I dismissed the defendant's application.