

Elan Impex (Singapore) Pte Ltd and Another v Daewoo Corporation and Others
[2003] SGHC 20

Case Number : Suit 282/2002, SIC 2498/2002, SIC 4545/2002
Decision Date : 08 February 2003
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : N Sreenivasan and Bal Ratanesh Kaur (Straits Law Practice LLC) for the Plaintiffs; Philip Jeyaretnam, SC and Goh Peng Fong (Rodyk & Davidson) for the first and second Defendants; Anil M Changaroth (Lim & Lim) for the third and fourth Defendants
Parties : Elan Impex (Singapore) Pte Ltd; Elan S.A. (Pty) Ltd — Daewoo Corporation; Daewoo International Corporation; Nair Sudhir Krishnan; Irene Nair (trading as Trin Marketing CC)

Civil Procedure – Service – Order granting service of writ out of jurisdiction – Whether order should be set aside

Civil Procedure – Stay of proceedings – Actions commenced in Singapore and South Africa – Whether Singapore more appropriate forum

Civil Procedure – Striking out – Whether action against defendants should be struck out

The parties

- 1 The first plaintiff is a company incorporated in Singapore. The second plaintiff is a South African company and is the first plaintiff's distribution agent.
- 2 The first and second defendants are South Korean companies. The second defendant was established in a restructuring of the first defendant.
- 3 The third defendant is a former employee of the first plaintiff, and the husband of the fourth defendant. They are residents of South Africa.

The three agreements

4 There are three agreements involved in these proceedings:

- (i) an agreement dated 18 January 2000 ("the first agreement");
- (ii) an agreement dated 23 August 2000 ("the second agreement"); and
- (iii) an agreement dated 19 June 2001 ("the third agreement").

The first plaintiff had entered into the first and second agreements with the first defendant. The first agreement was subsequently superseded by the third agreement which was entered into by the first plaintiff and the second defendant.

5 The agreements were licensing agreements which permitted the first plaintiff to use the defendants' "Daytek" and "Daewoo" names and logos on electrical appliances that the first plaintiff was to purchase on its own and sell. The first plaintiff would pay the defendants royalties based on the value of the appliances purchased.

6 The agreements covered different territories. The second agreement extended over three Asian countries and Australia while the third agreement extended over 12 African countries.

The termination of the agreements

7 The second agreement was terminated by the second defendant by a letter dated 21 December 2001 on the ground of lack of performance.

8 The third agreement was terminated by the second defendant by a letter of 8 February 2002 on the ground that the first plaintiff had failed to pay the full royalties due.

The basis of the claims

9 The plaintiffs instituted the action because they regarded the terminations of the two agreements as wrongful.

10 They claimed that the third defendant had procured and induced the "first and/or second defendant" to breach the agreements with the result that the second defendant breached the agreements.

11 They also claimed that the third and fourth defendants had threatened and intended to continue to procure breaches of the agreements.

Order of Court of 15 March 2002

12 The plaintiffs made *ex parte* applications for the service of the writ out of jurisdiction and for interim restraining orders against the defendants.

13 On 15 March 2002 the plaintiffs obtained an order to restrain the first and second defendants from granting branding and distribution rights to third parties or to distribute products bearing the Daytek and Daewoo names and logos in the areas covered by the agreements, or to supply such products to those territories, and to restrain them from interfering with the activities of the first plaintiff.

14 The plaintiffs also obtained leave to serve the writ on the first and second defendants in South Korea and on the third and fourth defendants in South Africa.

15 In addition to that Mareva injunctions were obtained against the third and fourth defendants restraining them from disposing of their properties in Singapore.

The defendants' applications

16 The applications before me were the first and second defendants' application that (i) the action against the first defendant be struck out, (ii) the order for service on them out of jurisdiction be set aside and (iii) the injunctions against them be discharged. Alternatively they wanted the proceedings against them stayed.

17 The third and fourth defendants applied that (i) the order giving leave to serve the writ on the third defendant be set aside, (ii) the actions against them be struck out, (iii) the Mareva injunctions

against them be set aside, and (iv) the proceedings against them be stayed.

Jurisdiction of the Singapore courts

18 The plaintiffs asserted that the action came within the jurisdiction of the courts of Singapore because (i) the first defendant executed the first and second agreements with the first plaintiff, and the first defendant has property in Singapore, (ii) the second defendant executed the third agreement with the first plaintiff, and is a necessary and proper party to the action and (iii) the third and fourth defendants are necessary and proper parties to the action.

19 Ground (i) related to Order 11 rule 1(a) of the Rules of Court which allows for service out of Singapore with the leave of court if relief is sought against a person who is domiciled, ordinarily resident, carrying on business or who has property in Singapore.

20 The question arises whether there is any relief that the plaintiffs can seek from the first defendant. Although the first defendant had executed the first agreement, the plaintiffs accept that this agreement was superseded by the third agreement between the first plaintiff and the second defendant. Effectively the first defendant was replaced by the second defendant as a contracting party. Two facts, (i) that the letter of termination was issued by the second defendant and (ii) that the plaintiffs complained that the termination for short payment of royalties was unjustified rather than that the second defendant was not the proper party to terminate the agreement, confirmed that the second defendant had replaced the first defendant.

21 Similarly, the plaintiffs had not complained that the second defendant did not have the capacity to terminate the second agreement. Their complaint was that they had not failed to perform the agreement and that the letter of termination the second defendant issued was lacking in particulars.

22 The plaintiffs also alleged in para 15 of their statement of claim that "Prior to their purported termination of the second Agreement...the first and/or second defendants were already in breach of the second Agreement" in that they authorised a third party to distribute products bearing the Daewoo brand and logo in the United Arab Emirates.

23 This claim was based on some documents exhibited in the affidavit of Gautam Kunzru, Managing Director of the first defendant. These documents referred to "setting up of an agency for Daewoo International Products in the U.A.E.", "the authenticity of the Principal being Daewoo International" and to Daewoo International being the party authorising the sale of the products. None of the documents referred to the first defendant at all.

24 There was no evidence that the first defendant was in breach of the agreement, and there was no basis for the plaintiffs to seek any relief from it. The action against the first defendant is therefore struck out.

25 The plaintiffs relied on Order 11 r 1(c) to assert that service out of jurisdiction can be effected on the second, third and fourth defendants because they are necessary or proper parties to the claim against the first defendant. The rule permits such service when the claim is brought against a person duly served in or out of Singapore and a person out of Singapore is a necessary or proper party thereto.

26 There were two major difficulties with this contention. First, once the action against the first defendant is struck out, the second, third and fourth defendants cannot be necessary or proper

parties to that action.

27 Second, when the application was made for leave to serve the second, third and fourth defendants out of jurisdiction, the first defendant was not a party duly served in or out of Singapore. In fact the first defendant was not served even when the applications came before me. Counsel for the plaintiffs brought my attention to the English Court of Appeal decision in *Kuwait Oil Tanker Co. S.A.K v Al Bader* [1997] 1 WLR 1410. Counsel argued that the same point was raised in that case without success. He was right, but not so that he brought the plaintiffs any comfort. It was true that in *Kuwait Oil Tanker*, the first defendant was not served when leave was obtained to serve the second and third defendants outside the jurisdiction. When an application was made to set aside that order, Judge Diamond QC held that the equivalent English rule in O 11 r 1(1)(c) of the Rules of the Supreme Court required a defendant to have been duly served before leave to serve another defendant outside the jurisdiction could properly be granted. But the plaintiffs took positive steps to rectify the matter. When the application to set aside the order granting leave to serve outside the jurisdiction was made, the plaintiffs applied for retroactive leave under O 2 r 1 and O 11 r1(1)(c), R.S.C. to issue and serve the writ. The judge granted the plaintiffs' application, with the result that while he upheld the defendants' argument that the original order granting leave to serve was wrong, he dismissed their application to set aside the service. When the defendants appealed to the Court of Appeal, Staughton LJ held there must be service before leave is granted for service on other defendants outside the jurisdiction. However, he also found on the facts there was good cause to validate the leave with retrospective effect.

28 In the present case, there was no application for retroactive validation, nor any ground disclosed to justify such validation. In the circumstances the orders giving leave to serve outside the jurisdiction were set aside.

29 The defendants had also applied that the injunctions against them be set aside. The application was based on two grounds, (i) that the plaintiffs had failed to make material disclosures when they applied for the orders and (ii) that on the balance of convenience, the orders should not be made.

30 Gautam Kunzru deposed in his affidavit filed in support of the plaintiffs' *ex parte* application for the injunction orders that the second defendant's basis for terminating the second agreement for lack of performance was untrue.

31 When counsel attended before me, there was no dispute that the first plaintiff had not made any purchases under the agreement. There was nothing untrue about the second defendant's complaint; it was the denial that was untrue.

32 Secondly, Gautam Kunzru also alleged in the same affidavit that the letter of termination dated 8 February 2002 did not contain sufficient particulars to justify the termination. That was true, but not the whole truth. When the first plaintiff received the letter of termination it wrote to the second defendant to request for evidence in support of its assertions. On 22 February the second defendant replied and supplied the evidence sought.

33 Gautam Kunzru made no reference to this exchange, and complained instead that "it is only with discoveries made very recently, that the complete picture and the real motivation for the termination has come to light". He presented a false picture that the second defendant had relied on a bare assertion to terminate the contract.

34 The plaintiffs who applied *ex parte* for injunctive relief were under a strict obligation to make full and frank disclosure of all matters relevant for the court's consideration, including matters adverse to

their case. The first plaintiff had wilfully withheld material information when it applied for the restraining orders and had presented an inaccurate and incomplete picture. On this ground alone those orders could be set aside.

35 There was another ground for setting aside those orders. This was that the restraining orders were not appropriate in the circumstances. Counsel for the plaintiffs pointed out that there was no order that the defendants retract the letters of termination or perform the agreements pending the trial of the action.

36 Rightly or wrongly, the permission to use the Daytek and Daewoo names and logos was withdrawn. The plaintiffs should not continue to use the Daytek and Daewoo names and logos as that would represent to other parties that they have the authority to use them. They can resume the use if they succeed in their claim for specific performance at the trial of the action. If they succeed their losses are on the profits that they would have earned if the agreements were not terminated, and this can be properly redressed by an appropriate award of damages.

37 On the other hand, the restraining orders prevent the defendants from using Daytek and Daewoo names and logos in the territories covered by the agreements. The result is that neither the plaintiffs nor the defendants or their licensees can use the Daytek and Daewoo names and logos there, and the names and logos will lose out to their competitors on the market. If the terminations are valid, an award of damages may not repair the damage to the defendants' goodwill in the Daytek and Daewoo names and logos. Furthermore, the first plaintiff is in financial difficulties and has entered into a scheme of arrangement with its creditors. If the claims of wrongful termination fail, it may not be able to pay damages.

38 The balance of convenience was against the continuation of the interim injunctions, and they were discharged.

39 Turning to the third and fourth defendants' applications, the action against the former should be allowed to go to trial. The plaintiffs have pleaded a reasonable course of action against him for procuring and inducing the termination of the two agreements. The merits of the claim and his defence are not to be decided at this stage.

40 With regard to the fourth defendant, the plaintiffs had not disclosed a proper course of action against her. She was named in the action as "Irene Nair trading as Trin Marketing CC", implying that Trin Marketing CC is not a distinct legal entity from her. In fact the plaintiffs knew that Trin Marketing CC is a close corporation established under the laws of South Africa, and that the fourth defendant is its sole member.

41 Under the Close Corporations Act No. 69 of 1984 of South Africa, a close corporation is on registration a juristic person, and the members of a close corporation are not by reason of their membership liable for the liabilities or obligations of the corporation.

42 A distinction must be made between the fourth defendant and Trin Marketing CC. As the plaintiffs' complaints were not directed at the activities of the fourth defendant, but against those of Trin Marketing CC, the action against her must be struck out, and the Mareva injunction against her was discharged.

43 I had also ordered that the claim against the third defendant and the Mareva injunction against him be stayed till further order. These stay orders were made because the plaintiffs have commenced proceedings against him in the High Court of South Africa before they commenced the Singapore

action against him. In that action they claimed that he had conspired with the second defendant to terminate the agreements. They have also obtained an Anton Pillar order and an interim injunction against him in that action.

44 The claim against the third defendant has substantial connections to South Africa. The third defendant and second plaintiff are there. The third defendant is accused of committing the acts of procurement and inducement of the termination of the agreements while he was there. The Singapore elements are that the first plaintiff is a Singapore company and the termination letters were sent to it in Singapore. The plaintiffs also assert that the agreements are governed by Singapore law, but the first and second defendants contend that they are governed by the laws of South Korea.

45 There is no reason for the two actions to proceed simultaneously. South Africa is the more appropriate forum for the action against the third defendant to be heard as most of the witnesses and the evidence are there, and proceedings have commenced there. I therefore ordered that the Singapore proceedings against the third defendant be stayed so that the matter can be dealt with in South Africa.

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