Fibresteel Industries Pte Ltd v Radovic Dragoslav
[2007] SGHC 157

Case Number : Suit 554/2006, RA 63/2007

Decision Date : 20 September 2007

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : A Rajandran (A Rajandran) for the plaintiff; Goh Aik Chew (Goh Aik Chew & Co) for the defendant

Parties : Fibresteel Industries Pte Ltd — Radovic Dragoslav

Civil Procedure – Interim orders – Defendant's application for security for costs – Whether filing of defence crucial to assessment of merits of plaintiff's case – Whether reason to believe plaintiff unable to pay costs if defence successful – Whether defendant's application oppressive – Whether any admission to plaintiff's claim made by defendant

20 September 2007

Tay Yong Kwang J:

Introduction

1 The defendant (originally the 3rd defendant) applied for security for costs in the sum of $150,000 to be provided by the plaintiff within 14 days pursuant to the Rules of Court and s 388(1) of the Companies Act (Cap 50). An Assistant Registrar dismissed his application with costs fixed at $550. The Assistant Registrar acknowledged that the plaintiff was impecunious but found the merits of the case difficult to assess without the benefit of the Defence, which had not been filed yet. The defendant then appealed to a Judge in chambers.

2 On 26 March 2007, I heard the appeal and dismissed it with costs fixed at $1,200 to be paid by the defendant to the plaintiff. The next day, the plaintiff filed its Statement of Claim (Amendment No. 1). At the request of the defendant's solicitors, I agreed to hear further arguments on the appeal as a result of the amendments made to the Statement of Claim.

3 On 7 May 2007, I decided to set aside my earlier orders. I ordered that security for costs in the amount of $30,000 be furnished by the plaintiff within 4 weeks and also ordered the plaintiff to pay $1,200 costs to the defendant in respect of the appeal. In the meantime, the proceedings would be stayed save that the Defence should be filed, as ordered earlier by an Assistant Registrar.

4 The plaintiff now appeals to the Court of Appeal against the above orders. In addition, the plaintiff states in the Notice of Appeal (at paragraph 3) that:

> The Appellants further seek leave of the Court of Appeal to allow the Appellants to appeal out of time against the decision of the Honourable Justice Lee Seiu Kin made on 8th February 2007 striking out Alexander Chan Tien Chee, originally named as a party to the proceedings as the 1st Defendant.

As the earlier order of Lee Seiu Kin J is a totally different matter, I shall make no comment on the

merits of the plaintiff's application to the Court of Appeal.

The defendant's case

5 In response to the plaintiff's submission that the application for security for costs was premature in that the defendant had not yet filed his Defence, the defendant argued that such an application could be made at any stage of the proceedings and in fact should be made as promptly as possible and not too close to trial (citing Halsbury's Laws of England, Vol. 37, 4th edition at paragraph 305).

6 There were originally four defendants in this action. The plaintiff's action against the 1st, 2nd and 4th defendants has since been struck out. As mentioned above, the present defendant was originally the 3rd defendant. The initial Statement of Claim filed on 28 August 2006 against all four defendants was a short two-page document with a one-page annexure. It read as follows:

> 1 The Plaintiffs' claim against the Defendants is for the sum of S$505,989.06 and damages for loss of profits in respect of the Defendants' repudiation of the contract with the Plaintiffs.
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> 2 Sometime in March 2006, the Plaintiffs purchased a machinery from the Defendants for the purchases of concrete reinforcement at the price of US$250,000.00.
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> 3 The Plaintiffs were assured that the machine would be set up in their premises at No. 7 Tuas Avenue 6 Singapore. The Plaintiffs took a tenancy on the said premises in the belief that the machine would be operational within 7 days. Now, the Plaintiffs are bearing the losses in respect of the rental charges for the said premises.
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> 4 The Plaintiffs were further assured that there was a contract with an Indonesian company in respect of which the Plaintiffs could earn profits upon the start-up within 7 days.
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> 5 The 3rd and 4th Defendants who are responsible for the start-up for the machines and the Defendants assured the Plaintiffs repeatedly that the machine would be in operation within 7 days. In the meantime, it was agreed that the Plaintiffs were to bear the costs and the expenses of the 3rd and 4th Defendants for the period of 7 days.
>
> 6 However, even after 37 days, the machine could not be operated and the Plaintiffs believe that they have been cheated by the fraudulent conduct of the Defendants causing the Plaintiffs to suffer loss and damages.
>
> 7 The Plaintiffs now verily believe that the Defendants have started their own operation and to usurp the profits meant to be earned by the Plaintiffs.
>
> 8 Particulars of the liquidated claim are enclosed in the Annex herewith.
>
> AND THE PLAINTIFF CLAIMS:
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> 1) The said sum of S$505,989.06;
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> 2) Damages to be assessed;
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> 3) The Plaintiffs also claim an injunction to restrain the Defendants from removing the

machinery and materials from the Plaintiffs' premises at No. 7 Tuas Avenue 6 Singapore;

4) Interest on the abovementioned sum at the rate of 6% per annum;

5) Costs; and

6) Such further or other relief that the Honourable Court may deem just.

The 16 items in the annexure added up to S$505,989.06. The main item in the annexure was a sum of S$407,697.38, said to be part payment by the Plaintiffs for the machinery.

7 The plaintiff is a $2 shell company owned by one Wong Wai Peng ("Wong") and another. Before 21 January 2006, it was known as My Nikko Pte Ltd. It has no assets. As at February 2007, it owed the defendants various amounts of costs ordered in interlocutory applications. In late March 2007, it paid the present defendant $2,450 out of $3,198 owing.

8 The defendant, through the former 1st defendant, his only business contact in Singapore, sought parties who were interested in a joint venture to produce and sell fibre steel, a specialised building material, and who would buy the machine in issue from his Dubai company, Cellate Marble LLC. Wong was keen in the joint venture. She and her associates would have a 60% stake in the joint venture while the defendant and his associates would have 40%. The plaintiff was meant to be the vehicle for the intended joint venture, hence its change of name to the present Fibresteel Industries Pte Ltd. It would own the machine. Wong provided US$250,000 to enable Cellate Marble LLC to redeem a pledge on the machine and to send it to Singapore.

9 The lack of *bona fides* in the plaintiff's action was demonstrated by its indiscriminate action in suing the defendant and all parties related to him. The former 1st defendant was the middleman who solicited Wong's participation in the joint venture. The former 2nd defendant, Cellate Concrete Systems Pte Ltd, was the company formed by the defendant and others after the intended joint venture with Wong failed and was aborted. The former 4th defendant is the brother of the present defendant. He was hired as a technician along with others to install the machine in the plaintiff's premises.

10 These three former defendants applied to strike themselves out as parties to this action on the ground that there was no reasonable cause of action and that the action against them was scandalous, frivolous and vexatious and an abuse of process of court. Lee Seiu Kin J granted these three former defendants the order sought. They thus ceased to be parties to this action with effect from 8 February 2007. The present defendant did not take out such an application and therefore remained the only defendant on record.

11 The original Statement of Claim (see [6] above) was based on a contract purportedly entered into by the plaintiff and the four defendants. The successful striking out application showed the plaintiff's claim to be totally false and made in bad faith. The US$250,000 provided by Wong was an interest-bearing advance made by her to secure the release of the machine from its pledge in Dubai. The purchase price of the machine was US$510,000. With the said advance, the machine was released and shipped to the plaintiff in Singapore. Wong still has possession of the machine through her control of the plaintiff and the plaintiff's premises, where the machine was kept. The advance would be repaid to Wong if the joint venture had materialised. The plaintiff would then include participation of the defendant and his associates as shareholders.

12 Unfortunately, no final agreement was entered into. At the later stage of the negotiations, the

matter became acrimonious and the parties decided to abort the joint venture. They then had discussions on the return of the advance made by Wong and other consequential matters. Proposals were made to return the money to Wong in consideration of a global settlement which would involve the return of the machine and the raw materials. However, no settlement was reached between the defendant and Wong. Wong refused to return the machine. There was no admission of liability by the defendant to pay US$250,000 as his offer to return the money was part of the proposed global settlement and even that was in respect of Wong and not the plaintiff. To date, the agreed purchase price of US$510,000 has not been paid in full to Cellate Marble LLC.

13 The defendant submitted that the plaintiff's claim was therefore a sham. The company has no financial means and would not be able to pay the defendant's costs if he is successful in defending the action. This lack of means was not brought about by the defendant's conduct as the plaintiff had started life as a shell company and remained so.

14 The amended Statement of Claim filed on 27 March 2007 has expanded from two pages to some ten pages, with the same annexure attached. The plaintiff now pleads that it was represented at all material times by Wong and that Alexander Chan, the former 1st defendant, acting as the defendant's agent, proposed the joint venture and suggested the incorporation of a joint venture company. Wong informed him that the existing company (My Nikko Pte Ltd) would change its name to the present name. Alexander Chan also proposed 60% of the equity in the joint venture company be taken up by the shareholders of My Nikko Pte Ltd and the other 40% be taken up by him and the defendant. The plaintiff avers that several material representations regarding the proposed business joint venture were made by Alexander Chan on behalf of the defendant, including projected minimum annual profits of US$1.2m. He requested that US$250,000 be advanced by the plaintiff to redeem the machinery, then located in Dubai, as it had been pledged to secure a loan. The plaintiff gave the advance sought but was not aware whether the money was used for its intended purpose. As an inducement for the advance, the plaintiff was told it would be given an option to purchase the machine. The defendant stated in writing that if the option was not exercised by the plaintiff, the defendant would immediately refund the plaintiff the said sum together with interest at 6% per annum.

15 Various draft agreements were proposed between the parties. In the final draft, material changes requested by the plaintiff were not included. Further, the defendant sought to divest 18% out of his share of 22% in the joint venture to his brother, the erstwhile 4th defendant. The plaintiff did not agree to have the defendant's brother as a joint venture partner.

16 The representations concerning the machine and the period for it to be operationally ready turned out to be untrue. The defendant was unable to furnish satisfactory documentary proof of his title to the machine and reneged on his assurance that he would transfer its intellectual property rights to the plaintiff. There was therefore repudiation of the contract in respect of the sale of the machine. Sometime on 21 April 2006, the plaintiff accepted the repudiation and treated the contract as rescinded by the wrongful conduct of the defendant and his agent and by their misrepresentations in respect of the joint venture. The plaintiff now claims, besides the amount of S$505,989.06, additional losses to be computed. It has abandoned its claim for an injunction to restrain the (then) defendants from removing the machine and materials from its premises.

17 The defendant submitted that "[t]he Amended Statement of Claim is an absolute confused mess and they really do not know what they are claiming". The defendant also referred to his Defence which was being filed on the date of the further arguments. It was argued that the defendant was clearly not the vendor of the machine.

The plaintiff's case

18 The plaintiff argued that the application for security for costs was premature as there was no Defence filed at the time the application was taken out. Although the Defence to be filed was now annexed to the further written submissions, it was contended that the court should pay no regard to it.

19 An important consideration in such an application was whether there was an admission by the defendant in the pleadings or elsewhere that money was due to the plaintiff and whether the application was being used oppressively to stifle a genuine claim. The plaintiff submitted that there could be no dispute that the defendant was liable for the US$250,000 advanced by the plaintiff as there was an admission made in the affidavits of the defendant and Alexander Chan that the plaintiff was the source of the funds. The plaintiff alleged that the defendant's application was oppressive and made to stifle the bona fide claim. The plaintiff also claimed to be exercising a lien on the machine.

The decision of the court

20 The defendant acknowledged at the outset that the present case did not fall within any of the four conditions listed in O 23 r 1(1)(a) to (d) of the Rules of Court (Cap 322, R 5) which would have justified an order for security for costs, namely, that the plaintiff is ordinarily resident out of the jurisdiction, or is a nominal plaintiff, or does not state its address properly or at all or has changed address with a view to evading the consequences of litigation. The defendant relied instead on s 388 of the Companies Act which reads:

> (1) Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.
>
> (2) The costs of any proceeding before a court under this Act shall be borne by such party to the proceeding as the court may, in its discretion, direct.

21 In *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and Anor* [1999] 1 SLR 600, L P Thean JA, in delivering the judgment of the Court of Appeal, said (at [25]):

> In all the cases which we have discussed, the court in the exercise of its discretion considered all the relevant circumstances, and in that connection, clearly, the strength or weakness of the plaintiff's claim is one of the relevant circumstances to be taken into account. This applies whether the court is considering an application under s 388 or under O 23 r 1(1)(a). It is certainly not correct to say that in an application made under s 388 the test is whether the plaintiff has a bona fide claim with reasonable prospect of success and that in an application under O 23 r 1(1)(a) the test is whether the plaintiff is likely to succeed in the sense that he has a high probability of success. At any rate, the difference between these two so called tests is really marginal. Neither of them alone is a test by which the court determines to exercise its discretion. Hence, it is not the law that once the plaintiff has shown that he has a bona fide claim with a reasonable prospect of success or that he is likely to succeed in the sense that he has a high probability of success, it follows as a matter of course that the court will not make an order for security for costs. Such a fact, if established prima facie, is only one of the circumstances that the court will take into consideration in determining whether in exercise of its discretion an order for security for costs should be made or should be refused. The court has to examine all the other circumstances and come to the conclusion whether it is just that an order for security for costs

should or should not be granted.

The Court of Appeal concluded that the plaintiff in that case had a *bona fide* claim against the defendant and a reasonable prospect of success on the claim and that, in view of the prevailing economic condition, there was no possibility of the plaintiff providing the security for costs as ordered and to allow the order to remain would in fact stifle its claim.

22 In *KS Oriental Trading Pte Ltd v Defmat Aerospace Pte Ltd* [1996] 2 SLR 606, there was a winding-up petition against the claimant company on the ground that it was unable to pay its debts. Nevertheless, Warren Khoo J, while accepting that impecuniosity was a factor to take into account, refused to order security for costs because of the "rather inconsistent defences of the respondents, and the vague and evasive way they have put them forward" (at [4]).

23 In *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] QB 609 (at 626), Lord Denning MR in the English Court of Appeal held that the court would also consider whether the application for security for costs was being used oppressively so as to try to stifle a genuine claim and whether a plaintiff's want of means was brought about by any conduct of the defendant, such as delay in payment or delay in doing its part of the work. The English Court of Appeal also took into consideration the fact that the application "was made at a late hour on the Thursday when the arbitration was due to start on the Monday" in coming to the conclusion that it was not a case for ordering security for costs.

24 Similarly, in *L&M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2001] 4 SLR 524 ("*L&M*"), Judith Prakash J accepted that the court might take into account whether there was an admission by the defendant on the pleadings or elsewhere that money was due and whether the application for security for costs was taken out at a late stage in the proceedings. The plaintiff in that case had applied for security for costs under s 388 of the Companies Act against the defendant, which had made a counterclaim of about $1.3m against the plaintiff, on the ground that the defendant was insolvent and would not be able to pay the plaintiff's costs if the latter was successful in defending the counterclaim. The learned judge held (at [15]) that the application was being made to prevent the defendant from proceeding "with a fairly good claim and one to which [the plaintiff] had no answer, at least as far as $800,000 was concerned". She was also of the view that the plaintiff's late application (taken out in June 2001 when it could have been done in October 2000) was a clear indication of its desire to prevent the case from being heard and was not due to a fear of being unable to recover its costs.

25 The plaintiff here was and remained a shell company. Its lack of finances and consequent inability to pay costs, which is not disputed, was therefore not due to any conduct of the defendant, who also could not be accused of using his application for security for costs oppressively. Far from being tardy in his application, which would have been a factor against him, the defendant is accused of having jumped the gun by taking out his application far too early in the proceedings.

26 The plaintiff in this case does not appear to be certain about the contracting parties or what the contract was. This is borne out by the successful striking out applications by the former defendants and the subsequent amendments made to the original claim. This view is now reinforced by the plaintiff's intended application to the Court of Appeal to be given leave to appeal out of time against the decision of Lee Seiu Kin J made on 8th February 2007 striking out Alexander Chan as the 1st Defendant. The obvious intention is to restore Alexander Chan as a defendant in this suit, some four months after he had made his exit. The fact that the defendant had not filed his Defence yet at the time of taking out the application for security for costs is therefore not crucial in weighing the strength of the claim, which, as shown, has inherent flaws and can hardly be described as being a good claim or one having a reasonable prospect of success.

27 Bearing in mind that a hearing for security for costs should not be the occasion to go into a detailed examination of the merits of the case (per Chao Hick Tin J, as he then was, in *Omar Ali bin Mohd & Ors v Syed Jafaralsadeg bin Abdulkadir Alhadad & Ors* [1995] 3 SLR 388 at 397), I shall discuss briefly the plaintiff's assertion that the defendant had admitted that he was liable to return the advance to the company. As submitted by the defendant, the offer to return the money with interest was made in the context of a global settlement of the dispute and, in any event, the offer was to return the money to Wong, not to the company (see the letter dated 25 April 2006 from the defendant's solicitors to the plaintiff's solicitors exhibited in the defendant's affidavit filed on 25 January 2007). In fact, the defendant wanted the shell company transferred to him or his nominees as a consequence. There was therefore no unequivocal admission of the plaintiff's claim or part thereof, unlike the situation in *L&M*.

28 Weighing all the circumstances of the case, I was of the view that I should exercise my discretion to order security for costs in this case. As the proceedings were still at a very early stage, I did not think that the amount ($150,000) asked for was justified. I therefore reduced the amount to $30,000 and made the orders that I did at [3] above.