L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd [2001] SGHC 279

Case Number : Suit 600131/2000 , RA 600137/2001

Decision Date : 25 September 2001

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Ramalingam Kasi (Raj Kumar & Rama) for the appellants/defendants; Intekhab Khan and Desmond Ong (J Koh & Co) for the respondents/plaintiffs

Parties : L & M Concrete Specialists Pte Ltd — United Eng Contractors Pte Ltd

Civil Procedure – Costs – Security for costs – Defendants insolvent – Order for defendants to furnish security – Plaintiffs' application for security made at late stage of proceedings and oppressive – Whether order for security for costs should be set aside – Factors to take account of – s 388 Companies Act (Cap 50, 1994 Ed)

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Background

United Eng Contractors Pte Ltd (`United Eng`), the defendants in this action, were the sub-contractors on two building projects on which the plaintiffs, L & M Concrete Specialists Pte Ltd (`L&M`) were the main contractors. The two projects which have since been completed were known as the Hilltop project and the Sinsov project.

In September 1998, United Eng commenced Suit 1523/98 whereby it sued L&M for unpaid moneys due to it in respect of the Hilltop project. L&M denied the claim and filed a counterclaim for moneys due in respect of the supply of labour and materials and for compensation paid to third parties. This action was heard in January 2000. After a trial lasting three days, judgment was entered in favour of United Eng in the sum of $287,971.12. The counterclaim filed by L&M was struck out for lack of particularisation but L&M was given liberty to file a fresh suit.

L&M acted on the permission granted by the court by filing this action in February 2000. Their claim in this action is for sums in excess of $300,000 which they say are due to them in relation to labour and materials supplied and payments made for the Hilltop project. United Eng filed a defence denying that any amount was due to L&M and also made a counterclaim against L&M for the unpaid balance due to them for their work done in respect of the Sinsov project. United Eng`s claim was for approximately $1.3m.

L&M`s response was not only to file a reply and a defence to counterclaim but also to file a counterclaim of its own in respect of the Sinsov project. L&M`s counterclaim is for damages amounting to about $2.5m arising out of alleged delays to the project caused by United Eng. United Eng has denied any liability for L&M`s counterclaim.

It should be noted that in L&M`s amended reply and defence to counterclaim and counterclaim to counterclaim filed on 17 October 2000 it set out its final accounts for the Sinsov project. According to these accounts, the sub-contract sum (inclusive of variations) payable to United Eng was $2,804,362.33. After retention of 2.5% was deducted and GST of 3% was added, the amount payable became $2,817,640.46. Of this total, L&M stated that it had made payments totalling $1,998,091.80. This meant that there was still a sum of $806,270.53 due to United Eng on L&M`s own accounts. The

reason why L&M`s account did not show this amount as being payable is that the account also took into consideration L&M`s claim for $2,541,671.26 against United Eng. Once that figure was factored in, the account showed a positive balance due to L&M of approximately $1.798m.

The action was fixed for hearing over nine days between 2 and 12 January 2001. These hearing dates were, however, vacated on the application of L&M as they wanted to call a foreign expert witness. Subsequently, parties were given directions to exchange affidavits of evidence-in-chief by 29 August 2001 and new hearing dates were fixed between 1 and 12 October 2001.

On 26 June 2001, L&M filed an application for security for costs pursuant to s 388 of the Companies Act (Cap 50, 1994 Ed) (`the Act`). The grounds of the application were that United Eng was insolvent and no longer in business and that United Eng would not be able to pay L&M`s costs if it failed to succeed in its counterclaim. The application was heard on 8 August and L&M was granted security in the sum of $50,000. It had originally asked for $120,000. United Eng appealed against the order. I heard the appeal and allowed it. L&M is dissatisfied with my decision.

Reasons

It is well known that under s 388 of the Act, the court is given the discretion to order a company which is a plaintiff in an action to provide security for the costs of the defendant in that action if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant`s costs if the defendant succeeds in the defence.

In this case, it was conceded from the beginning that United Eng was insolvent and might be unable to pay L&M`s costs if L&M succeeded in its defence to the counterclaim. Counsel for United Eng submitted, however, that that determination was not the end of the matter and that the court had to take all the circumstances into account in deciding how its discretion was to be exercised. This submission was based on the well-known decision of **Sir Lindsay Parkinson & Co v Triplan** [1973] 1 QB 609[1973] 2 All ER 273.

It was also submitted that the circumstances which the court might take into account would include:

(1) whether the company`s claim is bona fide and not a sham;

(2) whether the company has a reasonably good prospect of success;

(3) whether there is an admission by the defendants on the pleadings or elsewhere that money is due;

(4) whether the application for security was being used oppressively;

(5) whether the company`s want of means has been brought about by the defendants, such as delay in payments;

(6) lateness in taking out the application.

In this case, I accepted that one or more of the above circumstances if established would be relevant to my consideration of the case.

Taking the above factors in turn, I was first of all satisfied that United Eng`s claim against L&M in

respect of the Sinsov project was a bona fide one. There was no doubt that United Eng had done work on the project and that they were entitled to payment. The question in issue was the quantum of such payment. It was clear from the pleadings that about two-thirds of the claimed amount had been recognised as due by L&M and that the dispute would be over the remaining one-third. Whether or not United Eng would succeed in obtaining the full quantum they had sued for was not relevant. What was important was that the claim was a genuine one which was deserving of being tested in court.

The second question was whether United Eng had a reasonably good prospect of success. As far as this was concerned, their prospect of being successful in recovering at least $800,000 was good. Whether they would receive payment depended on whether L&M could prove its counterclaim. This was not a liquidated claim but a claim for damages for delay and there was no admission of liability. Since United Eng had not been the only sub-contractor involved in the project, L&M would have to show first that United Eng had delayed and second, that it was this delay that had caused the whole project to be delayed. Third, L&M would have to prove its damages. All these were issues for L&M to deal with and did not have a direct effect on United Eng`s case in relation to the amount of work which they had done.

The third factor, that is whether there was an admission by L&M on the pleadings or elsewhere that money was due, was clearly present in this case. It could be seen from the figures in para 56 of L&M`s amended defence to counterclaim. The effect of these figures is set out in [para]5 above.

The fourth factor was whether the application for security was being used oppressively. This had to be considered in conjunction with factor 6, ie the lateness in taking out the application. The writ of summons in this action was filed on 1 February 2000. Pleadings were closed in October 2000 and the summons for directions was heard on 3 October 2000. L&M had a perfect opportunity at that stage to apply for security for costs since the financial position of United Eng was as parlous then as it is now. L&M did not do so. The case was fixed for trial between 2 January and 12 January this year. L&M did not apply for security then. Instead, it applied to vacate the dates. It was not until June this year when the next set of trial dates were approaching that the application was made. I think this was far too late. The application should have been made at the earliest opportunity.

It appeared to me that the application was being made in order to prevent United Eng from proceeding with a fairly good claim and one to which L&M had no answer, at least as far as $800,000 was concerned. L&M was fully aware that United Eng would not be able to furnish the security and that the order once made would result in the end of United Eng`s claim. The net result of this would be that United Eng would be wound up and L&M would not make any payment to it at all on the basis that whatever might have been due was fully covered by the counterclaim to counterclaim even though the same had not been proved. L&M would have been relieved of the obligation of proving the issues that I have outlined in [para]12 above. In my judgment, L&M`s application at this late stage 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 costs.

There was also an allegation that it was L&M`s conduct that led to the financial difficulties which United Eng had experienced. While I express no concluded view on that issue, it does appear to me that L&M`s refusal to make payment promptly of amounts due to United Eng would have had some effect on its finances even though, as L&M was prompt to point out, United Eng also had other creditors.

When I considered the circumstances of this case as a whole, I was satisfied that the court`s discretion should not be exercised so as to deprive United Eng of its day in court. I therefore set

aside the order for United Eng to provide security for costs.

Outcome:

Appeal allowed.