Firstwaters Pte Ltd v Lindeteves-Jacoberg Ltd
[2005] SGHC 200

Case Number : Suit 384/2005, RA 235/2005

Decision Date : 28 October 2005

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Anthony Lee (Bih Li and Lee) and Ng Hweelon (Shenton LLC) for the appellant; Kelvin Poon (Rajah and Tann) for the respondent

Parties : Firstwaters Pte Ltd — Lindeteves-Jacoberg Ltd

Civil Procedure – Striking out – Business consultancy suing company for commission owed pursuant to agreement between them – Business consultancy and company disagreeing on interpretation of agreement – Business consultancy appealing against assistant registrar's decision to strike out claim pursuant to O 18 r 19 Rules of Court – Whether claim clearly unsustainable – Whether claim should be struck out – O 18 r 19 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

28 October 2005

Tan Lee Meng J:

1 The appellant, Firstwaters Pte Ltd ("FPL"), a company involved in business management and consultancy services, instituted an action against the respondent, Lindeteves-Jacoberg Limited ("LJL"), for fees payable under a contract for the introduction of investors to the latter. LJL succeeded in persuading the assistant registrar to strike out FPL's Statement of Claim. FPL appealed against the striking out of its claim.

2 At the material time, LJL was in the process of restructuring itself. It intended to raise working capital by way of a sale or the securitisation of some of its assets. Under an agreement ("the engagement agreement") dated 14 July 2004, FPL agreed to provide consultancy services to LJL to assist the latter in its restructuring exercise and in raising the required working capital.

3 The remuneration for FPL's services was provided for under s 3(a) of the engagement agreement, which was as follows:

> If, during the term of this agreement, [FPL] introduces an investor … to the Company and the Company or any of its related companies or associated companies of LJL (the "Group") enters into agreement with the [i]nvestor or its associated or related companies to acquire or securitise any assets of the Company (the "Transaction"), a success fee ... of one percent (1%) of the net proceeds from the Transaction … will be payable within thirty days of the completion of such agreement.

4 In due course, FPL introduced International Factors (Singapore) Ltd ("IFS") to LJL in July 2005. According to FPL, LJL and IFS then negotiated a structured factoring agreement. In November 2004, a press release by IFS revealed that the deal, which was worth €20m, was made between IFS and LJL's German subsidiary, Schorch Elektrische Maschinen und Antriebe GmbH ("Schorch").

5 On 12 November 2004, FPL invoiced LJL for $428,000 or €200,000, the sum being 1% of the value of the agreement with IFS. As this sum was not paid, FPL instituted legal proceedings to recover it.

6 LJL applied for FPL's claim to be struck out pursuant to O 18 r 19(*a*), (*b*) and/or (*d*) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). LJL asserted that FPL's pleaded case was "entirely unsustainable". It pointed out that under para 3 of the Statement of Claim, FPL had pleaded that it was a term of the engagement agreement that it would be paid a success fee if LJL or any of its related companies or associated companies enter into an agreement with an investor to acquire or securitise "any assets of the Defendants". However, it was the assets of a subsidiary, namely Schorch, and not LJL's assets, that had been securitised. As such, LJL contended that FPL's claim did not have a leg to stand on.

7 In reply, FPL contended that while s 3(a) of the engagement agreement could have been more clearly worded, it was evident, if s 3(b) was read together with it, that the parties intended that the said agreement would cover the securitisation of LJL's assets as well as the assets of its subsidiaries. After hearing the parties, the assistant registrar struck out FPL's claim.

The appeal

8 An application to strike out a claim under O 18 r 19 can only succeed if a clear case has been made out for such a course of action. In *Dyson v Attorney-General* [1911] 1 KB 410 at 419, Fletcher-Moulton LJ remarked that a plaintiff should not be "driven from the judgment seat" and in *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] SLR 798 at 803, [31], G P Selvam JC (as he then was) explained why courts are reluctant to strike out a claim summarily in the following terms:

> Courts are reluctant to strike out a claim summarily either under O 18 r 19 of the [Rules of Court] or the inherent jurisdiction. This is anchored on the judicial policy to afford a litigant the right to institute a bona fide claim before the courts and to prosecute it in the usual way. Whenever possible the courts will let the plaintiff proceed with the action unless his case is wholly and clearly unarguable …

9 That the court's discretion to strike out an action is to be used sparingly has been reiterated by the Court of Appeal on numerous occasions. Wherever possible, the court would allow a plaintiff to amend his statement of claim rather than strike out the action. (See, for instance, *Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd* [1994] 3 SLR 481 and *Ko Teck Siang v Low Fong Mei* [1992] 1 SLR 454). In *Ching Mun Fong v Liu Cho Chit* [2000] 1 SLR 517 at [12], L P Thean JA, who delivered the judgment of the Court of Appeal, said:

> The jurisdiction to strike out a statement of claim, whether under the Rules of Court or under the court's inherent jurisdiction, is only exercised in a plain and obvious case. In general, the court's approach to an application to strike out the statement of claim is to consider if the deficiency or defect therein, on the basis of which the application was made, could be cured by an amendment, and would prefer to allow an amendment rather than to take the drastic course of striking it out.

10 In the present case, LJL sought leave to amend para 3 of its Statement of Claim to clarify matters. It asserted that despite the wording of s 3(a) of the engagement agreement, the parties had intended that this clause would also cover the securitisation of the assets of LJL's subsidiaries. It added that the real intention of the parties would be apparent if s 3(b) of the engagement contract was taken into account. Section 3(b), which concerns the consequences of a termination by LJL of the said agreement, provides that FLP is entitled upon the termination of the engagement agreement to 50% of the success fee payable as calculated according to s 3(a) if during the period of 12 months after such termination, an investor enters into an agreement "to invest or acquire assets of [LJL] or its subsidiaries and associated companies". FLP asserted it does not make sense if it is entitled to a

payment for the securitisation of the assets of LJL's subsidiary after the termination of the engagement contract but not if the said securitisation takes place before the said contract has been terminated.

11 Reliance was placed on the following passage from the judgment of Kelly CB in *Gwyn v The Neath Canal Navigation Company* (1868) LR 3
Exch 209 at 215, which was cited with approval by Lord Lowry in *Forsikringsaktieselskapet Vesta v J N E Butcher, Bain Dawes Ltd* [1989] 1 Lloyd's Rep 331 at 345:

> The result of all the authorities is, that when a court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned.

12 Whether FPL's assertion in relation to the interpretation of s 3(a) of the engagement agreement is tenable remains to be seen. What is evident at this juncture is that it would be premature to strike out its claim. I thus granted leave to FPL to amend its Statement of Claim and reversed the decision of the assistant registrar on the striking out of its claim.