Sunny Daisy Ltd v WBG Network (Singapore) Pte Ltd
[2006] SGHC 130

Case Number : Suit 470/2005, RA 372/2005

Decision Date : 26 July 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : L Kuppanchetti Nadimuthu and Christopher Buay (Alban Tay Mahtani & De Silva) for the plaintiff; Peter Gabriel and Ismail bin Atan (Gabriel Law Corporation) for the defendant

Parties : Sunny Daisy Ltd — WBG Network (Singapore) Pte Ltd

Civil Procedure – Appeals – Registrar's Appeal from defendant's conditional leave to defend to judge in chambers – Whether judge in chambers should allow further evidence – Whether strict Ladd v Marshall criteria applicable

Civil Procedure – Parties – Whether plaintiff was proper creditor – Whether plaintiff was agent of other principal(s) thus affording defence to plaintiff's claims for balance of price of goods sold

Commercial Transactions – Sale of goods – Whether non-merchantable quality of goods affords defence to plaintiff's claim on price

26 July 2006

Judith Prakash J:

Introduction

1 The plaintiff, a Taiwanese company, sued the defendant for the sum of US$1,057,164.03 being the balance of the price of goods allegedly sold and delivered to the defendant by the plaintiff. According to the statement of claim, the goods were supplied between May 2003 and September 2004. The defendant remitted moneys to the plaintiff in partial payment of the price of the goods between January and September 2004. No further payment having been received, the plaintiff started this action in July 2005.

2 The defendant, a Singapore company, filed a defence and counterclaim. Basically, three lines of defence were taken. The first related to two alleged oral agreements between the defendant and another Taiwanese company called Internation Chlorella Co, Ltd ("Internation"). One Prof Wang Shun Te who was also the president of the plaintiff company represented Internation in discussions. The defendant alleged that the plaintiff had been acting as agent for Internation and not as principal and therefore was not entitled to claim the money due in respect of the goods supplied. The second defence was that by reason of certain credit notes issued, the amount claimed by the plaintiff was excessive. Finally, the goods supplied were not of merchantable quality and/or not reasonably fit for the purpose for which they were intended. The counterclaim was based on loss and damage allegedly arising from the failure of the plaintiff to supply merchantable goods.

3 The plaintiff made an application for summary judgment in respect of part of its claim. This was resisted by the defendant and on 12 December 2005, the assistant registrar granted the defendant conditional leave to defend. The plaintiff appealed to the judge in chambers. I heard the appeal and allowed it and granted the plaintiff judgment in the sum of US$611,764.03 and interest at 6% per annum from the date of issue of the writ till date of judgment. I stayed execution on the judgment pending the trial of the counterclaim and final disposal thereof. Costs of the O 14

application (O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) and of the appeal were ordered to be paid by the defendant to the plaintiff. The defendant is dissatisfied with my order and has appealed to the Court of Appeal.

Applications for further evidence

4 As stated, the original application for summary judgment was heard in early December 2005. On 27 February 2006, the plaintiff filed a further affidavit exhibiting some purchase orders issued by the defendant to the plaintiff. This affidavit was served on the defendant on that same day. The plaintiff asked for leave to admit the affidavit into evidence for the purposes of the appeal. When the appeal was heard on 17 March 2006, I allowed the affidavit to be used in evidence.

5 The defendant itself sought to adduce further evidence at the hearing of the appeal. What the defendant wanted to adduce was a letter dated 18 January 2005 ("the 2005 letter") sent to the defendant's previous solicitors, M/s Lee & Lee, by a Taiwanese law firm, the Law Offices of Tony M Chang under instructions from Prof Wang and Internation. The 2005 letter comprised not only the letter dated 18 January 2005 but also included three other documents. The 2005 letter was not adduced by way of an affidavit. Instead, the defendant's solicitors had sent a copy of the 2005 letter to the plaintiff's solicitors by facsimile transmission on the morning of 17 March 2006 itself. When he appeared in court, counsel for the defendant asked for leave to adduce the 2005 letter and its attachments as additional evidence. Counsel for the plaintiff objected on the basis that the 2005 letter was not written by his client, his client had not seen it and had not been able to give him instructions on it and it was too late to adduce the letter in evidence. I agreed. I did not think it was proper to simply produce the 2005 letter over the table at such a late stage. I refused the defendant's application to adduce the 2005 letter in evidence.

6 After the hearing, the defendant's solicitors wrote in for further arguments. This request was made only in respect of the admission of the 2005 letter and its attachments. The latter consisted of three documents: first, a document entitled "Formal & Serious Warning Issued to WBG Network (Singapore) Pte Ltd Debt Owing Exceeds One Million USD ($1,000,000)" ("the warning"), second, a document entitled "Notice to Cease Usage of Registered Trade Name "Cryptomonadales" ("the notice") and third, a document entitled "Full Recourse Promissory Note" ("the pro-note").

7 In the application for further arguments, it was said that it had always been the defendant's contention that the proper plaintiff in the present proceedings was either Prof Wang and/or Internation and that the named plaintiff was simply an agent acting for Prof Wang and/or Internation. Counsel for the defendant wrote that extracts from the letter were highly indicative of the true relationship between the plaintiff on the one hand and Prof Wang and Internation on the other. Further, the sum of money stated in para 4 of the 2005 letter and para 1 of the warning was the exact amount that was claimed by the plaintiff. Since the 2005 letter was dated 18 January 2005 (*ie*, before this action was instituted), it was a clear admission that the proper parties to these proceedings must be Prof Wang and/or Internation. The 2005 letter was highly relevant to the issue before the court and it had been issued on the instructions of Prof Wang who had affirmed all of the affidavits filed in this action on behalf of the plaintiff. Thus, the 2005 letter should have been included in the plaintiff's own affidavits so as to give a true and fair picture of the claim by the plaintiff against the defendant. This being so, there would be no prejudice to the plaintiff if the letter were to be admitted.

8 Counsel for the defendant ended his letter by submitting that based on the 2005 letter, it had been established that the money claimed by the plaintiff did not belong to the plaintiff and instead, was owed to either Prof Wang and/or to Internation. Thus, on the basis of the 2005 letter,

there was a triable issue, namely, to whom the debt of US$1,057,164.03 was actually owed.

9 In their response to the request for further arguments, the plaintiff's solicitors pointed out that the defendant had been in possession of the 2005 letter at the time the action was commenced and yet, for reasons best known to itself, it had not referred to or adduced the 2005 letter at the hearing before the assistant registrar on 12 December 2005. Further, the defendant had not produced the 2005 letter in the three months that elapsed between the first hearing and the hearing of the appeal. No explanation for the delay had been given. In any event, even if the letter had been admitted into evidence, it was not relevant to the present action because it involved parties other than the plaintiff. The letter was also not issued by the plaintiff or its solicitors. For the foregoing reasons, the plaintiff contended, no further arguments should be permitted.

10 In coming to my decision not to allow further arguments, I looked at the 2005 letter and all the attachments. The 2005 letter itself was apparently issued on the instructions of Prof Wang and Internation. It was a response to a letter from M/s Lee & Lee dated 4 January 2005 and referred to a document called the "Product Manufacturing Agreement" dated 14 February 2004. I noted that the 2005 letter did state that the defendant owed Internation "$1,057,1[6]4.03" and it contended that the defendant had raised issues on the quality of the goods in order to avoid paying that debt. However, it also stated that Prof Wang had consistently supplied the plaintiff with the standard Internation products that met food safety requirements pursuant to the agreement. Further, it referred to the fact that an executed copy of the pro-note had not been received. Therefore, the letter said that any offer associated with the pro-note was expressly withdrawn.

11 The next document, the warning, was issued on behalf of Internation and was stated to be a formal warning and demand for immediate repayment of debt totalling over "$1,057,1[6]4.03 USD" owed by the defendant to Internation. It said that if within seven days, the defendant did not respond with a reasonable plan of repayment or its director did not participate in settlement negotiations, Internation would commence all necessary action to "enforce the financial responsibility of [the defendant's] debt". This document appeared to indicate that the creditor was Internation. The third document, the notice, was a notice to the defendant to immediately cease the usage of the trade name "Cryptomonadales" and to cease sales of all products using this name. It stated that "[p]ending litigation and payment of debt owed totaling over $1,057,1[6]4.03 United States dollars", Internation had revoked the defendant's limited right to use the trade name. This document also indicated that the creditor was Internation.

12 The final document I examined was the pro-note. This was addressed to the "CEO" of the defendant. The first paragraph read:

> FOR VALUE RECEIVED, W.B.G. Network (Singapore) Pte. Ltd. (hereinafter "Borrower") hereby issues to Sunny Daisy Limited (hereinafter "Company") this Promissory Note on this 15th Day of November, 2004 with the following terms:
>
> …

The pro-note contained seven more paragraphs. If the pro-note had been executed by the defendant, it would have admitted by the wording of the third paragraph that by 15 November 2004, it had not paid the plaintiff the sum of US$611,764.03 a sum calculated on the basis of the total amount initially owed of "USD$1,057,1[6]4.03" less other amounts credited to the borrower. The fourth paragraph of the pro-note stated that the borrower would in good faith make all reasonable efforts to repay the remaining US$611,764.03 owed as soon as possible and, by a subsequent paragraph the borrower promised to pay interest on the outstanding balance of the pro-note. To my

mind, this document had been drafted on the basis that the defendant owed the debt to the plaintiff. No one else was named as the creditor of the defendant. It was also relevant that, as noted above, the 2005 letter itself had made reference to the defendant's failure to execute the pro-note.

13 In the letter asking for further arguments, the defendant's solicitors submitted that since in hearing the registrar's appeal I had conducted a rehearing of the original application, the strict tests found in *Ladd v Marshall* [1954] 1 WLR 1489 in relation to adducing further evidence on appeal had not applied to their attempt to adduce the 2005 letter. Counsel did not, however, refer to the most recent case on this issue, *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392, which held that although not all the conditions in *Ladd v Marshall* would apply to a registrar's appeal, reasonable conditions must be set for the exercise of the judge in chambers' discretion to admit fresh evidence. The Court of Appeal held that the second and third conditions under the *Ladd v Marshall* tests were eminently reasonable and remained relevant when a judge in chambers was asked to admit new evidence on appeal. It would be recalled that these conditions are that:

(a) the new evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive; and

(b) the evidence must be apparently credible, though it need not be incontrovertible.

14 Having looked at the documents, I took the view that the defendant had not been able to satisfy both conditions. There was no problem with satisfying condition (b). The problem lay with condition (a). I did not think that the new evidence to be given would have had an important influence on the result of the case. This was because, taken as a whole, the effect of the 2005 letter and its attachments was from the point of view of the defendant equivocal at best. Whilst the 2005 letter itself was ambiguous as to whether the debt was owed to Prof Wang as supplier of the product or to Internation and made reference to the pro-note which itself set out an entirely different position, two other documents identified Internation as the creditor, and the pro-note, an acknowledgment of debt to be executed by the defendant, plainly identified the debt as being owed to the plaintiff. It could not be said that the new evidence considered as a whole established that the creditor was someone other than the plaintiff. In view of the wording of the pro-note, a document expressly referred to in both the warning and the 2005 letter itself, the additional evidence tended more to showing that, indeed, the legal entity to whom the debt was owed was the plaintiff and not its president, Prof Wang, or Internation, another of Prof Wang's companies. The 2005 letter did not change the position as established by the other documents in the case which had been pivotal in my decision to allow the appeal.

The appeal proper

15 To recapitulate, the defendant argued that there were three triable issues. The first was the identity of the creditor, the second was that the amount claimed was excessive and the third related to the quality of the goods supplied. From the beginning, it was clear that the second potential triable issue was a non-starter. This was because the plaintiff was only asking for summary judgment in the sum of US$611,764.03 being the balance due after amounts stated in the credit notes issued by the plaintiff had been set off. I therefore need not deal further with this issue.

16 Moving to the first issue, from the outset, I thought it was difficult for the defendant to put forward a case that it was not indebted to the plaintiff when it was not able to identify precisely whom it had purchased the goods from. The defendant did not deny having purchased the goods. In fact, in its defence, it gave a long history of the circumstances under which it had bought and on-sold the goods. In its defence too, it had said that the plaintiff was in fact agent for Internation and

therefore was the wrong party to the proceedings. In the affidavit resisting the O 14 application, however, the defendant changed its stand and said that the correct creditor would be either Internation or Prof Wang. Throughout its submissions, the defendant maintained the stand that the plaintiff was "merely a vehicle used by a Prof Wang [Shun] Te to transact business on behalf of Prof Wang and/or Internation". The defendant was therefore not willing to commit itself as to whom it owed the money to. I found such equivocation to be disturbing.

17 In its submissions, the defendant referred to an e-mail dated 27 August 2004 from Prof Wang in which he stated that:

> We don't want WBG to owe Internation Chlorella more and more outstanding. Do not just think with your own point of view. Think about us, our company, we have been trying hard to help your company, WBG., but now … Think about us with our standpoint!

The defendant submitted that these being the words of Prof Wang himself and being contained in a contemporaneous document, they had to be taken very seriously. Prof Wang had acknowledged that what was owed by the defendant was owed to Internation. Prof Wang had not mentioned the plaintiff and this omission clearly showed that the creditor could not be the plaintiff. Additionally, Prof Wang had bought 25% of the shareholding in the defendant's associated company in Korea, WBG Korea, but when it came to payment, a credit note was issued by the plaintiff for the purchase of these shares. Clearly, the defendant submitted, the reason the credit note was issued by the plaintiff was that the moneys owing from the defendant belonged to Prof Wang and/or Internation and therefore had been used to set off Prof Wang's debt to the defendant. Further, the plaintiff's credit note which Prof Wang had signed described the amount of the credit note as "being our purchase of 25% shares in WBG Korea". Prof Wang and Internation had used the plaintiff for the formalities of the transaction when in fact they were the contracting parties and not the plaintiff.

18 I did not find any substance in the above arguments. The documents produced by the plaintiff showed that the defendant had issued purchase orders to the plaintiff asking to purchase the goods from the plaintiff. These purchase orders corresponded with invoices issued by the plaintiff to the defendant for goods sold and delivered. These invoices formed the basis of the claim against the defendant. The documentary picture therefore was that, whatever the relationship between Prof Wang, Internation and the plaintiff, it was the plaintiff who sold goods to the defendant and whenever the defendant wanted to purchase goods, it was the plaintiff to whom it sent its purchase orders. Additionally, it was significant that such payments for the goods as had been made by the defendant, had been made to the plaintiff and not to any other party. Additionally, the defendant had not alleged prior to the institution of this suit that the plaintiff was not the creditor. It appeared to me that the defence that the plaintiff was not the real creditor was an afterthought suggested by the loose language used by Prof Wang in his communications with the defendant. In any case, the defendant was always aware that Prof Wang was the president of the plaintiff company. Although he may have signed his own name to various communications, that would not have necessarily meant that he considered the amounts due as being due to him personally rather than to the company that he, as president, represented.

19 The defendant's equivocation as to the identity of the proper creditor was also significant. The defendant was not owning up to a debt. By refusing to state precisely whom it thought it had contracted with when it had bought the goods the defendant showed that its main motive was to avoid payment. The defendant did not produce any order for the goods that it had itself sent to Internation or to Prof Wang to show it had bought the goods from those parties. Instead, it had to rely on incidental statements in letters from Prof Wang to try and establish its assertion that it had bought the goods from Internation and/or Prof Wang himself. If the defendant's failure to state

precisely whom it owed money to was not deliberate but was due to ignorance as to the creditor, this too was significant. How could the defendant not have known whom it was buying the goods from?

20 Coming to the final issue on the quality of the goods, this issue did not in my view afford the defendant a defence to a claim on the price. If the goods were not of merchantable quality, then the defendant had a counterclaim for damages. That was why after finding that the plaintiff was the actual supplier of the goods, I gave judgment in the plaintiff's favour but stayed that judgment pending the hearing of the counterclaim. Where goods supplied to a purchaser are not merchantable, the purchaser can refuse to accept them and in that case need not pay the price of the goods. If the purchaser accepts the goods, then he must pay the price and is limited to a claim for damages arising out of the breach of contract on the part of the seller.

21 Section 35(1) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) provides that a buyer is deemed to have accepted the goods when, *inter alia*, the goods had been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. Further, under s 35(4), the buyer is deemed to have accepted the goods when after the lapse of a reasonable time he retains them without intimating to the seller that he has rejected the goods.

22 In this case, the goods were delivered to the defendant between May 2003 and September 2004. None of the goods were rejected. Instead, they were on-sold by the defendant to its customers. It was only when the customers started to return the goods that the defendant noticed any problems. The earliest returns by the customers were effected in February 2004 but these were not notified to the plaintiff until some time thereafter and, despite some goods being returned, and the defendant from time to time complaining about the quality of the goods, the defendant continued to order goods from the plaintiff until September 2004. It was not till January 2005 (by which time the plaintiff and Prof Wang were pressing the defendant for payment) that the defendant wrote to Prof Wang and proposed that it (*ie*, the defendant) return to the plaintiff all the goods remaining in its warehouse.

23 On the above facts, I considered that the defendant had accepted the goods because it had not rejected them within a reasonable time and, secondly, by on-selling the goods to its own customers, the defendant had acted inconsistently with the ownership of the plaintiff as seller of the goods. Accordingly, the defendant had no defence to an action for the price but was limited to making a counterclaim for damages.

Conclusion

24 As the defendant was not able to satisfy me that there were any issues to be tried in respect of the claim, I allowed the plaintiff's appeal and granted the plaintiff summary judgment in the amount asked for.