Meyer Erwin v Lerner Brian and Others
[2006] SGHC 163

Case Number : Suit 411/2005

Decision Date : 15 September 2006

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Abraham Vergis (Drew & Napier LLC) for the plaintiff; Kevin Kwek (Legal Solutions LLC) for the first to third defendants

Parties : Meyer Erwin — Lerner Brian; Leong Anna; Sanjaya Antiques Gallery Pte Ltd; Sjenny Zahara Kremer

Civil Procedure – Rules of court – First to third defendants obtaining additional security for costs and appealing for a higher sum – Plaintiff cross-appealing for additional security to be discharged – Discretion of court – O 23 r 1(1)(a) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

15 September 2006

Woo Bih Li J:

Background

1 The case of the plaintiff, Erwin Meyer ("Meyer"), was that he had in the past agreed with the first defendant, Brian Lerner ("Lerner"), and the second defendant, Anna Leong ("Leong"), to sell antiques in Singapore. Lerner and Leong are husband and wife. The antiques would be supplied by Meyer while Lerner and Leong would operate the business in Singapore.

2 The third defendant, Sanjaya Antiquities Gallery Pte Ltd ("Sanjaya Antiques"), was incorporated on or about 9 May 2000 with a paid-up capital of $50,000 held in the following percentages:

Meyer – 50%

Lerner – 25%

Leong – 25%

3 In or around May 2000, Meyer agreed with Lerner and Leong to supply Sanjaya Antiques with antiques on a consignment basis. Meyer asserted that the terms of the consignment agreement were as follows:

(a) Title in each antique would remain with him until it was sold by Sanjaya Antiques.

(b) When a piece was sold, Sanjaya Antiques would pay him his cost price and his expenses for importing the piece into Singapore.

(c) Thereafter, the balance would be used to pay the overheads of Sanjaya Antiques including but not limited to salaries and rental.

(d) The net profit would be divided among him, Lerner and Leong according to their shareholdings in Sanjaya Antiques.

Lerner and Leong asserted, *inter alia*, that the fourth defendant, Sjenny Zahara Kremer ("Sjenny"), who was the wife of Meyer at that time, was also a party to the agreement to sell antiques in Singapore and the consignment agreement. They said they were informed by Meyer and Sjenny that the antiques were jointly owned by them. As for Meyer's 50% shareholding in Sanjaya Antiques, it was agreed amongst the four of them that Sjenny was beneficially entitled to half of Meyer's shareholding. They also did not accept the terms of the consignment agreement as asserted by Meyer to be correct. I will say more about this later.

4 The antiques which were sent by Meyer to Singapore were stored at a facility of Helu-Trans (S) Pte Ltd ("Helu-Trans"). Lerner and Leong would select the pieces to be sent to Sanjaya Antique's premises in Raffles Hotel ("the gallery"). The items delivered to the gallery would be recorded in a pick-up/collection receipt of Helu-Trans. Likewise, when items were to be returned, Helu-Trans would be contacted to come and collect the same and again the items to be collected would be recorded in such a receipt.

5 According to Lerner and Leong, the descriptions in such receipts were general in nature. Furthermore, Sanjaya Antiques did not maintain its own record of pieces being delivered to or collected from its premises.

6 Subsequently, Meyer gave written notice on or about 18 February 2003 to the effect that he would no longer allow his antiques to be sold. In the meantime, Sanjaya Antiques was in arrears with its rent. Accordingly the landlord's solicitors commenced action in District Court Suit No 844 of 2003 against Sanjaya Antiques for unpaid rent and obtained judgment in default of appearance on or around 23 March 2003. On or about 4 April 2003, the landlord obtained a writ of seizure and sale, and executed the seizure on pieces which were still at the gallery. Sjenny claimed that the seized pieces belonged to her and under an order of court on or about 27 October 2003, these pieces were released to her.

7 Meyer was seeking an account of the antiques which were supplied to Sanjaya Antiques from May 2000 to January 2003 and delivery up thereof or damages for conversion. As regards those antiques which were released to Sjenny, Meyer was also seeking an account of the same and delivery up of the same or damages for conversion on the ground that Lerner and Leong had conspired with Sjenny to convert those antiques. I should mention that para 19 of Meyer's affidavit filed on 7 March 2006 states that he was also claiming an account of the business of Sanjaya Antiques and an account of the net profits on the sale of his pieces. This claim for an account of the business and net profits of Sanjaya Antiques may not have been properly pleaded as para 16(i) of the amended statement of claim simply claims "an account of the Converted Antiques that were supplied … and delivery up or damages for conversion". In any event, this claim was not material for the appeals before me.

8 The first to third defendants did not accept that they were under a duty or liability to account. As regards the terms of the consignment agreement, they asserted that once an antique was sold, the sale proceeds were to be applied as follows:

(a) first, all operating expenses would be paid;

(b) thereafter, Meyer would be paid the cost of the piece sold which the first to third defendants referred to as the "In Price" together with payment of $10,000 to Lerner and Leong being start-up costs paid by them; and

(c) the balance would be divided between Meyer, Lerner and Leong according to the

shareholdings in Sanjaya Antiques, with Sjenny's share being paid through Meyer.

9 The first to third defendants also claimed that they had learned from Sjenny that Meyer had inflated or misrepresented the "In Prices" which induced them into paying higher "In Prices" than what he would have been entitled to. Accordingly they were claiming US$93,981, being the loss and damage arising from the inflated pricing or misrepresentation, or damages to be assessed.

10 The first to third defendants obtained an order dated 24 August 2005 that Meyer provide $20,000 as security for their costs up to the discovery stage on the basis that he was not ordinarily resident within Singapore, as he was residing in Yogyakarta, Indonesia and had no assets in Singapore. Meyer is a Dutch citizen. This security was provided by way of a banker's guarantee on 13 September 2005.

11 Discovery was then completed and at a pre-trial conference on 6 January 2006, the parties, *ie*, Meyer and the first to third defendants, were ordered to exchange their affidavits of evidence-in-chief by 24 February 2006.

12 On 22 February 2006, the first to third defendants applied for an order that Meyer furnish an additional $80,000 as security for their costs up to the end of trial. The application was heard by an assistant registrar on 31 March 2006 who ordered Meyer to furnish an additional $20,000 as such security. Being dissatisfied, the first to third defendants appealed against this order as they wanted the additional security to be for a sum larger than $20,000. Meyer cross-appealed as he did not want to furnish the additional $20,000.

13 I should also mention that in the meantime, Meyer had also applied to have the earlier order for the first $20,000 security to be varied or discharged. This was also heard on 31 March 2006 by the same assistant registrar. Meyer's application was dismissed. There is no appeal from this decision.

14 I heard the two appeals on 28 July 2006. I dismissed the appeal of the first to third defendants and allowed Meyer's appeal. In other words, as a result of my decision, Meyer need not have to furnish the additional $20,000 as further security. The first to third defendants have appealed to the Court of Appeal against my decision.

The court's reasons

15 Order 23 r 1(1)(*a*) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) states:

> Where, on the application of a defendant to an action or other proceeding in the Court, it appears to the Court —
>
> (*a*) that the plaintiff is ordinarily resident out of the jurisdiction;
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> …
>
> then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

16 In *Pandian Marimuthu v Guan Leong Construction Pte Ltd* [2001] 3 SLR 400 at [12], G P Selvam J stated the principles which govern the exercise of the power to order security as follows:

(1) Security will not be ordered based on the mere fact that the plaintiff is a foreigner with no address or assets within the jurisdiction. The applicant must establish that in all the circumstances of the case it would be just to grant the application.

(2) In considering the application, the court should be mindful of the underlying principle on which security is ordered — that is, the plaintiff should not be permitted to litigate on an unlikely claim and leave the defendant with a paper judgment for costs. This means that there must be an appreciable degree of certainty that there will [be] a judgment for costs in favour of the defendant. Otherwise the order for security will be purposeless and will defeat the ends of essential justice when the plaintiff is disabled or unable to secure the security.

(3) The court should be circumspect to ensure that the defendant's purpose of seeking security for costs is not to quell the plaintiff's quest for justice.

(4) Ultimately the court should, on a broad view, weigh the merits of the claim and defence and decide whether it would be just to order security.

17 In *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427 at [14], Chao Hick Tin JA (as he then was) said:

> It is settled law that it is not an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The court has a complete discretion in the matter: see *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534. It seems to us that under r 1(1)(a), once the pre-condition, namely, being "ordinarily resident out of the jurisdiction", is satisfied, the court will consider all the circumstances to determine whether it is just that security should be ordered. There is no presumption in favour of, or against, a grant. The ultimate decision is in the discretion of the court, after balancing the competing factors. No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the fact situation. Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff.

18 Mr Vergis, counsel for Meyer, stressed the strength of his client's case regarding the claim for an accounting from the first to third defendants in respect of the pieces delivered to the gallery. Mr Vergis asserted that 211 pieces had been delivered, 99 had been seized by the landlord and subsequently delivered to Sjenny. Of the balance of 112 pieces, Sanjaya Antiques had sold 64. This left a remainder of 48 pieces still unaccounted for. He stressed that even as regards the 64 pieces which had been sold, only 27 sales were accounted for to Meyer, leaving 37 sales to be accounted for. Mr Vergis submitted that the trial on this claim would involve only the question whether there was a duty to account and the failure to account. If so, accounts would be taken before the Registrar. He referred to *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004) vol 2 at p 181 which states:

> **Possession, not ownership.** A conveyance which transfers both possession and ownership to the transferee cannot be a bailment. The essence of bailment is the transfer of possession, not ownership. …
>
> **The obligation to return the goods.** In the first place, the fact that the bailee is given possession of the goods and not ownership means that he cannot keep the goods. They must be returned to the bailor at the end of the period of the bailment. The bailee is therefore normally under an obligation to return the bailed chattel to the bailor at the end of the period of the bailment, unless he can show good cause for not returning it. …

19 I should also elaborate that the 211 pieces which Mr Vergis referred to did not tally with the number of 142 pieces identified in the further and better particulars of Meyer filed on 14 September 2005. As regards this discrepancy, Mr Vergis said that the further and better particulars would be amended. I also learned from such further and better particulars that not all the pieces delivered to the gallery had come through Helu-Trans. Some had been shipped by Meyer to Sanjaya Antiques directly. Furthermore, Mr Vergis indicated that the actual number of pieces sent to the gallery, whether through Helu-Trans or not, might be more than 211 pieces as not all were covered by documentation.

20 It appeared from the further and better particulars of the first to third defendants filed on 3 October 2005 that the prices of the 64 pieces sold have been finally set out. However, apparently, Meyer has not received even the "In Price" for 37 of the pieces sold.

21 Mr Kwek, counsel for the first to third defendants, submitted that a duty to account would arise only if there was a fiduciary relationship. Thus, an agent had a duty to account to his principal and a partner had the right to have an account from his co-partners. However, in my view, such illustrations did not go so far as to suggest that a duty to account would arise only if there was a fiduciary relationship. Indeed, Mr Kwek had no authority to counter the basic proposition set out in p 181 of *Chitty on Contracts* that a bailor is normally under an obligation to return the bailed chattel to the bailor at the end of the period of bailment. Here, there was no dispute that the consignment agreement was a contract of bailment. It seemed to me clear that the bailed pieces had to be returned to Meyer, failing which the first to third defendants would *prima facie* be liable to account for both the sale proceeds of pieces which had been sold and the pieces which had not been sold.

22 However, Mr Kwek also submitted that para 9 of the amended statement of claim, which had set out the terms of the consignment agreement asserted by Meyer, did not plead the duty to account. I would add that para 12 of the amended statement of claim pleaded the failure to account but not the duty to account. Be that as it may, I was of the view that as this gap could easily be rectified by an amendment, it would serve no useful purpose to make an order for further security based on present pleadings, only to vary it once the amendment was made.

23 Mr Kwek also submitted that Meyer had himself on various occasions taken out pieces from the Helu-Trans storage facility or from the gallery. It seemed to me that Meyer was not seeking an account of antiques stored at Helu-Trans' facility but those which were delivered to the gallery. As for the pieces which Meyer had removed from the gallery, those would be part of the accounting process sought.

24 Mr Kwek estimated the trial to be between six and eight days. He also explained that the first to third defendants would be engaging an accounting expert and an expert on antiques. The former was to establish the operating expenses of Sanjaya Antiques which would affect the amount due to Meyer but, in my view, if the accounting records of Sanjaya Antiques have been properly kept, it should not be difficult to establish its operating expenses. As for the purpose of the expert on antiques, Mr Kwek said that the first and primary purpose was for that expert to match the items delivered to the gallery with those taken from the gallery. It seemed to me that this matching exercise was necessary because Sanjaya Antiques had failed in the first place to keep a proper record of the pieces. The descriptions in the pick-up/collection receipts may be general but not all the pieces came through Helu-Trans. In any event, it was incumbent on Sanjaya Antiques to have better and more detailed descriptions, and, if necessary, photographs of the pieces, to avoid confusion. Any difficulty in the matching of pieces delivered to the gallery with pieces taken from it arose primarily, if not solely, because Sanjaya Antiques failed to keep proper records of the movements of the pieces to and from the gallery as it should have done. In any event, it seemed to me that it would not be

difficult for Meyer to establish the liability to account and it would then be for the first to third defendants to account.

25 According to Mr Kwek, the second purpose for the expert on antiques was to establish the value of the pieces to support the counterclaim if the court did not accept the "In Prices" disclosed subsequently by Sjenny to Lerner or Leong. In my view, Meyer was not liable to provide security for costs of the counterclaim in which he is the substantive defendant.

26 I come now to the second claim by Meyer in respect of conspiracy. As I have mentioned, the landlord subsequently seized the antiques remaining at the gallery to meet its judgment for unpaid rent. When it did so, Sjenny was informed about the same although there was no elaboration as to which of the first to third defendants had informed her. After seizure, Lerner executed an affidavit to say that the antiques belonged to Sjenny and Meyer and, consequently, the seized antiques were released to Sjenny in circumstances which I shall elaborate on later.

27 In support of the assertion, before me, that the antiques belonged to both Sjenny and Meyer, Lerner pointed out in his seventh affidavit filed on 7 March 2006 that payments in respect of the antiques had been made to the joint account of Sjenny and Meyer. However, Meyer countered that there were other payments to him solely. There were at least two e-mails from Lerner and/or Leong in April 2002 in which Meyer's confirmation was sought before payment was made to or collected by Sjenny.

28 Furthermore, Meyer claimed that all the e-mails about the business were between Meyer on the one hand and Lerner and/or Leong on the other hand. This appeared to be true until much later in February 2003 when there was an exchange of e-mails between Sjenny on the one hand and Lerner and/or Leong on the other hand. By that time the relationship between Meyer and Lerner/Leong was becoming strained. However, Lerner pointed out in an affidavit that for some of the shipments, Sjenny was listed as the shipper on the invoice and packing list.

29 On balance, it seemed to me, for the time being, that Meyer had the upper hand in his assertion that the consignment agreement was only with him and not with both Sjenny and him.

30 In any event, the events subsequent to the seizure of the antiques by the landlord carried more weight in respect of the second claim. It was not disputed that Sjenny had been informed about the seizure which led to her making a claim for and obtaining the release of the antiques. I will say more about this later. As for Meyer, he asserted that he had not been informed about the seizure at the material time. Significantly, it was only in a later affidavit of Lerner, *ie*, his tenth affidavit filed on 25 May 2006, that he said that both Leong and he had recently found copies of two letters, one purportedly sent to Meyer (dated 17 April 2003) and the other (dated 16 April 2003) to the landlord's solicitors. The one to Meyer was to put him on notice that a writ of seizure and sale dated 8 April 2003 had been served on Sanjaya Antiques and to inform him that any claim to the pieces seized should be made within seven days from the date of the notice of seizure and inventory. However, prior to this affidavit, Lerner had not even alluded to the fact that such a letter had been sent but could not be found, even though Meyer had already said he had not been notified about the seizure. It was strange, to say the least, that notwithstanding the urgency and importance of the seizure, Lerner and Leong had chosen to send only a letter to Meyer at an address in Yogyakarta, Indonesia, without also sending him an e-mail when they knew how to reach him by e-mail. Indeed, in the past, these parties had communicated via e-mail.

31 Furthermore, as I have mentioned, no elaboration was forthcoming as to how Sjenny was notified about the seizure. According to Meyer, she too was in Indonesia at the material time (see

para 23 of Meyer's affidavit filed on 20 March 2006). On the state of the evidence before me, the inference I drew was that Lerner and Leong had preferred Sjenny to Meyer and gave her the opportunity to claim back the pieces seized.

32 I should mention one other point. The first to third defendants sought to make something of the fact that Meyer still had not served the writ on Sjenny. However, Mr Vergis drew my attention to correspondence he had sent to Legal Solutions LLC, the solicitors of the first to third defendants, in September 2005 asking for the current residential address of Sjenny to effect service of the writ on her. The reply dated 4 October 2005 was that these defendants had no knowledge of her whereabouts. Yet by a facsimile dated 20 February 2006, Legal Solutions LLC claimed that by a simple telephone call, their clients had managed to find out the current whereabouts of one Bruno Guilloux whom Sjenny had subsequently married and that they were currently stationed in Novotel World Trade Centre in Dubai. If such information could have been obtained by these defendants with a simple phone call, it was remarkable that they did not obtain the information in early October 2005 but only in late February 2006 to pass on to Meyer. It did seem to me that they were hoping he would delay his current proceedings against the first to third defendants while he attempted service on Sjenny.

33 In all the circumstances, I was of the view that it would not be just to order Meyer to furnish additional security over the initial $20,000 security he had provided.

34 I would add that Meyer had also asserted in his affidavit filed on 8 May 2006 that if he was required to furnish additional security, this would seriously undermine his ability to continue prosecuting his claims. He claimed that the antiques delivered to the gallery formed a very substantial part of his assets. He also claimed that Sjenny had withdrawn most of the money in their joint accounts without his knowledge or consent. As a result, he had to borrow money from family and friends which he set out as follows:

(a) a loan from Raymond Davids for US$72,299 evidenced by a declaration dated 11 April 2006 and purportedly signed by Meyer and Davids;

(b) a loan from Michiel and Marian Van Der Mere for €25,000 evidenced by an acknowledgment signed by Meyer and one Irene (who is either his current girlfriend or wife); and

(c) a loan from his father of US$50,000 which was not documented.

35 The concluding paragraph of that affidavit stated that should he be required to furnish an additional $20,000 as security for costs he would find it "extremely difficult financially" to pursue his claims and he "may not be able to continue the suits". In my view, this affidavit was carefully crafted to give the impression that Meyer could not afford to provide the additional $20,000 security. I was not persuaded by it but I did not have to determine how much more security he should provide in view of my conclusion that it was just, for other reasons, not to order him to do so.