Silberline Asia Pacific Inc v Lim Yong Wah Allan and Others
[2006] SGHC 27

Case Number : Suit 133/2005, RA 294/2005

Decision Date : 16 February 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Adrian Tan and Chui Li Jun (Drew and Napier LLC) for the plaintiffs; Peter Yap (instructed) and Choo Kwun Kiat (Choo Kwun Kiat) for the defendants

Parties : Silberline Asia Pacific Inc — Lim Yong Wah Allan; Lim Kah Soon Jason; Globell Chemical Co Pte Ltd

Civil Procedure – Summary judgment – Whether to stay execution of summary judgment until after trial of defendant's counterclaim – Degree of connection between plaintiff's claim and defendant's counterclaim – Plausibility of defendant's counterclaim – Order 14 r 3(2) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

16 February 2006

Belinda Ang Saw Ean J:

1 The plaintiff, Silberline Asia Pacific Inc, is a Delaware corporation with a registered branch office in Singapore. The plaintiff is part of the Silberline group of companies and the main business of the group is in the manufacture and worldwide distribution of special effects pigment products. At all material times, the Singapore branch office was responsible for the distribution of Silberline products in Asia Pacific and the Middle East. The first defendant, Allan Lim Yong Wah, at the relevant time headed the plaintiff's branch office in Singapore as its managing director. The second defendant, Jason Lim Kah Soon, is a director of the third defendant, Globell Chemical Co Pte Ltd ("Globell"). The second defendant is also the managing director of Globell Chemical (China) Co Ltd ("Globell Hong Kong"), a company incorporated in Hong Kong SAR. This appeal only concerned Globell.

2 On 13 October 2005, the plaintiff obtained summary judgment against Globell for the total sum of US$5,245,736.96 with interest as prayed and costs in any event to be taxed, if not agreed. At the same time, the assistant registrar ordered a stay of execution of the entire judgment sum pending determination of Globell's counterclaim for wrongful termination of its sole distribution agreement of Silberline products. Globell asserted that the quantum of the counterclaim exceeded the judgment sum. On 27 October 2005, the plaintiff appealed against the stay order. At the conclusion of the hearing of the appeal, I was of the view that a stay should not be granted in respect of the entire judgment sum. The correct outcome of this appeal must be to order a stay of execution of part of the judgment sum, namely, US$1,785,247.65. I also ordered costs of the appeal fixed at $2,000. Globell has appealed against my decision.

3 Notably, Globell did not appeal against the summary judgment. A stay of execution in such a situation is at the discretion of the court based on what is just in all the circumstances of the particular case as such an order will effectively require a successful plaintiff to wait for its money. Order 14 r 3(2) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) confers on the court discretionary powers to order a stay of execution of a summary judgment until after the trial of a defendant's counterclaim. In exercising its discretion, the court will have regard to the degree of connection between the claim and cross-claim together with any other relevant circumstances such as the merits of the counterclaim and the financial ability of the plaintiff to satisfy any judgment on the counterclaim (as to which see *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at

p 155).

4 The requirement of a connection between the claim and cross-claim was reaffirmed by the Court of Appeal in *Cheng Poh Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR 170 at [11] and [18] in these terms:

> It is settled law that where claims and counterclaims arise out of the same transaction, and while the claims are admitted and the counterclaims are disputed, then so long as the counterclaims are plausible, the correct order to make would be that while judgment should be entered in respect of the claims, it should be stayed pending trial of the counterclaims: see *Sheppards & Co v Wilkinson & Jarvis* (1889) 6 TLR 13. But where a counterclaim does not arise from the same transaction, or is not connected therewith, different rules apply: *eg*, *Anglian Building Products Ltd v W & C French (Construction) Ltd* (1978) 16 BLR 6, and *AB Contractor Ltd v Flaherty Brothers Ltd* (1978) 16 BLR 10.
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> In short, special circumstances must be shown for there to be a stay of execution. The mere fact that a defendant has a *bona fide* counterclaim arising out of another contract with the plaintiff, unconnected with the contract which forms the subject matter of the action, will not of itself constitute a "special circumstance" justifying a stay of execution.

5 I begin with the question of whether the nature of Globell's counterclaim was sufficiently connected with the plaintiff's claim to allow a defence of equitable set-off. Having rejected for the reasons below the plaintiff's contention that Globell was not the proper party to bring the counterclaim, I was of the view that the degree of closeness between the plaintiff's claim and Globell's counterclaim required for an equitable set-off was made out. The plaintiff's claim was for the price of Silberline products. The purpose of the distribution agreement was to enable Globell to sell in the designated territories the Silberline products which it procured, ordered and purchased from the plaintiff. It would therefore be unjust to allow the plaintiffs' claim for the price of Silberline products sold and delivered without taking into account Globell's counterclaim.

6 This leads to the issue of whether there is a plausible counterclaim for a sum exceeding the judgment sum. Counsel for the plaintiff, Mr Adrian Tan's first contention was that the counterclaim was a sham in that on Globell's own pleaded case in para 3 of the Amended Defence and Counterclaim, the sole distributor for Silberline products in China and Hong Kong was Globell Hong Kong and not Globell. Alternatively, the counterclaim was a sham as Globell had failed to produce documentary evidence to support its assertion that the amount of the counterclaim exceeded the judgment sum. In the premises, the counterclaim was merely put forward to cause delays to the plaintiff.

7 In response, Mr Peter Yap for Globell contended that Globell has *locus standi* to sue the plaintiff for wrongful termination of the sole distributorship agreement. At the request of the plaintiff, from 2003 onwards, it was Globell (instead of Globell Hong Kong) who placed all orders and purchases for the sale of Silberline products in China and Hong Kong (as to which see paras 23 and 24 of the Amended Defence and Counterclaim). Furthermore, no notice of termination of the sole distributorship agreement was ever given by the plaintiff to Globell. At any rate, Globell did not regard the announcements in the two flyers mentioned below as constituting notice, let alone proper and valid notice, of termination of the sole distributorship agreement. The first flyer contained the announcement that the new distributor of the Silberline products in China was one Silhantan International Trading (Shanghai) Co Ltd ("Silhantan") and that flyer was circulated at the China

Coating Show 2003. The second flyer of 29 January 2004 was signed by the first defendant on behalf of the plaintiff and it was circulated to customers stating that the new distributor in China was Silhantan.

8 I did not accept Mr Tan's submission that Globell lacked the *locus standi* to sue the plaintiff. Paragraph 3 of the Amended Defence and Counterclaim was not to be read in isolation but together with two later paragraphs, namely, paras 23 and 24 of the Amended Defence and Counterclaim. In fact, Joseph Patrick Dowd ("JPD"), a director of the plaintiff, confirmed in his affidavit of 23 February 2005 that Globell was the distributor of Silberline products for Singapore and Malaysia between 1991 and April 2004 and that Globell Hong Kong was its distributor for China and Hong Kong from 1995 to 2002. JPD accepted that at some point thereafter, Globell took over from Globell Hong Kong the distributorship for China and Hong Kong until January 2004.

9 A cross-claim could arise from the alleged wrongful termination of the distributorship agreement, whether by the plaintiff's appointment of a new distributor for China and Hong Kong in the way alleged or by its eventual refusal to supply Silberline products to Globell. It seems to me that in these circumstances, the consideration is whether the wrongful termination constituted a repudiatory breach. If there was acceptance of the breach by the third defendant's behaviour, the distributorship agreement would come to an end.

10 On the evidence, there were no more supplies to Globell by May 2004. According to the second defendant, from December 2003, the plaintiff in breach of the distributorship agreement reduced its monthly supply to Globell (which had averaged not less than US$1m per month) to less than half of the monthly average. By March 2004, the plaintiff reduced its sales to Globell to approximately one-third of the monthly average and, in breach of the sole distributorship, increased supplies to Silhantan. In April 2004, the plaintiff only allowed a further supply totalling US$117,070.44 to Globell. There was also the incident concerning a further order for US$7,871.06 which the plaintiff refused to supply despite having received payment. The cheque was subsequently cancelled as the plaintiff refused to deliver the order to Globell. In the end, the plaintiff refused to supply any further orders to Globell.

11 The problem, as I saw it, was with Globell's quantification of its losses. For the China and Hong Kong markets, the counterclaim was for damages in the nature of loss of profits, overriding commission and headcount contribution. Mr Yap submitted that Globell was unable to fully quantify its true losses only because the plaintiff had not given discovery of its sales to Silhantan. That was not an entirely satisfactory explanation. As stated in *Singapore Civil Procedure 2003* ([3] *supra*) at p 156, it is for the defendant to "particularise the amount of his set-off or counterclaim or to specify or indicate how it is made up or calculated".

12 It was fanciful to suggest that the quantum of the counterclaim could well exceed the judgment sum as it was based on a continuing loss which was not borne out. There should be a cut-off point for any claim for loss of profits, overriding commission and headcount contribution. On Mr Yap's analysis of the facts, the appointment of a new distributor was a breach of the distributorship agreement but at the same time, in the absence of a valid notice of termination, Globell continued as the plaintiff's sole distributor of the Silberline products sold in Malaysia, Singapore, China and Hong Kong. The purported removal of Globell as sole distributor in the way it was alleged to have been done was *prima facie* wrongful, but it does not follow, as explained below, that Globell was thus still the plaintiff's sole distributor and that the breach continued.

13 Moreover, as the sole distributorship agreement was not in writing, no terms of the oral distributorship agreement were initially pleaded nor spelt out in the second defendant's affidavits filed

on behalf of Globell. However, in the Additional Further and Better Particulars filed by Globell on 3 August 2005, the latter confirmed that reasonable notice of termination would have to be given. It followed that the damages Globell was to receive had to reflect its loss of the chance to earn profits, overriding commission and headcount contribution during the notice period it was entitled to receive. (Incidentally as to what constitutes reasonable notice, Globell did not express a view.) To that extent, Globell had not verified the legal basis of its claim for damages continuing beyond April or May 2004 in respect of the China and Hong Kong markets.

14 Globell had in the Amended Defence and Counterclaim asked the plaintiff to account for all its sales for the year 2003 in respect of all four markets. However, the relief sought ignored the fact that the termination of the distributorship agreement for Malaysia and Singapore was in April 2005 (as to which see Globell's Additional Further and Better Particulars dated 3 August 2005). The plaintiff even suggested that the termination could have been earlier than April 2005. Globell did not honour its obligation to pay for the Silberline products within the 90-day credit period after November 2003 so that by April 2004, the plaintiff was entitled to and did accept Globell's repudiatory breach by termination of its relationship with Globell. These discrepancies lent some credence to Mr Tan's submission that the third defendant's quantification of damages for wrongful termination of the distributorship agreement for Malaysia and Singapore were *prima facie* unsupportable. I took these discrepancies into account in this appeal.

15 As stated, I was of the view that the nature of the counterclaim was not fanciful and it was not bound to fail as regards certain amounts of the claim. Significantly, the breaches which Globell complained of were related to the China and Hong Kong markets. The complaints were directed at loss of profits from the sales allegedly directed to Silhantan. Adopting the figures in para 15(a)(iii) of the second defendant's third affidavit of 17 May 2005, Mr Tan submitted that a reasonable quantum of damages using May 2004 as a cut-off point would be US$1,025,985, comprising:

(a) December 2003: US$ 114,000

(b) Jan – May 2004: US$ 911,985
(at US$182,397 per month)

16 JPD in his affidavit of 30 April 2005 deposed that between 1 November 2003 and 30 March 2004, the plaintiff sold and delivered Silberline products to Globell, the value of which amounted to approximately US$3.2m. Mr Tan clarified that out of the judgment sum of US$5,245,736.96, a sum of US$1,388,847.65 represented the purchases from the plaintiff for the China and Hong Kong markets. As Globell had sold Silberline products to Globell Hong Kong at costs, I adopted an approach where the outstanding sum of US$1,388,847.65 was taken as a reasonable estimate of the value of business, which is the normal contractual measure of damages. I also added to that figure the claim for overriding commission of US$39,000 and US$92,400 and headcount contribution of US$265,000. A stay of execution pending determination of the counterclaim was thus in the court's discretion limited to the sum of US$1,785,247.65.