Pacific Integrated Logistics Pte Ltd v Gorman Vernel International Freight Ltd [2007] SGHC 10

Case Number : Suit 788/2005, RA 242/2006

Decision Date : 03 January 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Wendy Tan (Haq & Selvam) for the plaintiff/respondent; Magdalene Chew Sui Gek and Martha Lee Mei (AsiaLegal LLC) for the defendant/appellant

Parties : Pacific Integrated Logistics Pte Ltd — Gorman Vernel International Freight Ltd

Civil Procedure – Interim orders – Security for costs – Plaintiff foreign company with no assets in Singapore – Whether court should exercise discretion to make order for security for costs against plaintiff in circumstances when potential order of costs may be enforced in plaintiff's jurisdiction – Order 23 r (1)(a) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

3 January 2007

Choo Han Teck J:

1 This was an appeal against the decision of the Assistant Registrar ("the AR") dismissing the appellant's application for security for costs in Suit No 788 of 2005("the main claim"). The appellant and respondent in this appeal were respectively the defendant and the plaintiff in the main claim. The respondent's claim against the appellant arose out of damage caused to five shipments of cargo. According to the respondent, the appellant had, amongst other things, breached its contract and/or duty as the handling and/or booking agents hired by the respondent for these five shipments. After hearing the parties, I allowed the appeal and granted security in the amount of S$60,000.

2 The appellant's application for security was filed pursuant to O 23 r 1(1)(a) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"), which provides:

> **Security for costs of action, etc (O 23, r 1)**
>
> 1.– (1) 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 jurisdiction;
>
> …
>
> 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.
>
> [emphasis added]

3 The parties were agreed that the respondent, a company incorporated under the laws of New Zealand, was a "plaintiff … ordinarily resident out of the jurisdiction" within the meaning in O 23 r 1(1)(a) of the Rules. In addition, it was not disputed that the respondent had no assets in Singapore. The only issue in this appeal was whether it would be "just" to grant an order for security "having regard

to all the circumstances".

4 Whilst O 23 r 1(1) confers a court with a broad measure of discretion, the exercise of this discretion remains guided by certain well-established principles. The middle ground between the Scylla of placing the law in a straightjacket through a formalistic "check-list" approach and the Charybdis of engendering a body of jurisprudence devoid of any coherent underlying basis seems to me to be the fairest approach. How might this be achieved?

5 To begin with, it is well accepted that proof of a plaintiff's residence outside Singapore is a *threshold condition* under r 1(1)(a), rather than a conclusive indicator that security should be ordered: see *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427 ("*Wishing Star*") at [14]. Although security will not follow as a matter of course whenever a foreign plaintiff is involved, it will generally be ordered where the circumstances are evenly balanced: see *Wishing Star* at [14]. This results, *not* from an inherent presumption or predisposition in favour of granting security, but rather as a matter of discretion because a plaintiff's foreign residence will often tip the finely balanced scales of justice in favour of such an order: see also *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1998] SGHC 171 at [3]; *Aeronave & Another v Westland Charters Ltd* [1971] 3 All ER 531 at 533. The court's overriding duty in all cases is to give effect to "what, in all the circumstances of the case, is the just answer": see *Porzelack Kg v Porzelack (UK)* [1987] 1 WLR 420 ("*Porzelack*") at 423. Unless "the circumstances of the case" and the "just answer" are considered as a whole, that is to say, unless the proposed solution adequately accounts for all the special features of each set of facts, the foregoing phrase may not be of much assistance. On the other hand, the court must assess the gravity of each individual factor so that emphasis might properly be given to the stronger factors. This would ensure that in considering the "circumstances of the case" and the "just answer", the court does not distract itself with a long inventory list of factors to consider.

6 In the present appeal, the respondent argued that the facts did not warrant an order of security. One of the considerations militating *against* the provision of security was the fact that any order of costs against the respondent would be enforceable in New Zealand, where it was incorporated. According to the respondent, the appellant should therefore be left to enforce any subsequent order of costs against in its assets in New Zealand. In response, the appellant contended that the availability of foreign enforcement was not a sufficient reason to disallow security. In counsel's submission, a defendant who has been made an unwilling party to an unmeritorious claim should not additionally be made to undergo the added expense of commencing foreign proceedings to recover its legal costs.

7 These arguments raised a more fundamental question in this area of law: at this *preliminary* stage of the proceedings, *how far* should the law go to *facilitate* a defendant's possible need in the future to recover an order of costs? The resolution of this question in each case will invariably depend on the countervailing detriment that would be visited on the plaintiff. Hence, where the plaintiff has a strong claim that would be stifled by an order of security, a court may refuse to grant security, particularly if there are "realistic alternatives" which would make it "comparatively simple" to enforce an order of costs against a plaintiff's foreign assets: see *Porzelack* ([5] *supra*) at 426. At the same time, this is not to say that security will *never* be ordered if foreign enforcement proceedings are a viable option. The purpose behind O 23 r 1(1)(a) is not limited to protecting a defendant in the extreme situation where an order of costs would otherwise be a "paper judgment". On a more nuanced level, it is also aimed to *reduce* the time and expense involved in enforcing such orders. As stated by our Court of Appeal in *Ooi Ching Ling Shirley v Just Gems Inc* [2002] 3 SLR 538 at [19], one of the rationales for granting security against a foreign plaintiff is "*the delay or expense* that will arise in enforcing the costs order abroad" (emphasis added).

8 In the present case, the enforceability of an order of costs in New Zealand was undoubtedly a relevant consideration. However, in light of the entire circumstances, I found that justice would be better served if an order of security was granted. By the respondent's own admission, it was a financially viable concern with a significant body of assets in New Zealand. An order of security would not therefore prejudice its conduct of the main claim in any way. Against this, the potential inconvenience and expense to the appellant, of foreign enforcement proceedings were, therefore, material circumstances in favour of awarding security for costs.