Ong Jane Rebecca v Pricewaterhousecoopers and Others
[2009] SGHC 29

Case Number : Suit 156/2006, RA 203/2008, 204/2008, 205/2008, 206/2008, 207/2008, 218/2008, 226/2008

Decision Date : 06 February 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Edmund Kronenburg, Andrew Ho and Gina Tan (instructed), Sam Koh (Sam Koh & Co) for the plaintiff; Eugene Thuraisingam (Allen & Gledhill LLP) for the first and second defendants; Quentin Loh SC, Elaine Tay and Tan Ai Lin (Rajah & Tann LLP) for the third defendant

Parties : Ong Jane Rebecca — Pricewaterhousecoopers; Pricewaterhousecoopers LLP; Arul Chew & Partners

Civil Procedure – Costs – Security – Whether there was need for security for costs when defendants were insured

Civil Procedure – Costs – Security – Whether overlap between defence and counterclaims should be taken into consideration when determining whether security should be ordered and quantum of any security to be provided

Civil Procedure – Costs – Security – Whether impecuniosity of individual, as compared to impecuniosity of company, was stronger factor in favour of encouraging, rather than limiting, uninhibited access to courts

6 February 2009

Judith Prakash J

Background Facts

1 The plaintiff, Jane Rebecca Ong, is a British National and her place of residence is the United Kingdom. The plaintiff commenced litigation proceedings in 1991 by Originating Summons No 939 of 1991 ("OS 939") against, inter alia, her ex-husband's mother in respect of her claim to a share in the Estate of Ong Seng King, deceased (the "Estate").

2 By way of a Judgement dated 16 July 2006, the High Court directed that an inquiry be held to determine the assets of the Estate and the plaintiff's rights, share and/or entitlement in the Estate (the "Inquiry").

3 The first defendant, PricewaterhouseCoopers ("PwC"), is a firm of Certified Public Accountants practicing in Singapore. PwC was engaged by the plaintiff as an expert to assist in ascertaining her rights, share and/or entitlement in the Estate and to respond to the reports prepared by the Estate's accountants, Messrs Arthur Andersen.

4 The second defendant, PricewaterhouseCoopers ("PwC UK"), is a limited liability partnership registered in the United Kingdom and is a firm of Chartered Accountants practicing in the United Kingdom.

5 According to the plaintiff, both PwC and PwC UK were engaged by her as an expert in or

around April 1999 for the purposes of the Inquiry. The plaintiff claims that PwC UK recommended PwC, their Singapore counterpart, and in particular, Mr Chan Kek Teck. PwC UK represented to the plaintiff that Mr Chan Kek Teck was well known to the Singapore Courts as an expert and was experienced in Estate matters and the administration thereof.

6 The third defendants were, from time to time between 1996 and 2006, the plaintiff's solicitors in respect of, inter alia, OS No. 939 of 1991.

7 In March 2006, the plaintiff commenced an action against the three defendants under Suit No 156 of 2006/W. With respect to PwC and PwC UK, the plaintiff claims damages for breach of contract and/or breach of their duty of care when they negligently failed or neglected to act with reasonable skill or care in carrying out their duties.

8 With respect to PwC, the plaintiff's main allegation is that PwC had erred in the methodology adopted in its report. Although the scope of the Inquiry as directed by the Court did not allow the plaintiff to recover damages for breaches of trust committed by the personal representative of the Estate, the report prepared by PwC purported to deal with the Estate on the basis that there were breaches of trust committed by the personal representative of the Estate. This caused the number and value of the assets of the Estate to be inflated.

9 PwC's defence is that it had prepared its report and proceeded with the Inquiry in accordance with the express instructions of the plaintiff, as well as of her solicitors. The plaintiff is the author of her own misfortune if the instructions from the plaintiff had proceeded on an erroneous legal basis. She should therefore be precluded from claiming her loss (if any) from PwC.

10 PwC has made a counterclaim against the plaintiff for the fees due to them in respect of their professional services rendered in connection with the Inquiry.

11 With respect to PwC UK, the plaintiff avers that they should be liable to her to the same extent as PwC. This is because they allegedly failed to supervise the work performed by PwC. Alternatively, they should also be liable for failing to recommend a competent expert to the plaintiff.

12 PwC UK agrees that they had recommended PwC to the plaintiff since the Inquiry was to be conducted in the Singapore Courts. PwC UK claims that the plaintiff subsequently appointed PwC and it was PwC who liaised with the plaintiff and/or her solicitor in the drafting and preparation of the report. There was no contractual relationship between PwC UK and the plaintiff, and PwC UK played no part in preparing the report. According to PwC UK, they did not owe any duty to the plaintiff to supervise the work performed by PwC and there is no evidence that PwC UK had agreed to supervise the work done by PwC.

13 The plaintiff's cause of action against the third defendants is primarily based on breach of retainers and the tort of negligence. The crux of the plaintiff's claim against the third defendants is their alleged negligence in failing to plead breaches of trust in OS 939. The third defendants deny that there was any breach of retainer or negligence on their part. Their main defence is that the Statement of Claim filed in OS 939 was not prepared by them. The third defendants say they were only retained by the plaintiff to draft the written submissions and reply submissions in OS 939 after the conclusion of the trial.

14 The third defendants have also made a counterclaim against the plaintiff for the professional fees due to them in return for the professional services they have rendered to the plaintiff.

15 On 11 March 2008, PwC filed Summons No. 1110 of 2008/V ("SUM 1110") for the plaintiff to provide security in the sum of $250,000 for PwC's costs up to and including the completion of the trial of this action. On 6 May 2008, the Assistant Registrar granted an order for security for costs against the plaintiff in the sum of $125,000. The plaintiff appealed against the decision of the Court by way of Registrar's Appeal No. 204 of 2008/T ("RA 204"). PwC filed a cross-appeal by way of Registrar's Appeal No. 206 of 2008/C ("RA 206")

16 PwC UK filed Summons No. 2324 of 2008/N ("SUM 2324") for the plaintiff to provide security in the sum of $220,000. On 10 June 2008, the Assistant Registrar granted an order for security for costs against the plaintiff in the sum of $60,000. The plaintiff appealed against the decision of the Court by way of Registrar's Appeal No. 218 of 2008/N ("RA 218"). PwC UK filed a cross-appeal by way of Registrar's Appeal No. 226 of 2008/C ("RA 226").

17 The third defendants filed Summons No. 1239 of 2008 ("SUM 1239") for security for costs in the sum of $250,000 to be provided by the plaintiff. The Assistant Registrar granted an order for security for costs against the plaintiff in the sum of $125,000. The plaintiff appealed against this decision of the Court by way of Registrar's Appeal No. 203 of 2008/N ("RA 203"). The third defendants filed a cross-appeal by way of Registrar's Appeal No. 207 of 2008/C ("RA 207").

18 On 10 October 2008, having heard all the appeals, I made the following decisions:

(a) I dismissed RA 206, RA 207 and RA 226.

(b) I allowed RA 204 in part in that I reduced the security to be provided by the plaintiff to $70,000.

(c) I allowed RA 218 in part in that I reduced the security to be provided by the plaintiff to $40,000.

(d) I allowed RA 203 of 2008 in part in that I reduced the security to be provided by the plaintiff to $70,000.

I now give my reasons for making the above decisions.

The law

19 The applications by all the defendants were made pursuant to O 23 r 1(1) (a) of the Rules of Court (Cap 322, 2006 Rev. Ed.). This rule provides as follows:

(1) Where, on the application of a defendant to an action or other proceeding in the High Court, it appears to the Court —

(a) that the plaintiff is ordinarily resident out of the 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.

20 There is no dispute that the plaintiff is ordinarily resident out of jurisdiction. The fact that the

plaintiff is ordinarily out of jurisdiction does not mean that an order for security for costs will be granted as a matter of course. It only means that the court's discretion is invoked, and in the exercise of that discretion, the court decides whether or not to order security for costs against the plaintiff.

21 In *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR 600 ["*Creative Elegance*"], the Court of Appeal held that the Court should consider all the circumstances and then decide whether it is just to order the plaintiff to provide security for costs and the extent of such security. There is no presumption in favour of, or against, a grant of security. See *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427 at 431.

22 The strength or weakness of the plaintiff's claim is one of the relevant factors. The Court considers whether the plaintiff has a *bona fide* claim with a reasonable prospect of success. The decision as to whether the plaintiff's claim is a *bona fide* one with a reasonable prospect of success is made without a detailed examination of the merits of the case. In *Porzelack K.G. v. Porzelack* (UK) Ltd [1987] 1 W.L.R. 420 at 423, Sir Nicholas Browne-Wilkinson V.C stated that:

> A major matter for consideration is the likelihood of the plaintiff succeeding. This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.

23 Similarly, in *Omar Ali bin Mohd and Others v Syed Jafaralsadeg bin Abdulkadir Alhadad and Others*[1995] 3 SLR 388 at [18], the Singapore High Court held that while the likelihood of the plaintiff succeeding is a relevant consideration, an application for security for costs should not be made the occasion for a detailed examination of the merits of the case. Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

24 On the facts of this case, I found (and the plaintiff and third defendants have conceded) that the strength of the case is a neutral factor in the determination of whether security should be granted. I agreed with the Assistant Registrar that each of the parties has an arguable case on the face of it. The probability of success or failure cannot be clearly demonstrated without a trial.

25 The plaintiff argued that there is no need for an order for security to the defendants because they are insured. Therefore, the defendants would not be out of pocket if they have difficulty in enforcing an order for costs. However, the fact that a defendant is insured is irrelevant in determining whether an order for security should be made. See *Paper Properties Ltd v Jay Benning & Co* [1995] 1 BCLC 172.

26 The plaintiff also argued that an order for security should not be made because this would provide the defendants with security for the costs of mounting their counterclaims against the plaintiff. In *Jurong Town Corp v Wishing Star Ltd* [2004] 2 S.L.R. 431, the Court of Appeal held that the fact that the issues for the defence and counterclaim are largely similar is a factor that should be taken into account in deciding the quantum of security to be ordered. In the case, the defendant's defence to the claim and its counterclaim were launched from the same platform. The Court held that granting security to the defendant could amount to indirectly aiding the defendant to pursue its

counterclaim. This is because costs incurred in defending the action could be regarded as costs necessary to prosecute the counterclaim.

27 I considered that on the facts before me there was some overlap between the defences and counterclaims. This does not mean, however, that no security can be ordered. The extent of the overlap should be a factor that is taken into account in considering whether security should be ordered and the quantum of any security to be provided. See *PT Muliakeramik Indahraya TBK v Nam Huat Tiling & Panelling Co Pte Ltd* [2006] SGHC 154. In this case, I considered that the overlap was limited and only had a small impact on the costs of defence.

28 The plaintiff argued that an order for security for costs against her would be oppressive and would stifle her claim. This was due to her difficult financial position: the plaintiff is currently under an Individual Voluntary Arrangement in the United Kingdom. She has been unemployed since at least 1996.

29 In *Faridah Begum bte Abdullah v Dato' Michael Chong* [1995] 2 M.L.J. 404, it was held that the mere bankruptcy or impecuniosity of the plaintiff is not a sufficient ground for ordering security for costs against him. On the other hand, the Court is not precluded from ordering security for costs merely by reason of the plaintiff's bankruptcy or impecuniosity. The fact that the plaintiff here is a natural person rather than a company was material as the attitude in cases of impecuniosity differs in relation to companies and to individuals.

30 In *Ho Wing On Christopher and Others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR 817 ["*ECRC*"], the Court of Appeal observed:

> In addition, we feel that the courts' approach to the principle expressed in *Al Fayed* must be sufficiently nuanced to discern between different categories of impecunious claimants. The balance between a claimant's right of access to the courts and a successful defendant's right to be reimbursed his legal costs needs to be struck differently depending on the type of claimant involved. The distinction that needs to be drawn between differing categories of claimants is illustrated by the principles governing security for costs. Whilst it is trite law that poverty is no bar to a litigant who is a natural person (*Cowell v Taylor* (1885) 31 Ch D 34 at 38), s 388(1) of the CA subjects all companies to the potential liability to furnish security for costs where "there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence". As Megarry VC stated in *Pearson v Naydler* [1977] 1 WLR 899 at 905, the rationale for this distinction between natural persons and companies is as follows:
>
> > *A man may bring into being as many limited companies as he wishes*, with the privilege of limited liability; and section 447 [the equivalent of our s 388] provides some protection for the community against *litigious abuses by artificial persons manipulated by natural persons*. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty. [emphasis added]
>
> In our view, the law on security for costs is express recognition that impecunious companies do not have an unfettered freedom to commence legal actions against defendants who cannot be compensated in costs if they win. When one is dealing with a company rather than a natural person, public policy is in favour of *limiting*, rather than encouraging, uninhibited access to the courts.

It is plain from the above passage that where the litigant is a natural person, public policy leans much more towards encouraging access to the courts.

31 Ultimately, the court has to carry out a balancing exercise. On the one hand, it has to weigh the injustice to the plaintiff if the plaintiff is prevented from pursuing a proper claim by an order for security. Against that, the court has to weigh the injustice to the defendant if no security was ordered and the plaintiff's claim fails at trial. The defendant may find itself unable to recover from the claimant the costs that it had incurred in its defence of the claim.

32 In *Creative Elegance*, the Court of Appeal cited the following observations of Sir Nicolas Browne-Wilkinson V-C in *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All ER 1074 with approval:

> The purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of this court against which it can enforce the judgment for costs. It is not, in the ordinary case, in any sense designed to provide a defendant with security for costs against a plaintiff who lacks funds. The risk of defending a case brought by a penurious plaintiff is as applicable to plaintiffs coming from outside the jurisdiction as it is to plaintiffs resident within the jurisdiction.
>
> The next matter that I take into account is that on the evidence before me, there is little doubt that if I order security on anything like the scale asked for, the plaintiff's action will in fact be stifled. It simply does not have the means to put up the money. It is always a matter to be taken into account that any plaintiff should not be driven from the judgment seat unless the justice of the case makes it imperative. I am always reluctant to allow applications for security for costs to be used as a measure to stifle proceedings.

33 Before the Court refuses to order security on the ground that it would unfairly stifle any claim, the Court has to be satisfied that the plaintiff concerned does not have the ability to provide the security. The plaintiff here maintained vigorously that she should not have to provide any security at all. The defendants on the other hand asserted that her alleged lack of means had not been sufficiently documented. I agreed that while the plaintiff had shown she was in difficult circumstances, she had failed to give sufficient particulars to establish that she could not raise any funds at all to provide any amount of security either from her own resources or through other means. I noted that although she had been unemployed for many years she had still been able to obtain funds for the numerous legal proceedings she was involved in in this jurisdiction and had also received some money from the Estate over the years. In view of the plaintiff's financial circumstances as outlined in [28] above, it appeared probable to me that, as she submitted, an order for security for costs in the full amounts argued for by the respective defendants, would stifle her claims.

34 Having considered all the abovementioned circumstances, I came to the conclusion that it would be just to order some security for costs to the defendants. I reduced the quantum of security ordered by the Assistant Registrar, however, to avoid stifling her claim. An order for security is a provisional remedy provided at a preliminary stage of the proceedings where the merits of the litigation have not been decided upon. As the Court of Appeal in *ECRC* observed, a Court hearing a security application should invariably take a conservative approach in order to balance the interests of all the parties.