Tokuhon (Private) Limited v Seow Kang Hong and Others
[2003] SGHC 121

Case Number : Suit 1499/2001, SIC 1924/2003

Decision Date : 30 May 2003

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : K Shanmugam SC (Martin & Partners) for the plaintiffs; R E Martin (Martin & Partners) for the plaintiffs; Indranee Rajah SC (Wong M Seow & JYP Chia) for the defendants; Teh Ee-Von (Wong M Seow & JYP Chia) for the defendants

Parties : Tokuhon (Private) Limited — Seow Kang Hong; Wong Kah Joo; Gamma 2000 (S) Pte Ltd

Civil Procedure – Stay of proceedings – Stay of execution pending appeal – Whether successful party entitled to costs of trial or whether payment of costs to be stayed together with other forms of execution pending appeal

1 The plaintiffs' suit against the defendants was dismissed by me with costs on 25 March 2003 after a trial lasting many days. The action concerned the sole distributorship rights to a brand of analgesic plasters known as Tokuhon. Three companies respectively known as Nan Tat & Co ('Nan Tat'), Continental Trading Co ('Continental') and Weng Seng Heng Medical Hall ('Weng Seng Heng') were separately importing and selling Tokuhon products since the 1950s. The three companies were run by three individuals namely Thong Giok Sin from Continental, Chang Chiow Hee from Nan Tat and Ooi Choon Sian from Weng Seng Heng.

2 At the suggestion and prodding of Tokuhon Corporation of Japan, the plaintiffs were incorporated in 1962 after the patriarchs of the three companies decided to put together a joint outfit. It was agreed amongst the three families that each family was to be represented on the plaintiffs' board by one director.

3 For the period from 1989 to 1999, the directors of the plaintiffs were Dr Chang Jin Aye ('Dr Chang') from Nan Tat; Ooi Choon Sian ('Ooi') from Weng Seng Heng, his alternate being his brother Ng Choon Heng ('Ng'); and Dr Seow Kang Hong ('Dr Seow') from Continental, his alternate being Dr Seow's wife Mdm Wong Kah Joo ('Mrs Seow'). Mrs Seow was appointed a director, her alternate being her husband, on 2 April 1998. This appointment continued until 28 May 1998 when both Dr Seow and Mrs Seow became directors in their own right without being alternate to each other. Dr and Mrs Seow were the first and second defendants to this action respectively.

4 The distributorship agreement held by the plaintiffs was terminated by Tokuhon's authorised representatives China Merchant Import and Export Co Ltd of Hong Kong ('China Merchants') on or about 15 May 2000. At the plaintiffs' Annual General Meeting of 6 June 2000, Dr Seow was not re-elected to the board and as a result of his non-election, Mrs Seow resigned from the board on the same day. Dr and Mrs Seow eventually sold their shares to Dr Chang and Ng on or about 21 February 2001.

5 The action by the plaintiffs against the first two defendants was for an alleged breach of fiduciary duties as directors. The plaintiffs alleged that it was through the acts of the first two defendants (viz, a series of letters written by Mrs Seow to China Merchants making false allegations about the company) that caused the loss of the distributorship agreement. Further, they alleged that the first two defendants had procured the said distributorship for themselves through the third defendants (a company incorporated by the first two defendants on 4 February 2000 with a view to

sell cosmetics and beauty products initially) without disclosure to the plaintiffs.

6 The defendants alleged that Dr Seow had no role in bringing about the termination of the plaintiffs' Tokuhon distributorship. Further, they alleged that the loss of distributorship was not caused by the actions of Mrs Seow, but rather, by the actions of Dr Chang and Ng. They alleged that Dr Chang and Ng were themselves in breach of fiduciary duties as directors because they had, amongst other things, made trips to Japan to present sale and marketing strategies in an effort to wrestle the distributorship agreements for their respective companies. They also claimed that while the third defendants did enter into a distributorship agreement with China Merchants, they were not the beneficial owners of the third defendants.

7 In the end, the plaintiffs failed before me as I held that the defendants could not be held responsible for the loss of the plaintiffs' distributorship rights. The facts and my reasons for dismissing the plaintiffs' claim are fully set out in a written judgment [2003] SGHC 65 delivered by me on 25 March 2003. The plaintiffs have since appealed against my decision and the appeal I am told is scheduled for hearing sometime in August this year.

8 Following dismissal of the plaintiffs' claim, the defendants taxed their bill of costs and were awarded an amount of $259,750 in their favour. The said costs have yet to be paid by the plaintiffs to the defendants. In the result, the defendants issued a statutory notice under section 254(4) of the Companies Act (Cap 50) and since then followed up with a winding-up petition against the plaintiffs.

9 The plaintiffs then applied to the court for a stay of execution by the defendants until the plaintiffs' appeal is heard and disposed by the Court of Appeal. When the matter came up for hearing before me first on 16 April 2003, I granted the stay requested as I was of the view that the winding-up of the plaintiffs, if proceeded with, might render the appeal nugatory. The defendants subsequently applied for further arguments stating this time that they would be amenable to a stay in relation to the winding-up but stay as respects other forms of execution would expose them to peril since the plaintiffs whilst expending their resources to finance their further proceedings in this matter, were noticeably unwilling to pay even a portion of the costs ordered against them.

10 The current principles applicable to stay of execution pending appeal are set out by Staughton LJ in *Linotype-Hell Finance Ltd v Baker* [1992] 4 All ER 887 at 888 as follows:

> In *The Supreme Court Practice* 1991 vol 1, para 59/13/1 there are a large number of nineteenth century cases cited as to when there should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the current practice. It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution. The passage quoted in *The Supreme Court Practice* from *Atkins v Great Western Rly Co* (1886) 2 TLR 400, 'As a general rule the only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds', seems to be far too stringent a test today.

11 In *United Malayan Banking Corporation Bhd v Lim Kang & Anor* (Suit No 93 of 1998 – unreported), Prakash J, after making reference to the views expressed by Staughton LJ (*supra*), granted a stay pending appeal to a defendant-applicant on condition that he paid the plaintiffs' taxed costs and interests at the rate of 8% per annum on the judgment sum.

12 I fully subscribe to the approach adopted in the cases cited. I would hasten to add however, that the discretion vested in the courts to grant a stay must be tempered with an equal concern for the successful party. In exercising its discretion, the court must weigh in its mind whether there was a likelihood that a stay would result in the evanesence or dimunition of the assets of the losing party, be it deliberate or by sheer force of circumstances. If funds are seemingly available presently and there is an imminent danger of its subsidence, a successful party should not be deterred from getting at it, more so in relation to costs which after all represent the amount expended in the course of the litigation to sustain one's cause. The concern of course is whether there is a reasonable probability of getting the paid amount back, if the appeal were to succeed. If there is no risk - in this case there is none - then the courts, in the absence of other good reasons, ought to lean in favour of the successful litigant to have a hold on the loser's remaining funds.

13 Returning to the application at hand, I must say that when the parties appeared before me on 16 April 2003, the concern articulated by plaintiffs' counsel was only in relation to the winding-up proceedings. This had since become a non-issue since counsel representing the defendants made it presently known to the court that stay in respect of the winding-up proceedings would no longer be resisted by them. However, the plaintiffs were not content with what they had obtained so far. They seemed to have shifted the gear to a higher ratio. They were plumbing for a blanket stay and attempted to argue that even the other forms of execution, such as a writ of seizure and sale against the plaintiffs' properties might cause the mortgagees of the plaintiffs to recall the entire loan which they are not able to satisfy immediately and the result would be a liquidation of the plaintiffs in an indirect way.

14 In my view, an all-embracing stay would be inappropriate in the circumstances of the present case. Whilst I could appreciate the plaintiffs' concern on the implications of the winding-up proceedings, the same cannot hold true for the other forms of execution. The plaintiffs cannot have it both ways. If they could marshal their resources to engage counsel of the ilk who were present before me to argue this application, it should not be too difficult for them to channel part of it to address a very legitimate concern of the defendants that at the end of the day they might not even recoup the amount expended by them to defend their cause. In my determination, a blanket stay, as is being pressed for the plaintiffs would indeed result in the defendants being deprived of whatever that is available currently before others could lay their claims to them.

15 Having considered the views expressed in *Linotype-Hell Finance* and the approach taken in the *United Malayan Banking Corporation Ltd* case, I concluded that a total stay would be entirely inappropriate as it would cause considerable prejudice to the defendants. In the premises, I revoked the order made by me on 16 April 2003 and in its place made the following orders:

> (a) The plaintiffs be granted a stay pending appeal only as respects the winding-up proceedings instituted by the defendants against the plaintiffs in Companies Winding-Up Petition No 91 of 2003 until the disposal of the plaintiffs' appeal in relation to the judgment delivered by me in Suit No 1499 of 2001;
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> (b) As regards other forms of execution, a stay is granted to the plaintiffs on condition that they either pay the taxed costs to the defendants or provide a bankers' guarantee acceptable to the defendants within one week from 20 May 2003;
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> (c) Costs of the application before me were fixed at $2,500 payable by the plaintiffs to the defendants.

Order accordingly.