

Tunas (Pte) Ltd v Ng Man-Leong
[2001] SGHC 16

Case Number : Suit 408/2000, RA 73/2000
Decision Date : 30 January 2001
Tribunal/Court : High Court
Coram : Tay Yong Kwang JC
Counsel Name(s) : Peter Pang (Peter Pang & Co) for the plaintiffs/respondents; Julian Kwek (Drew & Napier) for the defendant/appellant
Parties : Tunas (Pte) Ltd — Ng Man-Leong

JUDGMENT:

Grounds of Decision

1 This is an appeal by the Defendant arising out of his application (SIC 789 of 2000) made under Order 18 rule 19(b) and (d) and under the inherent jurisdiction of the Court seeking the following:

(1) the Plaintiffs Statement of Claim be struck out and the action dismissed;

(2) the Defendants costs incurred in defending this action, the costs of this application and the costs of the application in SIC 643 of 2000 filed on 29 August 2000 be borne by the Plaintiffs on an indemnity basis.

2 The Senior Assistant Registrar dismissed the Defendants application with costs fixed at \$1,500.

3 I allowed the Defendants appeal and ordered the Plaintiffs to pay the Defendant \$3,500 as the costs of the entire action.

4 The Defendant alleged that the Plaintiffs present action was frivolous, vexatious and an abuse of process of Court as it was nothing more than an attempt to re-litigate the causes of actions and the issues in five earlier actions by the Defendant and that there were no merits in the Plaintiffs allegations.

THE BACKGROUND AND THE ARGUMENTS

5 The Plaintiffs commenced the present action on 26 June 2000. Their Statement of Claim was in the following terms:

"1. The Plaintiff is a company incorporated in Singapore and having its office at 27 Apex Tower #27-00 Singapore 079905.

2. At the request of the Defendant from time to time between the period of 1995 to 1998 the Defendant delivered a number of shipments of various Chinese antiques, (purported to have been exported out of the People Republic of China) to the Plaintiff. As acknowledgement of the estimated value the said goods (antiques) delivered, the Plaintiff issued a number of cheques and some from their chairman, Mr Tong Djoe at the material time. The total value of these cheques amounted to \$649,000.00 in 1998.

3. The Defendant subsequent commenced action in late 1998 against the Plaintiff and their chairman claiming the sale of the Chinese antiques and

instituted actions for the value of these antiques delivered based on the cheques received and presented for payment but were dishonoured on presentation. The Plaintiff maintained that the goods (antiques) were held by them as bailor and therefore disputed that the cheques were meant to be presented for payment.

4, The Defendant in his actions in Suit 2037 of 1998 was for \$565,000.00 and in DC Suit No. 6583 of 1998 for \$64,000.00 against Mr Tong Djoe for the proceeds of sale of antiques based on the cheques issued by them.

5. By an agreement and in settlement of the Defendants actions in Suit No. 2037 of 1998 and DC 6583 of 1998, the terms of the settlement were described in the Plaintiffs solicitors letter dated 15th December 1998, which was duly accepted by the Defendant through his solicitor on the 17th December 1998. The settlement were meant for all the antiques delivered to the Plaintiff which were agreed at \$324,500.00 subject to the following terms:

(i) \$32,450.00 being 10% to be paid within 7 days

(ii) Thereafter 18 monthly instalments of \$16,225.00

in exchange the Defendant was to deliver

(a) all the cheques concerned

(b) a letter of indemnity for any claim arising from the cheques concerned

(c) To file the Notice of Discontinuance of both action on settlement or agreement of terms

(d) all shipping documents, invoices, custom clearance documents as inspected and accepted and be exchanged on receipt of 1st instalment payment.

Pursuant to the agreement, inspection took place where various invoices and shipping documents were inspected but the actual exchange did not take place at all despite attempts to carry out the exchange on 25th March and 30th March 1998.

6. In fact, the cheques concerned were handed over to the Defendants solicitors as stakeholders pending the exchange. Further the notices of discontinuance of both actions and the letter of indemnity were also similarly handed by the Defendant to the Plaintiff solicitors.

7. (a) Pursuant to the settlement agreement, the sum of \$10,000.00, \$8,000.00

and \$8,000.00 were paid by the Plaintiff prior to the intended exchange to demonstrate the Plaintiff intention to pay under the terms of settlement. The exchange of the balance of the documents described in paragraph 5(d) above were to be exchanged and furnished by the Defendant.

(b) Subsequently, without providing all the documents to be exchanged described in paragraph 5(d) above under the terms of settlement, the Defendant commenced numerous actions for the payments due under the terms of the agreement. They are:

	Action Nos.	Commenced on	Judgement
(i)	M.C. Suit No. 15327/99	23 rd June 1999	\$6,500.00
(ii)	M.C. Suit No. 17228/99	15 th July 1999	\$16,225.00
(iii)	M.C. Suit No. 60687/99	5 th November 1999	\$48,675.00
(iv)	D.C. Suit No. 21/2000	6 th March 2000	\$64,900.00
(v)	M.C. Suit No. 8588/2000	5 th June 2000	Pending
	Total		\$136,300.00

8 (a) The Plaintiff solicitors were instructed to enter appearance to all the above actions referred to in paragraph 7(b) above but were instructed not to reply to the Order 14 applications for summary judgment as the Plaintiff intended at all times to make payment under the terms of settlement. All the judgment entered in paragraph 7 above were satisfied except for the 21/2000G where the sum of \$68,309.02 is being held by the Defendants solicitors as stakeholders pending an application to set aside the default judgment.

(b) By the payment of \$136,300.00 described in paragraph 7 above, the Plaintiff have made payment under the terms of settlement beyond the 1st instalment payment and more.

9. In addition, the Plaintiff was laboring under the believe at the material time by the Defendants oral assurances given from time to time that he had those documents agreed and described in paragraph 5(d) above, especially the custom clearance papers, to confirm the country of origin of the goods (antiques) imported and that he was willing and able to hand them over as agreed under the terms of settlement.

10. On the 23rd March 2000, the Plaintiff through their solicitors objected to the judgment entered in default of appearance when the Memorandum of Appearance submitted to be filed electronically on the 14th day of March was rejected and thereafter the Plaintiff Memorandum of Appearance filed was minutes late before judgment was entered on the 15th March 2000. The Plaintiff also intimated that the agreed documents under the terms of settlement were still outstanding and have not yet been furnished by the Defendant. The Defendant failed or refused to furnish the documents concerned or reply on the matter.

11. On the 12th June 2000 the Plaintiff demanded the production of the documents to be delivered by the Defendant under the term of the settlement in particular those described under paragraph 5(d) above.

12. However, the Defendant in reply refused to provide any of the documents and thereby breached the fundamental term of the settlement. As a result the Plaintiff is unable to provide proof that the antiques were from the Peoples Republic of China and put to suffer loss and damages by the Defendant.

13. And the Plaintiff claims

- (i) Specific performance by the Defendant to deliver the said documents described in paragraphs 5(d) above.
- (ii) Damages for the detention of the documents concerned.
- (iii) Further and other relief as the Court deems fit.
- (iv) costs

14. Alternatively, the Plaintiff claim

- (i) Damages;
- (ii) Loss from the sale of the antiques without the certification of origin;
- (iii) Further and other relief as the Court thinks fit
- (iv) Costs

15. In addition, the Plaintiff pray for an order that pending the decision of the Court the sum of \$68,309.02 in the solicitors accounts of the Defendant, M/s Drew & Napier, which may be payable to the Defendant be restrained from being dealt with by the Defendant in any way or pay to the Defendant or remit by the Defendant out of jurisdiction."

6 The settlement agreement referred to in the Statement of Claim was contained in the Plaintiffs solicitors letter dated 15 December 1998 and the Defendants solicitors letter dated 17 December 1998. The 15 December 1998 letter read:

"SUIT NO 2037 OF 1998 and DC Suit 6583 of 1998

1. Our clients, the company accepts that their Chairman, Mr Tong Djoes cheques were drawn to pay on behalf of the company and therefore acknowledges that the cheques in the 2nd action above were part of the additional cheques to be paid by them.

2. Upon satisfactory conclusion of the terms of settlement our clients shall issue payment of 10% of the settlement sum within 7 days.

3. Therefore our clients shall issue the 18 monthly installments and it would be

convenient if the addresses were given for the sending of the cheque for each month.

4. The terms of settlement to be accepted by the parties are subject to the following:

a) Inspection of all the original cheques concerned with the total of \$649,000-00 and the settlement sum is \$324,500-00. 10% would be \$32,450-00 and each equal monthly installment is \$16,225-00 for 18 months.

b) All original cheques are handed to our clients upon receipt of the 10% payment and your client or his solicitor is entitled to cancel all the cheques handed over.

c) an indemnity in the terms acceptable by our clients against all the cheques for any claim arising thereof should be handed to our clients in exchange for the first payment.

d) All shipping documents, invoices, custom clearance documents to be inspected and accepted and be exchanged on receipt of the 1st installment payment of 10%.

e) That on acceptance of the terms of settlement your client shall forthwith file the Notice of Discontinuance for the above actions.

5. Please confirm the above are the terms agreed by the parties so that we can proceed with inspection and drafting of the terms of indemnity for the acceptance.

6. The payment made in exchange of the cheques and the documents described in paragraph 4 (d) above should take place within this week.

7. Could you confirm the above as in order and acceptable? We would be able tomorrow to inspect the items in 4(a) and 4(d)."

The 17 December 1998 letter accepted the above in the following terms:

"We refer to your "Without Prejudice" letter addressed to us dated 15 December 1998 and the subsequent telephone conversation between your Mr Peter Pang and our Diana The today.

We confirm that the terms contained therein have been accepted by our clients. We undertake to forward the original copy of the duly executed Indemnity Agreement within 14 days of the exchange."

7 The Defendant conceded that a formal exchange of payment against documents did not take place but averred in paragraph 16 of the Amended Defence (with 14 paragraphs of particulars) that it was due to the Plaintiffs fault. The Defendant also averred in paragraph 26 of the Amended Defence that the Plaintiffs were estopped from alleging that they were entitled to any documents

or that the said exchange was incomplete. Reliance was placed on the particulars given in paragraph 16 of the Amended Defence as well as 12 more paragraphs of particulars. It was further averred that the Plaintiffs had waived strict compliance with the terms of the settlement agreement and the requirement of an exchange and that the Plaintiffs had affirmed the settlement agreement. In any case, the Defendant said, the Plaintiffs were estopped from alleging breach by the Defendant as a result of the five judgments obtained by the Defendant against the Plaintiffs in the five earlier suits.

8 Paragraph 16 of the Amended Defence averred as follows ("GPP" refers to the Defendants then solicitors and "PP&Co" refers to the Plaintiffs solicitors):

"16. The Defendant was ready, able and willing to carry out the Exchange. The Exchange did not take place on 25 and 30 March 1999, or at all, at the fault of the Plaintiffs.

Particulars

a. By a letter dated 8 January 1999 from GPP to PP&Co, GPP proposed that the Exchange be conducted on 12 January 1999 at 10 am. By a letter dated 12 January 1999 from PP&Co to GPP, PP&Co replied that the Plaintiffs (chairman) were in Indonesia;

b. By a letter dated 21 January 1999 from GPP to PP&Co, GPP required PP&Co to conduct the Exchange by 22 January 1999. By a letter dated 29 January 1999 from PP&Co to GPP, PP&Co replied that the Plaintiffs chairman was still outstation;

c. Instead, the Plaintiffs forwarded a cheque for the sum of S\$10,000.00 to GPP;

d. By a letter dated 1 February from PP&Co to GPP, PP&Co requested that all the original cheques to be forwarded to them;

e. By a letter dated 3 February 1999 from GPP to PP&Co, GPP requested the exchange to take place by that week. By a letter inadvertently dated 29 January 1999 but received by GPP on 5 February 1999, PP&Co replied that the Plaintiffs chairman was still outstation;

f. By a letter dated 2 March 1999 from GPP to PP&Co, GPP required the Plaintiffs to pay the balance of S\$32,4500.00 by 10 March 1999. By a letter dated 8 March 1999 from PP&Co to GPP, PP&Co replied that the Plaintiffs chairman was still outstation;

g. By a letter dated 19 March 1999 from PP&Co to GPP, PP&Co proposed that the exchange be effected on 25 March 1999 at PP&Cos office. Further, PP&Co requested confirmation that a sum of S\$10,000.00 and S\$8,000.00 had been forwarded;

h. By a letter dated 23 March 1999 from GPP to PP&Co, GPP denied that a second sum of S\$8,000.00 had been received. Further, GPP also requested the balance payment to be forwarded to GPP given that the original cheques and original indemnity had been forwarded to PP&Co;

i. By a letter dated 24 March 1999 from GPP to PP&Co, GPP offered to attend at

PP&Cos office on 25 March 1999;

j. By a letter dated 24 March 1999 from PP&Co and received by GPP on 25 March 1999 at 2.58 pm, PP&Co insisted that a further sum of S\$8,000.090 had been forwarded and a balance payment of S\$14,450.00 would be issued. PP&Co concluded the letter by saying that "We need in return the indemnity (witnessed) in exchange";

k. By a letter dated 26 March 1999 from GPP to PP&Co, GPP reserved the issue of the receipt of the S\$8,000.00 to be resolved through litigation, and proposed that the exchange take place on 30 March 1999 at 3 pm at PP&Cos office;

l. By a letter inadvertently dated 29 January 1999 and faxed to GPP on 30 March 1999 at 4.58 pm, PP&Co stated that a separate sum of S\$8,000.00 was attached to the letter and that the balance sum of S\$6,000.00 would be given in the week following. PP&Co also requested the documents for the exchange to be delivered;

m. By a letter dated 31 March 1999 from GPP to PP&Co, GPP replied that the balance sum should be S\$6,450.00 and required payment by 1 April 1999; and

n. By a letter dated 29 April 1999 from PP&Co to GPP, PP&Co forwarded the balance sum of S\$6,450.00 to GPP. (Taking into account the S\$8,000.00 that is in dispute, this payment completed the exchange sum of S\$32,450.00, and the time for payment of the 18 instalments starts to run).".

9 Paragraph 26 of the Amended Defence was in the following terms:

"26. The Plaintiffs are estopped by its conduct from alleging that it is entitled to any documents or that the Exchange is uncompleted.

Particulars

a. The Defendant repeats the particulars to paragraph 16 above;

b. By a letter dated 2 June 1999 from PP&Co to GPP, PP&Co replied that the Plaintiffs (chairman) would be in Singapore by 15 June 1999 to issue payment for the 1st of the 18 instalments.

c. On or about 23 June 1999, the Plaintiffs made part-payment of S\$5,000.00 towards the 1st of the 18 instalments due on 29 May 1999;

d. On or about 16 July 1999, the Plaintiffs made part-payment of S\$4,715.00 towards the 1st of the 18 instalments due on 29 May 1999;

e. The Plaintiffs failure to resist the Defendants application for Summary Judgment in MC Suit No. 15327 of 1999;

f. The Plaintiffs did not contest the garnishee proceedings pursuant to the Summary Judgment in MC Suit No. 15327 of 1999;

- g. The Plaintiffs failure to resist the Defendants action in MC Suit No. 17228 of 1999;
- h. The Plaintiffs willingness to satisfy the Judgment in Default of Defence in MC Suit No. 17228 of 1999;
- i. On or about 3 September 1999, the Plaintiffs voluntarily paid the sum of S\$16,225.00 in respect of the 3rd instalment due on 29 July 1999;
- j. The Plaintiffs refusal to resist the Defendants application for Summary Judgment in MC Suit No. 60687 of 1999;
- k. The Plaintiffs payments of the sum of S\$15,000.00 (on 17 January 2000), S\$10,000.00 (on 25 February 2000) and S\$12,000.00 (on 17 March 2000) towards part-satisfaction of the Summary Judgment in MC Suit No. 60687 of 1999;
- l. By a letter dated 22 February 2000 from PP&Co to the Defendants second set of solicitors, Drew & Napier ("D&N"), PP&Co represented that the Plaintiffs chairman was on his way back to Singapore to make further payment; and
- m. The Plaintiffs failure to reply to or dispute GPP and D&Ns letters of demand or statements of current outstandings."

10 Before the commencement of the present action, the Defendant had instituted five suits in the Subordinate Courts for the recovery of the instalments that had fallen due under the settlement agreement and had obtained judgment in four of them. The fifth judgment was obtained shortly after the commencement of the present action. In each of those five suits, it was pleaded by the present Defendant that the first of the 18 instalments was due and payable on 29 May 1999 and that the remaining 17 were due and payable on the 29th day of each subsequent month.

11 The Defendant argued that the two judgments under Order 14 and the three judgments under Order 13 and Order 19 in the said five suits precluded the Plaintiffs here from asserting there had been a breach. Further, the Plaintiffs present allegations could and should have been raised in any of the said five suits. However, the Plaintiffs decided not to contest those actions and allowed judgment to be entered in each of them. After judgment in default of appearance had been obtained in DC Suit 21 of 2000, the present Plaintiffs applied to have the judgment set aside. The application was heard by a Deputy Registrar of the Subordinate Courts on 27 July 2000 and was dismissed on 11 August 2000. The present Plaintiffs appealed. The appeal was dismissed by a District Judge on 11 November 2000. The issues in DC Suit 21 of 2000 and those in the present action were the same. The Plaintiffs have applied for leave to appeal to the High Court.

12 The Defendant further submitted there were no merits in the Plaintiffs present allegations as it was plain from the various correspondence pleaded and exhibited that the exchange did not take place in the manner provided in the settlement agreement because of the Plaintiffs own fault.

13 The Plaintiffs argued that the customs clearance documents were never handed over to them or their solicitors. Their solicitors letters dated 16 June 2000 and 21 June 2000 to the Defendants present solicitors read:

(16 June 2000)

"RE: TERMS OF SETTLEMENT ACCEPTED 17TH DECEMBER 1998

BETWEEN TUNAS PTE LTD AND MR NG MAN-LEONG

1. We have your letter of 15th June 2000.
2. In view of your clients refusal to furnish any of the outstanding documents agreed under the terms of settlement and even made no attempt to mitigate the situation by furnishing some of the outstanding documents agreed in exchange, our client has no option but to hold your client in breach of the terms of settlement.
3. Our client therefore reserves their rights to seek specific performance and in the alternative seek damages against for all losses suffered.
4. In the event we are seeking the recovery of the losses, it would include all monies paid to date by our client. We have instructions to include preservative orders where applicable.
5. Accordingly, on expiry, we are instructed to proceed to institute proceedings without delay."

(21 June 2000)

- "1. We refer to the above matter and our letter of 16th June 2000.
2. We are instructed to file in the High Court the action for specific performance and alternatively to recover damages suffered arising therefrom.
3. Your client in DC 21/2000/G and MC 8588/2000/Y are therefore related and should be consolidated to avoid multiple duplicate proceedings arising from the same matter.
4. In this context, would your client agree to let the High Court case be a test case and that the order be applicable accordingly to the other two matters.
5. As for DC 21 of 2000/Y, will your client consent to our client application to set aside the judgment entered on 15th March 2000 or your clients agreement to the above be subject to our client succeeding in setting aside the judgment?
6. We appreciate your reply within 7 days from date hereof."

14 The Defendants solicitors replied on 27 June 2000 as follows:

- "1. We refer to your letter dated 16 June 2000 and 21 June 2000.
2. In view of your clients conduct and all the correspondence, the allegation that our client is in breach of the settlement agreement is outrageous. Our client has not breached the settlement agreement, and there is, therefore, no duty to mitigate.
3. Be that as it may, we note your clients allegations that there are outstanding

documents, and that they are prejudiced from discovering the origin of the goods. We also note from Gabriel Peter & Partners letter dated 17 December 1998 that copies of the documents were handed to you, and that your letter dated 29 December 2000 clearly shows that your clients had accepted the documents.

4. In the circumstances, is all this just to obtain another set of the documents? If so, despite the fact that our client has discharged all his obligations, we will provide your client with another set of the documents.

5. That is our clients position. Beyond that, we see no point in corresponding further on this subject, parties are clearly set to litigate. We will leave it to the court to adjudicate on this case. Our clients will proceed in accordance with their legal rights.

6. As for your suggestion to use the High Court case as a test case, the proposal is unacceptable. Our client has had enough of your clients dilatory conduct, and there is simply no way of ensuring that your client will proceed expeditiously.

7. If a High Court action is commenced, and preservatory orders are sought, you are hereby put on notice that we object to any applications being made ex-parte.

8. For the avoidance of doubt, all our clients rights are reserved including the right to dispute the appropriateness of commencing a High Court action."

15 Before me, Mr Peter Pang stated that if the said customs clearance documents were handed over to him, he would withdraw the present action. He was compelled to commence this suit because of the Defendants solicitors insistence that they had been handed over when they were not.

16 He argued that the Plaintiffs allowed the five judgments to be entered in the Subordinate Courts because the Plaintiffs wished to affirm the settlement agreement despite the Defendants breach. Since they were so affirming, they were obliged to pay and their right to sue for damages had not been waived or abandoned in any way.

17 The Defendant responded by stating that although no inventory list of all the documents was prepared, the Plaintiffs had not complained about the customs clearance documents being missing until March 2000 when a Writ of Seizure and Sale was taken out in DC Suit 21 of 2000.

THE DECISION OF THE COURT

18 Comparing the documents in the five actions in the Subordinate Courts and those in the present suit, it was clear to me that the Plaintiffs present suit was nothing more than a repetition of the same issues which had been put to rest by the Plaintiffs decision to allow judgment to be entered in any of the five suits.

19 By submitting to judgment and paying the instalments, the Plaintiffs had acknowledged that the instalments were due under the settlement agreement. They could not have been due if the exchange of documents was not done or was not completed satisfactorily. They were therefore estopped in all the circumstances of this case from alleging that the exchange was incomplete. In any event, the formal exchange was not carried out due to the Plaintiffs fault.

20 The Plaintiffs could not decide when and where they would raise matters when those matters had already been put in issue in earlier proceedings and, in this instance, many times over. If they chose not to contest the Defendants actions or to allow the summary judgments therein to stand, they could not now attempt to shake the factual foundation on which those judgments rest. The instalments stage was premised upon the exchange stage having been completed satisfactorily. If the exchange stage had not been so, it was incumbent on the Plaintiffs to challenge that the instalments were due at all or at least to insist that any judgment entered reflect the status of the exchange. By electing not to do so, they could not now be permitted to rake up what had been interred with their consent or knowledge.

21 If any breach of the settlement agreement had taken place, it was on the part of the Plaintiffs. It was their lackadaisical attitude in carrying out the terms that threw everything out of the order intended. They could not now be permitted to sue on what was essentially their own wrongdoing. The present claim was therefore devoid of merit in any case.

22 I therefore allowed the appeal and granted the Defendant the orders sought. I fixed the costs of the entire action payable by the Plaintiffs to the Defendant at \$3,500.

Tay Yong Kwang

Judicial Commissioner

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