Swiss Singapore Overseas Enterprise Pte Ltd v Navalmar UK Ltd (No 2)
[2002] SGHC 263

Case Number : Suit 1331/2002, SIC 4702/2002

Decision Date : 07 November 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : R Srivathsan (Haridass Ho and Partners) for plaintiffs; Joseph Tan Wee Kong (Kenneth Tan Partnership) for defendants

Parties : Swiss Singapore Overseas Enterprise Pte Ltd — Navalmar UK Ltd

Civil Procedure – Injunctions – Application for stay of execution pending appeal against interlocutory order for mandatory injunction – Whether circumstances justify stay of execution

Judgment

GROUNDS OF DECISION

1. The defendants are the owners of the vessel MV Zubaran that they had chartered to an Indonesian party called Menaras. The Zubaran was carrying a cargo of timber in respect of which the defendants had issued a total of nine "freight to collect" bills of lading. They were obliged to issue "freight prepaid" bills (the switch bills) in exchange for the originally issued bills when freight has been paid. The plaintiffs had purchased the cargo and re-sold it to a customer in India. When the defendants refused to issue the switch bills, the plaintiffs sued in this action and on 5 November 2002, in an interlocutory application, obtained an order from JC Woo Bih Li for mandatory injunction requiring the defendants to issue the switch bills to them. Against this order the defendants intend to appeal and applied by this summons for a stay of execution.

2. Before me, Mr. Joseph Tan made several points in which he says are the substance of the defendants' grounds of appeal. First, he says that there was no privity of contract between the plaintiffs and themselves and that the plaintiffs were therefore not the proper party to sue. Secondly, Mr. Tan submitted that the plaintiffs' counsel, Mr. Srivathsan, had wrongly relied on the UK Contract (Rights of Third Parties) Act 1999 when they argued the injunction application before JC Woo. Counsel submitted that he had filed affidavit evidence from London counsel to the effect that the said Act had no application on the facts of this case. The plaintiffs, he says, on the other hand, had not filed any affidavit to contradict that. Thirdly, Mr. Tan says that the plaintiffs wrongly suggested that an independent contract was created by the exchange of correspondence between them and the defendants. That could not be the case since the plaintiffs paid freight as agents for the charterers. Payment of freight was an existing obligation of the charterers and therefore no fresh consideration can be said to have been given in exchange for the promise to issue the switch bills. Finally, Mr. Tan submitted that freight was already due in any event and had to be paid, implying that the payment of freight cannot be a fresh consideration.

3. It was not disputed that the plaintiffs had made payment of US$258, 341 as freight charges on 21 October 2002. The defendants however, assert that a sum of US$187,930 in demurrage is due to them from the charterers. Mr. Srivathsan drew my attention to the terms of the charterparty which were set out in the fixture note at p.13 of the affidavit of Vyas Rajendra Kumar, the plaintiffs' Commercial Executive. In particular counsel pointed out the following term which in effect states that the defendants were bound to issue the "freight prepaid" bills against a Letter of Indemnity from their local agent:

> "Owners to appoint a Singapore agent (free of charge to [the plaintiffs] to issue a second set "freight prepaid" BOL against LOI as per owners' format which [is] to be signed by their authorised signatory." Furthermore, Mr. Srivathsan argued that by the following clause the defendants were not entitled to have a lien on the cargo for the purposes of exacting payment of demurrage from the charterers: "Demurrage and detention charges, if any, including at the loading port to be settled within two weeks of completion of discharge of cargo based on relevant supporting documents."

4. Mr. Srivathsan also drew my attention to the exchange of correspondence between the plaintiffs and defendants beginning with the defendants' telefax to the plaintiffs dated 18 October 2002 in which the defendants pointed out that freight had not been paid. The plaintiffs then asked for confirmation that the defendants will switch bills as soon as freight is paid. By a reply dated 21 October the defendants gave the plaintiffs the confirmation sought. Mr. Srivathsan submitted that the plaintiffs are a Singapore company with a paid-up capital of $34,000,000 and there is no suggestion that they will not be in a position to pay damages should the defendants succeed on appeal, which, by the nature of the claim, will effectively determine the final outcome of this suit.

5. On the submissions before me, it seems that the only concern of the defendants in not issuing the switch bills is to retain a perceived right to lien on the cargo. That would be a matter for the appeal proper but at this stage I am entitled to consider the relative strength of that ground as a basis for the exercise of my discretion whether to grant a stay. On the facts and the balance, I am of the view that it does not seem a sufficiently strong point. Against that, the plaintiffs who have already paid the freight on the basis of the representation by the defendants that switch bills would be issued may be liable to their purchasers for breach of contract if the switch bills are not issued. There is only Mr. Tan's surmise but no evidence before me to indicate that the plaintiffs paid freight as agents for and on behalf of the charterers. In any event, I doubt that it would have made any difference even if they had paid as agents because the confirmation and representation by the defendants in their response to the plaintiffs on 21 October was unequivocal and which the plaintiffs or the charterers (if they were the principals) were entitled to rely on. Mr. Tan says that there was no consideration moving from the charterers if they were the principals. That argument ignores the sagely wisdom in the common law contract principle that although consideration must be sufficient it need not be adequate. That is to say, that once the subject of exchange is recognised in law as suitable consideration, quantity is irrelevant. Hence, as natural love and affection are not reckoned as suitable consideration (when no element of a bargain is present), it matters not that they were copiously lavished. See, for instance, *White v Bluett* (1853) 23 LJ Ex 36. On the other hand, legal tender the veritable commercial consideration of choice, is good consideration even if one offers two cents for a piece of cake. In the present case, the payment of freight was an obligation but the time for payment was not defined save that the switch bills would be issued only after payment of freight, or when a letter of indemnity was given, otherwise, the charterers would have to be satisfied with retrieving their cargo on the basis of the "freight to collect" bills. Therefore, by their express agreement to issue the switch bills upon payment the defendants had varied, however slightly, the time for payment. That is sufficient consideration as there were clear indications of a bargain.

6. I come now to Mr. Tan's argument that the UK Contract (Rights Against Third Parties) Act 1999 does not apply and his contention that the plaintiffs did not file any affidavit of UK lawyers to say how the law under that Act works. It is true that foreign law is a question of fact and is ordinarily proved in that manner. But where it comes to English law (European Union law excepted), it is in my

view, unnecessary to require evidence from counsel. English law, not only the common law principles but even statutes such as the Sale of Goods Act, have been used in argument by counsel in Singapore without reference to the opinion of English counsel tendered as evidence of fact. Furthermore, on the facts in this instant case, I am doubtful that the defendants' point is at all relevant. When the defendants say to the plaintiffs that they (the defendants) will issue the switch bills upon payment of freight by the plaintiffs, it lies ill in their mouth to say that the Act does not apply. That is really a substantive matter for judge hearing the substantive application, and as it had been so considered by that judge, in determining whether a stay ought to be granted, I would only interfere if I can be persuaded that the judge was palpably wrong. In this case I have not been persuaded so.

7. The law as to what is required to be weighed in an application for stay of execution has been summarised and applied in the judgment of Yong Pung How CJ in *Lee Sian Hee (t/a Lee Sian Hee Pork Trader) v Oh Kheng Soon (t/a Ban Hon Trading Enterprise)* [1992] 1 SLR 77. Basically, a successful litigant is not to be denied the judgment he had obtained, or have his enjoyment of it deferred just because of a pending appeal. In exercising the court's discretion as to whether a stay of execution ought to be granted, the court will have to consider the grounds of the intended appeal, not substantively as if sitting in place of the appeal court, but sufficiently to see if there are merits in it. It ought also to weigh the balance of convenience of a stay order, and finally, to consider whether the appeal would be rendered nugatory or academic if a stay was not granted. In the present case, although the order was an interlocutory one, it effectively dealt with the substantive claim and involved the issuance of bills of lading which cannot be recalled once they are acted upon before the appeal, the essence of the dispute is nonetheless measurable in monetary terms. If the defendants succeed on appeal, damages is quantifiable and the plaintiffs appear to be viable for payment. I had also taken into account the fact that the defendants' intended appeal concerns an interlocutory order as opposed to a final order after the full merits of the case had been fully argued at trial. The circumstances of this case are such that oral evidence does not appear to be relevant and, indeed, the arguments before JC Woo were limited to mostly undisputed facts. In the circumstances, I am of the view that a case for stay of execution has not been sufficiently made out and this application was accordingly dismissed.

Sgd:

Choo Han Teck

Judicial Commissioner