Metalform Asia Pte Ltd v Holland Leedon Pte Ltd
[2006] SGHC 74

Case Number : OS 1996/2005

Decision Date : 05 May 2006

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : CR Rajah SC, Chew Kei-Jin, Moiz Haider Sithawalla and Lavinia Rajah (Tan Rajah & Cheah) for the plaintiff; Steven Chong SC, Lee Eng Beng and Low Poh Ling (Rajah & Tann) for the defendant

Parties : Metalform Asia Pte Ltd — Holland Leedon Pte Ltd

Injunctions – Purposes for grant – Restraint of proceedings – Plaintiff applying for injunction to prevent presentation of winding-up petition by defendant pending determination of plaintiff's counterclaim against defendant – Applicable principles for grant of injunction

5 May 2006

Woo Bih Li J:

1 The plaintiff, Metalform Asia Pte Ltd ("MA"), had purchased the business of the defendant, Holland Leedon Pte Ltd ("HL"), pursuant to a sale and purchase agreement dated 13 June 2004 ("the SPA"). HL was in the business of manufacturing and selling covers for computer disk drives and had sold its business to MA for US$267m. The price was based largely on earnings before interest, tax, depreciation and amortisation ("EBITDA") multiplied by 7.

2 HL had also supplied steel to MA between July 2004 and June 2005. The undisputed amounts owing by MA to HL for the supply are US$16,877,641.93 and $112,667.17 (collectively referred to as "the undisputed debt").

3 In this originating summons, MA was seeking an injunction to restrain HL from presenting a winding-up petition based on the undisputed debt until the determination of MA's claims against HL for breaches of warranties given by HL under the SPA.

4 Cases like *Re Sanpete Builders (S) Pte Ltd* [1989] SLR 164 ("*Sanpete*") and *In re Bayoil SA* [1999] 1 WLR 147 show that a court may restrain the filing of a winding-up petition or decline to make an order on a winding-up petition if the debtor has a *bona fide* cross-claim based on substantial grounds. This general proposition was not disputed by Mr Steven Chong SC, counsel for HL. *Sanpete* also makes it clear that the cross-claim must be for a sum equal to or exceeding an undisputed debt.

5 MA contended that the quantum of its claims under the SPA came up to the sum of $34,472,740. I will refer to MA's claims collectively as "the counterclaim". MA's position was that the counterclaim was *bona fide* and based on substantial grounds and that it exceeded the quantum of the undisputed debt.

6 MA relied on two other grounds to support its application:

(a) that HL had a collateral motive in threatening to present a winding-up petition, and

(b) the presentation of such a petition would cause irreparable harm to MA which has an ongoing business.

7 HL disputed that the counterclaim was *bona fide* and based on substantial grounds. More significantly, Mr Chong submitted that under the terms of the SPA, Allen & Gledhill was holding $25m in an escrow account ("the escrow amount") to meet any claim under the warranties. Once the escrow amount was taken into account, it was obvious that the quantum of the counterclaim, which was rounded up to $35m for the purpose of argument, fell far short of the quantum of the undisputed debt. For the purpose of argument, the parties proceeded on the basis that the undisputed debt amounted to $25m. Therefore, the aggregate of the escrow amount and the undisputed debt was $50m and exceeded the counterclaim by $15m.

8 Mr C R Rajah SC, counsel for MA, did not dispute the above scenario. However, upon inquiry by me, he said that MA would agree to the release of $15m from the escrow account so that the aggregate of the balance of $10m and the undisputed debt of $25m would be equal to the counterclaim of $35m. Mr Rajah also submitted that notwithstanding the escrow amount, MA was still standing in the position of a creditor *vis-à-vis* HL in view of the counterclaim.

9 However, Mr Chong objected to the suggestion to release $15m from the escrow account. He stressed that there was prejudice to HL in such an approach. Mr Chong explained that as matters stood, if the counterclaim was not successful, HL would be assured of receiving the return of the $25m from the escrow account but not payment of the $25m under the undisputed debt because MA's financial position was weak. Mr Chong also stressed that the parties had agreed that MA would look to the escrow amount for any claim under the warranties. He sought payment of $15m from MA before HL would consider withholding a winding-up petition pending the outcome of the counterclaim.

10 Mr Chong also disputed that there was a collateral motive by HL in its intention to present a winding-up petition based on the undisputed debt.

11 He further submitted that there was prejudice to HL if the injunction sought was granted because the counterclaim was pursued in arbitration proceedings and it was not likely that such proceedings would be concluded in 2006. HL was intending to challenge the validity of payments made by MA to its holding company, being partial repayments of a loan, from September 2004 to March 2006, amounting to about US$10m. The basis of the intended challenge was that such payments amounted to an unfair preference. Payments which constitute an unfair preference may be set aside under s 99 of the Bankruptcy Act (Cap 20, 2000 Rev Ed) read with s 329 of the Companies Act (Cap 50, 1994 Rev Ed) provided the commencement of winding up is initiated no later than two years after the payments. Therefore, if HL was allowed to file its winding-up petition only after the arbitration was concluded, HL (or the liquidator) would not be able to challenge some of the payments made to the holding company.

12 I was of the view that it was not open to MA to rewrite the SPA. MA had agreed to look to the escrow amount to meet any claim under the warranties. In so far as the escrow amount was insufficient to meet the counterclaim, MA could look elsewhere but only to the extent of the difference. While it was true that the escrow amount was for MA's benefit, I was of the view that MA could not unilaterally vary the SPA and effectively seek to substitute the security it had for the counterclaim. This reason alone was sufficient for me to dismiss MA's application for the injunction.

13 However, as much time was also spent on the issue whether the counterclaim was *bona fide* and based on substantial grounds, I will say something about that.

14 Mr Chong stressed that until quite late in the day, MA had consistently admitted the claims of HL and also made proposals to pay in instalments. Indeed, a partial payment of US$2m had been received on 24 June 2005, leaving the undisputed debt to be paid. Nevertheless, the evidence from

MA did suggest that they were looking into various breaches a few months before the counterclaim was in fact raised in September 2005.

15 Furthermore, although Mr Chong also sought to establish that MA's claims for breaches of warranties were clearly unsustainable, it was not possible for me to reach that conclusion at this stage in respect of all the claims under the counterclaim.

16 Mr Chong also submitted that part of the counterclaim was based on estimates and not actual costs of steps taken to rectify the breaches but that in itself did not mean that the counterclaim was unsustainable.

17 However, Mr Chong further submitted that the huge amount of the counterclaim arose from the fact that MA's claims were grouped under recurring and one-off breaches. The majority of the claims were under the recurring category to which a multiplier of 7 was added as the purchase price was based on EBITDA multiplied by 7. Mr Chong submitted that it was wrong to include this multiplier and, if it were excluded, the counterclaim would amount to about $10m only, much less than the undisputed debt even if the escrow amount was to be excluded from consideration. This demonstrated that the counterclaim did not exceed the undisputed debt.

18 On the other hand, Mr Rajah referred to a few cases which suggested that the formula used in determining the purchase price could be taken into account in determining the quantum of damages. However, Mr Chong submitted that there was no claim by MA for breach of the warranty under Schedule 4 clause 3.1 of the SPA which warranted that the accounts of HL (which was selling the business to MA) reflected a true and fair view of its assets, liabilities and state of affairs of HL and of its profits and losses. Mr Chong also highlighted that it was MA's accountants who had prepared the "Initial Statement", as defined in Schedule 2 of the SPA, which stated, *inter alia*, the value of the EBITDA, and HL had agreed to the Initial Statement. Under clause 8 of Schedule 2, the Initial Statement was final and binding on the parties in the absence of fraud or manifest error.

19 On such facts, it did not seem sufficient to me for Mr Rajah to say that MA was relying on fraudulent misrepresentation unless MA was also specifically seeking to set aside or challenge the EBITDA under the Initial Statement. Neither was it sufficient for Mr Rajah to say that the other breaches would in turn affect the profit and loss of HL at the material time and that this in turn would affect the EBITDA if there was no specific challenge to the EBITDA. Accordingly, it seemed to me that the amount of the counterclaim was not based on substantial grounds. This was another factor I took into account in dismissing MA's application. However, I hasten to add that nothing which I say here binds the arbitrator who is hearing the counterclaim and it is for him to rule thereon.

20 I will also say something about MA's assertion that there was a collateral purpose behind HL's threat to file a winding-up petition.

21 MA explained that HL was owned by Anthony Ser, George Ser and Ser Song Huak, who were also it directors. Anthony and George Ser own 67.3% of the shares in HL. Anthony and George Ser also own Leedon Ltd ("Leedon"), a Mauritian company, which in turn owns MPL (I) Limited which is the ultimate holding company of MA. The other shareholder of MPL (I) Limited is JPMP MPL Holdings Limited ("JPMP") which is owned by various investment funds managed by JP Morgan Partners, LLC. Therefore, JPMP and Leedon own and control 51% and 49% respectively of MPL (I) Limited. There are five directors of MA of which Anthony and George Ser are two. MA asserted that it was proposing to do a refinancing whereby it would sell three buildings it owns and lease it back. This would have raised funds to pay back the undisputed debt but the Sers disagreed with the proposal. The Sers were eventually prepared to agree to the refinancing but on terms stated in an e-mail from Leedon

dated 8 November 2005 which required MA to waive restrictions against competition with the business of the group companies and to waive all claims under the SPA. MA asserted that HL's threat to present a winding-up petition was part of a larger plan to engineer the release of various obligations of HL, Leedon, Anthony and George Ser.

22 While disputing that the Sers had a collateral purpose, Mr Chong stressed that HL's intended petition would be based on the undisputed debt unlike some other instances where the petition was based on, for example, the just and equitable ground. He submitted that where the petition was based on an undisputed debt, motive was irrelevant. I need refer to only two of the cases he cited.

23 In *Mann v Goldstein* [1968] 1 WLR 1091 the plaintiffs sought an injunction to restrain the defendants form taking any further step in the prosecution of their respective petitions. Ungoed-Thomas J said at 1095:

> I come now to the allegation of lack of bona fides and to abuse of process. It seems to me that to pursue a substantial claim in accordance with the procedure provided and in the normal manner, even though with personal hostility or even venom, and from some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting mala fide but acting bona fide in accordance with the process.

24 Although the above passage suggests that it is an absolute rule that motive is irrelevant where the debt is undisputed, another part of the judgment shows that it is meant to be a general rule only. Thus, Ungoed-Thomas J said at 1096:

> What then is the course for this court to take (1) when the creditor's debt is clearly established; (2) when it is clearly established that there is no debt; and (3) when the debt is disputed on substantial grounds?
>
> (1) When the creditor's debt is clearly established it seems to me to follow that this court would not, *in general at any rate*, interfere even though the company would appear to be solvent, for the creditor would as such be entitled to present a petition and the debtor would have his own remedy in paying the undisputed debt which he should pay.
>
> [emphasis added]

25 Indeed, the other case, *Sanpete* ([4] *supra*), also suggests that this is a general and not an absolute rule. In *Sanpete*, Chao Hick Tin JC (as he then was) said at 176, [45]:

> *Prima facie*, a creditor who cannot get paid has a right to a winding-up order, whatever may be his other motives. [emphasis added]

26 Mr Chong then explained that the Sers did not initially agree to the proposed sale and lease back transaction because MA had no use for the buildings which it would be leasing. It would be paying rent for buildings which it had no use for. Furthermore, the subsequent e-mail dated 8 November 2005 still demonstrated that the Sers wanted the undisputed debt paid as that was one of the conditions therein.

27 In the circumstances, I was of the view that there was no collateral purpose behind the threat to file a winding-up petition if the undisputed debt was not paid such as to justify the granting of the injunction sought. Ironically, it seemed to me that, bearing in mind the escrow amount, it was MA who was using the counterclaim for a collateral purpose, *ie*, to restrain HL from presenting a

winding-up petition.

28 In the circumstances, MA's assertion that a winding-up petition would cause it irreparable damage could not carry much weight. In any event, I will also say something about this argument.

29 MA had asserted that such a petition may well cause it to lose an existing contract and a potential contract. Such a petition would also amount to a default under a loan facility granted to it, if the petition was not set aside within 60 days. If the banks recalled the loan, this could and would possibly lead to MA's collapse. Yet, as I have mentioned, MA had from September 2004 repaid about US$10m on a shareholder's loan. Mr Rajah submitted that the repayment was to carry on the businesses of the MA group and surplus moneys would come back to MA but that still did not explain why MA had chosen not to pay HL for the steel that MA had received from HL and had used to manufacture and sell its own products. Logically, MA should have received payment for the sale of its products and should have been able to pay the undisputed debt unless the purchase moneys were diverted elsewhere and/or the prospects of the businesses were not as good as MA was suggesting. If the purchase moneys were used to expand businesses at the expense of HL, this was not equitable to HL.

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