IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 238

D C Suit No 50476/1997

Between

B M I Building Material International GmbH

… Plaintiff

And

Roberto Building Material Pte Ltd

… Defendant

GROUNDS OF DECISION

Version No 1: 20 Nov 2026 (00:35 hrs)

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B M I Building Material International GmbH v Roberto Building Material Pte Ltd

[1998] SGHC 238

D C Suit No 50476/1997
Lai Siu Chiu J
13 July 1998

Judgment:

GROUNDS OF DECISION

The background

1. The plaintiffs are a German company based in Hamburg and the defendants are a Singapore company. At the material time, the defendants were a customer of the plaintiffs who are suppliers of ceramic tiles. The defendants are in the business of selling building materials, both wholesale and retail.

2. In payment of tiles supplied by the plaintiffs, the defendants on 3 January 1997 duly accepted a bill of exchange for DM131,646.32 (the bill of exchange) dated 16 December 1996 drawn by and payable to the plaintiffs on 15 April 1997. However, the defendants failed to honour the bill of exchange on the due date, despite repeated requests. Accordingly the plaintiffs commenced these proceedings to recover the sum of DM131,646.32.

3. After the defendants' solicitors had entered an appearance to the writ of summons, the plaintiffs applied for and obtained summary judgment against the defendants on 26 February 1998. The defendants appealed against the decision of the court below and their appeal (Registrar's Appeal 300035/98) came up for hearing before me on 26 March 1998. I dismissed the appeal with costs and affirmed the decision of the lower court.

4. The defendants by their new solicitors then applied for further arguments pursuant to O 56 r 2 of the Rules of the Supreme Court (RSC) in respect of one issue only, namely that there should be a stay of execution on the judgment obtained by the plaintiffs, pending trial of the defendants' counterclaim. I acceded to the defendants' request and heard further arguments after which I granted a stay of execution on the judgment on the following terms:

> a. that the judgment sum and costs awarded to the plaintiffs be paid by the defendants to their solicitors to be held by the latter as stakeholders pending the trial of the defendants' counterclaim and the defendants' solicitors would furnish their undertaking to the plaintiffs to that effect;
>
> b. the defendants' solicitors would pay the judgment sum and costs awarded to the plaintiffs within 7 days in the event that the defendants' counterclaim is dismissed or in the event of any further order of court in the counterclaim proceedings.

The plaintiffs have appealed (Civil Appeal No 136/98) against my decision.

The affidavits

5. It is necessary for me to refer to the affidavits filed for the O 14 proceedings and the Registrar's Appeal relating to the defendants' counterclaim, to explain the reasons for my decision.

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6. The defendants in the affidavit of their project director Cher Eng Hiak (Cher) alleged that the plaintiffs are only middlemen who source marble tiles (the tiles) from factories in Spain and Portugal. It is only when they receive orders for tiles that the plaintiffs in turn, place such orders with manufacturers and suppliers. Cher deposed that the initial order placed by the defendants with the plaintiffs at end 1994 was satisfactorily fulfilled.

7. Cher deposed that subsequent shipments from the plaintiffs however, were less satisfactory -- the defendants discovered in early January 1996 that there were serious defects in the tiles supplied by the plaintiffs; they included differences in tonality and colouring, tiles of substandard quality which did not conform to the defendants' specifications, poor polishing, discoloured tile surfaces and tiles damaged by poor packing. Thereafter defects were discovered in other shipments of tiles supplied by the plaintiffs. In every case, full payment had been made by the defendants. Arising out of such defects, Cher said the defendants had a claim of US$59,693.56 and DM342,214.20 against the plaintiffs. Cher also claimed storage charges of $40,576 from the plaintiffs for warehousing the defective tiles and $4,000 for compensation paid to a customer.

8. To reinforce Cher's complaints on the defects in the tiles, the defendants filed an affidavit by two (2) surveyors, for their appeal. Chin Cheong and Yip Keng Cheong both of Building Appraisals Pte Ltd deposed that at the defendants' behest, they conducted a visual inspection of six (6) types of tiles supplied by the plaintiffs, on or about 14 March 1998, at the defendants' warehouse. They found that the tiles were out of range, different tiles were mixed in the same crates and at least 50% of the tiles were cracked, chipped or broken at the corners; 2 out of the 5 types of tiles were not of the quality specified.

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9. At the hearing of their appeal, I informed the defendants' counsel that, based on all the well known authorities cited by counsel for the plaintiffs, the defendants can have no defence to the bill of exchange held by the plaintiffs and which the defendants had accepted unless, the defendants could show fraud, illegality or lack of consideration touching the instrument. As the defendants could not prove any of the 3 elements, I accordingly dismissed their appeal.

10. Dismissal of the appeal however did not dispose of the defendants' counterclaim. In this regard I should mention that the plaintiffs, through their solicitor had filed an affidavit (on 14 February 1998) in reply to Cher's. I noted that in paras 8 to 11 of her affidavit, counsel did not deny the defendants' counterclaim; rather she sought to explain (without disclosing the source of her information) that:

> a. assorted tiles should not be used but should be destroyed to avoid mixing with those of the accepted quality, as per the terms of the agreement between the parties;
>
> b. the parties had also agreed on a system of handling quality complaints but it was never agreed that the plaintiffs would accept complaints from the defendants after a matter had been concluded between them and certainly not 7-12 months after delivery. In any case, the plaintiffs had agreed to replace one shipment without charge, despite which the defendants lodged a claim;
>
> c. the defendants' claim for storage charges was intended to inflate their claim for the purpose of finding a set-off to what they owed the plaintiffs – business sense dictated that the defendants should have destroyed the defective tiles rather than keep and return them to the plaintiffs, incurring storage and shipping charges in the process;
>
> d. the defendants also caused loss of goodwill and inconvenience to the plaintiffs by their cancellation of orders and change of choice of colours and decisions.

11. In their letter requesting for further arguments, (new) counsel for the defendants pointed out that the plaintiffs had not denied the defendants' claim

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for defective materials under 3 invoices totalling US$35,531.80 nor their claim for storage charges totalling S$40,576; the plaintiffs merely said the defendants' claim for storage charges was *unreasonable*. Neither did the plaintiffs deny the defendants' claim for compensation of $4,000 paid to a customer who took his claim against the defendants to the Small Claims Tribunal. Counsel cited *Sheppards & Co v Wilkinson & Jarvis* (1889) 6 TLR 13 to support his request.

12. I should add that in para 14 of his affidavit, Cher had deposed that to his knowledge, the plaintiffs had no substantial assets or paid up capital nor do they have any plant. In para 16 of the same affidavit, Cher had deposed that there was a real possibility that should the defendants succeed on their counterclaim, their judgment would be hollow as the plaintiffs would not be in a position to pay and it would also be impossible for the defendants to recover the judgment sum if they paid the same to the plaintiffs. These allegations were not disputed by the plaintiffs in any affidavit or by their counsel in her submissions. All that counsel said in her written submissions (at para 6) is as follows:

> It is not infrequent that the plaintiffs in actions on Bills of Exchange are mostly foreigners. The mere fact that the plaintiffs are foreigners cannot be a sufficient ground that the ordinary rule should not be applied and that the holder of the Bill should not be entitled to judgment without delay.

Neither did the plaintiffs deny Cher's statement that the plaintiffs are merely middlemen who source for tiles from various manufacturers whenever they receive orders such as those from the defendants. On the other hand, according to Cher, the defendants are an established company of substance in Singapore.

13. After I had granted the defendants a stay of execution on the plaintiffs' judgment, their counsel wrote in for yet further arguments submitting that I had exercised my discretion wrongly in granting a stay; I refused her request as it

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was tantamount to giving the plaintiffs a second bite of the cherry as they had already presented their arguments to oppose the defendants' application for a stay, which I rejected.

The decision

14. Counsel for the plaintiffs had submitted, that the defendants' counterclaim arose out of a transaction separate from the plaintiffs' claim based on a bill of exchange. Whilst that is technically correct, the fact remains that the bill of exchange was delivered to the plaintiffs by the defendants in payment for the tiles which defects formed the subject of the defendants' counterclaim, a portion of which the plaintiffs had admitted.

15. I turn now to the authorities cited by counsel to support the defendants' application for a stay; I begin with the Court of Appeal decision in *Sheppard v Wilkinson Jarvis* where the following dicta of Lord Esher MR (at p 13) was relied on by counsel:

> ….If it was clear that the claim must succeed, and there was really no defence to it, and the plaintiff would only be put to expense in proving his claim, then there ought to be judgment on the claim, but the matter must be so dealt with that the defendants who had a plausible counterclaim must not be injured. That could be done by staying execution on the judgment until the counterclaim had been tried…

The above extract was cited with approval by our courts in *P H Grace Pte Ltd v American Express International Banking Corporation* [1987] 1 MLJ 437 and in *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc* [1990] 3 MLJ 390.

16. As counsel for the plaintiffs on the other hand relied on *Yeo Hiap Seng v Australia Food Corp Pte Ltd* [1991] 3 MLJ 144 to support her arguments that

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no stay should be granted, I now turn to that case. There, the plaintiffs' claim against the second defendant was based on a contract of guarantee made between the plaintiffs and the second defendant pursuant to which the second defendant, who was a director of the first defendant, guaranteed that a cheque issued by the first defendant would be honoured. The plaintiffs presented the first defendant's said cheque for payment and it was dishonoured whereupon the plaintiffs claimed against the first and second defendants for the proceeds of the cheque. The plaintiffs obtained summary judgment on their claim against the second defendant and her appeal therefrom to a judge in chambers was dismissed. The first defendant also failed in its attempt to set aside the judgment obtained in default of its appearance by the plaintiffs, alleging that it had a counterclaim against the latter for supplying defective products.

17. In dismissing the defendants' appeals, the court held that the alleged counterclaim was based on the underlying contract between the plaintiffs and the first defendant but it did not relate to the plaintiffs' claim which was based on the dishonoured cheque and on s 55 of the Bills of Exchange Act Cap 23. The court went further to add that even if the first defendant succeeded in obtaining summary judgment on its counterclaim, it would not be allowed to set off the counterclaim against the plaintiffs' claim, relying on *Montecchi v Shimco (UK) Ltd; Domenica v Same* [1980]1 LLR 50 (which counsel for the plaintiffs also cited); I refer now to that Court of Appeal decision.

18. The two Italian plaintiffs in *Montecchi's* case sold leather goods to the English defendants. In each case, payment was by way of bills of exchange drawn by the defendants. In each case the bills were dishonoured and the plaintiffs brought separate actions. In the first action, the court granted summary judgment to the plaintiff but granted a stay of execution which was removed on

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appeal. In the second action, the plaintiff also obtained summary judgment. On appeal by the defendants, the court granted a stay of execution on the defendants paying the judgment sum into a joint account or into court; an injunction was also granted restraining the plaintiff from dealing in anyway with the proceeds of the judgment.

19. The defendants appealed in the first action and the plaintiff appealed in the second action. The Court of Appeal dismissed the defendants' appeal in the first action but allowed the appeal of the plaintiff in the second action. In his judgment Bridge LJ held that the fact that the defendants might have a counterclaim for unliquidated damages arising out of the same transaction formed no defence to an action on a bill of exchange and no ground on which a stay of execution of the judgment should be granted. His lordship further held that the granting of the Mareva injunction was inappropriate as

> there had to be a real reason to apprehend that if the injunction is not made, the intending plaintiff in this country may be deprived of a remedy against the foreign defendant whom he sought to sue.

20. As I declined to follow this authority, I which to highlight certain other passages from Bridge LJ's judgment which would explain my reasons. At p 52 his lordship went further to say:

> Now what is the position here? Here for all we know, the two Italian plaintiffs, the sellers of the goods in respect of which the bills of exchange were given, are persons of perfectly sound financial standing in Italy. The actions have been brought in this country on the bills of exchange. The defendants have had the advantage of being able to make their counterclaim in each case for the damages they say are due to them in respect of defects in the goods. If those counterclaims are eventually successful, then they will result in judgments in this country which will be enforceable in Italy under the procedure provided by the Foreign Judgments (Reciprocal Enforcement) Act 1933, and orders made thereunder.

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> ….for myself I am not satisfied that anything before us comes within a mile of showing that either of these two plaintiffs, in their role as prospective defendants to the defendants' counterclaim in the action, are debtors who will be liable to avoid any obligation which it may be shown they are under as a result of the counterclaim being brought to trial, or will be unable to satisfy such judgment as may result from the trial of those counterclaims.

Herein lies the difference between *Montecchi* and this case -- unlike the English defendants there, the defendants in our case will have no redress and no means of recovery should they succeed in their counterclaim at trial after they have paid the German plaintiffs the judgment sum of DM131,646.32. We do not have legislation equivalent to the Foreign Judgments (Reciprocal Enforcement) Act 1933 to enable a Singapore judgment creditor to register and enforce its judgment in Germany. As far as I am aware, our Reciprocal Enforcement of Foreign Judgments Act Cap 265 does not cover Germany.

21. At the risk of repetition, the plaintiffs did not deny the defendants' allegations made in Cher's affidavit that:

> a. they are only middlemen not manufacturers with at least a factory or other assets;

b. they have no assets or any presence in Singapore at all.

The plaintiffs gave no assurance that they will repay the judgment sum if paid to them, in the event the defendants succeed on the counterclaim. This case therefore is a far cry from the facts in *Yeo Hiap Seng* and *Montecchi.*

22. The conditions which I attached to granting a stay of execution on the judgment safeguarded the plaintiffs' interests more than adequately; they were not prejudiced by any delay in receiving the fruits of their judgment pending trial of the defendants' counterclaim.

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23. Hence, I granted the defendants' application.

Lai Siu Chiu

Judge

Lai Siu Chiu J

Lisa Sam (Donaldson & Burkinshaw) for the plaintiffs
William Da Silva (W P Da Silva & Company), Raymond Wong (Lee & Lee) for the defendants

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