Elitegroup Computer Systems Co, Ltd *v* Kobian Pte Ltd
[2010] SGHC 37

Case Number : Suit No 594 of 2009 (Summons No 251 of 2010)

Decision Date : 01 February 2010

Tribunal/Court : High Court

Coram : Philip Pillai JC

Counsel Name(s) : See Tow Soo Ling (Colin Ng & Partners LLP) for the plaintiff; B Ganeshamoorthy (Cornerstone Law LLP) for the defendant.

Parties : Elitegroup Computer Systems Co, Ltd — Kobian Pte Ltd

Civil Procedure

1 February 2010 Judgment reserved.

Philip Pillai JC:

1 The plaintiff was earlier granted summary judgment on its action in which the defendant had filed an original counterclaim. The defendant's application for a stay of execution based on its original counterclaim was unsuccessful as it did not raise a plausible counterclaim that would merit a stay.

2 This is an application by the defendant for leave to amend its counterclaim. In the event that leave to amend is granted, the defendant has made a further application for the judgment made on 12 January 2010 granting summary judgment to the plaintiff to be varied by an order to stay execution on the plaintiff's summary judgment pending the trial of the defendant's amended counterclaim.

Whether to grant leave to amend counterclaim?

3 The defence cites para 14/1/11 of *Singapore Court Practice 2009* (LexisNexis, 2009) ("*Singapore Court Practice*") in support of its need to amend its counterclaim at this preliminary stage:

> The plaintiff must ensure that all necessary amendments to his statement of claim are made prior to filing his application for summary judgment. This principle was recently reiterated by Woo Bih Li in Lee Hsien Loong, at [26]. Woo J also endorsed Chun Thong Ping v Soh Kok Hong [2003] 2 SLR 204 ('Chun Thong Ping') on the point that where the plaintiff makes an application to amend his statement of claim in the course of the summary judgment hearing prior to its conclusion, it will normally be permitted if the defendant is provided with the opportunity to amend his defence.

4 The proposed amendments to the counterclaim are to add the claim of false, untrue or fraudulent representations founded on oral discussions between the plaintiff and the defendant in connection with the Memorandum of Understanding ("MOU"). The object of these amendments is consequentially to persuade the Court afresh that there is now a plausible counterclaim for an amount not less than the plaintiff's claim within the circumstances set out in *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure*") at para 14/4/10 to wit:

(3) where there is no defence to the claim but a plausible counterclaim of not less than the claim is set up, judgment should be for the plaintiff on the claim with costs, stayed until the trial of the counterclaim;

5 I would state at the outset that this is not a case in which the defendant's right to apply for leave to amend its counterclaim may not be pursued hereafter under Order 20 Rule 5 of the Rules of Court and for a court to permit such amendment as the court may find appropriate under the principles enunciated in *Ketteman v Hansel Properties Ltd* [1987] AC 189 which were applied in *Wright Norman and anor v OCBC Ltd* [*1993*] 3 SLR(R) 640, [1994] 1 SLR 513.

6 At this preliminary stage of the proceedings relating to the defendant's counterclaim, I do not see the applicability of *Singapore Court Practice 2009* at para 14/1/11 cited by defence counsel.

7 Accordingly I have only to consider whether the amendments at this stage are warranted, taking into account that their conceded purpose is to provide the defendant with a stronger additional basis in support of its application for a stay of execution. The immediate question before me however is whether to allow the application for leave to amend and only if I were to grant such leave, to consider whether a stay of execution on the plaintiff's summary judgment ought to be granted. For completeness I should add that I was not minded to grant a stay of execution on the original counterclaim as it did not appear to me to present a plausible case.

8 I am also mindful that in the event that leave is granted to the defendant to amend the counterclaim at this stage, the plaintiff would be entitled to file an amended defence to the counterclaim.

9 I have considered *Singapore Civil Procedure 2007* at para 20/8/26 and *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348. I have further considered *International Factors Leasing Ltd v Personal Representative of Tan Hock Kee (deceased) and others* [2003] 2 SLR(R) 1 and in particular *Invar Realty Pte Ltd v Kenzo Tange Urtec Inc* [1990] 2 SLR(R) 66 per Yong Pung How J:

> The Court of Appeal in *Sheppards v Wilkinson* … recognized that a counterclaim may be used by a party as a defence to a claim in certain instances. The court stated that a defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible or there might be a counterclaim pure and simple. To shut out such a counterclaim would be an autocratic and violent use of O 14. The court had no power to try such a counterclaim on such an application, **but, if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded**. If the counterclaim was for a less sum than that claimed then judgment might be signed, if there was no real defence, for so much of the amount of the claim as was not covered by the counterclaim. But if the counterclaimed overtopped the claim and was really plausible, then the rule which had been often acted upon at chambers, of allowing the defendants to defend without conditions was the right one. There were however circumstances which might call on the court to act differently. If it was clear that the claim must succeed and there was really no defence to it, and the plaintiffs would only be put to expense in proving their 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; and that would be done by staying execution on the judgment until the counterclaim had been tried.
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> [emphasis in bold added]

10 The original counterclaim was founded on implied terms and constructing a contract arising out of an admittedly non-legally binding MOU. The amendments which are now proposed escalate the counterclaims to include false, untrue and fraudulent representations.

11 It is not denied that the parties entered into an MOU which was not legally binding because a legally binding agreement was premature in the context of how their collaboration would eventually materialize. If based on this, it is now sought to enforce the terms of the MOU by way of representations, it amounts to an indirect route to legally enforce what was conceded at the outset to be non-legally binding. This approach has no merit. It is further sought to supplement this approach by reference to oral discussions and representations in the context of the conclusion of an admittedly non-legally binding MOU. Again this fails to meet the threshold of plausibility and in the context of running these counterclaims for the purpose of obtaining a stay on the Plaintiff's summary judgment. This leads me to my decision that a stay is not warranted in any event.

12 Furthermore, since the proposed amendments lack particulars and quantification as to the damages claimed, it is not possible to establish whether any damages recoverable in a trial would exceed the amount payable to the Plaintiff under the summary judgment.

13 In the light of the above, I am not satisfied that the defendant has raised a plausible counterclaim relating to false, untrue or fraudulent statements to persuade me to grant leave to amend the counterclaim at this stage of the proceedings.

14 As I have found that the defendant's original and proposed amended counterclaim did not satisfy the threshold of a plausible counterclaim, the further application to vary my original decision to allow a stay of execution of the Plaintiff's summary judgment does not arise.

15 The defendant's applications are therefore denied. Costs of application awarded to plaintiff to be agreed or taxed.

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