Elbow Holdings Pte Ltd *v* Marina Bay Sands Pte Ltd
[2014] SGHC 219

Case Number : Suit No 954 of 2012 (Registrar's Appeal No 239 of 2014)

Decision Date : 29 October 2014

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Tan Weiyi, Lucas Lim and Chia Joanne (Wong & Leow LLC) for the plaintiff; Alma Yong and Sim Mei Ling (WongPartnership LLP) for the defendant.

Parties : Elbow Holdings Pte Ltd — Marina Bay Sands Pte Ltd

Civil Procedure – Security for costs

29 October 2014

Choo Han Teck J:

1 This is an appeal by the plaintiff, Elbow Holdings Pte Ltd ("Elbow") against the decision of the Supreme Court Registrar ("Registrar") in Summons No 2330 of 2014 ("Summons 2330 of 2014") on 26 July 2014 to award security for costs amounting to $75,000 in favour of the defendant, Marina Bay Sands Pte Ltd ("MBS"). The Registrar ordered that the security be furnished within 14 days of that order, namely, by 10 July 2014 and further ordered a stay of proceedings in the interim pending the payment of security. To date, the plaintiff has not provided the security, nor has it paid costs (which were fixed at $5,000 including disbursements) arising out of the security for costs application.

2 Elbow is a Singapore incorporated company that owns and operates an Australian themed bar and bistro known as South Coast Bar & Bistro ("South Coast") located at Marina Bay Sands Shoppes in Singapore's Marina Bay Sands Integrated Resort. South Coast is Elbow's only business. MBS is the landlord of and manages Marina Bay Sands Shoppes. On 8 March 2010, Elbow and MBS Pte Ltd entered into a lease agreement for units #01-R7 and #B1-R7 of Marina Bay Sands Shoppes. South Coast opened for business on 3 December 2010. Unit #01-R7 is the kiosk of South Coast, whereas #B1-R7 is the basement kitchen.

3 On 7 November 2012, Elbow commenced Suit No 954 of 2012 ("Suit 954 of 2012") for damages for misrepresentation and breach of a collateral contract. Elbow says that in the course of negotiations for the lease agreement from March 2009 to early March 2010, MBS had made the following oral and/or written representations to Elbow:

(a) First, Elbow would be able to use the outdoor space in the front of the kiosk for South Coast ; and

(b) Second, Elbow would be able to use the outdoor area along the promenade of the integrated resort. Elbow says that the outdoor area can accommodate hundreds of customers.

MBS denies these and counterclaims for arrears for the period 19 March 2012 to 1 January 2013 arising from Elbow's use and occupation of units #01-R7 and #B1-R7 and the outdoor space in front of the kiosk. It is MBS's defence that around June 2012, some two years after the lease agreement was signed, the parties restructured the lease agreement.

4 Since Elbow's commencement of Suit 954 of 2012, MBS has commenced two further actions against Elbow. Both actions are in relation to the leased units. The first is Suit No 702 of 2013 ("Suit 702 of 2013") commenced on 5 August 2013 for further arrears allegedly due and owing for the period from 1 March 2013 to 1 August 2013. The second, Suit 553 of 2014 ("Suit 553 of 2014") is a claim for arrears allegedly due and owing from September 2013 and May 2013 under the alleged restructured lease agreement and alternatively, the original lease agreement. In Suit 553 of 2014, MBS also seeks repossession of the units. The plaintiff obtained an order in Summons No 2654 of 2014 ("Summon 2654 of 2014") on 31 July 2014 consolidating Suits 702 of 2013, 553 of 2014 and 954 of 2012. These suits will proceed as one action.

5 On 21 April 2014, MBS's lawyers wrote to Elbow's lawyers requesting security for costs in the sum of $150,000 by way of a banker's guarantee. On 28 April 2014, Elbow's lawyers replied, saying that their client will not agree to provide security. MBS then took out Summons 2330 of 2014 for security for cost amounting to $150,000. As mentioned in [1] above, the registrar ordered security against Elbow who now appeals against that order.

6 Section 388(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") reads:

> **Security for costs**
>
> **388.**–(1) Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

The inability to pay the defendant's costs is one of two conditions for the courts to award security for costs. It must also be just to make such an order, having regard to all relevant circumstances (*Creative Elegance (M) Sdn Bhd v Puay Kim Seng & Anor* [1999] 1 SLR(R) 112 ("*Creative Elegance*") at [13]).

7 I begin by determining if the first condition is satisfied. MBS's lawyers argue there is reason to believe that Elbow will be unable to pay its (MBS's) costs as Elbow is in a "poor financial situation". MBS says that this is evidenced by: (1) Elbow's own documents; (2) concessions made by Elbow's Managing Director, Ms Kate McGettigan; and (3) Elbow's failure to pay arrears due and owing from its lease of the units.

8 Elbow's lawyers submit that MBS has not shown that Elbow will not be able to pay MBS's costs:

(a) First, there is evidence to suggest that Elbow will continue to be a going concern as Elbow's shareholders have indicated their intention to provide continuing financial support to Elbow. In support of this, Elbow's lawyers point out that one of its client's shareholders, Mr Brian McGettigan, has provided a payment of $177,693.96 in the past to enable Elbow to meet payment ordered by the High Court in relation to an injunction application in Suit 553 of 2014;

(b) Second, Ms McGettigan has provided an undertaking to pay MBS's costs if MBS is successful in its defence, should Elbow be unable to pay them;

(c) Third, Elbow is a company with a substantial paid-up capital of $1 million. Even though Elbow does not own real property, it owns "several assets"; and

(d) Fourth, Elbow has been operating South Coast for more than three years. Even though South Coast sustained losses in the first few years of its business, it continues to generate income and meet its operating and non-operating costs.

In any event, Elbow's lawyers argue that their client's present financial situation is caused by MBS. Elbow's lawyers say that MBS's refusal to allow it to use the outdoor area of the promenade "naturally" led to a "decline in its profitability".

9 After reviewing the evidence before me, I find that there is reason to believe that Elbow will be unable to pay MBS's costs if MBS is successful in its defence, namely:

(a) First, Elbow appears to be both cash flow and balance sheet insolvent. Its 2012 Annual Report, which were prepared by its auditors Veritas CPA states that Elbow incurred a net loss of $601,400 and that its current and total liabilities exceed its current and total assets by $988,502 for the year ending 28 February 2011. It further states that Elbow incurred a net loss of $431,996 and that its current and total liabilities exceed its current and total assets by $35,896 for the year ending 29 February 2012. There are no further annual reports provided by Elbow even though it could have easily done furnished one;

(b) Second, Elbow appears to be suffering significant net losses for the past few years since 29 February 2012. This can be seen from the following documents and concessions made by both Elbow and its staff. I start with the documents. The first is the Elbow's monthly balance sheet for January 2013 which shows that Elbow has negative equity amounting to $321,710.75. The second document is the Elbow's income statement dated 28 February 2014. It shows that Elbow suffered a net loss of $373,851.77 for the year ending 28 February 2014. Elbow's own Managing Director, Ms Kate McGettigan conceded that Elbow's financial situation is dire. In Ms McGettigan's 5th affidavit dated 5 June 2014, she states at [39(b)] that Elbow continues to suffer net losses. Elbow's own Statement of Claim states that "the viability of South Coast…was, and remains at risk";

(c) Third, it appears that Elbow remains in business only because of continuing financial support from the shareholders. This can be seen from the following comment made by Veritas CPA in Elbow's 2012 Annual Report, which reads:

> **2. Going concern**
>
> …The ability of the Company to continue as a going concern depends on the shareholders undertaking to provide continuing financial support to enable the Company to meet its obligation as and when they fall due.
>
> The financial statements of the Company have been prepared on a going concern basis as the shareholders have indicated their intention to provide continuing financial support to enable the Company to meet its obligation as and when they fall due. In the event that the continuing financial support from the shareholders is not forthcoming, and as a result the Company is unable to continue in operational existence for the foreseeable future, adjustments may have to be made to reflect the situation that assets may need to be realised other than in the normal course of business and at amounts which could differ significantly from the amounts that are currently recorded in the statement of financial position. In addition, the Company may have to provide for further liabilities that might arise…

The fact Elbow needs to rely on third parties to keep it in business is an indication that it may

not have the financial means to pay MBS's costs if MBS succeeds in its defence (*Frantonios Marine Services Pte Ltd v Kay Swee Tuan* [2008] 4 SLR(R) 224 ("*Frantonios*") at [33]); and

(d) Fourth, while it is true that Elbow has significant assets as seen in its 2012 Annual Report such as trade receivables and equipment, its liabilities exceed its assets (see above: [9(a)]).

10 The argument made by Elbow's lawyers that their client's present financial situation is caused by MBS is one of the main issues at trial. It is also my view that this contention can only be resolved at trial as MBS's refusal to allow Elbow use of the outdoor area might well be justified if there was no representation made by MBS that Elbow can use the outdoor area.

11 I now consider if it is just in the circumstances to order security for costs. Elbow's lawyers submit that it is not just in the circumstances to order security for costs for the following reasons:

(a) First, Elbow has a *bona fide* claim with a reasonable prospect of success;

(b) Second, Elbow's cash flow issues are caused by MBS;

(c) Third, an order for security will be oppressive and will stifle Elbow's claim;

(d) Fourth, MBS delayed taking out an application for security for costs. It waited 18 months after the commencement of Suit 954 of 2012 to do so; and

(e) Fifth, MBS is responsible for incurring significant costs in Suits 702 of 2013, 553 of 2014 and 954 of 2012. This is because it took many steps in these three suits such as:

(i) resisting Elbow's application for consolidation in Summons 2654 of 2014;

(ii) pursuing summary judgment in Suit 702 of 2013 all the way to an appeal;

(iii) resisting specific discovery in Suit 954 of 2012;

(iv) refusing to pay Elbow's costs for the summary judgment and discovery applications mentioned ($4,165.60); and

(v) giving notice to repossess the units occupied by South Coast.

12 MBS's lawyers, in arguing that it is just in the circumstances to order security for costs, submit the following:

(a) First, "policy reasons" lean in favour of protecting a defendant against an unsatisfied costs order where impecunious corporations are concerned. In this regard, Elbow's lawyers rely on the decision of the Court of Appeal in *Ho Wing On Christopher v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 ("*Ho Wing On Christopher*") and that of the High Court in *Frantonios* (see above: [9(c)]);

(b) Second, the legal costs for this suit are likely to be high. MBS's lawyers say that the trial is likely to last from six to ten days, large volumes of documents have been prepared, and both parties have hired senior counsel to represent them. Furthermore, Elbow has indicated that it is considering alternative heads of damages, may seek expert opinion on these damages and may amend its Statement of Claim later. MBS's lawyers say that MBS will have to incur further costs in making consequential amendments and obtaining expert advice on these alternative heads of

damage. There may also be a further round of discovery;

(c) Third, Elbow does not have a strong *bona fide* claim against it;

(d) Fourth, MBS is not the cause of Elbow's financial predicament; and

(e) Fifth, MBS is not attempting to stifle Elbow's claim, nor is it seeking to oppress Elbow.

13 It is just in the circumstances to order security for costs. First, the legislative and public policy behind s 388(1) of the CA leans more in favour of protecting a defendant (in this case, MBS) against an unsatisfied costs order. This is because the overriding policy consideration in a security for costs application is the plaintiff corporation's (in this case, Elbow) ability to pay the costs of the defendant should the former fail in its claim. As such, once a court finds that a plaintiff corporation is impecunious, the court ought to grant security for costs unless there are "special circumstances" pointing to the contrary (*Ho Wing On Christopher* (see above: [12(a)]); *Frantonios* (see above: [9(c)]). Elbow's lawyers in their written submissions have erred in stating that the policy consideration behind s 388 of the CA is only taken into account in the absence of "special circumstances". Elbow's lawyers as such, made no submissions on whether there are "special circumstances" necessitating not ordering security for costs.

14 Second, I am satisfied that the $75,000 awarded by the Registrar for security for costs is not an unreasonable sum for the same reasons given by MBS's lawyers (see above: [12(b)]).

15 Third, although MBS waited 18 months from the commencement of Suit 954 of 2012 to ask for security for costs, the delay is not significant because the parties have just completed discovery.

16 Fourth, I do not find that MBS had acted oppressively. MBS is entitled to pursue the interlocutory applications mentioned in [11(e)]. The legitimacy and propriety of MBS's attempt to repossess the units occupied by South Coast is a matter that is best resolved at trial.

17 The relative strengths and weaknesses of the parties' respective cases is a relevant consideration (*Creative Elegance* (see above: [6]) but is one that affords no assistance in the present case. This is because it is not clear at present which party has the stronger case given that many facts are in dispute. These facts will have to be determined by the trial judge as it is not appropriate for a court hearing an interlocutory application for security for costs to do so, except in the clearest of cases (*Frantonios* (see above: [9(c)]) at [51]; *Trident International Freight Services v Manchester Ship Canal Co* [1990] BCLC 263).

18 As mentioned in [10], it is speculative to determine whether MBS caused Elbow to suffer a loss. As such, I do not find this to be a relevant consideration.

19 For the reasons above, I order as follows:

(a) Elbow's appeal is dismissed;

(b) Elbow is to furnish security for costs within 21 days of 27 October 2014, the date of delivery of judgment;

(c) MBS may proceed with its counter-claim; and

(d) Costs are to be in the cause.

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