

STANDARD CONFECTIONERY SDN BHD & ANOR

v.

AMANAH RAYA BERHAD & ORS

High Court Malaya, Kuala Lumpur
Yeoh Wee Siam J
[Civil Suit No: 22NCVC-476-10-2014]
7 July 2015

Civil Procedure: Security for costs — Application for — Defendants filed application for security for costs from plaintiffs — Defendants claimed plaintiffs would be unable to pay costs if action was unsuccessful — Whether there was reason to believe that plaintiffs were unable to pay costs — Reasonable amount to be paid as security for costs — Whether seven days given to pay up security for costs sufficient — Whether stay of proceedings might be allowed following plaintiffs' failure to give security for costs

The 1st and 2nd defendants in this action filed applications (encls 67 and 122) seeking for security for costs of RM300,000.00 to be paid by the plaintiffs, in respect of the plaintiffs' writ of summons ('writ') and statement of claim ('SOC') (encl 1), within seven days from the date of the Court's Order, failing which these proceedings would be stayed, and this action would be dismissed. The plaintiffs' claim in encl 1 involved fraud regarding the sale and leaseback transactions of a property which was worth about RM91,200,000.00. The 1st and 2nd defendants contended that: the plaintiffs were impecunious and suffered losses; the plaintiffs' shares were delisted from Bursa Malaysia Securities Berhad following the rejection of its regularisation plan to Bursa Malaysia; and there was credible testimony that the plaintiffs would be unable to pay the costs of the defendants in the event the action was unsuccessful.

Held (allowing the defendants' application):

(1) The sum of RM30,000.00 as proposed by the plaintiffs was grossly insufficient as security for costs considering the value of the subject property. Furthermore, there are 30 volumes of the common bundle of documents totaling 6,299 pages. The lists of witnesses of the respective parties filed showed that there were five witnesses for the plaintiffs, two witnesses for the 1st defendant, two witnesses for the 2nd defendant, and four witnesses for the 4th defendant. This case involved serious disputes on fact and complex issues in law. The costs to be awarded after the trial would not be low. (para 12)

(2) In the instant application, the sum of RM300,000.00 as proposed by the 1st and 2nd defendants respectively was too high considering the plaintiffs' impecunious position. The security for costs should be reasonable, and not be oppressive. Its main purpose was to furnish security for the defendants' costs, and not to stifle the plaintiffs' litigation. The sum of RM100,000.00 was reasonable and fair, after considering the value of the subject property and the complexity of the matter, and after weighing the interests of the plaintiffs and the 1st and 2nd defendants. (para 13)



(3) It was imperative that security for costs be paid before the date of the Final Case Management because that was the date when the court would confirm whether all parties were ready for the trial. If not, in accordance with O 34 r 2(3) of the Rules of Court 2012 ('ROC'), the court might "dismiss such action or proceedings, or strike out the defence or counterclaim or enter judgment or make such Order as it thinks fit." The plaintiffs filed the writ and SOC on 17 October 2014. Enclosures 67 and 122 were filed on 7 May 2015 and 22 May 2015 respectively. When the plaintiffs filed the action, they should be prepared for all eventualities including any Order for security for costs since the plaintiffs themselves should know better that their financial position was weak. Moreover, the plaintiffs had ample time to make preparations and get ready the money for the security for costs even long before 15 June 2015 onwards. It was a baseless contention for the plaintiffs to now plead that they were only given seven days to pay the security for costs knowing full well that the trial would commence on 29 June 2015 and costs would start running. (paras 15-16)

(3) In the present case, s 351(1) of the Companies Act 1965 was correctly relied upon by the defendants in their respective applications. The two defendants did not apply for security for costs under O 23 of the ROC since those situations as envisaged in O 23 r (1)(1)(a) to (d) were not applicable here. Notwithstanding the court's discretionary power to stay all proceedings under s 351(1) of the Companies Act 1965, the court exercised the inherent powers under O 92 r 4 of the ROC and ordered that the plaintiffs' action be dismissed if the plaintiffs failed to give the security for costs within seven days from the date of the Order. This was for the reason that it would cause grave injustice to the defendants if the court allowed the plaintiffs' proceedings to be stayed indefinitely when the plaintiffs failed to give the security for costs. It amounted to allowing the plaintiffs to abuse the process of the court in that the plaintiffs could decide to commence its action, and yet not be able to give security for costs, but still expected the court to stay all proceedings until such time as was convenient for the plaintiffs to give the security for costs. (paras 25-26)

(4) With regards to the plaintiffs' action against the 3rd and 4th defendants (encl 1), since the plaintiffs did not comply with the Court's Unless Order to file the remaining trial documents ie the plaintiffs' witness statements and list of exhibits by the extended deadline, the 4th defendant's oral application was allowed. Accordingly, the plaintiffs' action against the 4th defendant was dismissed with costs. The 3rd defendant was absent and was not represented. Since the plaintiffs had failed to file their witness statements and list of exhibits for the action in encl 1, it meant that the plaintiffs had actually, *inter alia*, not filed the necessary trial documents in respect of proving its claim against the 3rd defendant. Therefore, the plaintiffs were not entitled to enter final judgment against the 3rd defendant on the trial date since the plaintiffs did not file the above documents as ordered by the court. Accordingly, the plaintiffs' action against the 3rd defendant was dismissed. (paras 44-45)



(5) With regards to encl 9, since the plaintiffs did not comply with the Court's Order to file the witness statements and list of exhibits for the trial of the 2nd defendant's counterclaim against the 2nd plaintiff, and in view of the fact that the 2nd defendant's counterclaim was a mixed claim, the plaintiffs were ordered to be precluded from defending the 2nd defendant's counterclaim and the plaintiffs' defence to the counterclaim be struck out. Further, Interlocutory Judgment to the 2nd defendant was granted for its counterclaim against the 2nd plaintiff, subject to proof of the counterclaim. (para 50)

Legislation referred to:

Companies Act 1965, ss 176, 351(1)

Rules of Court 2012, O 23 rr 1(1)(a), (b), (c), (d), 2, 3, O 34 r 2(3), O 92 r 4

Counsel:

For the plaintiffs: Chong Phow Yew; M/s Kamaruzaman Arif, Amran & Chong

For the 1st defendant: Shamsul Bahrin Manaf; M/s Mohanadass Partnership

For the 2nd defendant: Benjamin Dawson (Eileen Othman with him); M/s Benjamin Dawson

For the 3rd defendant: Absent

For the 4th defendant: Suzalena Salleh; M/s Hasnan Hamzah

JUDGMENT

Yeoh Wee Siam J:

Enclosures 67 And 122

[1] Enclosure 67 is the 1st defendant's application for security for costs of RM300,000.00 to be paid by the plaintiffs, in respect of the plaintiff's writ of summons ("writ") and statement of claim ("SOC") (encl 1) filed against the 1st defendant, within seven days from the date of the Court's Order, failing which these proceedings would be stayed, and this action would be dismissed without further Order, and for costs.

[2] Enclosure 122 is the 2nd defendant's application for security for costs of RM300,000.00 to be paid by the plaintiffs in respect of encl 1 against the 2nd defendant on almost similar terms as in encl 67.

Court's Decision Given On 15 June 2015 Regarding Enclosures 67 And 122

[3] On 15 June 2015 after considering encls 67 and 122 respectively, and the affidavits and written submissions and authorities filed by both parties, and the further oral submissions of learned counsels for the 1st and 2nd defendants, and the plaintiffs, I allowed encls 67 and 122 respectively in the terms prayed for except that the security for costs is RM100,000.00, and not RM300,000.00 as prayed.



Notices Of Appeal Filed By Plaintiffs Regarding Enclosures 67 And 122

[4] On 26 June 2015 the plaintiffs filed two separate notices of appeal regarding encls 67 and 122 respectively. Each appeal is only in respect of part of the court's decision ordering that if the plaintiffs fail to give the security for costs of RM100,000.00 to solicitors for the 1st defendant or 2nd defendant, as the case may be, within seven days from 15 June 2015, then the plaintiffs' action against the 1st and 2nd defendants respectively would be dismissed without further Order.

Grounds For Court's Decision Regarding Enclosures 67 And 122

[5] I shall now give the grounds for my decision on the following three matters:

- (1) the sum of RM100,000.00 as security for costs;
- (2) that the security for costs be paid by the plaintiffs within seven days of the Order; and
- (3) that the plaintiffs' action be dismissed without further Order if the plaintiffs fail to pay the security for costs within seven days from the date of the Order, ie 15 June 2015.

Regarding (1) Above

[6] The plaintiffs submitted that the time frame of seven days imposed is clearly a tactical ploy made by the respective 1st and 2nd defendants to get rid of the plaintiffs' claim knowing that the plaintiffs will not be able to pay the money within such a short space of time. The applications were being used to stifle the *bona fide* claim made by the plaintiffs. The plaintiffs further submitted that if the court is minded to give a time frame, the plaintiffs would only be able to meet the time frame if the amount ordered to be placed as security is RM30,000.00 as offered by the plaintiffs which is reasonable.

[7] The plaintiffs' claim in encl 1 involves fraud regarding the sale and leaseback transactions of a property which is worth about RM91,200,000.00 or more.

[8] The 1st defendant's grounds for the application in encl 67, briefly, as are follows:

- (a) The plaintiffs are impecunious and suffered losses at all material times;
- (b) The 2nd plaintiff's shares were delisted from Bursa Malaysia Securities Berhad ("Bursa Malaysia") following the rejection of its regularisation plan to Bursa Malaysia; and
- (c) The 1st defendant therefore has no assurance that the plaintiffs will be able to meet the costs of litigation should costs be awarded against them.

(see 1st defendant's affidavit in support/AIS).



[9] The 2nd defendant's grounds for the application in encl 122, briefly, are as follows:

- (i) There is credible testimony that the plaintiffs will be unable to pay the costs of the 2nd defendant in the event the action herein is unsuccessful as:
 - (a) based on the company search result, as at 7 May 2015, the 1st plaintiff has accrued a loss after tax amounting to RM14,648,213.00 whilst the 2nd plaintiff has accrued a loss after tax of RM52,821,000.00; and
 - (b) the Restraining Order under s 176 of the Companies Act 1965 which the plaintiffs had obtained has lapsed on 15 April 2015, and as such the plaintiffs are now exposed to legal action including enforcement proceedings by its numerous creditors.

(see 2nd defendant's AIS).

[10] The two applications are made under s 351(1) of the Companies Act 1965 which provides as follows:

"Security for costs

351. (1) Where a company is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company 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."

[11] In view of the credible testimony regarding the plaintiffs' poor financial position, and there is reason to believe that the plaintiffs would be unable to pay the costs of the 1st and 2nd defendants, if they are successful in their defence, it is necessary to require the plaintiffs to give sufficient security for those costs before the trial to ensure that at the end of the trial, should costs be awarded in favour of the 1st and/or the 2nd defendants, the defendants would be paid their costs.

[12] I am of the view that the sum of RM30,000.00 as proposed by the plaintiffs is grossly insufficient as security for costs considering the value of the subject property. Furthermore, there are 30 volumes of the Common Bundle of Documents (CBOD) totaling 6,299 pages. The lists of witnesses of the respective parties filed show that there are five witnesses for the plaintiffs, two witnesses for the 1st defendant, two witnesses for the 2nd defendant, and four witnesses for the 4th defendant. This case involves serious disputes on fact and complex issues in law. The costs to be awarded after the trial would not be low.



[13] On the other hand, I am of the view that the sum of RM300,000.00 as proposed by the 1st and 2nd defendants respectively is too high considering the plaintiffs' impecunious position. In my opinion, the security for costs should be reasonable, and not be oppressive. Its main purpose is to furnish security for the defendants' costs, and not to stifle the plaintiffs' litigation. I was satisfied that the sum of RM100,000.00 is reasonable and fair, after considering the value of the subject property and the complexity of the matter, and after weighing the interests of the plaintiffs and the 1st and 2nd defendants.

Regarding (2) Above

[14] The Hearing in Chambers of encls 67 and 122 was on 15 June 2015. On 20 January 2015 during Case Management ("CM"), the full trial dates of the plaintiffs' action had already been fixed on 29 to 30 June 2015, and 28 to 31 July 2015.

[15] It would defeat the purpose of ordering the security for costs and then giving the plaintiffs a period which is longer than seven days to pay such security since 15 June 2015 was only 13 days before the commencement of the trial of the plaintiffs' action and the 2nd defendant's counterclaim. The last CM for the writ and SOC (encl 1) and the 2nd defendant's counterclaim (encl 9) was already fixed on 23 June 2015. Thus, bearing in mind the reality of the situation, I allowed the prayer of the 1st and 2nd defendants respectively to require the plaintiffs to pay the security for costs within seven days of the Order. The seven days would expire on 22 June 2015, ie 1 day before the final CM and seven days before the trial. It is imperative that security for costs be paid before the date of the final CM because that is the date when the court would confirm whether all parties are ready for the trial. If not, in accordance with O 34 r 2(3) of the Rules of Court 2012 ("ROC"), the court may "dismiss such action or proceedings, or strike out the defence or counterclaim or enter judgment or make such Order as it thinks fit."

[16] The plaintiffs filed the writ and SOC on 17 October 2014. Enclosures 67 and 122 were filed on 7 May 2015 and 22 May 2015 respectively. When the plaintiffs filed the action, they should be prepared for all eventualities including any Order for security for costs since the plaintiffs themselves should know better that their financial position is weak. Moreover, the plaintiffs had ample time to make preparations and get ready the money for the security for costs even long before 15 June 2015 onwards. It is a baseless contention for the plaintiffs to now plead that they were only given seven days to pay the security for costs knowing full well that the trial would commence on 29 June 2015 and costs would start running.

Regarding (3) Above

[17] Learned counsel for the plaintiffs submitted that if the plaintiffs fail to give the security for costs as ordered by the court, then in accordance with s 351(1) of the Companies Act 1965 the court may "stay all proceedings until



the security is given". He argued that s 351(1) of the Companies Act 1965 does not allow an automatic dismissal or striking out of the plaintiffs' action if the plaintiffs fail to give the security for costs as ordered, and the court should only stay all proceedings until the security is given.

[18] Regarding the above submission, it must be noted that the plaintiffs did not file any application for a stay of the Order dated 15 June 2015, or for a stay of the entire proceedings. Neither was there any application filed for extension of time to pay the security for costs. The court was only informed through the first oral statement from the Bar ("oral statement") of learned counsel for the plaintiffs on 15 June 2015 that the plaintiffs would be able to pay the security for costs if given two weeks to pay, and again through his second oral statement made on 23 June 2015 that the plaintiffs would need another two weeks to come up with the money to pay for the security for costs. It must be further noted that two weeks from 23 June 2015 would be until 7 July 2015, ie eight days after the trial commences on 29 June 2015. That would defeat the whole purpose of the court in granting an Order for security for costs.

[19] Therefore, with respect to learned counsel for the plaintiffs, I am of the view that while s 351(1) of the Companies Act 1965 provides for the court's discretionary power to stay all proceedings until the security is given, that provision does not prevent the court from exercising its inherent powers under O 92 r 4 of the ROC "to make any order as may be necessary to prevent injustice or to prevent an abuse of process of the court."

[20] It is common practice for the court, when ordering a plaintiff to give security for costs under O 23 r 1(1) of the ROC to order the time limit for the plaintiff to give such security, failing which the action shall be dismissed without further Order. This is done in exercise of the court's power contained in O 23 r 2 of the ROC which provides as follows:

"Manner of giving security (O 23, r 2)

2. Where an order is made requiring any party to give security for costs, the security shall be given in such manner, at such time, and on such terms, if any, as the court may direct."

[21] It is observed that O 23 r 3 of the ROC further provides as follows:

"Saving for written law (O 23 r 3)

3. This Order is without prejudice to the provisions of any written law which empowers the court to require security to be given for the costs of any proceedings."

[22] The effect of the saving provision in O 23 r 3 is that any Order made by the court for a plaintiff to give security for costs under O 23 should be without prejudice to the provisions of any written law which gives the court power to require security to be given for the costs of any proceedings.



[23] Applying O 23 r 3 of the ROC to the present case, it means that the powers of the court to order security for costs under s 351(1) of the Companies Act 1965, a written law, should not be prejudiced or be affected by O 23 of the ROC.

[24] Therefore, where there is a specific provision in the written law, ie s 351(1) of the Companies Act 1965 as in this case, that specific provision should be allowed to apply.

[25] In the present case, s 351(1) of the Companies Act 1965 was correctly relied upon by the 1st and 2nd defendants (“the two defendants”) in their respective applications. The two defendants did not apply for security for costs under O 23 of the ROC since those situations as envisaged in O 23 r 1(1)(a) to (d) are not applicable here.

[26] Notwithstanding the court’s discretionary power to stay all proceedings under s 351(1) of the Companies Act 1965, I exercised the court’s inherent powers under O 92 r 4 of the ROC and ordered that the plaintiffs’ action be dismissed if the plaintiffs fail to give the security for costs within seven days from the date of the Order. This is for the reason that it would cause grave injustice to the two defendants if the court allows the plaintiffs’ proceedings to be stayed indefinitely when the plaintiffs fail to give the security for costs. It tantamounts to allowing the plaintiffs to abuse the process of the court in that the plaintiffs can decide to commence its action, and yet not be able to give security for costs, but still expect the court to stay all proceedings until such time as is convenient for the plaintiffs to give the security for costs.

[27] It must be stressed here again that the trial dates have been fixed about five months ago, and the trial would begin on 29 June 2015. This action was filed in October 2014 and according to the aging list, the action would be nine months old on 17 July 2015. The plaintiffs cannot be allowed to have their cake and eat it. If they wish to maintain the action, they would have to give the security for costs as ordered by the court. Otherwise, it is only right and fair that the plaintiffs’ action be dismissed. The plaintiffs owe a duty to the court to assist the court in the due administration of justice so that the backlog of cases can be cleared timeously and efficiently.

Notice Of Appeal Filed By The Plaintiffs Regarding The Court’s Orders Given On 23 June 2015

[28] The plaintiffs filed a third Notice of Appeal on 26 June 2015 regarding the Orders of the court made during CM on 23 June 2015.

[29] The date, 23 June 2015, was fixed by the court for the CM of encls 67 and 122, and also for the final CM of enclosures 1 and 9 before trial.



Grounds For Court's Orders Given On 23 June 2015**CM Regarding Enclosures 67 And 122, And Final CM Of Enclosure 1 Regarding The Plaintiffs' Claims Against The 1st and 2nd Defendants**

[30] In accordance with the court's Orders made on 15 June 2015, the plaintiffs' action against the 1st and 2nd defendants respectively would be dismissed without further Order if the plaintiffs fail to give the security for costs by the 7th day, ie on/or before 22 June 2015.

[31] On 23 June 2015, learned counsel for the plaintiffs confirmed that the plaintiffs did not give the security for costs by 22 June 2015.

[32] Accordingly, I dismissed the plaintiffs' action (encl 1) against the 1st and 2nd defendants effective on 22 June 2015.

[33] Considering the value of the subject property being about RM92 million, and the complexity of the issues involved in the case, and the number of trial documents already filed, learned counsels for the 1st and 2nd defendants asked for costs of RM300,000.00 each.

[34] I ordered the plaintiffs to jointly pay each of the 1st and 2nd defendants costs of RM15,000.00. To my mind, this is a reasonable sum since all the preparations and work for trial had already been done by the 1st and 2nd defendants and their counsels. But for the failure of the plaintiffs to give security for costs by 22 June 2015, the trial in respect of encl 1 would have commenced on 29 June 2015.

Final CM Of Enclosures 1 And 9 For The Plaintiffs' Remaining Claims Against The 3rd And 4th Defendants, And The 2nd Defendant's Counterclaim

[35] With the dismissal of the plaintiffs' action against the 1st and 2nd defendants, the remaining claims left for trial are:

- (1) the plaintiffs' action against the 3rd and 4th defendants (encl 1);
and
- (2) the 2nd defendant's counterclaim against the 2nd plaintiff (encl 9).

Enforcement Of The Unless Order Given By The Court

[36] In respect of the plaintiffs' case against the 1st, 2nd and 4th defendants, the court had, during the CM on 7 January 2015, deemed the pleadings to be closed. The court was still awaiting the plaintiffs' action to serve the writ and SOC on the 3rd defendant, pending the plaintiffs' application for leave to proceed against the 3rd defendant who has become a bankrupt.

[37] During the CM on 20 January 2015, the court fixed the trial on 29 to 30 June 2015 and 28 to 31 July 2015. The court further ordered that all parties file the following documents for the trial ("trial documents"):



1st set of trial documents to be filed by 13 April 2015, namely the bundle of pleadings (BOP), statement of agreed facts (SOAF), issues to be tried (ITBT), summary of case, list of witnesses, and the common bundle of documents (CBOD) in Parts A, B and C; and

2nd set of trial documents to be filed by 13 May 2015, namely the witness statements and list of exhibits.

[38] On 20 January 2015, the court further gave the Unless Order and informed all parties present that if any party fails to file any of the above trial documents by the dates given, then in accordance with the court's powers given in O 34 of the ROC for Pre-Trial Case Management, in particular O 34 r 2(3), the court may dismiss the action or proceedings, or strike out the defence or counterclaim or enter judgment or make such Order as it thinks fit. The court advised all parties to strictly comply with the filing dates given.

[39] In the case of the 3rd defendant, the plaintiffs subsequently served the writ and SOC on the 3rd defendant by substituted service. The affidavit of service was filed on 19 March 2015. The last day to enter appearance was 1 April 2015. However, the 3rd defendant did not enter appearance. On 6 April 2015, learned counsel for the plaintiffs applied for judgment in default of appearance against the 3rd defendant. However, since this is not a liquidated claim but a mixed claim, the court ordered that the 3rd defendant be precluded from entering appearance and defence. The court further ordered that interlocutory judgment be entered against the 3rd defendant subject to the outcome of the full trial against the other remaining defendants, and proof of the plaintiffs' claim against the 3rd defendant and proof of damages, if any.

[40] Regarding the above Unless Order, learned counsel for the plaintiffs wrote a letter to the court dated 9 April 2015 asking for extension of time to file the trial documents. The court by a letter dated 15 April 2015 allowed an extension of time until 27 April 2015.

[41] Learned counsel for the 1st defendant then wrote a letter dated 20 May 2015 asking the court for extension of time to file the witness statements, list of exhibits and list of witnesses. The court replied by a letter dated 2 June 2015 to counsel for the plaintiffs, and counsels for the 1st, 2nd and 4th defendants, to allow these parties to file the witness statements, list of exhibits and list of witnesses by 22 June 2015. Parties were also informed by the court that the final CM would be on 23 June 2015 and the trial would commence on 29 June 2015 at 11.45am. Parties were further informed that they were required to comply with the court's directions and attend court on the date and time fixed.

[42] On the final CM date on 23 June 2015, the 1st, 2nd and 4th defendants had complied with the court's directions given vide its letter dated 2 June 2015, and had already filed all the remaining trial documents on/before 22 June 2015. However, on record, the plaintiffs failed to file their witness statements and list of exhibits on/before the deadline given, ie 22 June 2015.



[43] Learned counsel for the 4th defendant then made an oral application for the plaintiffs' action against the 4th defendant to be dismissed. She asked for costs of RM300,000.00 since all the trial documents have been filed and all preparations and work for the trial on 29 June 2015 had already been completed.

[44] In exercise of the court's powers under O 34 r 2(3) of the ROC, since the plaintiffs did not comply with the court's Unless Order to file the remaining trial documents, ie the plaintiffs' witness statements and list of exhibits by the extended deadline of 22 June 2015, I therefore allowed the oral application of learned counsel for the 4th defendant. Accordingly, the plaintiffs' action against the 4th defendant was dismissed with costs of RM15,000.00 to be paid by the plaintiffs jointly to the 4th defendant.

[45] The 3rd defendant was absent and was not represented by counsel on 23 June 2015. Since the plaintiffs had failed to file their witness statements and list of exhibits for the action in encl 1, it means that the plaintiffs had actually, *inter alia*, not filed the necessary trial documents in respect of proving its claim against the 3rd defendant. Therefore, notwithstanding the earlier interlocutory judgment given by the court against the 3rd defendant, the court decided that the plaintiffs are not entitled to final judgment to be entered against the 3rd defendant on the trial date on 29 June 2015 since the plaintiffs did not file the above documents by 22 June 2015 as ordered by the court. Accordingly, the plaintiffs' action against the 3rd defendant was dismissed, but with no Order as to costs considering that the 3rd defendant had at all times been absent, and had not entered appearance or filed any application in court.

[46] In view of the fact that the plaintiffs failed to file their witness statements and list of exhibits by 22 June 2015, learned counsel for the 2nd defendant made an oral application for the 2nd plaintiff's defence to the 2nd defendant's counterclaim to be struck out and for judgment to be entered against the 2nd plaintiff in respect of the counterclaim (encl 9).

[47] Learned counsel for the plaintiff then cited s 351(1) of the Companies Act 1965 and submitted that all proceedings are stayed until the plaintiffs give sufficient security for costs.

[48] With respect, I am unable to agree with the above submission. Instead, I agree with the submission of learned counsel for the 2nd defendant that any reference to a stay of proceedings, if allowed, is only applicable to the action commenced by the plaintiffs. Section 351(1) of the Companies Act 1965 provides for security for costs to be given by the plaintiffs for the prosecution of its claim against the defendants. Section 351(1) of the Companies Act 1965, by any stretch of imagination, can never apply to the 2nd defendant's counterclaim against the 2nd plaintiff. The plaintiffs did not file any application for security for costs to be given by the 2nd defendant for its counterclaim, which is a separate action from the plaintiffs' action. Thus, there is no legal basis for the proceedings regarding the 2nd defendant's counterclaim to be stayed under s 351(1) of the Companies Act 1965.



[49] The 2nd defendant's counterclaim is not wholly a liquidated claim. It is a mixed claim against the 2nd plaintiff for payment of outstanding lease rental, double rental, interest on any sum assessed and awarded by the court, and for declaratory Orders regarding the wrongful occupation of the property by the 2nd plaintiff and for vacant possession of the property, and costs and general damages to be assessed.

[50] Since the plaintiffs did not comply with the court's Order to file the witness statements and list of exhibits for the trial of the 2nd defendant's counterclaim against the 2nd plaintiff, and in view of the fact that the 2nd defendant's counterclaim is a mixed claim, I ordered that the plaintiffs be precluded from defending the 2nd defendant's counterclaim and the plaintiffs' defence to the counterclaim be struck out. I granted interlocutory judgment to the 2nd defendant for its counterclaim against the 2nd plaintiff, subject to proof of the counterclaim as applied for in prayer 45 of the counterclaim (encl 9).

[51] I then fixed the hearing of the 2nd defendant's counterclaim against the 2nd plaintiff on 29 June 2015 at 11.45am. In view of the plaintiffs' defence to the 2nd defendant's counterclaim being struck out, I further ordered the 2nd defendant to file its amended witness statements, if any, before 4pm on 25 June 2015.

