Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd
[2004] SGCA 44

Case Number : CA 8/2004

Decision Date : 21 September 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

Counsel Name(s) : Jimmy Yim SC (Drew and Napier LLC), Josephine Chong and Victor Leong Wai Ming (Chan Kam Foo and Associates) for appellant; B Mohan Singh (K K Yap and Partners) for respondent

Parties : Romar Positioning Equipment Pte Ltd — Merriwa Nominees Pty Ltd

Civil Procedure – Pleadings – Amendment – Whether late amendment to Reply introducing inconsistent plea not found in Statement of Claim should have been allowed

Contract – Contractual terms – Condition precedent – Whether signing and forwarding of Deed condition precedent to obligation to pay under Deed

Contract – Contractual terms – Implied terms – Deed signed in counterparts – Whether necessary to imply term requiring forwarding of signed Deed to other party

21 September 2004

Lai Siu Chiu J (delivering the judgment of the court):

1 This was an appeal against the decision of the judge awarding judgment to Merriwa Nominees Pty Ltd ("the respondent") on 8 January 2004 and ordering Romar Positioning Equipment Pte Ltd ("the appellant") to render an account, *inter alia*, of moneys owed to the respondent. We heard the appeal and allowed it on 26 August 2004. We now give our reasons.

The facts

2 The appellant is a Singapore company. It is in the business of manufacturing, supplying and acting as consultants in automated welding equipment and metal work machinery. The respondent is a company incorporated in Western Australia with a place of business at Perth. It is in the business of providing specialised drilling technology and services.

3 In early 2000, the appellant approached the respondent to inquire whether the latter was interested to enter into a joint venture to provide specialised drilling services to an Indian company, Reliance Engineering Associates Private Limited ("Reliance"), with whom the appellant had established contact. After several discussions between the appellant's managing director, Jonathan Lim ("Lim"), and the respondent's managing director, James Johnson ("Johnson"), it was agreed that the two parties would jointly undertake the venture.

4 On or about 13 November 2000, the appellant entered into an agreement with Reliance ("the Reliance Agreement") to provide technical assistance, direction and supervision for the installation of a network of optic fibre cables throughout India ("the project"). Although the appellant alone contracted with Reliance, it was agreed that the contracted works would be provided by both parties.

5 On 1 December 2000, the appellant and the respondent entered into two written agreements, one being a Service Agreement and the other a Partnership Agreement. Under the

Service Agreement, the respondent was to train and provide sufficient personnel to be employed by the appellant to enable the company to fulfil its obligations under the Reliance Agreement. In consideration of this, the appellant would, within three business days after it had received payment from Reliance for the services rendered, provide to the respondent the details of the payment received and all reasonable expenses incurred under the Reliance Agreement, as well as a cheque for an amount equal to half of the payment received by the appellant (less reasonable expenses incurred).

6 In the period between December 2000 and September 2001, the respondent recruited and trained personnel for the appellant. By September 2001, the appellant had paid the respondent US$165,000 for the latter's share of the services provided to Reliance. This sum was in addition to amounts paid to Johnson for his work as one of the specialists employed in the project.

7 Reliance's delay in paying invoices issued by the appellant caused unhappiness to the respondent. The respondent accused the appellant of withholding payments from and of not accounting fully to it. The respondent would not accept the appellant's explanation that Reliance was responsible for the delay.

8 After an exchange of telephone calls and e-mails between Lim and Johnson on the accounts issue, a meeting took place on 7 February 2002 in Australia, at the office of the respondent's Perth solicitors, attended by the respondent's solicitor Chris Stokes ("Stokes"). The parties reached an agreement at the meeting to settle their differences. It was agreed that the appellant would pay the respondent a sum of US$325,000 ("the settlement sum") in full and final settlement of all claims between them in connection with the Service Agreement. The settlement sum would be paid in three instalments, *viz* US$250,000 upon the signing of the settlement agreement, US$50,000 on or before 31 May 2002 and US$25,000 on or before 31 July 2002.

9 As Lim had to return to Singapore on the same day, it was agreed that Stokes would draw up the settlement agreement and fax a copy to Lim's Singapore office for his signature. A deed of settlement and release ("the Deed") was subsequently prepared by Stokes. Clause 1 of the Deed reflected the agreement to pay the settlement sum by three fixed instalments in accordance with the time frame stated above. Clause 7 provided that the Deed would not be effective until the full settlement sum had been received by the respondent.

10 Also on the same day (7 February 2002), Stokes faxed a copy of the Deed to Lim for his signature, under cover of a letter. Lim duly executed the Deed and forwarded it to Stokes' office.

11 On 8 February 2002, the appellant's solicitors received a letter from the respondent's Singapore solicitors confirming the settlement agreement and stating that a copy of the Deed was signed by the appellant and another copy was signed by the respondent. The letter also gave details of the bank account into which the settlement sum was to be paid. However, no copy of the signed Deed was attached to the letter.

12 On the same day, the appellant's solicitors hand-delivered a draft of US$250,000 to the respondent's Singapore solicitors together with a request for a copy of the signed Deed. There being no response, the appellant's solicitors wrote again on 16 May 2002 to the respondent's Singapore solicitors for a copy of the Deed; this was before the second payment was due.

13 On 31 May 2002, the appellant's solicitors forwarded to the respondent's Singapore solicitors the second instalment of US$50,000 due that day, even though they had still not received a copy of the signed Deed. The appellant's solicitors made a third request for a copy of the Deed by their letter

dated 28 June 2002, giving notice therein that the final payment (when due) would only be set aside, unless a copy of the Deed duly executed by the respondent was received by them.

14 By a letter dated 29 July 2002 from Stokes' law firm to the appellant, the respondent gave notice that it no longer considered itself bound by the Deed because of alleged misrepresentations on the part of Lim. (The appellant said it only received the letter on 2 August 2002). Two days earlier, the appellant had obtained a draft for US$25,000 in payment of the final instalment due that day. However, the draft was never tendered to the respondent. Instead, on 1 August 2002, the appellant's solicitors wrote to the respondent's solicitors giving notice that a draft for US$25,000 had been issued and would only be released in exchange for the Deed. The solicitors followed up with another letter dated 26 August 2002 to the respondent's solicitors, rejecting the respondent's allegations of misrepresentations and electing to treat the Deed as valid and subsisting.

The proceedings below

15 On 2 April 2003, the respondent commenced action against the appellant for breach of contract in failing to render accounts and to make payment in accordance with cl 2.3 of the Service Agreement. The statement of claim also pleaded that the Deed was vitiated because the respondent (Johnson) had been induced to enter into the Deed by alleged misrepresentations on the part of the appellant (Lim). The appellant's defence was that there had been satisfaction and discharge of the respondent's cause of action by reason of the Deed.

16 On the first day of trial, the respondent sought and obtained leave from the court to amend its reply to include a new basis for vitiating the Deed in addition to the plea of misrepresentation. The respondent pleaded in para 4 of the Amended Reply that cl 7 of the Deed stated that the Deed was not effective until the respondent had received all three instalments. Since the last instalment of US$25,000 was not received by it, the respondent averred that the Deed was not effective.

17 The trial judge ruled in favour of the respondent on the ground that the appellant's defence of accord and satisfaction was not made out. There was no finding that any misrepresentation vitiated the Deed. Instead, the respondent's new plea in the Amended Reply was accepted and the Deed was held to be ineffective because the third payment was not made on time. The trial judge took the view that the appellant's act of purchasing the bank draft of US$25,000 did not suffice as the payment was not actually tendered. He rejected the appellant's argument that the final payment was not tendered because it was conditional upon receipt from the respondent of a copy of the executed Deed.

The issues

18 Two issues arose for determination in this appeal:

(a) Could the appellant rely on the Deed as a valid defence to the respondent's claim notwithstanding that the third and final instalment of US$25,000 was not paid on the due date of 31 July 2002?

(b) Should the last-minute amendment to the Reply have been allowed?

Did the Deed constitute a valid defence notwithstanding the non-payment of the final instalment?

19 As stated earlier at [17], the trial judge made no finding on the respondent's allegation of

misrepresentation which purportedly induced it to enter into the Deed. Consequently, the only issue to be determined on appeal was whether non-payment of the final instalment rendered the Deed unenforceable.

20 The crux of the appellant's case was that payment of the instalments was conditional upon its receipt of a copy of the executed Deed. Therefore, it was entitled to withhold payment of the last instalment of US$25,000 until it received a copy of the Deed, which never came. The trial judge had rejected this argument of counsel for the appellant on the basis that it was not a pleaded defence (see [2004] SGHC 78 at [14]). His finding overlooked the fact that it was the respondent who first raised this issue by its eleventh hour amendment of para 4 of the Reply.

21 It was our view that the appellant had succeeded on the first limb of its appeal. We accepted its counsel's submission that it was a condition precedent to the appellant's obligation to pay under the Deed, that the respondent would firstly sign and secondly forward a copy of the signed Deed to the appellant in exchange for payment of the first instalment.

22 In the context of contracts, the words "condition precedent" have two meanings. According to Kim Lewison's *The Interpretation of Contracts* (3rd Ed, 2004) at para 15.02:

> A condition precedent is a condition which must be fulfilled before any binding contract is concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract, but which suspends performance of it until fulfilment of the condition.

23 Clause 1(a) of the Deed provided that the first instalment of US$250,000 would be paid "upon the signing of this agreement". This meant that signing of the agreement was a condition precedent to the appellant's obligation to pay the first instalment, under the second meaning referred to in [22] above.

24 As the respondent failed to fulfil the condition precedent by furnishing a copy of the signed Deed to the appellant, the latter's obligation to pay the settlement sum did not arise. The non-production of the Deed was a valid defence as the appellant did not waive its right to be given a copy, judging by its repeated requests to the respondent's solicitors for the document, notwithstanding its payment of the first and second instalments. It was perfectly entitled to withhold payment of the third and final payment of US$25,000. Indeed, we had grave doubts that the respondent signed the Deed at all. It was admitted by counsel for the respondent that the Deed was not in the respondent's list of documents filed for the trial and he could not offer any explanation for the omission. As a half-hearted justification, he pointed out that the appellant did not in any event ask for discovery of the document in the court below. We noted that the Deed was also not produced before us.

25 Mr Yim for the appellant had also referred the court to an undated internal note of Johnson which his clients had obtained in the process of discovery from the respondent. The following are extracts from that note:

> Suggested plan of attack
>
> …
>
> After the next $50,000 has been transferred start new action threatening to take legal action in Singapore

Fly to India and speak to Reliance directly

Contact all trade centers and blacklist him

He thinks my Achilles heel is the taxation but I don't think so

Possible renege on excepting [*sic*] final payment from Lim

Target getting another $250,000 of him.

The note clearly revealed the respondent's intentions to renege on the Deed. Counsel also referred to extracts from the cross-examination at the trial of Johnson on the above note.[1] He submitted that it showed that Johnson was evasive. The appellant surmised that the respondent withheld a copy of the signed Deed (if indeed it was signed by the respondent) as part of the latter's strategy to frustrate the appellant's payment of the final instalment.

26 It would also be appropriate at this juncture to address the following submission in the Appellant's Case (at p 50):

> It was an express and/or implied term of the Deed, alternatively, the [respondent] had made a collateral warranty, that the signed Deed would be given to the [appellant] upon payment by the [appellant] of the first US$250,000.

27 At law, a term may be implied into a contract to give effect to the presumed intention of the contracting parties. That intention may be gathered from the express words of the contract and the facts and circumstances surrounding it. *Chitty on Contracts* (29th Ed, 2004) vol 1 at para 13-004 states:

> … The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. … Both, however, depend on the presumed intention of the parties.

The tests were reaffirmed by our courts recently in *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458 and *Tan Chin Seng v Raffles Town Club Pte Ltd* [2003] 3 SLR 307. The first or "business efficacy" test was laid down by Bowen LJ in *The Moorcock* (1889) 14 PD 64 at 68 whilst the second or "officious bystander" test was propounded by MacKinnon LJ in *Shirlaw v Southern Foundries (1926), Limited* [1939] 2 KB 206.

28 *Chitty on Contracts* went on to add (at para 13-009):

> A term ought not to be implied unless it is in all the circumstances equitable and reasonable. But this does not mean that a term will be implied merely because in all the circumstances it would be reasonable to do so or because it would improve the contract or make its carrying out more convenient. "The touchstone is always *necessity* and not merely *reasonableness.*"… A term will not be implied if it would be inconsistent with the express wording of the contract.

29 Turning to the facts of this case again, we noted that the parties arrived at a binding agreement during a meeting at the Perth office of the respondent's solicitors. The parties also agreed

that a formal deed of settlement would be drafted to reflect the agreement. One may well ask, why was there a need for a document if a verbal agreement had already been reached? Presumably (and logically), it was to have written proof of such a settlement. Hence, it was further agreed that the parties would sign the Deed in counterparts, for one party to ensure that the other party had signed. It was therefore reasonable and necessary to imply a term (be it under the "business efficacy" test or the "officious bystander" test) that the Deed, signed by the respondent, would be forwarded to the appellant before the appellant was required to make any payment under the Deed.

30 Our view was reinforced by Stokes' fax to Lim of 7 February 2002 of which para 3 stated:

> In accordance with your telephone discussion with James Johnson and myself of this afternoon, *it is agreed that a signed copy of the Deed of Release will be provided to you by our Singapore Agents in exchange for your bank cheque in the sum of US$250,000* made payable to the Mohan Singh trust account. [emphasis added]

31 Although not specifically phrased, the appellant raised accord and satisfaction in the following paragraphs of its Defence:

> 10 In pursuance of the Deed of Settlement and Release, the Defendants made payments of US$250,000 on 8th February 2002 and US$50,000 on 31st May 2002;
>
> 11 On 31st July 2002, the Defendants purchased a bank draft for US$25,000 being the final payment to the Defendants under the Deed of Settlement and Release. However, the Plaintiffs had refused to accept payment and attempted to repudiate the said Deed
>
> 12 In the premises, by reason of the Deed of Settlement and Release, there has been satisfaction and discharge of the Plaintiffs' alleged cause/s of actions.

32 The respondent relied on the definition of accord and satisfaction from *Chitty on Contracts* (28th Ed, 1999) at para 23-012, for its submission that the appellant could not rely on that plea as a defence, since the appellant had failed to pay the last instalment:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself.

33 However, when Johnson was cross-examined in the court below[2] he admitted that the respondent had decided, on or about 26 June 2002, not to be bound by the Deed. It did not therefore lie in the respondent's mouth to say there was no accord and satisfaction due to non-payment of the final instalment, when it itself had decided to renege on the Deed before the final instalment was due on 31 July 2002

Should the amendment to the Reply have been allowed?

34 Although we decided in the appellant's favour on the first issue, we will, for completeness, address the second limb of its appeal. Had it been necessary to do so to determine the outcome of the appeal, we would have reversed the order made below for the respondent to amend its Reply.

35 The appellant mounted two arguments in relation to its objection to the amended Reply. First, the application was made at a late stage of the proceedings. Second, the amendment raised a new ground of claim which was inconsistent with that pleaded in the Statement of Claim and which would

not be allowed under O 18 r 10(1) of the Rules of Court (Cap 322, R 5) ("the Rules"). Order 18 r 10(1) reads:

> A party shall not in any pleading make an allegation of fact, or raise any new ground or claim, inconsistent with a previous pleading of his.

The appellant cited various English authorities to support its first objection (*Williamson v London and North Western Railway Company* (1879) 12 Ch D 787; *Kingston v Corker* (1892) 29 LR Ir 364; *Herbert v Vaughan* [1972] 3 All ER 122).

36 It is not in dispute that under O 20 r 5 of the Rules, a court has the discretion to grant leave to amend a pleading at any stage of the proceedings. This could be before or during the trial, or even after judgment or on appeal. Delay *per se* therefore does not automatically prevent the application from succeeding, unless it will result in an injustice to the other party, which cannot be compensated by an appropriate order for costs.

37 In this case, however, the respondent applied to amend its Reply on 5 January 2004, almost eight months after the original Reply was filed on 9 May 2003. The amended para 4 of the Reply states:

> The plaintiffs deny that there had been satisfaction and discharge by reason of the Deed of Settlement and Release *in view of the matters pleaded in paragraphs 16 to 21 of the statement of claim and in particular for the reason that the said Deed is ineffective, clause 7 of the Deed providing that the agreement is not effective until all funds have been received into the plaintiffs' solicitors' bank account and confirmation of that receipt has been provided by the plaintiffs' solicitors. All funds payable under the Deed has not been received into the plaintiffs' solicitors' bank account.*

(The italicised words reflect the amendment.)

38 It was difficult to find any reason that could justify the delay in the respondent's application. The amendment did not arise out of any new facts or circumstances which came to the attention of the respondent only at a late stage of the proceedings. The consequence of the amendment was that the appellant became aware of the respondent's new stand, that the Deed was unenforceable due to non-payment of the final instalment, only on the first day of trial. Arguably, this prejudiced the appellant.

39 It bears remembering that the function of a reply is to allow the plaintiff to raise facts in answer to the defendant's case. In particular, it will be necessary to file a reply if the defendant raises a new issue for the first time in the defence. As the function of a reply is limited to answering matters raised in the defence, it follows that the reply should not be used as an avenue to introduce new causes of action which are not raised in the statement of claim. If a plaintiff wishes to raise an additional and inconsistent claim in the alternative after the statement of claim has been filed, the proper approach should be to apply to amend the statement of claim, rather than slip it in by way of the reply.

40 In the original Statement of Claim, the respondent pleaded that the Deed was unenforceable as it was vitiated by the appellant's misrepresentations. The appellant came to court prepared to meet that case (in para 21 of the Statement of Claim). In the Amended Reply, however, the respondent pleaded that the Deed was ineffective because the appellant failed to pay the final instalment, a position which was diametrically opposite to its original stand. It was an inconsistent

plea which should have been made in the alternative in the Statement of Claim. As was said by G P Selvam J in *Nirumalan K Pillay v A Balakrishnan* [1997] 1 SLR 322 at [10], a case cited by the appellant:

> The reply serves the function of answering points raised in the defence so that the defendant is given notice of matters which are intended to defeat a defence or explain a matter raised in the defence in a way favourable to the plaintiffs. … Further, because the function of a reply is to answer matters raised in the defence, its contents must relate to matters raised in the defence. What is the same thing, the plaintiffs may not supplement [their] statement of claim by including in [their] reply matters which ought to have been included in the statement of claim. In this respect, a reply is analogous to re-examination of a witness which should be confined to matters touched on in cross-examination. Fresh evidence adding to or re-affirming evidence-in-chief is not permitted in re-examination.

41 An appellate court will normally not interfere with a lower court's discretion to grant or refuse an amendment unless that court has exercised that discretion wrongly (see *Wright Norman v Overseas-Chinese Banking Corp Ltd* [1994] 1 SLR 513). However, the respondent in this case succeeded on its claim below based purely on its Amended Reply, there being no finding on the allegation of misrepresentation. The amendment was made without any explanation for the lateness and it prejudiced the appellant. It should not have been allowed. Consequently, the appellant would also have succeeded on the second limb of its appeal, had it been necessary for us to make that ruling.

Appeal allowed.

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[1]Verbatim notes pp 64–67

[2]See verbatim notes p 47