WBG Network (S) Pte Ltd v Sunny Daisy Ltd
[2007] SGCA 1

Case Number : CA 43/2006

Decision Date : 12 January 2007

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Choo Han Teck J; Andrew Phang Boon Leong JA

Counsel Name(s) : Gabriel Peter and Ismail bin Atan (Gabriel Law Corporation) for the appellant; L Kuppanchetti Nadimuthu and Christopher Buay Kee Seng (Alban Tay Mahtani & de Silva) for the respondent

Parties : WBG Network (S) Pte Ltd — Sunny Daisy Ltd

Evidence – Principles – Admission of additional evidence in proceedings other than trial – Whether conditions laid down in Ladd v Marshall applicable to Registrar's Appeals vis-a-vis summary judgment proceedings

12 January 2007

Choo Han Teck J (delivering the grounds of decision of the court):

1 The appellant, having taken delivery of goods purchased from the respondent, a Taiwan company, failed to make full payment. The respondent sued for payment in the sum of US$1,057,164.03 being the amount outstanding. The appellant filed a defence and counterclaim and denied liability on three grounds. First, that the contract had been between the appellant and a company called Internation Chlorella Co, Ltd ("Internation") and that the respondent had only acted as Internation's agent through one Prof Wang Shun Te ("Prof Wang") who was also the president of the respondent company; secondly, that the amount claimed was excessive if certain credit notes issued by the respondent were taken into account; and thirdly, that the goods were not of merchantable quality. The respondent applied for summary judgment against the appellant. At first instance, the assistant registrar granted the appellant unconditional leave to defend. The respondent appealed. Judith Prakash J allowed the appeal and granted judgment in the sum of US$611,764.03, being the amount claimed by the respondent in its application for summary judgment. The amount claimed by the respondent in its application for summary judgment was considerably lower than that of the sum initially claimed as the respondent had taken into account the appellant's second defence of the possibility of a set-off by reason of the credit notes. The learned judge, however, stayed execution of the summary judgment pending the outcome of the appellant's counterclaim for damages. The appellant appealed to this court against the order for summary judgment in the sum of US$611,764.03.

2 It was apparent to us that the second defence was utterly without merit since the respondent had not included the sum that the appellant claimed to be subject to a set-off (by reason of the credit notes issued) in its application for summary judgment. Similarly, the appellant's third ground of defence, namely that the goods were not of merchantable quality, was bound to fail since it was not a defence in so far as the respondent was claiming payment of the purchase price for goods of which delivery had already been taken. A buyer is not obliged to accept delivery of non-merchantable goods, but if he does so, his claim would be limited to damages only. There seemed to be no dispute that the goods in question were delivered to the appellant between May 2003 and September 2004. Instead of rejecting them, the appellant had sold them on to its customers. As provided under s 35(1)(*b*) of the Sale of Goods Act (Cap 393, 1999 Rev Ed), a buyer is deemed to

have accepted the goods if he does an act (in this case, the selling of the goods to its own customers) in relation to those goods which is inconsistent with the rights of ownership belonging to the seller (in this case, the respondent). Hence, on the facts, the court below was right to hold that the appellant had accepted delivery of the goods.

3 The appellant was thus left with the claim that the respondent was not the seller, and, therefore, had no right to sue, in order to succeed in establishing a triable issue. That was thus the main thrust of the appellant's case before us. Counsel for the appellant, Mr Gabriel Peter, submitted that it was evident from an email dated 27 August 2004 from Professor Wang to the appellant, that the money owed by the appellant to the respondent was, in fact, money owing to Internation. The salient parts of that email read as follows:

> We don't want *WBG to owe Internation Chlorella* more and more outstanding. Do not just think with your own point of view. Think about us, our company, we have been trying hard to help your company, WBG., but now … Think about us with our standpoint! [emphasis added]

We are of the opinion that this passage did not convey what the appellant claimed it to mean. The meaning that the appellant wished the court to accept from this passage (*ie* that the debt must have been owed to Internation) was, in our view, so exegetically derived that any other equally exotic meaning could have been asserted in its place. In any event, if the appellant claimed that the respondent had only acted as an agent for Internation, then we would expect to see clear words to that effect. Furthermore, even if we were willing to accept, for the sake of argument, that the respondent was an agent for Internation, the appellant faced another difficulty. Not only was there no evidence that the respondent was *not* empowered to sue for non-payment, but the appellant appeared to have accepted that the respondent was entitled to bill, and, implicitly, in the absence of anything to the contrary, to sue on the bill on behalf of Internation. This was apparent from the affidavit of the president of the appellant, one Mr Lim Lip Khoon ("Mr Lim"), dated 11 November 2005, in which he noted, at para 16, as follows:

> [A]ll Purchase Orders would be sent by the [appellant] to the [respondent] as agent for Internation, and that the [respondent] as agents for Internation would bill the [appellant].

The adoption of such a stance, in our view, precluded the appellant from now claiming that the respondent had no right to sue. Hence, we agree with the learned judge in the court below that the undisputed documentary evidence in connection with the sale and purchase of the goods in question showed that the respondent was the creditor.

4 The final issue before us concerned the refusal by the learned judge below to allow the appellant's application to admit further evidence at the proceedings before her. That evidence consisted of a letter dated 18 January 2005 with three attachments, namely, a document entitled "Formal & Serious Warning Issued to WBG Network (Singapore) Pte Ltd Owing Exceeds One Million USD ($1,000,000)", a document entitled, "Notice to Cease Usage of Registered Trade Name 'Crytomonadales'", and a document entitled, "Full Recourse Promissory Note" ("the pro-note") (collectively, "the letter"). The letter had purportedly been sent by an overseas lawyer to the appellant's previous solicitors in Singapore on the instructions of Prof Wang. The letter was not produced in the form of an affidavit and instead, was merely handed to the learned judge below by counsel for the appellant at the hearing.

5 We are of the opinion that, based on the improper manner the evidence was adduced, the court would have been entitled to reject the documents. Documents do not amount to evidence unless they have been properly adduced and admitted into evidence by the court. Accordingly, the

person adducing the evidence must do so on oath or affirmation as well as be subject to cross-examination, if necessary, so as to ascertain the relevance or authenticity of the evidence that is sought to be admitted. The question of weight is a secondary issue in that it does not arise until the evidence has been admitted. In this connection, we note the dual objection of counsel for the respondent in the court below, namely, that the respondent had not been the writer or initiator of the letter and that he (*ie* counsel for the respondent) had no opportunity to obtain instructions to make any further comment on it.

6 Subsequently, counsel for the appellant requested leave to make further arguments on the ground that the letter was crucial in that it showed that the proper plaintiff ought to be either Prof Wang or Internation. In the same affidavit, Mr Lim also deposed, at para 29, that "the [respondent], Internation, and Prof Wang are in essence and fact one and the same entity and that as such, they must be treated as being so." In relation to that argument, counsel for the appellant urged the court to take a less stringent approach towards requests for the admission of further evidence in proceedings other than the trial. The point made was that the conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") in regard to the admission of further evidence should not apply to Registrar's Appeals *vis-à-vis* O 14 proceedings under the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

7 One of the conditions in *Ladd v Marshall* was that an appeal court would not allow evidence to be admitted for the appeal after trial if that evidence could have been obtained with reasonable diligence by that party at trial. This seemed to apply to the appellant's case. Indeed, on the facts, it seemed clear, as counsel for the respondent had pointed out, that the appellant was in possession of the letter at all material times and decided to produce it only at the appeal before Prakash J. The learned judge observed that the appellant did not refer to the decision of this court in *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392 ("*Lassiter*") in which this court was of the view that the *Ladd v Marshall* conditions applied to proceedings in Registrar's Appeals in situations in which the matter had been subject to a preceding judicial inquiry that was conducted akin to the trial, for example, in cases involving an assessment of damages, or, as in *Lassiter* itself, where the proceedings were lengthy and oral evidence was required: see *Lassiter* at [20]. Nonetheless, in *Lassiter*, this court formed the view that in some situations, further evidence might be permitted and that the discretion is left to the judge hearing the appeal from the registrar's decision.

8 It is necessary to briefly revisit this court's decision in *Lassiter*. There, the question of the applicability of the *Ladd v Marshall* conditions was relevant because, strictly speaking, *Ladd v Marshall* applied to appeals from the High Court to the Court of Appeal, and not to appeals from the Registrar to a judge in chambers. The question was particularly pertinent since in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233 ("*Lian Soon Construction*"), this court appeared to reject the strict applicability of *Ladd v Marshall*, suggesting, at [38], that in an appeal to the judge in chambers, the judge would be "free to allow the admission of fresh evidence *in the absence of contrary reasons*." That approach was based on the premise that as the judge in chambers exercises *confirmatory*, as opposed to *appellate*, jurisdiction, the High Court must have a wider discretion than the Court of Appeal since it was hearing the matter *de novo*.

9 The concern in *Lassiter* however, was that the liberal use of such wide discretion to admit fresh evidence would defeat the very rationale underlying the delegation of matters to the Registrar. As Chao Hick Tin JA, who delivered the decision of this court in *Lassiter*, reasoned (at [20]):

> [T]he very *raison d'etre* of having an assessment of damages being carried out by the Registrar, instead of before the court, is to save the time of the judge. This object would be lost, or substantially diminished, if the applicable principle is that either party is freely entitled to adduce

new evidence at the hearing before the judge or that the judge should, as a rule, exercise his discretion liberally to admit such fresh evidence, including the *viva voce* examination of witnesses. This approach would mean that everything could be re-opened or further clarified. We do not see how such a rule could serve the interest of justice. It would only protract the assessment process and could lead to abuse. It is our opinion that the parties should, as a rule, present their entire evidence at the assessment.

10 On that reasoning, this court (in *Lassiter*) decided that the second and third conditions of the *Ladd v Marshall* conditions should apply to the facts of that case. As Chao JA (at [24]–[25]) observed:

> 24 … The first condition under *Ladd v Marshall* is a very stringent one – it must be shown that the new evidence could not have been obtained with reasonable diligence at the trial. Any sort of judgmental error would not be sufficient to meet this condition. However, for the reasons given in the previous paragraph, the imposition of the same stringent requirement on an appeal from an assessment by the Registrar to the judge would not be appropriate. The judge should be given a wider discretion in the matter. But this is not to say that the discretion ought to be exercised liberally. Sufficiently strong reasons must be shown why the new evidence was not adduced at the assessment before the Registrar.
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> 25 The next question to ask is whether the second and third conditions in *Ladd v Marshall*, namely, that the evidence must be such that, if given, it would probably have an important influence on the result of the case and that it must be apparently credible though it need not be incontrovertible, are in any way relevant. To our mind, these two conditions are eminently reasonable ones. If the new evidence sought to be admitted cannot satisfy the two conditions, what would be the point of admitting the evidence? It would be meaningless to do so.

11 We emphasise that the opinion rendered in *Lassiter* should be seen in its context: this court's opinion there in regard to the application of the second and third conditions in *Ladd v Marshall* was in respect of an appeal from an assessment of damages (from an action in tort) that was lengthy and in which oral evidence was necessary. It should not, in our view, be construed as any form of unqualified endorsement of any rule that the second and third conditions of *Ladd v Marshall* must necessarily apply in all circumstances, whether they be appeals from an assessment of damages before the Registrar or in respect of interlocutory applications. This was precisely why, in *Lassiter*, at [19], the court implicitly adopted the distinction drawn in *Ang Leng Hock v Leo Ee Ah* [2004] 2 SLR 361 (at [15]):

> …between the adduction of further evidence before the judge in chambers on an appeal from the registrar against a decision on an interlocutory application like an O 14 application, and one that is against a final decision, albeit by a registrar, which has been taken after a full trial on the merits in that discovery has taken place, documents and affidavits of evidence-in-chief have been filed, *viva voce* evidence has been given and the parties have had the opportunity of cross-examining each other's witnesses. In the first case, the original evidence would have been only documentary. Any prejudice that might have arisen from allowing further documentary evidence by way of affidavit could have been dealt with easily by giving the other party a right of reply. The second situation is very different. In that case, both parties would have (or should have) prepared for the hearing before the registrar in the same manner as for a trial in the High Court and would have engaged in the discovery exercise and in the cross-examination of witnesses. To allow further evidence to be freely adduced before the judge on appeal could easily lead to abuse of process.

12 Similarly, the adoption of that distinction led this court in *Lassiter* to hold that *Lian Soon Construction* did not apply to the facts there. As Chao JA explained, at [18], "*Lian Soon Construction* did not concern an appeal from an assessment of damages by the Registrar to the judge in chambers and thus the case is not strictly determinative of the present issue." That *Lassiter* only intended to limit the *strict* applicability of the second and third conditions of *Ladd v Marshall* to proceedings with characteristics of a trial was further explained at [26], where this court noted that it did not see "any reason why [the second and third conditions of *Ladd v Marshall*] should not also apply to other similar proceedings conducted by the Registrar, such as the taking of accounts or the making of inquiries". Conspicuously, no mention of its applicability to appeals from interlocutory proceedings or, indeed, to summary judgment proceedings, was made.

1 3 *Lassiter* thus recognised a distinction between the standard to be applied in appeals where there had been the characteristics of a full trial or where oral evidence had been recorded (for example, in proceedings of inquiries or, as in *Lassiter*, in an assessment of damages) and those that were interlocutory in nature. As a result, one might not unreasonably conclude that there is a distinction between the standard to be applied for the adducing of fresh evidence in cases which are similar on the facts with *Lassiter* (for example, in assessments of damages or inquiries), in which the second and third conditions of *Ladd v Marshall* should strictly apply and those which are similar to *Lian Soon Construction* (for example, interlocutory matters), in which the court would be allowed to exercise its discretion more liberally. The existence of a wider discretion in the latter situation however, does not mean that *Ladd v Marshall cannot* apply in such circumstances. Instead, the existence of such wider discretion would mean that it would be left to the court hearing any particular matter to decide whether the facts justified the application of *Ladd v Marshall* (and if so, to what extent).

14 A party wishing to adduce further evidence before the judge in chambers in cases where the hearing at first instance did not possess the characteristics of a trial might still have to persuade the judge hearing the matter that he had overcome all three requirements of *Ladd v Marshall* if he were to entertain any hope of admitting the further evidence because the judge was *entitled*, though not *obliged*, to employ the conditions of *Ladd v Marshall* to help her decide whether or not to exercise her discretion to admit or reject the further evidence. In such a case, if the appellant could not persuade the judge that the conditions, if applied, would result in his favour, then it would be unlikely that the judge would allow his application to adduce the fresh evidence.

15 Reverting to the facts before this court, as the matter arose from a summary judgment application, the judge below was, strictly speaking, not *obliged* to apply the second and third conditions of *Ladd v Marshall*. Nonetheless, we are of the opinion that she was, nonetheless, entitled to apply the second and third conditions in *Ladd v Marshall* as part of her decision process concerning the application to adduce further evidence. As was observed in *Lassiter*, at [25] (reproduced at [10] above), given that the second and third conditions of *Ladd v Marshall* are not magical pronouncements capable of application only in the most unique of circumstances but simple and sensible directions which should be applied in most situations, we do not see how the appellant could reasonably mount any argument suggesting that neither condition was applicable on the facts. In fact, though this should not be considered determinative of the test to be applied in future cases since each case is dependent upon its own facts, we would go even further and say that the judge would not have been wrong had she rejected the further evidence on the ground that the letter in question had been in the appellant's possession all the time and that its absence from the evidence hitherto had not been satisfactorily explained. Accordingly, though the judge below did not consider it, we are of the view that it would have been reasonable for her not to have admitted the letter for failure to satisfy the first condition in *Ladd v Marshall*.

16 Instead, by applying the second condition in *Ladd v Marshall*, the learned judge reviewed the letter and concluded that nothing there supported the appellant's case. Indeed, quite to the contrary, she noted that one of the documents, *ie* the pro-note, actually appeared to support the respondent's case, for it indicated that the legal entity to whom the debt was owed was the respondent. As such, she was of the opinion that the letter would not have an important influence on the result of the case. We agree with her view entirely. In the result, it was apparent to us that there was no merit whatsoever in allowing the letter to be admitted into evidence.

17 Accordingly, for the above reasons, the appeal was dismissed with costs.