IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 15

Suit No 1308 of 1987

Between

Toh Tin Formerly t/a Fuji Woodworking Co

… *Plaintiff*

And

Nakano Singapore (Pte) Ltd

… *Defendant*

GROUNDS OF DECISION

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Toh Tin Formerly t/a Fuji Woodworking Co v Nakano Singapore (Pte) Ltd

[1992] SGHC 15

Suit No 1308 of 1987
Chan Sek Keong J
30 January 1992

1 **JUDGMENT:**

2 This is an appeal against the Assistant Registrar's decision to strike out the plaintiff's claim for want of prosecution. The plaintiff was a sub-contractor of the defendants who were the main contractor for a building project Ulu Pandan. On 7 May 1987, he commenced this action to claim the sum of $105,576.69 being the balance (including retention monies) due from the defendants for work done and material supplied. The particulars of the claim were as follows:

3 " PARTICULARS

10.3.83	Claim for balance of price for work done and materials supplied at Ulu Pandan Worksite (Block 2)	$57 ,77 6.00
19.3.83	Claim for balance of price for work done and materials supplied at Ulu	44,808.69

	Pandan Worksite (Blocks 1, 3 and 4)	
End 1982	Claim for balance of price Beginning for work done and materials 1983 supplied at Ulu Pandan Worksite	2,99200
		$105,576 .69

4 "

5 In their Defence filed on 1 July 1987, the defendants averred that they had paid everything to the plaintiff that had been allowed to him, and that the prices charged by the plaintiff were not agreed prices. Paragraph 3 of the Defence averred that

6 "It was an express term and condition of the agreement, alternatively by the course of dealings between the parties it was agreed between them, that the whole of the works were to be carried out to the entire satisfaction of the Defendants' project manager, and that the Plaintiff should not be entitled to claim or otherwise charge the Defendants for any work or put them to any cost whatsoever which had not nor would be allowed to him by the project manager and that the Plaintiff should become bound to accept the project manager's measurement and valuation both as regards the quantities and amounts charged for and the prices charged."

7 The defendants also pleaded in the alternative that the plaintiff had overstated the amount of work done and materials supplied and also the prices charged for them. In the Particulars, full details were given of the defendants' measurements of the work done and also the prices the plaintiff had claimed and

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the defendants had allowed. As regards the retention money of $2,992.00, the defendants averred that it represented 5% of the plaintiff's original claim which was withheld for the payment of rectifying any defects (even though the works were completed in 1983).

8 The solicitors for the plaintiff, M/s C & T, took out a summons for directions on 1 July 1988. The following directions were given 27 September 1988: (a) the plaintiff and the defendants to serve a list of documents within 14 days, and inspection thereof within 21 days of service; (b) the trial to be set down within 30 days and (c) the parties to exchange their respective quantity surveyors' reports.

9 For three years after that, neither party's solicitors took steps to give effect to the Court's directions. On 21 September 1991, the defendants' solicitors made an application to dismiss the plaintiff's action for want of prosecution. The date for hearing of this application was fixed for 21 October 1991. The affidavit filed in support of this application disclosed that sometime around 1984 the project manager returned to Japan and subsequently left the defendants' employment and the defendants had no contact with him since he left. The affidavit also stated that given the lapse of time the project manager would not be able to recall with reasonable accuracy what had happened in 1983 on the project in question.

10 On 27 September 1991, a notice of change of solicitors was filed by M/s C & C on behalf of the plaintiff. On 10 October 1991 M/s C & C made an application to extend the period for compliance with the Court's directions. The plaintiff's affidavit filed in support of this application made two points: firstly, that he had been advised by M/s C & T that the action could not be proceeded

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with until the parties had exchanged the quantity surveyors' reports; and secondly, that the dispute turned on objective facts, i.e., the amount and the value of the work done and the materials supplied, and that as this could be ascertained by quantity surveyors, the defendants could not be prejudiced by the delay in prosecuting the claim.

11 On 31 October 1991, M/s C & C filed an affidavit disclosing that M/s C & C had taken over the conduct of the case from M/s C & T on 9 February 1990, and that the partner having conduct of the case left the partnership in April 1990, as a result the present solicitor did not know whether the firm continued to act in the matter or the retiring partner had taken over the matter.

12 Both applications were heard before an Assistant Registrar. He dismissed the plaintiff's application for extension of time and allowed the defendants' application to dismiss the plaintiff's claim. The plaintiff appealed against both decisions.

13 On 11 January 1992, the defendants filed another affidavit in which they asserted that " the project manager is an important witness as to the measurement and valuation of the work done and materials supplied. Further, he certified the records of the measurements upon which the Defendants are relying. He would have to be available at the trial of the action to produce such records. His evidence...is therefore highly relevant to the issues raised by the Defence." The affidavit also disclosed that the project manager was traced in Japan in December 1991 but that as he was no longer employed by the defendants, he was not agreeable to travel to Singapore for the trial of the action.

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14 The principles which the Court will apply to applications of this nature are well-established. They were settled by the Court of Appeal in ALLEN v SIR ALFRED McALPINE & SONS LTD [167] 2 Q B 229 and approved by the House of Lords in BIRKETT v JAMES [1978] AC 297. As summarised by Lord Griffiths in DEPARTMENT OF TRANSPORT v CHRIS SMALLER LTD [1989] 1 AC 1191, at page 1203, they are as follows:

15 "The power to strike out for want of prosecution should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay o the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants, either as between themselves and the plaintiffs, or between each other, or between them and a third party."

16 The above principles were applied by the Court of Appeal in QBE INSURANCE LTD v SIM LIM FINANCE LTD [1987] 2 MLJ 656.

17 In this case, there is no doubt that there has been inordinate and inexcusable delay on the part of M/s C & T. Their excuse for the delay, that the defendants had also not complied with the Court's directions, carries little weight. It was their duty to prosecute their client's action as speedily as possible. The delay was further compounded by the partnership dispute in M/s C & C, and for that reason the present solicitor having conduct of the plaintiff's case is probably the least blameworthy of all the plaintiff's solicitors.

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18 The defendants' solicitors also carry some of the blame for the delay, but not as much as the plaintiff's solicitors. The Court's directions bound the defendants as much as the plaintiff, save and except that the primary duty lay on the plaintiff to prosecute their claim. The defendants contributed to the delay in not complying with the Court's directions. No warning of any kind was given to the plaintiff's solicitors. There was no reason (and no reason was given) why they could not have set down the action for trial or sent their quantity surveyors' report to the plaintiff's solicitors. The Judge ordered the exchange of surveyors' report because it was either necessary or could become necessary to prove the claim or the defence, as the case may be.

19 Counsel for the defendants has strenuously argued that the evidence of the project manager is vital to the defence that there was an express agreement or a course of dealings by which the plaintiff agreed to be bound by the project manager's measurements and valuation both as regards the quantities and amounts charged for and the prices charged. The defendants have not produced any documentary evidence to suggest the existence of such an agreement. Whether or not there was such a course of dealings is provable by the documentary claims made by the plaintiff for work done from time to time.

20 It is quite possible that there might have been an agreement, which in this case, could only be oral, of the nature alleged in the Defence. But it would also be quite an extraordinary state of affairs if the plaintiff had agreed to such a binding arrangement. The sub-contract works were valued in the region of $1 million. It is not for this court at this stage to determine whether or not the defence can be made out, but in determining whether the defendants have been or are likely to be prejudiced, the court must take into account the inherent probability of the plaintiff having agreed to such an arrangement under which

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his right to payment and the amount he is entitled to would be dependent entirely on the goodwill of the defendants' project manager.

21 Although the project manager is no longer employed by the defendants, he is still available to give evidence if he wishes to. He has not filed any affidavit nor written to the defendants to say that under no circumstances will he testify in court. Accordingly, I place no weight to the statement that the project manager would not be able to testify on behalf of the defendants.

22 But for the extraordinary nature of this defence, I have no doubt that the defendants have not been prejudiced by the delay on the part of the plaintiff. The amount of work done and materials supplied and the value of such can still be measured by competent quantity surveyors as the building is still in existence. Even if the works done by the plaintiff had been altered or obliterated, no prejudice would accrue to the defendants as in that situation, the plaintiff would not be able to prove his own measurements as a result of his own delay. On balance, I am unable to find that the delay of the plaintiff's solicitors in prosecuting this action fulfils condition 2(b) as set out in the passage from the judgment of Lord Griffiths.

23 The appeal is allowed. The orders of the Assistant Registrar are set aside. The plaintiff will be given 14 days to comply with the Court's directions, save that the quantity surveyors' report should be exchanged within three months from the date hereof. In the circumstances of the case, each party will pay their own costs of the appeal and at the hearing below.

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Chan Sek Keong J

Cheong Tuck Meng (Cheong & Cheong) for the plaintiff/appellant
Thio (Chor Pee & Co) for the defendants/respondents

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