IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1996] SGHC 18

DA 19/1995

Between

SMS Pte Ltd

… *Appellant*

And

Power & Energy Pte Ltd

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Pleadings — Striking out; Civil Procedure — Pleadings — Striking out

Version No 1: 29 Oct 2026 (23:45 hrs)

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SMS Pte Ltd v Power & Energy Pte Ltd

[1996] SGHC 18

DA 19/1995
C R Rajah JC
31 January 1996

1 The respondents/plaintiffs are cargo owners and the appellants/defendants are carriers. Under a contract for carriage the appellants were to deliver a cargo of 299 bales comprising 149,500 Jute Bags Btwill to the respondents at Ho Chi Minh port. The respondents` statement of claim accepts that the cargo was delivered by the appellants to them but claims that it was not delivered in the same good order and condition as when the appellants took charge of the cargo to carry it to Ho Chi Minh port. They say that 44,100 out of the 149,500 Jute Bags Btwill had been damaged by coming into contact with sea water. The respondents also say this damage was caused by the appellants` breach of the contract of carriage and/or breach of duty as a bailee and/or negligence and claim for damages against the appellants.

2 The respondents brought their claim by filing a generally indorsed writ in the subordinate courts on 14 December 1990. This writ was not served on the defendants until a year later on 13 December 1991. The statement of claim was filed and served some further 20 months later on 18 August 1993. The defendants filed their defence on 21 September 1993. Pursuant to a request, further and better particulars of the defence were filed on 6 October 1993.

3 The defence pleaded various grounds as to why the appellants were not liable. Now, only two grounds are relied on. Both arise from art III r 6 of the Hague Visby Rules which provides as follows:

> *Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.*

4 The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

5 Subject to para 6 ***bis*** the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has risen.

6 In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7 Both parties agree that the Hague Visby Rules apply to the contract of carriage between them.

8 The first defence is that no notice as referred to in the first paragraph of art III r 6 was given and accordingly there is prima facie evidence that the goods were undamaged when delivered. The second defence is that the respondents` suit was not commenced within one year of the date of delivery of the goods.

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9 With regard to the first defence of no notice, there is nothing to suggest from the affidavit of evidence-in-chief of the respondents` two witnesses or from any of the documents tendered by the respondents that any such notice was given or why such notice was not necessary. The second defence of time-bar will succeed if the goods were delivered more than a year prior to 14 December 1990. The appellants say the fact that this was the case is supported by the following:

> (i) The telex from Vinacontrol in Ho Chi Minh to Robins Davies Marine Recoveries (S`pore) received on 3 January 1991 confirms that from 15 December 1989 to 12 February 1990 the cargo was stored in the container port of Ben Nghe a Vietnamese river port some 100 km from the sea. The port of discharge, however, was not Ben Nghe but Ho Chi Minh. This the appellants say shows that the cargo must have been discharged and delivered in Ho Chi Minh before 15 December 1989. Otherwise it could not have reached Ben Nghe by 15 December 1989.
>
> (ii) Paragraph 6 of the respondents` witness Sadasivam Sivaramakrishnan`s affidavit of evidence-in-chief says the vessel arrived at Ho Chi Minh sometime in early to mid-December 1989. This the appellants say is consistent with the goods being delivered before 15 December 1989;
>
> (iii) The statement of claim does not indicate the date of delivery. The appellants say this is because the goods were delivered before 15 December 1989.

10 Both defences, therefore, appear to provide a defence on the merits.

11 On 27 September 1994, pursuant to a summons for directions taken out by the respondents, the district court ordered, inter alia, that:

> (a) each party file and verify by affidavit its list of documents within 30 days;
>
> (b) the affidavit of evidence-in-chief of each party`s witnesses be filed and exchanged within 60 days; and

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> (c) the action be set down by 30 December 1994 with three witnesses for the respondents and three witnesses for the appellants.

12 In the event only the respondents filed a list of documents. It is not apparent from the record of appeal if this was filed within the time limited or not. Again only the respondents as having filed affidavits of evidence-in-chief but only for two witnesses. The first, that of Sadasivam Sivaramakrishnan, was filed almost 21/2 months out of time, on 10 February 1995, 12 days before the hearing. The second, that of Magdalene Ng Mei Theng, was filed even later on 21 February 1995, the day before the hearing. This affidavit does not appear in the record of appeal. The record of appeal also does not show if the action was set down for hearing within the time limited.

13 At the hearing of the action on 22 February 1995, the respondents applied under O 24 r 16 for the defence to be struck out and judgment to be entered for the respondents. This rule provides that if an order for discovery is not complied with, the court may, where the party in breach is a defendant, strike out the defence and enter judgment for the plaintiff. The application was made orally and not by way of a summons-in-chambers.

14 The learned trial judge in the exercise of his discretion allowed the respondents` oral application, struck out the defence and entered judgment for the respondents. Before going on to assess damages, the learned trial judge, on the appellants` oral application, struck out the last two sentences on para 6 and the whole of paras 7 to 10 as well as the whole of exh SS4 in the affidavit of the respondents` witness. The learned trial judge then assessed damages and awarded the respondents damages of US$16,571.01 with interest thereon from the date of the writ until judgment and costs fixed at $3,000.

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15 The appellants now appeal against the striking out of the defence and the entering of judgment for the respondents.

16 Their first ground of appeal is that the learned trial judge erred in allowing the respondents to make their striking out application orally. The appellants say it should have been made in the usual way by summons-in-chambers supported by affidavit setting out the factual basis for the application. Only then they say would they have had the proper opportunity to marshal their facts and arguments in rebuttal.

17 The second ground of appeal is that the learned trial judge should not have struck out the appellants` defence because:

> (a) the order for discovery of 27 September 1994 was not an `unless` order, ie it did not state that unless a duly verified list of documents was filed within the period stipulated in the order the defence would be struck out; and
>
> (b) in the circumstances of this case the fact that the appellants did not file a list of documents did not result in a real or substantial risk that a fair trial would be impossible.

18 The first ground of appeal is a procedural one. The usual procedure for striking out a defence requires the respondents to apply by way of summons-in-chambers supported by an affidavit. This is not to say that the court has no power to order a striking out on an oral application. However, there should be a good reason why the usual practice was not followed. Neither the notes of evidence nor the grounds of judgment sets out why the respondents` application was made orally on the date of hearing rather than by summons-in-chambers filed prior to the date for hearing. There is, therefore, no apparent good reason why the usual procedure was not followed. However, the learned trial judge having exercised his discretion to allow the application to be made orally, an appellate

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court would be slow to reverse this decision without first looking at the reasons for the appellants` failure to file a list of documents and whether such failure would render a fair trial of the action impossible.

19 The appellants` counsel informed the court from the bar on the date of hearing that the appellants` company had ceased operations for a long time and the person then in charge of the company had no personal knowledge of this matter and was unable to find any documents relating thereto. In his submissions at the appeal, the appellants` counsel informed that this difficulty in obtaining the documents had been mentioned to the court even at the pre-trial conference stage and was not something that the respondents were unaware of. This explanation should properly have been made by an officer of the appellants on affidavit rather than by their counsel from the bar. If the respondents had made their application in the usual way by summons-in-chambers, before the hearing date, then unless this explanation was given on affidavit by an officer of the appellants the court could well disregard it. But where the application was made orally at the commencement of the hearing, as done here, the court cannot ignore and must consider counsel`s oral explanation. This explanation does inform why no discovery had been provided by the appellants and shows there was no suppression of documents by the appellants. However, even if they did not have any discoverable documents, the appellants could and should have filed a nil list giving such particulars as they could of what documents were once in their possession and then verified the list by affidavit. This they did not do and were wrong not to. Did the appellants` failure to file a nil list warrant the defence being struck out and judgment being entered? It would be appropriate to do so only if such failure created a real risk that a fair trial of the action would be impossible. Whether this was so is dealt with shortly.

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20 The first part of the second ground of appeal is also procedural in nature. The appellants contend that the court should not strike out a defence without an `unless` order having first been made and then only if the `unless` order is breached. There is nothing in the wording of O 24 r 16 to support this contention. It is true that in the cases that have come to the attention of this court in the course of the hearing of this appeal and the preparation of this judgment, defences were struck out for failure to file a list of documents only where the order breached was an `unless` order. However, none of these cases say that a defence would only be struck out if the order breached was an `unless` order. Where the order breached is an `unless` order, the breach itself automatically, without the court having to do more, results in the defence being struck out. But where as in this case the order breached is not an `unless` order then the court will only strike out a defence if in all the circumstances there is a serious risk that a fair trial would not be possible by reason of the defendants` breach.

21 The second part of the second ground of appeal raises this very issue. The appellants say that in the circumstances of this case no such risk was caused by their failure to file a list of documents.

22 The relevant circumstances are:

> (1) The defence of no notice does not appear to depend on any documents which the respondents should not themselves already have a copy of.
>
> (2) The same can be said of the defence of time-bar.
>
> (3) The appellants appear to have a defence on the merits.
>
> (4) The appellants do not appear to have discoverable documents.
>
> (5) The appellants have indicated to the respondents and to the court at the pre-trial conference their difficulty in obtaining the documents.

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> (6) There does not appear to have been any suppression of documents by the appellants.
>
> (7) The appellants should have but failed to file a nil list verified on affidavit by one of their officers.
>
> (8) The respondents themselves have not observed the various time requirements in their conduct of this action.

23 The learned trial judge does not appear to have taken these circumstances into account. The matters that he considered and his reasons for striking out the defence and entering judgment are set out in the following passage from his judgment:

> *In the present case the defendants had not complied with an order of discovery even on the date of trial. In fact, the defendants had not filed any documents, not even their affidavit evidence, even though they indicated at the summons for directions stage that they had three witnesses. In explanation Mr Sahagar could only state that his clients had difficulty in getting the documents as the defendants had ceased operations for a long time and the person in the office had no personal knowledge* ***. There was absolutely no indication that any documents could be produced at all or whether the defendants made any attempts to find the documents.****If this was the state of affairs on the day of trial, I was of the view that it would then be a waste of time to proceed any further with the trial in the light of the nonchalant attitude of the defendants and their continual disobedience of the order of court.*

24 I was of the view that in the light of the circumstances, there was no necessity for the court to make an unless order before exercising its power to strike off the defence. In the circumstances, I granted the application and ordered the defence to be struck out and consequently entered interlocutory judgment for the plaintiffs. [Emphasis added.]

25 From the sentence in italics it appears to have weighed heavily with the learned trial judge against the appellants that they had given no indication at all that any documents could be produced at the hearing or whether they had made any attempts to find the documents. But this was not so. The defendants had

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informed the court that they did not have any documents to produce and also explained why this was so. This is confirmed by the sentence preceding the italicized sentence and by the notes of evidence which records counsel for the appellants informing the court that:

> *Person in office does not have personal knowledge and they cannot retrieve documents as company not in operation for some time.*

26 There was no reason to believe that this explanation did not reflect the actual state of affairs relating to the appellants and their documents. The learned trial judge was, therefore, wrong to hold that there was no indication that the appellants made any attempts to find the document. Indeed the appellants` explanation was that they have not been able to find any documents because they have ceased operations for a long time and no one at present with the appellants knows anything about what happened in this matter or any documents relating thereto that the appellants may have had. That the explanation was made from the bar rather than on affidavit cannot be held against the appellants. As the application to strike out was itself made orally and not supported by affidavit, the respondents` oral explanation from the bar through their counsel should have been accepted unless there was reason not to. There was no such reason here.

27 Furthermore, in deciding whether or not to strike out the defence, the learned trial judge does not appear to have applied the test whether failure to file the list of documents would have rendered a fair trial of this action impossible. Applying this test and bearing in mind the relevant circumstances enumerated earlier, in this court`s judgment the failure of the appellants to file their list of documents did not render a fair trial of this action impossible. In any event such a list would have been a nil list and the respondents would have been

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in no better or worse position than they were before the list was filed. If the appellants had filed a nil list verified on affidavit the respondents would have had to accept it unless of course they had evidence to the contrary and subject to their right to ask for discovery of particular documents as provided by O 24 r 7. As Harman LJ said in ***John Walker & Sons Ltd v Henry Ost & Co*** [1970] RPC 151, at p 154 ll 45-48.

> *True it is that one cannot, when an affidavit of documents or a list of documents is produced, file an affidavit to say: `Well, I do not believe this man has told the truth or disclosed everything he ought to`. This affidavit is, as they say, conclusive.*

28 The defence should not, therefore, have been struck out. Instead the respondents should have been called on to prove their case. The appellants had by not filing any affidavits of evidence-in-chief of witnesses elected not to adduce any evidence. The trial court would have had to decide the case on the evidence available at the close of the respondents` case.

29 The appeal is accordingly allowed and the whole of the judgment dated 22 February 1995 is set aside. This matter is sent back to the district court for a new trial. Pursuant to the provisions of O 24 r 17, the appellants are ordered to file a list of documents, even if it be a nil list, within one month from the date of this judgment failing which their defence herein shall be deemed struck out and the respondents shall be at liberty to enter judgment against the appellants.

30 The costs of this appeal and the hearing below is fixed at $6,000, of which half shall be paid by the respondents to the appellants and the remaining half shall be the appellants` costs in the cause.

31 ***Appeal allowed.***

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Barnard Sahagar (Jumabhoy Leong & Gay) for the appellants
Lo Chun Boon (Gurbani & Co) for the respondents

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