S3 Building Services Pte Ltd v Sky Technology Pte Ltd
[2001] SGCA 63

Case Number : CA 600040/2001

Decision Date : 26 September 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Manjit Singh and Sree Govind Menon (Manjit & Partners) for the appellant; Lok Vi Ming, Joanna Foong and Chan Hoe (Rodyk & Davidson) for the respondent

Parties : S3 Building Services Pte Ltd — Sky Technology Pte Ltd

Civil Procedure – Delay – Filing and exchange of affidavits of evidence-in-chief – Extension of time – Application by respondents to file and exchange affidavits of evidence-in-chief out of time dismissed by registrar but allowed by judge – Whether judge rightly held that delay was unjustified – Whether any prejudice caused to appellants by reason of respondents' delay

Civil Procedure – Striking out – Party causing delay in proceedings – Whether court should dismiss delaying party's action – Real risk of prejudice – Whether award of costs can compensate prejudice to innocent party – Striking out only as a last resort

Judgment:

1. This was an appeal by S3 Building Services Pte Ltd (the appellant) against the decision of Woo Bih Li JC, in which he allowed the appeal from the decision of the registrar refusing the application by Sky Technology Pte Ltd, the respondent (the respondent) for an extension of time to file the affidavits of evidence-in-chief of witnesses and exchange them with the appellant, and striking out the defence and dismissing the counterclaim with costs. We dismissed the appeal and now give our reasons.

Background facts

2. The relevant facts giving rise to the appeal were briefly these. On 25 November 2000, the appellant instituted this action against the respondent, seeking an order for the rescission of an agreement whereby the respondents agreed to assign certain patent rights to the appellant on the terms and conditions therein stated. The basis of the claim, among others, was that the respondent had intentionally suppressed material information relating to the patent rights. Soon after the commencement of the action, the appellant took out an application for summary judgment. At the hearing thereof before an assistant registrar on 15 January 2001, the respondent was granted unconditional leave to defend. On 31 January 2001, the respondent served its defence and counterclaim. The appellant appealed against the decision of the assistant registrar and the appeal was heard on 13 February 2001 before Lai Siu Chiu J. She dismissed the appeal. Not contented with the decision, the appellant, on 27 February 2001, applied for hearing of further arguments. That application appeared to be belated, as the time for such application had expired. Nonetheless, the application was acceded to by Lai J, and 5 March 2001 was fixed for the hearing of further arguments.

3. In the meantime, on 28 February 2001, the parties appeared before the registrar for directions, and at that hearing the registrar made, inter alia, the following directions:

> (a) The affidavits of evidence-in-chief of witnesses to be called were to be exchanged between the parties by 30 March 2001 and objections thereto were to be taken by 6 April 2001.

(b) Leave was granted to the respondent to adduce the oral evidence at the trial of a representative from Allen & Gledhill, and a representative from Chu Chan Gan & Ooi.

(c) The trial be fixed for five days from 27 April 2001 to 4 May 2001 and the action be set down by 9 April 2001.

4. On 5 March 2001, the parties appeared before Lai J for the hearing of further arguments. At the conclusion, the judge altered her previous decision and ordered that the respondent be given only conditional leave to defend the appellants claim instead. The condition imposed was that the respondent was to provide security in the sum of S$600,000 for the appellants claim by 26 March 2001.

5. On 16 March 2001, the respondent filed an appeal against Lai Js decision and applied for the hearing of the appeal to be expedited. The application was allowed, and in consequence the appeal was heard on 22 March 2001. The appeal was unsuccessful, but the court granted to the respondent an extension of two weeks from the original deadline of 26 March 2001 to provide the security in the sum of S$600,000.

6. Thereafter, the respondent and its solicitors attempted to prepare the affidavits of evidence-in-chief of the witnesses for the trial to meet the deadline of 30 March 2001, but did not succeed in so doing. On Friday, 30 March 2001, the appellants solicitors sent a fax to the respondents solicitors requesting for a time to be fixed for the exchange of the affidavits. The respondents solicitors sought an extension of time from the solicitors for the appellant on the ground that Ms Winnie Tham of Allen & Gledhill, one of the witness they intended to call, was overseas. The solicitors for the appellants refused. There followed an exchange of correspondence and no agreement was reached between the parties. The appellant took out an application to strike out the defence and counterclaim. The respondent, on its part, applied for an extension of time to 14 April 2001 to file and exchange the affidavits of evidence-in-chief.

7. On 4 April 2001, both the applications were heard before the registrar. The registrar refused the respondents application for an extension of time and allowed the appellants application, and consequently ordered that the defence be struck out and counterclaim dismissed with costs, and that judgment for the appellant be entered. On the same day, the respondent filed an appeal to a judge in chambers, and the appeal was heard before Woo Bih Li JC on 10 April 2001. He allowed the appeal. From that decision, the appellant appealed to this Court.

The appeal

8. We considered first the reasons given by the respondent in the application for an extension of time before the registrar. In the affidavit filed in support of the application, Mr Lim Yeow Bing, the intellectual property and contracts director of the respondent, said in 4 the following:

> 4. The directions provided a short time frame for the preparation of the affidavits. Meanwhile, the Defendants efforts to prepare the affidavits expeditiously have been affected by the following circumstances:-
>
> > (a) The Plaintiff obtained leave, subsequent to the giving of the directions, to make further arguments before Justice Lai Siu Chiu in respect of her earlier dismissal of their appeal for summary judgment. The further arguments were heard on 5

> March 2001 and, at the end of a lengthy hearing, the learned Judge gave conditional leave to defend.
>
> (b) The Defendant appealed to the Court of Appeal against the learned Judges order, and the appeal was heard on an expedited basis on 22 March 2001. The appeal was unsuccessful. Much of the Defendants attention and effort were taken up by the hearing of the further arguments and the appeal.
>
> (c) The Defendant had also previously indicated that they may call a lawyer from M/s Allen & Gledhill to testify. In this regard, Ms Winnie Tham of M/s Allen & Gledhill, who acted for the Defendant in the subject patent application, has been out of the country since 23rd March 2001 and is understood that she will only return to Singapore after 4 April 2001.

9. The judge below held that the true reason for the delay was not given in the application for the extension of time and thus the conduct of the appellant was unsatisfactory, and further, that the delay was unjustified. The judge said at 61:

> 61. The truth of the matter was that Rodyk & Davidson and Sky Technology had used the absence of Winnie Tham to seek an EOT [extension of time] when the real reason was something else. To this extent, their conduct was unsatisfactory.

Later, the judge said at 64-66:

> 64. The true reason for the delay was that Rodyk & Davidsons time and attention had been taken up and distracted by the hearings before Lai J and the Court of Appeal in respect of the application for summary judgment and conditional leave. They had misjudged the time required to prepare the AEICs.
>
> 65. Although I had some sympathy for the situation they found themselves to be in, the true reason was still not satisfactory. After all, S3s AEICs were ready by 30 March 2001.
>
> 66. Hence, the delay was unjustified.

10. We had some difficulty in accepting the findings the judge made in this part of his judgment. First, with respect, we did not agree with his finding that the respondents had used the absence of Ms Winnie Tham to seek an extension of time when the true reason was something else. Mr Lim, in his affidavit, gave what the judge later said were the true reasons for the delay and these included the absence of Ms Winnie Tham as one of the reasons. It is true that in seeking an agreement from the appellants solicitors for the extension of time, Mr Lok Vi Meng, the solicitor for the appellant, gave only one reason for the delay: that is, that Ms Winnie Tham was out of the country. That was rather unfortunate, but not fatal. What was more important, surely, must be what the respondent relied on as the true reasons for the delay at the hearing before the registrar. These were given by Mr Lim in his affidavit filed in support of the application, the relevant part of which we have quoted above. We certainly did not find anything wanting in respect of what was said there. Nor did we find the conduct

of the respondent unsatisfactory.

11. Secondly, with respect, we did not find that the delay was unjustified. The summons for directions before the registrar was heard only on 28 February 2001 and, among other things, a direction was given for the exchange of the affidavits of evidence-in-chief to take place on 30 March 2001. Mr Lim said in his affidavit that the time frame given for the preparation of the affidavits was a short one. We found nothing wrong with this statement. In the circumstances of this case, we think that the time frame was a short one. Now, what happened immediately after the directions were given was that multiple proceedings took place. It appeared that on 27 February 2001, which was the day before the date the directions were given, the appellant applied to Lai J for a hearing of further arguments on the application for summary judgment. Mr Lok said that he was unaware of this application at the hearing of the summons for directions before the registrar. That was not disputed. Probably at that point in time, neither of the parties knew that the application had been granted, or for that matter, expected that it would be granted, having regard to the fact that the time for such an application had expired. It was unclear when the parties were notified that Lai J agreed to hear further arguments. However, the hearing of further arguments was fixed for 5 March 2001. Naturally both parties would have to prepare further arguments for submission before the judge. Then on 5 March 2001, Lai J altered her decision previously given and gave the respondent leave to defend the appellants claim on condition that the respondent furnished security in the sum of S$600,000. Against that decision, the respondent decided to appeal, and it immediately filed an appeal. An urgent application was made by the respondent for the hearing of the appeal to be expedited and an order was made expediting the hearing. The appeal was heard on 22 March 2001, but unfortunately the respondent was unsuccessful in the appeal. Plainly, all these events supervened during the relevant period, i.e. date when the order for directions was made, namely 28 February 2001, and the deadline for the exchange of affidavits on 30 March 2001. It was manifestly clear to us that all these events, which were unforeseen at the time the directions were given, occasioned a delay in the preparation by the respondent of the affidavits of evidence-in-chief. As the judge below said, and we agreed, the time and attention of the solicitors for the respondent had been taken up and distracted by the hearing before Lai J and the Court of Appeal in respect of the application for summary judgment.

12. In our judgment, having regard to the supervening events and the short time frame allowed, the delay could not, with respect, be characterised as unjustified. We were of the view that an adequate explanation was given for the extension of time, and the registrar should have granted the extension of time sought or alternatively an extension of seven or even ten days, and should not have exercised the draconian power of striking out the defence and dismissing the counterclaim with judgment to the appellant. Particularly, in this case, such extension would not necessitate an adjournment or postponement of the trial, and the impact of an extension of time on the case overall would not have been significant.

Prejudice

13. Having regard to what we have said, it is unnecessary to deal with the issue of prejudice. However, since this was an issue raised and argued by both parties, we should say a word on it. The leading authority is the case of *The Tokai Maru* [1998] 3 SLR 105. That was a case involving also a delay in filing and exchanging affidavits of evidence-in-chief, and the delay involved covered a period of some nine months, and the court held that the explanation given for the delay was unsatisfactory and the delay was unjustified. Nonetheless, the Court of Appeal found that there was no prejudice caused to the respondents and the application to extend the time was granted. In coming to this conclusion, the Court followed the decision of the Court of Appeal in England delivered by Sir Thomas Bingham MR (as he then was) in *Costellow v Somerset County Council* [1993] 1 All ER 952, [1993] 1

WLR 256. Among other things, it was stated there that *the courts practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter.* Even if prejudice is caused, which can be cured by an appropriate order of costs, the court would be disinclined to refuse the application for an extension of time.

14. It is unnecessary for us to refer to the judgment in *Costellow* which was quoted in extenso in *The Tokai Maru* and also in this Courts decision in *Leong Mei Chuan v Chan Teck Hook David* [2001] 2 SLR 17. Suffice here to remind ourselves of the following passage of the judgment of Sir Thomas Bingham MR which we find appropriate ([1993] 1 All ER 952 at 960, [1993] 1 WLR 256 at 264):

> [I]n the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiffs action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, *on an overall assessment of what justice requires*, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under O 3 r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.

[Emphasis is ours]

15. The judge below found that there was no undue prejudice to the appellant if an extension of time was granted to the respondent to exchange affidavits of evidence-in-chief by 11 April 2001, i.e. one day after the hearing before him. We, for our part, found that there was no evidence that the appellant had suffered *any* prejudice entitling it to deny an extension of time to the respondent.

Conclusion

16. For the reasons given, we found that the appeal had absolutely no merit and had no hesitation in dismissing it.

Sgd:	Sgd:
L P THEAN Judge of Appeal	CHAO HICK TIN Judge of Appeal

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