Chinese Chamber Realty Pte Ltd and Others v Samsung Corp
[2003] SGHC 189

Case Number : Suit 428/2003, RA 167/2003

Decision Date : 15 August 2003

Tribunal/Court : High Court

Coram : S Rajendran J

Counsel Name(s) : Koh Kok Wah, Gerald Ng and Daniel Chia (Wong & Leow LLC) for the appellants/defendants; Latiff Ibrahim and Yeo Khung Chye (Harry Elias Partnership) for the respondents/plaintiffs

Parties : Chinese Chamber Realty Pte Ltd; China Square Holdings Pte Ltd; Church Street Properties Pte Ltd — Samsung Corp

Civil Procedure – Jurisdiction – Inherent – Whether inherent jurisdiction should be exercised where matter of procedure covered by Rules of Court

Civil Procedure – Rules of court – Order 14 r 1 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) provide for summary judgment application to be made only after Defence filed – Order made granting leave to file summary judgment application without Defence being filed -Whether order proper – Appropriate order to be made in circumstances

1 Until late 2002, a plaintiff could, upon the defendant entering appearance, apply under O 14 r 1 of the Rules of Court for summary judgment of part or whole of his claim against that defendant: O 14 r 1 did not, at that time, require the plaintiff to wait for the defence to be entered before making an application for summary judgment. This situation changed on 1 December 2002 when certain amendments to O 14 came into effect. The amended O 14 r 1 reads as follows:

> Where a statement of claim has been served on a defendant and that defendant has *served a defence to the statement of claim*, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

As a result of the amendment (indicated in italics above) an application for summary judgment under O 14 may be made only after the defendant "has served a defence to the statement of claim".

2 This amendment brought in its wake difficulties in relation to obtaining summary judgments under O 14 for contracts – particularly building contracts – which provided for disputes to be referred to arbitration. Despite the existence of such arbitration clauses the practice had developed for a plaintiff – such as a contractor or sub-contractor who had not been paid progress payments due under an Architect's Certificate – to commence proceedings in the civil courts in order to obtain the benefit of a speedy judgment under O14. When such an action was commenced, the defendant – if he wished the matter to be heard by the arbitrator – would apply for a stay of proceedings on the grounds that the parties had contractually agreed to arbitration and that arbitration was the more appropriate mode for resolving the disputes. It was the practice – pre-December 2002 – for the O 14 application and the stay application to be heard together.

3 Under the amended O 14 provisions, however, the plaintiff would have to wait for the defendant to file his defence before applying for O 14 judgment but a defendant who wanted the dispute resolved by arbitration would not file his defence for fear that by so doing he would be deemed to have taken a step in the proceedings and thereby waived his rights to arbitration. To avoid that consequence, the defendant – as happened in this case – would have to apply for leave

that he be allowed to file his defence only after the application for stay had been dealt with.

4 If the court granted the defendant's application for leave to file the defence after the stay application had been dealt with, the plaintiff would not be able to apply for summary judgment under the amended O 14. The result would be that the stay application would be heard without the O 14 application being heard at the same time. In those circumstances, if the stay application were granted, the plaintiff would be precluded from making an O 14 application. It is only if the stay application was refused that the plaintiff, after the defendant files his defence, can proceed to apply for O 14 judgment.

5 That the courts would grant O 14 judgment even in cases where parties had contractually agreed to refer disputes to arbitration is clear from a number of decisions of the Singapore courts. I need refer to only one of these cases, namely, *Aoki Corp v Lippoland (S) Pte Ltd* [1995] 2 SLR 609 at 619 – a case which, as here, also involved the SIA form of building contracts – where Warren Khoo J stated the rationale for so doing as follows:

> Clause 31.11 of the SIA conditions of contract provide, so far as relevant for present purposes, that no certificate of the architect shall be final and binding, but in the absence of fraud or improper pressure or interference by either party, full effect shall be given to all certificates of the architect, whether for payment or otherwise, until final judgment or award.
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> …
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> The object of these provisions of the contract is that certificates issued in the ordinary course by the architect are to be honoured, and that any challenge in relation to them should be referred for arbitration, although, as can be seen in the *Tropicon* case, where the circumstances are such that the legality or propriety of a certificate can be decided by reference to the terms of the contract and the circumstances in which it was issued, the court will not hesitate to deal with the matter even in summary judgement proceedings.

The case of *Tropicon* referred to by Khoo J was a reference to the decision in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] SLR 80 where the Court of Appeal took a similar view.

6 The plaintiffs in the present case, Chinese Chamber Realty Pte Ltd, China Square Holdings Pte Ltd and Church Street Properties Pte Ltd ("CCR"), were developers of a 30-storey office building and their claim against the defendants, Samsung Corporation ("Samsung"), who were the main contractors for the development, was under a Delay Certificate issued by the Project Architect. In their Statement of Claim, CCR expressly pleaded that they would be relying on the temporary finality of the Delay Certificate under cll 31 and 37 of the SIA conditions of contract (that applied in this case) and stated that they would be applying for summary judgment in respect of the amount due to them thereunder.

7 Samsung entered an appearance to the writ and then applied to have the proceedings stayed for the dispute to be referred to arbitration. The defence was not filed on the grounds that filing the defence would amount to taking a step in the proceedings. Samsung's application for stay came up for hearing before Ms Thian Yee Sze, Assistant Registrar, on 28 May 2003. Because the defence had not been filed CCR was unable to apply for summary judgment under O 14 r 1.

8 At the hearing before the Asst Registrar, Samsung orally applied for an order that it be granted extension of time to file its defence after the stay application and any appeal therefrom had been determined. As noted above, if that order was granted, the O 14 application could not be heard

simultaneously with the stay application. That being so, if the stay application was granted, CCR would not under the amended O 14 be able to make the O 14 application at all as the dispute would be referred to arbitration. CCR would be able to make an O 14 application only if the stay application was refused and Samsung then filed its defence. Even in such event, CCR – vis-à-vis its position prior to the O 14 amendment – would still suffer prejudice in that it would be unable to apply for O 14 judgment immediately but would have to wait until Samsung filed its defence after any appeal from the refusal to grant a stay order had been disposed of.

9 To overcome the difficulty created by the amended O 14, CCR applied orally to the Asst Registrar for leave to file their application for summary judgment without the defence having been filed and for the O 14 application and the stay application to be heard together. Samsung objected on the grounds that such a course of action would be a violation of the clear provisions of the amended O 14.

10 The Asst Registrar appreciated the difficulty that CCR found itself in. She also appreciated the difficulty that Samsung would encounter if it filed its defence. She resolved this impasse by –

(a) giving CCR leave to file an O 14 r 1 application without the defence having been filed;

(b) allowing Samsung's application that it need not file its defence until after the resolution of the stay application;

(c) ordering that all affidavits filed by Samsung in the O 14 application were not to be considered as steps in the proceedings; and

(d) ordering that the O 14 application and the stay application be heard together.

By the above orders, the Asst Registrar attained the objective of having the stay application and the O 14 application heard together without Samsung being prejudiced by having filed its defence.

11 The Asst Registrar justified the grant of the above orders by invoking the inherent powers of the court spelt out in O 92 r 4. Order 92 r 4 provides as follows:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

The Asst Registrar's reason for invoking O 92 r 4 and granting the orders – as noted in the court records – was as follows:

> … in my view, the circumstances of the present case are very unique. First, the Plaintiffs have in their statement of claim prayed for summary judgment (see paragraph 16 of statement of claim) pursuant to Clause 37 (the Arbitration clause). Second, the Defendants are seeking a stay of application pursuant to the provision in Clause 37 to refer disputes to arbitration. As such, the facts and arguments raised in support of the stay application and a summary judgment application will invariably be intricately intertwined. By allowing these two application to be heard together, this will alleviate the problem of duplicity in arguments for these two applications to a large extent. Under these circumstances, I shall exercise my discretion pursuant to Order 92, rule 4 to allow the Plaintiff to file an application for summary judgment under O 14 despite the fact that the Defendant have not filed any defence.

The Asst Registrar was obviously trying to prevent prejudice to CCR in not being able to have its O 14 application heard together with the stay application: a practice sanctioned by the courts for some considerable period of time.

12 Samsung was dissatisfied with the Asst Registrar's decision and appealed against her decision.

13 At the hearing of the appeal, Samsung argued that by invoking the "inherent powers" of the court and allowing CCR to apply for O 14 judgment before Samsung filed its defence, the Asst Registrar had ignored the clear words of O 14 r 1. Samsung argued that the provisions of O 92 r 4 were not a sufficient mandate for the Asst Registrar to ignore the clear directions in the amended O 14.

14 The court undoubtedly has inherent powers to make such orders as may be necessary to prevent injustice or to prevent an abuse of the process of the court. However, where a matter of procedure is covered by the Rules of Court and those Rules are clear, the court should be most circumspect in declining to follow those rules. Failure to follow the clear directions in the Rules is tantamount to the court re-writing the Rules to fit the "justice" of each case. Such an approach will introduce uncertainty into court procedures and is undesirable. I need to refer to only two cases – one from England and one from Malaysia – as authorities for that proposition.

15 In the *Siskina* [1979] AC 210 at 262, Lord Hailsham referring to the failure by the Court of Appeal in the exercise of its inherent jurisdiction to follow the Rules of Court stated:

> The jurisdiction of the Rules Committee is statutory, and for judges of first instance or on appeal to pre-empt its functions is, at least in my opinion, for the courts to usurp the function of the legislature. Quite apart from this and from technical arguments of any kind, I should point out that the Rules Committee is a far more suitable vehicle for discharging the function than a panel of three judges, however eminent, deciding an individual case …
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> To follow Lord Denning MR in his invitation to pre-empt its counsels is not merely to usurp the function of a legislative body entrusted by Parliament with a particular task. It is to remove a function properly exercised by a representative body able to examine a question from all relevant points of view and hand it over to a particular panel of judges deciding an individual case.

The House of Lords in that case robustly rejected Lord Denning's flexible attitude towards the Rules of Court.

16 V C George J in *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] 2 MLJ 334 at 347 stated:

> The court has always had an inherent jurisdiction to regulate its own proceedings. Order 92 r 4 of the Rules of the High Court 1980 recognizes this to be the position. However, that is not to mean that the judge may ignore express rules of court and make his own rules of practice and procedure inconsistent with written rules and time-honoured practices. There is no doubt that from time to time, established rules and practices become outdated. For instance, there are rules and practice that make for extended trials. Some of these rules and practices could perhaps be done away with or at least streamlined. New rules could be brought in. However, it is not open to individual judges or even for the conference of judges to take it upon himself or itself to do away with or streamline or adopt innovative procedures. However, well-intentioned, that sort of thing, if permitted, could lead to a form of anarchy! If changes are called for, what

has to be done is to have the rules committee – the members of which are carefully selected from the Bench and from members of the Bar and includes the Attorney General or his representative and which is headed by none other than the Chief Justice – give due consideration to the new ideas and have the rules duly amended. And until such amendments are effected, the old rules and practices cannot be ignored and new procedures may not be implemented. However, where there is a lacuna in the rules and practice, then and only then, may the aforesaid inherent jurisdiction be invoked.

The view expressed by VC George J in *Yomeishu Seizo* was similar to that of the House of Lords in the *Siskina*.

17 Jeffrey Pinsler in his article "The Inherent Powers of the Court" [1997] SJLS 1 at 21 very succinctly summarised the approach in *Siskina* and *Yomeishu Seizo* when he said: "As it is only the Rules Committee which has statutory authority to make rules to regulate practice and procedure, there is a strong basis for contending that judges should not be seen to override those rules and, in effect, make new rules of procedure on an *ad hoc* basis. Such a route would involve a return to the time before the establishment of the Rules Committee when judges made rules pursuant to their inherent jurisdiction."

18 What the Asst Registrar in this case did, in order to ensure that the O 14 application and the stay application were heard together, was to override the clear words of O 14 r 1 and enable CCR to make the O 14 application without Samsung filing its defence. I do not think the Asst Registrar was justified in taking so flexible an approach towards O 14 r 1.

19 It is of interest to note that amongst the orders that the Asst Registrar made was an order that participation by Samsung in the O 14 proceedings was not to be considered to be a "step in the proceeding". In making this order, the Asst Registrar was following an established practice of the courts of making such orders in order to preserve rights.

20 The difficulty that CCR faced in bringing O 14 proceedings was Samsung's reluctance to file a defence as the filing of the defence could be construed as taking a step in the proceedings. It seemed to me that that problem could – without doing violence to the procedure spelt out in the amended O 14 – be resolved by ordering Samsung to file its defence and directing that compliance with that order was not to be construed as a step in the proceedings. Samsung would then be protected; CCR would be able to apply for O 14 judgment in compliance with the amended O 14; and it would be possible to have the O 14 application and the stay application heard together.

21 I asked Mr Koh Kok Wah, who appeared for Samsung, to address me on whether the court would be contravening any rules should it adopt such a course. Mr Koh accepted that there would be no breach of any rules but submitted that in the light of what Woo Bih Li JC (as he then was) said in *Yeoh Poh San v Won Siok Wan* [2002] 4 SLR 95, the court should refrain from such a course. Mr Koh submitted that the learned JC in that case had frowned upon the practice of the courts making such "compromise orders".

22 *Yeoh Poh San* was a case where there had been an application for stay of proceedings on the grounds of forum non conveniens and on the grounds of multiplicity of suits. That stay application was dismissed by the Asst Registrar and the defendants filed Notice of Appeal against the dismissal. Before the appeal could be heard the time for filing the defence expired. The plaintiff applied for judgment in default of defence whilst the defendant applied for an extension of time to file his defence.

23 The Deputy Registrar granted an extension of time of 14 days "on the undertaking of the plaintiff's counsel not to treat the filing of the defence as a step taken by the defendant in the proceedings in view of the appeal on the defendant's application to stay". That order of the Dy Registrar had two limbs to it:

(a) the defendant was granted an extension of 14 days to file her defence;

(b) after the defendant had filed her defence, the plaintiff was precluded from asserting that the filing of the defence was a step in the proceedings.

The defendant appealed and sought instead an order granting her leave to file her defence after all avenues of appeal in respect of the stay application had been exhausted. Meanwhile, the defendant's appeal on the stay of proceedings was dismissed by the judge-in-chambers and the defendant indicated an intention to appeal to the Court of Appeal.

24 In that case, there was – whilst the appeal process in respect of the dismissal of the stay application was pending – no pressing need for the defence to be filed. The Dy Registrar could therefore have extended the time for filing the defence until all appeals in respect of the stay application had been disposed of. Instead, the Dy Registrar made a "compromise order" consisting in part of an extension of time to file the defence and in part the undertaking by the plaintiff referred to above. It was this "compromise order" that Woo JC criticised in the *Yeoh Poh San* case. I respectfully agree with that criticism.

25 The facts and issues in the present case are very different from those in *Yeoh Poh San*. Here the stated purpose of CCR in instituting its claim in the civil courts (instead of by way of arbitration) was to invoke the court's jurisdiction to grant summary judgment under O 14: a course of action that had always been available to a plaintiff in the circumstances of CCR. However, in view of the amendment to O 14, CCR was unable to immediately apply for O 14 judgment and – as had been the practice – have that application heard together with the stay application. To have such a joint hearing would be beneficial because the O 14 application could be more speedily dealt with and because it would – as the Asst Registrar pointed out – alleviate the problem of duplicity in arguments. A direction, in these circumstances, that Samsung file its defence but that that act should not be construed as a step in the proceedings would, in my view, be an appropriate order to make: it would not be the sort of "compromise order" that Woo JC disapproved of in the *Yeoh Poh San* case.

26 For the above reasons, I dismissed the appeal against the Asst Registrar's decision that the O 14 application and the stay application be heard together but in order to comply with the provisions of the amended O 14 varied the orders she made to read as follows:

(a) Samsung file and serve its defence within 14 days from the date of this order;

(b) SIC 3102/2003 (the stay application) and SIC 3571/2003 (the O 14 application) be heard together;

(c) The affidavits of CCR and Samsung filed as of the date of this order in the abovementioned SIC 3571/2003 shall stand as having been properly filed and served; and

(d) Samsung's filing of its defence; its filing of affidavits; and its participation in the O 14 proceedings shall not be construed as steps in the proceedings.

As I had reversed the Asst Registrar's order in relation to the leave granted for CCR to file the O 14 application without the defence being filed, I felt that CCR should be entitled to only 75% of the costs of the appeal and I fixed the costs payable to CCR at $5,000.

Defendants' appeal dismissed.
Variations to Asst Registrar's orders made.