

**RBG Resources plc (in liquidation) v Banque Cantonale Vaudoise and Others
[2004] SGHC 170**

Case Number : Suit 1175/2002, SIC 3903/2004
Decision Date : 11 August 2004
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Matthew Saw (Lee and Lee) and Seah Yi-Lein (Shook Lin and Bok) for plaintiff; Lawrence Teh (Rodyk and Davidson) for second defendant
Parties : RBG Resources plc (in liquidation) — Banque Cantonale Vaudoise; Credit Lyonnais; Westdeutsche Landesbank Girozentrale; BNP Paribas (Suisse) S.A.; Ing Bank N.V.; Banque Bruxelles Lambert; GMAC Commercial Finance PLC

Civil Procedure – Appeals – Leave – Successful plaintiff denied full costs of action as it failed on issue raised during trial – Whether plaintiff should be granted leave to appeal against judgment on costs – Section 34(2)(b) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

11 August 2004

Woo Bih Li J:

Background

1 In my judgment of 11 June 2004 ([2004] SGHC 123), I declared that the plaintiff, RBG Resources plc ("RBG"), remained the legal and beneficial owner of metals in certain warehouses which had been held for the account of RBG prior to any dealing of the metals between RBG and the second defendant Credit Lyonnais ("CL"), save for one drum of nickel identified as 519-W127 by SGS Testing & Control Services Singapore Pte Ltd. I also ordered that the sale proceeds of RBG's metal be released to RBG or its solicitors.

2 I further ordered CL to pay damages to RBG for conversion of nickel briquettes which CL had taken delivery of from one of the warehouses, such damages being the net purchase price or prices which CL had obtained for the briquettes as CL had sold the same.

3 Consequently, CL's counterclaim for the metals in the warehouses, which also formed the subject matter of RBG's claim, was dismissed, save for the one drum of nickel identified as 519-W127. CL was consequently entitled to the sale proceeds of that one drum of nickel.

4 I reserved the question of costs and interest for counsel's submissions. After hearing submissions, I awarded RBG 70% of the costs of its claim and of CL's counterclaim. The details of the costs order and my reasons are set out in my further judgment dated 6 August 2004 ([2004] SGHC 167) ("judgment on costs"). I did not award RBG full costs because it was not successful on the issue it raised under s 62(4) of the Sale of Goods Act (Cap 393, 1999 Rev Ed). The s 62(4) issue is elaborated on in my judgment of 11 June 2004.

5 CL then appealed against my judgment of 11 June 2004 and my judgment on costs.

6 Subsequent to the filing of CL's notice of appeal, RBG filed an application for leave to appeal against my judgment on costs pursuant to s 34(2)(b) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the SCJA"). The ground, as stated in the application, was that RBG should

have been awarded full costs as it had obtained judgment for all its claims and had successfully defended CL's counterclaim, save for one drum of nickel. I will refer to this as "the Application Issue".

7 However, when parties appeared before me to argue the application, RBG started its arguments on a different ground. RBG said that it intended to file a respondent's notice in CL's appeal to argue that my decision should also be supported under s 62(4). If the Court of Appeal were to agree with RBG on the s 62(4) issue, RBG intended to ask that my costs order be varied so that it would then be awarded full costs instead of 70% of the costs. I will refer to the issue about varying my costs order if RBG succeeds on the s 62(4) issue as "the Conditional Issue". I should also mention that the concept of a respondent's notice has been done away with and RBG would have to raise the s 62(4) issue in its respondent's case instead under O 57 r 9A(5) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed).

8 RBG relied on *Lee Hiok Tng v Lee Hiok Tng* [2001] 3 SLR 41 to support its contention that it had to apply for leave to appeal in the circumstances, otherwise it would be denied the chance to seek a variation of my costs order should the Court of Appeal determine the s 62(4) issue in its favour.

9 RBG also relied on the Application Issue. However, RBG appeared to appreciate that the Application Issue alone would probably not be sufficient to obtain leave to appeal. Costs awards are in the discretion of the trial judge and it is not unusual for a party to be awarded part of the costs of his claim because he has failed on an issue raised by him, even though he has obtained judgment effectively for his full claim. Hence, RBG placed much reliance on the Conditional Issue.

10 If I were not inclined to grant leave to appeal on the Application Issue, the question was whether I should nevertheless grant such leave because of the Conditional Issue. It seemed to me that RBG could not raise the s 62(4) issue in an appeal proper. As mentioned above, the s 62(4) issue would be raised only in its respondent's case.

11 The case of *Lee Hiok Tng* was of no assistance to RBG. In that case, Lee Hiok Tng ("Tng") and Lee Hiok Woon ("Woon") had instituted an originating summons as executors/trustees of the estate of Lee Wee Nam to seek the court's determination of certain issues in respect of a gift of shares from Lee Wee Nam to Tng. Tng was the defendant in his personal capacity. However, three beneficiaries of Lee Wee Nam's estate intervened in the action. They objected to the application on the ground that the issues had already been decided by the High Court in another action. The court of first instance agreed with the three beneficiaries that the issues had already been decided. However, no order of costs was made in favour of Tng and Woon in their representative capacity. When Tng (in his personal capacity) lodged an appeal, the three beneficiaries challenged the correctness of the costs order in the hearing before the Court of Appeal. They argued that the costs of Tng and Woon in their representative capacity should have been paid by Tng personally as the originating summons had really been brought by Tng to pursue his personal interest. The Court of Appeal said that it was unable to consider the challenge as the three beneficiaries had not filed a notice of appeal, preceded by an application for leave pursuant to s 34(2)(b) of the SCJA.

12 As can be seen, the three beneficiaries were taking the position that in view of the decision of the court below, the costs order was not correct. They were not saying that the costs order should be varied if they succeeded before the Court of Appeal on a point which they had lost below. Accordingly, their objection could have been the subject of an appeal, if leave to appeal had been sought and obtained. In the case before me, the s 62(4) issue could not have been the subject of an appeal by RBG, as I have mentioned.

13 There is one other point I should mention. If I were to grant leave to appeal, RBG's appeal would have a life of its own. RBG could carry on with it even if CL should withdraw its appeal. That would be contrary to a respondent's case. If an order were to be made that RBG's appeal would be deemed withdrawn upon the withdrawal of CL's appeal, that would make RBG's appeal, in substance, a respondent's case.

14 Accordingly, I was of the view that RBG should seek a variation of my costs order in its respondent's case filed pursuant to CL's appeal. Of course, this would mean that RBG cannot rely on the Application Issue if no leave to appeal were to be granted for it.

15 There is one other point I wish to mention. Order 57 r 9A(5) and (6) state:

(5) A respondent who, not having appealed from the decision of the Court below, desires to contend on the appeal that the decision of that Court should be varied in the event of an appeal being allowed in whole or in part, or that the decision of that Court should be affirmed on grounds other than those relied upon by that Court, must state so in his Case, specifying the grounds of that contention.

(6) Except with the leave of the Court of Appeal, a respondent shall not be entitled on the hearing of the appeal —

- (a) to contend that the decision of the Court below should be varied upon grounds not specified in his Case;
- (b) to apply for any relief not so specified; or
- (c) to support the decision of the Court below upon any grounds not relied upon by that Court or specified in his Case.

16 As limb (b) of r 9A(6) is connected with limb (a), it seems to me that limb (b) is intended to apply in a situation where a respondent is contending that the decision below should be varied in the event of the appeal being allowed in whole or in part, but not when the respondent is contending that the decision below should be affirmed on grounds other than those relied upon below. Nevertheless, I am of the view that there is an unintended lacuna and it must be implied that if a respondent succeeds in its contention that the decision below should be affirmed on grounds other than those relied upon below, the respondent is entitled to claim consequential relief from that contention. Hence, the relief sought by RBG under the Conditional Issue should be stated in its respondent's case and should not be used to justify an application for leave to appeal on the Application Issue.

17 In the circumstances, RBG's application for leave to appeal was dismissed with costs.

Plaintiff's application dismissed with costs.