IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 67

Civil Appeal No 33 of 2017

Between

ARIES TELECOMS (M) BERHAD
(FORMERLY KNOWN AS
V TELECOMS BERHAD)

… *Appellant*

And

VIEWQWEST PRIVATE LIMITED

… *Respondent*

In the matter of Suit No 860 of 2013
(Summons No 5786 of 2016)

Between

ARIES TELECOMS (M) BERHAD
(FORMERLY KNOWN AS
V TELECOMS BERHAD)

… *Plaintiff*

And

VIEWQWEST PRIVATE LIMITED

… *Defendant*

And

FIBERAIL SDN BHD

… *Third Party*

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ORAL JUDGMENT

[Tort] – [Remedies] – [Damages]
[Civil procedure] – [Rules of court] – [O 14 r 12]

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Aries Telecoms (M) Bhd
v
ViewQwest Pte Ltd

[2017] SGCA 67

Court of Appeal — Civil Appeal No 33 of 2017
Andrew Phang Boon Leong JA, Tay Yong Kwang JA and Steven Chong JA
27 November 2017

27 November 2017 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the oral judgment of the court):

Introduction and background

1 This is an appeal against a determination by a High Court judge ("the Judge") of a purported question of law under O 14 r 12 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("O 14 r 12") in *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd (Fiberail Sdn Bhd, third party)* [2017] SGHC 124 ("the GD"). The appellant, Aries Telecoms (M) Bhd ("the Appellant"), obtained an interlocutory judgment on liability against ViewQwest Pte Ltd ("the Respondent") for conversion – specifically, for retaining and using certain information technology equipment ("the equipment") belonging to the Respondent. Before the trial progressed to the assessment of damages stage, the

Appellant, at the Judge's suggestion, took out Summons 5786 of 2016 ("SUM 5786") to seek a determination:

> … as to the nature of the damages the [Appellant] is entitled to claim; in particular, whether the [Appellant] is entitled to an account of the profits made by the [Respondent] arising from the conversion and for the [Respondent] to disgorge such profits.

2 After two oral hearings and two rounds of written submissions, the Judge held that on the evidence as it existed, the Appellant had failed to establish crucial facts such as cynical and deliberate wrongdoing. The Appellant was therefore not entitled to disgorgement of profits and also not entitled to punitive, exemplary, or aggravated damages.

3 The Appellant brought this appeal on the basis that the Judge had erred by deciding disputed questions of fact in an O 14 r 12 application. The Respondent argued, amongst other things, that the Appellant was foreclosed from raising this argument in the appeal by the principle that a person may not approbate and reprobate.

4 Having considered both parties' submissions, we are of the view that the appeal should be allowed because the Judge had, in arriving at his decision, decided disputed questions of fact, which are not suitable for determination in an O 14 r 12 application. However, we emphasise that this error is not, in substance, attributable to the Judge, or indeed to any fault of the Respondent. Rather, it was the product of the Appellant's lack of clarity in its written and oral submissions, and in its drafting of the question posed in SUM 5786.

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The principle of approbation and reprobation

5 We address, first, the Respondent's threshold objection that the Appellant's appeal falls afoul of the principle of approbation and reprobation, also known as the principle of election. We accept the law as stated by the Respondent. However, an election must be reasonably clear to be effective. As we shall see when we come to the main issues in this appeal, the Appellant's position before the Judge was incoherent, equivocal, and confusing. That carries its own consequences which the Appellant must bear. But being so unclear, the Appellant's statements below cannot constitute an election and do not engage the principle of approbation and reprobation.

The purpose of O 14 r 12

6 Turning now to O 14 r 12, this mechanism is meant to save time and costs by allowing a court to determine a question of law without having to go through a full trial. (It can also be used in matters of construction, but we are not concerned with that here.) In simplified terms, a question has to meet three requirements to be suitable for the O 14 r 12 procedure, which are as follows (see generally Jeffrey Pinsler SC, *Singapore Court Practice 2017*, Vol I (LexisNexis, 2017) at para 14/12/3):

(a) First, it has to be a question of law.

(b) Second, it has to be suitable for summary determination.

(c) Third, answering the question must fully determine either the whole cause or matter, or at least one claim or issue within it.

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The error

7 The fundamental problem in this case is that the question required the court to determine disputed questions of fact *in addition to* questions of law. This can be seen in the prayer for relief in SUM 5786. It concerned "the nature of the damages the [Appellant] ***is entitled*** to claim" and, specifically, "whether the [Appellant] ***is entitled*** to an account of the profits made by the [Respondent]" [emphasis added]. If the facts had already been established or agreed, there would have been nothing objectionable about this question. But that was not the case here, because the parties still hotly contested key facts including whether the Respondent had acted cynically or deliberately in retaining and using the equipment.

8 In part due to the deficient phrasing which we have just discussed, a number of factual determinations were made which were not appropriate in an O 14 r 12 application. These include the findings (at [24]–[26] of the GD) that the Respondent:

(a) had genuinely believed that the equipment was subject to its contract with another company, Fiberail Sdn Bhd ("Fiberail"), instead of its contract with the Appellant;

(b) had acted on this genuine belief when it refused to return the equipment to the Appellant upon demand; and

(c) had returned the equipment not because it accepted that the equipment had been delivered to it under its contract with the Appellant, but because the court had noted that Fiberail was not claiming ownership of the equipment.

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Unfortunately, these findings of fact were not mere incidental observations, but were central to, and dispositive of, the application as the Judge understood it.

9 This is not to deny that the question *could* have been reinterpreted so as to disclose a suitable question, that is: what reliefs would be available under Singapore law *provided* that cynical or deliberate wrongdoing was established at the trial for the assessment of damages? The Appellant now claims that this was how the question was originally intended. However, the Judge did not adopt this interpretation, nor was it explained in those terms to the Judge despite there being many opportunities for the Appellant's counsel to do so.

The Appellant's blameworthiness for the error

10 This brings us to the Appellant's role in creating an erroneous understanding in the Judge's mind. We highlight, as a non-exhaustive list, four ways in which the Appellant caused this error.

11 First, as earlier noted, the question itself suggested that the Judge was to make findings of fact.

12 Secondly, the Appellant's first set of submissions in SUM 5786 contained the misleading statements that the claim "cannot be ruled out" and that it would be wrong to "strike out such a claim summarily". This is the language of striking out (pursuant to O 18 r 19), not the language of an O 14 r 12 application.

13 Thirdly, when asked to clarify the Appellant's position at the 12 January hearing, the Appellant's counsel gave confusing answers which suggested that he did want the court to make determinations of fact, and that he was content with the state of the evidence as it then existed. Most misleadingly, he stated

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that "*there is already enough evidence* ***to prove our claim*** for account of profits or disgorgement of profits. *Court can draw inference*" [emphasis added].

14 Fourthly, the Appellant's second set of submissions in SUM 5786 delved deeply into the evidence of the Respondent's alleged cynical and deliberate wrongdoing. Naturally, the impression this gave the Judge was that he ought to make a determination on whether there was cynical and deliberate wrongdoing on the facts.

Conclusion

15 Against the backdrop of these statements guiding the court toward an incorrect approach, the Judge eventually decided SUM 5786 on the basis of *factual unsustainability* rather than any issue of law. That is particularly apparent when we arrive at that part of the grounds of decision concerning punitive and exemplary damages. The law on that point as regards torts was well-established and unchallenged (its ambit having been considered and clearly set out in the recent decision of this court in *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918), leaving *only* a *purely factual* question of whether the prerequisites for such reliefs were present on the evidence. On the basis of these errors, we allow the appeal and set aside the Judge's decision. Further, since it does not appear that remitting the question to be interpreted and answered using the correct approach would save time and costs at this point, we dismiss SUM 5786. For the avoidance of doubt, any such questions may now be decided afresh in the course of the assessment of damages.

16 Although we have allowed the appeal, it would not be right for the Appellant to benefit from a mess of its own making. We accept the Appellant's explanation that the mistakes which it made below were inadvertent. The

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Appellant and its counsel did not set out to cause confusion as to the nature of an O 14 r 12 application. Nonetheless, this appeal would not have been necessary if the Appellant had taken greater care to be clear from the start. We therefore make no order as to the costs of the appeal. In light of the dismissal of SUM 5786, the Appellant is to bear the costs of the proceedings in the court below. The usual consequential orders will apply.

Andrew Phang Boon Leong	Tay Yong Kwang	Steven Chong
Judge of Appeal	Judge of Appeal	Judge of Appeal

Troy Yeo Siew Chye (Chye Legal Practice) for the appellant;
Sze Kian Chuan and Loh Hui Chen Nicola (Joseph Tan Jude Benny LLP) for the respondent.

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