Sim Cheng Soon v BT Engineering Pte Ltd and Another
[2006] SGCA 21

Case Number : CA 140/2005, SS 1039/2006

Decision Date : 22 June 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : N Sreenivasan and Collin Choo (Straits Law Practice LLC) for the appellant; Fan Yuen Chi Edwina and Elizabeth Lee (Kelvin Chia Partnership) for the respondents

Parties : Sim Cheng Soon — BT Engineering Pte Ltd; Keppel Shipyard Ltd

Civil Procedure – Appeals – Application for adducing fresh evidence on appeal in respect of set of photographs – Plaintiff's counsel at appeal discovering some photographs in set of photographs adduced at trial left out – Plaintiff's counsel at trial having opportunity to look at photographs but failing to identify fact that some photographs were missing – Whether application should be allowed – Applicable principles

22 June 2006 *Judgment reserved*.

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

Introduction

1 The present proceedings were straightforward. They constituted an application by the plaintiff for the adducing of fresh evidence for the consideration of this court in his appeal against the decision of the trial judge ("the judge") in *Sim Cheng Soon v BT Engineering Pte Ltd* [2006] 1 SLR 697. In particular, the application asked for the following orders:

> 1 That the Respondents [the defendants] do provide all the negatives of the photographs that were allegedly taken by Ng Sze Kiat [the second defendant's then safety officer] on 22nd June 2002;
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> 2 That leave be given for all the photographs allegedly taken by Ng Sze Kiat on 22nd June 2002 to be admitted into evidence for the purposes of showing the sequence and timings of the photographs;
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> 3 Such consequential orders as may be necessary; and
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> 4 The costs of and occasioned by this application be paid by the Respondents to the Appellant [the plaintiff].

2 By way of brief factual background, the plaintiff was a welder employed by the first defendant ("BT"). BT's business included the repair and conversion of sea-going vessels. According to the plaintiff, while working at the premises of the second defendant, Keppel Shipyard Limited ("Keppel") on 22 June 2002, he fell into and through an opening in a working platform that was uncovered and unfenced, and landed on the deck of the vessel. As a result of the accident, he suffered serious injuries, which rendered him a quadriplegic needing full-time care.

3 The plaintiff claimed against both defendants for the injuries he sustained. He based his claim

against the defendants on both breach of a duty of care as well as occupiers' liability. The plaintiff further alleged that the defendants had breached various provisions of the Factories Act (Cap 104, 1998 Rev Ed) ("the Factories Act") in failing to construct soundly and to properly maintain safe means of access. The defendants filed a common defence denying liability and negligence for the plaintiff's injuries. They argued that the plaintiff had lost his grip while he was descending a ladder and thus injured himself.

4 The judge held in favour of the defendants. She found the evidence tendered by the plaintiff to be unsatisfactory. In particular, she found him to have been vague and evasive in his account of what had happened. She also found that there had been a discrepancy between this account and his earlier version of events in his solicitors' letter to the defendants. The judge found that, on a balance of probabilities, the position in which the plaintiff fell was more consistent with the defendants' version that he (the plaintiff) must have fallen off the ladder than with the plaintiff's version (at [2] above), which was that he had fallen into an uncovered opening. She further held that, in any event, even if the plaintiff's version of events were accepted, the defendants would not be liable as they were not in breach of their statutory duties under ss 33(2) and 33(3) of the Factories Act inasmuch as they had provided the plaintiff a safe means of access to as well as a safe place of employment on board the vessel concerned. The judge further held that there had, in the circumstances, been no breach by the defendants of their duty owed under the common law.

5 There was, however, one other issue – which constitutes the central focus of the present application. The then counsel for the plaintiff had in fact argued against the admission of photographs taken of the scene of the accident on the grounds that they were not contemporaneous with the accident and that the photographer (the then safety officer of Keppel) was unavailable to testify as to their veracity. The judge rejected these arguments, holding that there had been no evidence of a time lag and that, even if there had in fact been a time lag, it was not so long as to enable any scaffolding around the vessel to be altered or removed. She further held that as the photographer had since left the employment of Keppel and was working overseas, an adverse inference ought not to be drawn from his absence in testifying at the trial.

6 In the present proceedings, counsel for the plaintiff, Mr N Sreenivasan, applied for fresh evidence to be adduced on appeal. Such evidence, as mentioned above, took the form of negatives and photographs which he alleged had not been produced at the trial itself and which could have had a significant impact on the final decision rendered by the judge. Mr Sreenivasan argued that he and his colleague, Mr Collin Choo, (both of whom had not been the original counsel at the trial) had (principally through his colleague) only just discovered the missing photographs after examining the back of the photographs that *were* in fact adduced as evidence at the trial itself. In this application, Mr Sreenivasan was also seeking discovery of the negatives after counsel for the defendants had sent the same set of photographs in response to a request by counsel for the plaintiff for the negatives so that they could develop the photographs for the purposes of the pending appeal, a response that obviously did not find favour with counsel for the plaintiff and which resulted in the present application. Mr Sreenivasan pointed out that the back of these photographs contained numbers showing the time sequence in which they were taken and that there had been a break in the sequence – hence, the inference that there had been missing photographs.

The applicable legal principles

7 It was common ground between counsel for both parties – and rightly in our view – that no fresh evidence may be adduced except where the three conditions laid down in the leading English Court of Appeal decision of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") had been satisfied (see also s 37(4) of the Supreme Court of Judicature Act (Cap 322, 1999 Ed) and O 57 r 13(2) of the

Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court")). These were set out by Denning LJ (as he then was), as follows (at 1491):

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use in the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

8 The principles in *Ladd v Marshall* have been applied by this court on numerous occasions (see, for example, *MCST Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR 613 and *Cheong Kim Hock v Lin Securities (Pte)* [1992] 2 SLR 349). And no modifications to those principles (see, for example, *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233; *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392 and *Cheng-Wong Mei Ling Theresa v Oei Hong Leong* [2006] 2 SLR 637) are applicable in the context of the present proceedings.

9 We therefore proceed to apply each of the three conditions laid down in *Ladd v Marshall* to the facts of the present case. It is clear that these conditions are cumulative (see also the Singapore Federal Court decision of *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148 and the Malaysian Court of Appeal decision of *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1). Hence, in order to succeed in his application, the plaintiff must demonstrate that all three conditions have been satisfied.

Application of the legal principles to the facts

10 The first condition in *Ladd v Marshall* poses the most problems in so far as the present application is concerned. The plaintiff had to show that the evidence could not have been obtained with reasonable diligence for use in the trial. Counsel for the defendants, Ms Edwina Fan, not surprisingly, argued that this condition had not been fulfilled simply because the then counsel for the plaintiff ought to have made the requests for the negatives and photographs earlier on as they had ample opportunity to do so. She also argued that the plaintiff's then solicitors would have been aware of the sequence of the photographs as well as the gap in the sequence had they utilised reasonable diligence and checked the back of the photographs. However, Mr Sreenivasan argued that no counsel could reasonably have been expected to have examined the back of the photographs to ascertain that there were numbers there and thenceforth to have checked the sequence of the said numbers in order to discover that photographs were missing. As we have already noted, Mr Sreenivasan was not counsel for the plaintiff during the trial. We agree with him that the standard required in so far as reasonable diligence is concerned ought (as the concept itself suggests) to be a reasonable one, based on the actual factual matrix concerned. In our view, Mr Sreenivasan and his colleague had exhibited *extraordinary* diligence in ascertaining that there were numbers at the back of the photographs and that there had been missing photographs. However, the requisite standard, it bears repeating, is one of reasonable diligence, not Herculean or extraordinary effort. As Kamalanathan Ratnam JC (as he then was) put it in the Malaysian High Court decision of *Re Lim Hong Kee David* [1995] 4 MLJ 564 at 572 (which decision was in fact helpfully cited by counsel for both parties):

> Diligence means industry. It is a steady, earnest and meticulous pursuit towards the attainment of one's goal. In the context of obtaining the fresh evidence that is intended to be adduced, the party seeking to make such an introduction ought to satisfy the court that he has made all reasonable cogent and positive efforts in the pursuit of obtaining the best evidence to prove his case. It is his duty to show to the court that neither indolence nor a lackadaisical attitude

> predominated in the preparation of his case nor that insufficient preparation at the pre-trial stage led to the party being unable to adduce the evidence he now seeks to introduce as fresh evidence. If all reasonable efforts had been exhausted and fresh evidence that is sought to be introduced could not have been thus obtained the court ought then to allow for the admission of such fresh evidence subject of course to any existing statutory provisions. Positive, tangible or clear explanation ought to be given as to why such evidence could not have been obtained with reasonable diligence for use at the trial.

This case was in fact cited (as Mr Sreenivasan also noted) in *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 57/13/12, where it is further noted thus:

> *Re Lim Hong Kee David* [1995] 4 M.L.J 564 dealt with O.56, r.3A of the Malaysian Rules of the High Court 1980 which was said by Malanjum J. [as he then was] in *John Trawe Kuda v. Adtec Sdn. Bhd.* [1996] 5 M.L.J. 335 at 342 to have incorporated the three conditions laid down in *Ladd v. Marshall*.

11 We agree with Mr Sreenivasan that no counsel acting for the plaintiff would have been reasonably expected to have examined the back of the photographs and even if they did, they would not reasonably have been expected to have noticed or even have suspected the significance of the numbers therein. In the same breath, it may also not be said to have been reasonable for counsel for the *defendants* to deliberately look at the back of the photographs to notice and even more so, understand the significance of the numbers, although it is our view that it is more probable for counsel for the defendants to notice the numbers and hence sequence of the photographs than counsel for the plaintiff, given that counsel for the defendants kept the original set of photographs as well as the negatives. This itself supports the view, which we adopt, that *no* counsel would *reasonably* have been expected to examine the back of the photographs and thenceforth to check the sequence of the said numbers in order to discover that photographs were missing.

12 Turning to the specific facts of the present case, although the plaintiff's then solicitor was given the same set of photographs twice, it could not reasonably be assumed that it would naturally occur to her to look at the back of the photographs and notice the numbering. Even if she did notice the numbering, reasonable diligence was not, in our view, sufficient to prompt her to piece the numbers together to form a sequence and realise the missing photographs. The evidence here shows that but for the defendants' solicitor's defensive response to the request for the negatives alleged by the plantiff's present solicitors, the plaintiff's present solicitors themselves would not have taken the effort to examine the photographs carefully and hence been led to notice the numbers at the back, let alone the plaintiff's then solicitor. We would imagine that after this decision, solicitors would not be considered reasonably diligent if they do not examine numbers or any other indications on the back of photographs which are intended to be used as evidence.

13 The defendants' solicitor raised the point that the safety manager of Keppel stated that he would not know if the photographs in the defendant's bundle of documents at pp 130 to 145 represented all the photographs the then safety officer of Keppel took on the day of the accident. Indeed, this point contains some relevance to the then plaintiff's solicitor's duty of reasonable diligence but ought not, in our view, to militate against a finding of due diligence on her part. The reason lies in the fact that the realisation that photographs were missing was more likely to have dawned upon the plaintiff's then solicitor had she seen, and understood the significance of, the numbers at the back of the photographs, which would have required extraordinary diligence on her part. It was not unreasonable for the plaintiff's then solicitor to accept that what was in fact given to her comprised *all* the *relevant* photographs then in the possession of the defendants in relation to the present action. Indeed, we find that, although the safety manager did appear to state what we have

noted at the outset of the present paragraph during the course of cross-examination, a close perusal of the relevant portions of the notes of evidence reveals that the focus was on the authenticity of the photographs and that the statement concerned appeared fleeting. This is why we have stated that the more substantive indication would have been the numbers at the back of the photographs instead – a point which we have already dealt with above. In the circumstances, therefore, we find that the plaintiff's then solicitor had in fact exercised reasonable diligence and could not be faulted for not having adduced the evidence concerned for use at the trial.

14 Ms Fan did, however, argue that the photographs that were missing were of private individuals and were hence of no relevance to the present proceedings. That may well be the case but, if that were so, why did the defendants not simply produce the photographs? More importantly, perhaps, even if we accept Ms Fan's argument, there might still be legal significance with regard to the *timing* of the taking of the photographs. There could also be legal significance in so far as the credibility of the testimony of Keppel's safety manager was concerned, as he was the only witness who had testified as to how the photographs had been taken. This, in fact, leads us neatly into the consideration of the second condition in *Ladd v Marshall* that had to be satisfied – that the evidence must be such that if given, it would probably have an important influence on the result of the case although it need not be decisive. Having regard to what we have just stated, we are of the view that this condition has been satisfied as well.

15 We turn, therefore, to the third (and final) condition – which is that the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it need not be incontrovertible. We are of the view that this condition has been satisfied as well. Indeed, Ms Fan did not proffer any arguments to the contrary in so far as this particular condition was concerned.

16 We note that, in so far as the *negatives* are concerned, this might arguably entail a request, not for the adducing of fresh evidence as such, but rather for further discovery. On the other hand, it could be argued that the purpose for requesting the negatives was to acquire the missing photographs (and see [6] above), and hence related to an attempt to adduce fresh evidence. Since we admit all the photographs (including the missing photographs), by a logical extension, we also admit the negatives. If, however, the request for the negatives in the present proceedings is to be treated as a request for further discovery pursuant to O 24 of the Rules of Court, then we are of the view that, in the circumstances, it clearly satisfied, *inter alia*, the central criterion of relevance (laid down in numerous cases such as *Tan Chin Seng v Raffles Town Club Pte Ltd* [2002] 3 SLR 345).

Conclusion

17 In our view, all three conditions set out in *Ladd v Marshall* have been satisfied. We therefore allow the application, and also grant the plaintiff's request for both the filing of affidavits adducing the fresh evidence as well as the filing of supplementary cases, if necessary. However, we do not grant prayer 4 of the application as we hold that the costs of this application are to be in the appeal.