Roberto Building Material Pte Ltd and Others v Oversea-Chinese Banking Corp Ltd and Another
[2003] SGCA 18

Case Number	: CA 100/2002, Notice of Motion 18/2003, 24/2003, 25/2003, 26/2003
Decision Date	: 01 April 2003
Tribunal/Court	: Court of Appeal
Coram	: Choo Han Teck J
Counsel Name(s)	: Joseph Tan Wee Kong, Foo Jien Huei (Kenneth Tan Partnership) for the Appellants; Lee Eng Beng, Chio Yuen-Lyn (Rajah & Tann) for the first Respondent; Loong Tse Chuan (Allen & Gledhill) for the second respondent
Parties	: Roberto Building Material Pte Ltd; Tan Heng Yong; Ho Kit Sun; Tan Heng How — Oversea-Chinese Banking Corp Ltd; Don Ho Mun-Tuke

Civil Procedure – Jurisdiction – Inherent – Stay of appeal pending payment of taxed costs of action below – Rules of Court O 92 r 4 (Cap 322, Rule 5, 1997 Rev Ed).

Civil Procedure – Appeals – Stay of appeal – Whether a single Judge can order stay of appeal pending payment of taxed costs of action below – Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) s 36(1).

Delivered by Choo Han Teck J

1 There were two applications taken out by the first respondent in Notice of Motion 18 of 2003. The first was for an order dismissing the appeal unless the appellants pay forthwith costs of the trial taxed at $280,000 as well as a further sum of $7,000 being costs thrown away in favour of the first respondent. The second application was for an order for further security of $80,000 in respect of costs for the appeal.

2 The first respondent was a defendant in the trial below. The first appellant is a company in which the second, third and fourth appellants are directors owning in total a total of 99.8% of the shares in the company. The first respondent is a bank which, in 1995, granted banking facilities to the first appellant. The other appellants executed deeds of guarantee in respect of those facilities. The first appellant defaulted in 1997 but managed to reduce the debt in 1998 but remained largely exposed.

3 By March 2000 the first appellant's financial position deteriorated to the extent that the first respondent felt compelled to demand payment of the outstanding debt of $32,921,485.06 from the four appellants. On 22 April 2000 the first respondent exercised its contractual rights and appointed a Receiver and Manager (the second respondent) to the first appellant.

4 The first appellant subsequently commenced proceedings by way of Originating Summons No 1889 of 2000 against the first and second respondents alleging among other matters, bad faith on the part of the first respondent, as well as recklessness in appointing the second respondent as Receiver and Manager. Essentially, the first appellant alleged that its financial ruin was caused by the first and second respondents. The first appellant claimed that not only were they not liable for the $32,921,485.06 debt but also claimed for damages in the region of $25,000,000 to $30,000,000 on account of loss suffered by them arising from the fault of the respondents.

5 The second, third and fourth appellants also executed a deed of indemnity in favour of the first appellant to indemnify it against any costs that might be awarded against the company. The originating summons was converted to a writ action and tried before Justice Lai Kew Chai. The

appellants lost. Costs were awarded to the first respondent and taxed at $280,000. In addition to this sum, a sum of $7,000 being costs thrown away to the first respondent in respect of amendments to the pleadings. The four appellants filed an appeal against the decision of Justice Lai but had till date not paid the costs due to the first respondent. They were also ordered to pay the second respondent's costs although the latter had not yet taxed the costs awarded.

6 Mr Joseph Tan appearing on behalf of all the appellants initially objected to Mr Lee Eng Beng's application on behalf of the first respondent to amend the Notice of Motion so that "First Appellant" may read as "the Appellants" or "First, Second, Third and Fourth Appellants". He submitted that he had not prepared any arguments on behalf of the second, third and fourth appellants because they were not named in the motion.

7 It appears to me that the objection was a specious one in the circumstances will show. The exchange of correspondence between the solicitors indicated that all the appellants (who were jointly represented by Mr Tan) were aware of the nature and grounds of this application. The only dispute or issue was whether the first respondent ought to have made a formal application by way of a summons-in-chambers to amend the Notice of Motion. Mr Tan referred me to *SMS Pte Ltd v Power Energy Pte Ltd* [1996] 1 SLR 767 in which the court ruled that an application to strike out a defence must be made by way of a summons-in-chambers and not orally on the day of trial. The basis was that the defendant did not comply with certain discovery orders.

8 I do not think that the decision in the *SMS* case can be criticised because it did not appear that there were any sound reasons why a formal application was not made beforehand there. There was also no reason to strike out the defence there for failure to comply with an "unless order" for there was none. The oral application was thus sprung on the defendants late and in ambush.

9 In the present case, the first respondent's intended application was made manifestly clear to all the appellants and so were the issues. From the time-line described by Mr Lee (without challenge as to the accuracy of the dates) I am of the view that there was no inordinate delay in taking out these applications. The main issues were first, whether the appeal ought to be dismissed or stayed if costs were not paid forthwith, and secondly, whether further security for costs ought also be ordered. In the event, however, I indulged Mr Tan and directed Mr Lee to file and serve his formal application to amend the Notice of Motion by naming all appellants instead of just the first appellant. Consequently, I gave leave to Mr Tan to address me further as to why the first respondent's application should not be granted. Both counsel had submitted written arguments before me, but Mr Tan initially submitted that he made no arguments on behalf of the second, third and fourth appellants. However, on the resumed hearing after the first respondent had filed a formal application to amend the Motion, Mr Tan made further submissions, this time on behalf of all appellants.

10 Mr Tan conceded that he had no reason to offer as to why the taxed costs had not been paid although it appears clear that the appellants do not have the funds to pay and now argue that their financial plight was caused by the respondents. Mr Tan argued that the first respondent filed this application only four days before the respondents were due to file the respondents' case. The respondents did, however, file their case and so it was not a matter of much significance although Mr Tan submitted that it would have hampered his preparations. The appeal is scheduled for hearing in the week commencing 28 April 2003. One of the issues raised by Mr Tan in his second submission was that the court had no authority to stay the appeal because s 36(1) of the Supreme Court of Judicature Act made no provision for such power. Section 36(1) reads as follows:

> "In any proceeding pending before the Court of Appeal, any direction incidental thereto not involving the decision of the appeal, any interim order to prevent prejudice to the claims of

parties pending the appeal, and any order for security for costs and for the dismissal of an appeal for default in furnishing security so ordered may be at any time be made by a Judge."

Mr Tan further submitted that the respondents have no basis to ask for a stay in any event because the Notice of Motion prayed for a dismissal of the appeal. While I agree that the appeal should not be dismissed just because costs awarded below had not been paid. However, s 36(1) expressly empowers the court to make any incidental order or direction not involving the merits of the appeal and that, in my view, is sufficiently wide to empower the court to stay the appeal until costs below are paid and further security furnished.

11 An application to stay an appeal for failure to pay costs is not the same as a similar application made to stay the trial. Until trial, the respective merits of the case for both sides have not been determined and it may result in injustice if the trial does not proceed on account of the mere impecuniosity of a party. That is not to say, of course, that a trial cannot otherwise be stayed since every application turns on its own facts and circumstances. Hence the authority of *Lascomme Ltd v United Dominions Trust (Ireland) Ltd* [1993] 3 IR 412 cited to me by Mr Tan is not very helpful not only because that case concerned a stay application before trial although the factual background bears some similarity to the present. An application of this nature after a full trial is, however, very different in that the merits of the case would have been fully ventilated and the only issue on appeal is whether the judge had erred. In such a case, the appellants can hardly rely on the argument that their impecuniosity was caused by the respondents. The trial judge had ruled otherwise. Hence that is a spent argument. In balancing the equities at this stage, the advantage lies with the respondents because they have the weight of the judgment behind them. It behoved the appellants to satisfy me that they have a case on appeal so powerful that their impecuniosity notwithstanding, they ought to be allowed to proceed less a grave injustice is done. There was nothing whatsoever in Mr Tan's written submission on behalf of the first appellant (who was the principal party) to suggest what merit it has on appeal let alone a strong or powerful case.

12 Two very brief grounds were submitted to me in counsel's written submission of 24 March 2003. First, it was argued that "the first respondent breached its duty of good faith when they appointed the receiver and when they refused to withdraw the appointment despite knowledge of the Chesterfield offer". This, with respect, is a regurgitation of a part of the appellants' allegations. It is not an argument, let alone one that tended to show any merit in the appeal. The appellants blamed the first respondent for the withdrawal of an offer to purchase (by Chesterfield) but that did not appear to impress the trial judge in the least. Secondly, counsel submitted that the trial judge applied the wrong test in that it ought to have applied the "reasonable time" test and not "the mechanics of payment test". Nothing was advanced to persuade me why the test was wrongly applied.

13 The second respondent also made a similar application for further security for costs and Mr Loong, counsel for the second respondent prayed for a sum of $80,000 to be ordered. He adopted the arguments of Mr Lee in support of his client's application. The second respondent had also been awarded costs of the trial but his costs had not been taxed. If a party wishes to pursue an appeal it may only do so if the successful party is not prejudiced. Not having been paid the taxed costs is sufficient prejudice and so the respondent ought not face the prospect of incurring even more costs. If an impecunious appellant wishes to proceed without paying costs or security it must at least lay out a strong case that it has an important point of law to argue and has a strong likelihood of success, but even so, the discretion lies with the court.

14 For the reasons above, I ordered that the appeal be stayed until the costs awarded to the first respondent are paid and further security in the sum of $40,000 in favour of the first respondent and

$10,000 in favour of the second respondent are furnished. Mr Tan had asked for time until 17 April 2003 to make payment and I am of the view that that is not an unreasonable request and so I directed that payment be made by 17 April 2003. Mr Tan enquired if I am making a default order. In my view, a default order is not strictly necessary especially when a specific date had been given for payment of further security to be made. If no payment was made by that date the respondents would be entitled to make a further application, this time to dismiss the appeal. I directed that the costs of these motions are reserved to end of the appeal should it proceed, or failing which, upon further order by application.