Attorney-General, Singapore v Tan Wee Beng
[2002] SGHC 261

Case Number : Suit No 625 of 2001
Decision Date : 06 November 2002
Tribunal/Court : High Court
Coram : Kenneth Yap AR
Counsel Name(s) : —
Parties : —

Introduction

1. The two applications in this matter were related and heard together before me. The first application raised a question of law, namely whether the automatic discontinuance provision under Order 21 Rule 2(6) would apply if the plaintiff had obtained interlocutory judgment with damages to be assessed, but had taken no step or proceeding for one year. The second application related to whether the matter should, in any case, be struck out for want of prosecution by the plaintiff.

2. Having carefully considered the detailed submissions of both counsel, I dismissed the defendant's arguments that the action was deemed discontinued, or that alternately, it was to be struck out for want of prosecution. I now give my reasons.

The facts

3. The plaintiff in this case had obtained interlocutory judgment against the defendant on 29 August 2001, for damages to be assessed with interest payable. On 29 August 2002, the plaintiff filed a summons for directions in SIC 3297 / 2002, to set the timelines for discovery, filing and exchange of affidavits for the purposes of a hearing to assess damages. The defendant objected to the summons on the basis that the matter had been automatically discontinued under Order 21 Rule 2(6), due to the plaintiff's inaction during the period of 12 months from 29 August 2001 to 28 August 2002. It was the defendant's submission that during this period, the plaintiff had not made any formal applications to nor attended any hearings before the court, and had therefore had not taken a "step or proceeding … that appears from records maintained by the Court".

4. In the alternative, the defendant filed SIC 3604 / 2002 to strike out the plaintiff's action for want of prosecution, to be proceeded upon in the event that the objection to SIC 3297 / 2002 was unsuccessful.

The law

5. Order 21 Rule 2(6) reads as follows:

> Subject to paragraph (6A), if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B)), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.

6. Order 21 Rule 2(6A) and (6B) do not apply in the present context. For the sake of completeness, it should be noted that where a matter has been automatically discontinued, it may be reinstated on such terms as the court thinks just, per Order 21 Rule 2(8):

> Where an action, a cause or a matter has been discontinued under paragraph (5) or (6), the Court may, on application, reinstate the action, cause or matter, and allow it to proceed on such terms as it thinks just.

These provisions were introduced by section 4 of the Rules of Court (Amendment No. 2) Rules 1999, and amended by section 3 of the Rules of Court (Amendment) Rules 2000.

Automatic Discontinuance under Order 21 Rule 2(6) – SIC 3297 / 2002

7. The plaintiff advanced three arguments to resist automatic discontinuance under Order 21 Rule 2(6). The first argument was the preliminary objection that the one-year deadline expired only after 29 August 2002, and not after 28 August 2002, and that the summons for directions filed on 29 August 2002 was therefore a step or proceeding within time. The plaintiff's second argument was that interlocutory judgment was 'final' as to the issue of liability, and that Order 21 Rule 2(6) had no application once final judgment was obtained. Finally, the plaintiff advanced a third argument that on the facts, there had indeed been a step or proceeding satisfying Order 21 Rule 2(6).

(1) Whether the one-year deadline expired after 28 August or 29 August 2002

8. The defendant's objection was based on the assumption that the one-year period included the date on which interlocutory judgment was obtained, i.e. 29 August 2001, and that it thereby expired after 28 August 2002.

9. In somewhat anticlimactic fashion, I found in favour of the plaintiff's preliminary argument that the time period only expired after 29 August 2002, which means that their application was brought just barely within the one-year time period. However, in the event that this matter is taken further, and for the sake of completeness, I will express my views on the plaintiff's second and third arguments shortly.

10. The method of computing time period under the Rules of Court is provided in Order 3 Rule 2(1) and (2):

> (1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with this Rule.
>
> (2) Where the act is required to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

11. The White Book (1999 Edition), at para 3/2/3, under the heading "General rule of computation of time", gives a general description of the operation of Order 3 Rule 2. It states that the computation of a time period to perform an act should exclude the day which triggers the running of time:

> These words set out the general rule that where a period of time from or after a given date or event is prescribed as the period within which an act is to be done, the day of that date or event is to be excluded in the computation of the period, and the act is to be done on or before the last day of the period (*Pugh v Duke of Leeds* (1777) 2 Cowp. 714). This is a rule of general application in R.S.C. …, whether the period is expressed in days, weeks, months or years.
>
> So, where by statute a prosecution had to be launched "within one calendar month after the

cause of such complaint shall arise", and the act complained of was committed on May 30, and the information laid on June 30, it was in time (*Radcliffe v Bartholomey* [1892] 1 Q.B. 161). Where the plaintiff was injured by the defendants' negligence on November 8, 1954, a writ issued by him on November 8, 1957, in an action for damages for the injury was in time under the Limitation Act 1939, and the Law Reform, etc., Act 1954 (*Marren v Dawson, Bentley & Co Ltd* [1961] 2 QB 135) …

The same rule of computation has been applied in cases where the period is not one within which some act is to be done. An insurance for 12 calendar months from November 24, 1887 excludes that day but includes November 24, 1888 (*South Staffordshire Tramways Co. v Sickness and Accidents Assurance* [1891] 1 QB 402; *Cartwright v MacCormack* [1963] 1 WLR 18; [1963] 1 All ER 11, C.A.).

12. Counsel for the defendant argued that the general rule in Order 3 Rule 2(2) is inapplicable to Order 21 Rule 6, for the reason that the latter does not contain a prescription to perform a positive *act*, but rather specifies a penalty upon an *omission* to take action. I found this distinction unnecessarily technical and unjustified under the scheme of the Rules. Order 3 Rule 2(1) clearly states that the principle of computation is of general application. In specific circumstances, the Rules of Court provides for certain exceptions to this method of computation, most notably, in the calculation of the duration before expiry of a writ under Order 6 Rule 4(1) - where it is specified that the writ is valid for a time period which begins with the day of the issue of the writ. Where the rules are silent, however, the general principle under Order 3 Rule 2(2) must apply, and the computation of time period must accordingly exclude the 'trigger date' itself. Hence in this case, where the last step taken was interlocutory judgment obtained on 29 August 2001, the one-year deadline would only expire *after* 29 August 2002.

13. I am aware that in two unreported decisions of the district courts in relation to this matter, a contrary view had been expressed, i.e., that the one-year deadline was considered to have expired on the same day of the following year. In *Tamilselvan s/o Renganatha v Singapore Bus Services Ltd* (unreported, DC Suit No. 1406 of 2000, 24 June 2002), the learned district judge Foo Tuat Yien in paragraph 4.7 of her judgment held that where the last step or proceeding was on 8 February 2001, the action was deemed automatically discontinued after 7 February 2002. Similarly, the learned district judge in *Norisham Bin Minggu v Sim Eng Koon* (unreported, DC Suit No. 8616 of 1992, 21 September 2002) also assumed, in paragraph 4.2 of her judgment, that where the one-year time period ran from the statutory date of 1 January 2000, it would be considered expired after 31 December 2001.

14. The exact date of the expiry of the time period was not however in issue in either of the above cases. In *Tamilselvan*, the plaintiff's next step or proceeding was taken on 15 April 2001, hence whether the time frame expired on 7 or 8 February 2001 was inconsequential. Likewise, in *Norisham Bin Minggu*, the plaintiff's subsequent step was on 20 March 2002, which meant that whether the deadline expired on 31 December 2000 or 1 January 2001 was immaterial. In the circumstances, I do not think that the defendant can draw much assistance from these two cases. It is clear from the wording of Order 3 Rule 2(2) and the accompanying text in the White Book that generally, the computation of the time period for performing an action must exclude the triggering date itself. Accordingly, the plaintiff's application on 29 August 2002 was lodged within the nick of time, and on that basis alone, the matter would not have been automatically discontinued.

(2) Whether an interlocutory judgment can be distinguished from a final judgment

15. Although the above argument is sufficient to dispose of the defendant's objection to the

summons for directions, I would, for the sake of completeness, turn to consider the two further arguments advanced by the plaintiff.

16. The plaintiff argued that an interlocutory judgment with damages to be assessed is 'final' as to the issue of liability, and it is implicit in Order 21 Rule 2(6) that the automatic discontinuance rule does not apply to a final judgment, for the obvious reason that the matter is effectively closed and that there is no further action to be taken.

17. This view finds support in an article by Ms Lim Hui Min in 13 S.Ac.L.J. 150 (March 2001), entitled "Automatic Discontinuance under Order 21 Rule 2 – First Dormant, then Dead …", at p 163:

> If, for example, a plaintiff in a personal injuries claim obtains interlocutory judgment for damages to be assessed, and then takes no further step in the proceedings for over a year from the date of the interlocutory judgment, will the action be automatically discontinued? Will the plaintiff be barred from applying for an assessment of damages hearing pursuant to the interlocutory judgment? It is submitted that in such a situation, the action will not be automatically discontinued, and the plaintiff will not be barred from applying for an assessment of damages hearing. This is because the plaintiff has already obtained an interlocutory judgment, which represents the conclusion of his action. The assessment of damages is a step taken after judgment, and *pursuant* to a judgment; and following the reasons stated earlier, a step taken after judgment should not count as a "step or proceeding" for the purposes of the automatic discontinuance provision. It is therefore submitted that cases where an interlocutory judgment has been obtained should fall outside the ambit of the automatic discontinuance provision.

18. This argument had however been recently considered and rejected by the district courts, in the case of *Norisham Bin Minggu* (supra). There the plaintiff likewise contended that an interlocutory judgment with damages to be assessed was 'final' as to liability and that the action could not be discontinued under Order 21 Rule 2. The learned district judge Foo Tuat Yien however held that automatic discontinuance could still apply. She said, at paragraph 5.2 of her judgement:

> Unlike a final order, which determines the rights of the parties, an interlocutory order leaves something further to be done to determine those rights.

She continued, at paragraph 5.4:

> There is no reason why Order 21 rule 2(6) should not apply to interlocutory judgments for damages to be assessed as the party entitled to the benefit of the judgment is required under Order 37 to take the further step of applying for directions for assessment of damages.

And at paragraph 5.5, she held:

> An interlocutory judgment is but a step or proceeding with other steps of proceeding to be further taken by the plaintiff before completion of the action against the defendant. The Rules of Court prescribe the procedure for proceedings before the court. It cannot be that actions with an interlocutory judgment for damages to be assessed, can be allowed to remain outstanding indefinitely. This is contrary to the spirit and letter of this Order.

19. I would respectfully adopt the view of the district judge that automatic discontinuance under Order 21 Rule 2(6) applies to interlocutory judgments with damages to be assessed. It is a view which finds strong support in both principle and policy. The simple reason why final judgments are implicitly excluded from Order 21 Rule 2(6) is that there is simply no further action to discontinue. An

interlocutory judgment, however, still leaves much to be done. Order 37 states clearly the further steps that must be taken by the plaintiff in order to initiate assessment of damages; for example, Order 37 Rule 1(1) requires the party entitled to the judgment to apply within one month for directions; Rule 1(3) provides that if summons for directions are not taken out within one month, the court may on the application of the other party proceed to assess the damages; and Rule 1(5) provides that the party entitled to the benefit of the judgment must file a notice of appointment for assessment of damages within 6 months of the date of the judgment. On the basis of principle alone, there is little in favour of saying that the plaintiff, having obtained interlocutory judgment, has taken all necessary steps in the action and that are no further proceedings on which the discontinuance provision can 'bite'.

20. Furthermore, to exclude proceedings after interlocutory judgment from the ambit of Order 21 Rule 2(6) would hardly be in accordance with the rationale of automatic discontinuance. The provision puts the onus on the plaintiff to take the necessary steps to keep his action current and active. The judiciary would then no longer have to waste precious resources monitoring dormant suits. This purpose is stated succinctly by Ms Lim Hui Min in her article, at p 151:

> In the course of the last decade, there has been a major shift in the judicial approach towards the control of litigation proceedings, not only in Singapore, but in other parts of the Commonwealth. The emphasis is now on expedition, economy, and the avoidance of delay in litigation. Disputes will no longer be allowed to drag on for years. Towards this end, the courts in Singapore have adopted the practice of case management. Each case is monitored, and if necessary, the court will intervene to ensure that it proceeds expeditiously. If every action has an indefinite time span from the time it is commenced, and if the court is to adhere conscientiously to its case management philosophy, the burden will continually be on the court to conduct case management exercises (such as pre-trial conferences) in order to monitor dormant suits and to find out why they have become dormant. This is arguably an unnecessary and inefficient use of judicial resources. It seems that the court has now found a solution – in the form of the automatic discontinuance provision – to the problem of having to adhere to its case management philosophy on the one hand, and having to husband scarce judicial resources in doing so, on the other. Under the automatic discontinuance regime, no action will have an indefinite time span. Therefore the court's burden in conducting case management exercises for any one case will be for a finite time period.

21. There seems no sensible reason why Order 21 Rule 2(6) would have been enacted to encourage plaintiffs to proceed expeditiously towards interlocutory judgment, yet allow them to procrastinate in its aftermath. A purposive reading of Order 21 Rule 2(6) accordingly requires automatic discontinuance to apply up to the stage of final judgment, where both liability and damages are clarified and no further steps need be taken by the plaintiff in the resolution of his claim.

22. As a footnote, I have considered the plaintiff's additional argument that allowing automatic discontinuance of an action which had already proceeded to interlocutory judgment might result in an absurdity. This is based on the assumption that the plaintiff must bring a fresh claim *ab initio* after discontinuance, which would then lead to questions of whether the issue of liability was *res judicata*. While this problem may arise in a striking out for want of prosecution (hence the reluctance of the court to strike out where the plaintiff is not time-barred from bringing a fresh claim), it does not apply to automatic discontinuance. Under Order 21 Rule 2(8), a discontinued action can simply be reinstated at the discretion of the court - which means it continues from the point at which it was discontinued, as opposed to the plaintiff having to bring a fresh claim *ab initio*. No absurdity arises under this situation.

(3) Whether any step or proceeding that appears in the Court records was taken

23. There is no definition of what is a "step or proceeding … that appears from the records maintained by the court" under Order 21 Rule 2.

24. The plaintiff submitted that a "step or proceeding" had indeed been taken in the twelve months after 29 August 2001, arising from the following incidents: Firstly, there was correspondence between the parties with a view to settlement, wherein a series of letters was exchanged sometime from November 2001 to May 2002; secondly, the plaintiff had written to the court (commencing 14 May 2002) for the purposes of clarifying the wording of the draft judgment, pursuant to Order 42 Rule 8(3); and thirdly, the interlocutory judgment was engrossed on 18 July 2002.

25. The term "step or proceeding … that appears from the records maintained by the court" connotes an action vested with the formality of the court adjudication process. The operative term is that the step or proceeding must be one which appears in the court record. Such a step or proceeding must therefore involve documents which are filed in court, which accordingly excludes correspondence with the court and correspondence between the parties.

26. This was the view adopted by Ms Lim Hui Min in her article, at p 164:

> As stated earlier, the plaintiff has the duty to push his suit to a conclusion. Hence a "step or proceeding" must be a step which is intended to bring the suit closer to a conclusion (in the sense of obtaining a judgment in the matter). In this regard, it must be a "formal and significant" step.

She continued, at p 167:

> Communications between the parties are not formal or substantive steps, and therefore do not qualify as a "step or proceeding" for the purposes of this rule.

She later commented, at p 169, that "negotiations between parties (at any rate those which do not involve the court mediation process) would not appear from records maintained by the court, which is one of the requirements under Order 21 Rule 2(6)."

27. There is also English authority for the proposition that mere correspondence does not constitute a step in the proceedings. In *Ives and Barker v Williams* [1894] 2 Ch 478, the issue in question was the interpretation of the phrase "step in the proceedings" under s 4 of the Arbitration Act then in force in England. Lindley LJ said, at 484:

> The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, not the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

28. In *Mundy v The Butterley Co Ltd* [1932] 2 Ch 227, the court interpreted the phrase "any other proceeding" under Order 26 Rule 1 of the English Rules of Court. Maugham J said, at p 233:

> I do not think on the whole that a letter written by a solicitor stating that he intends to set the action down for trial at a future date would be a proceeding in the action; I do not think a mere appointment to examine documents which had been offered for inspection would be a proceeding; I do not think that conferences between solicitors or either informal or quasi informal letters or

conversations could be regarded as a proceeding.

29. I would only add to the above reasoning that there is good sense in excluding mere correspondence from the ambit of "step or proceeding" under Order 21 Rule 2(6). Were this not the case, the one-year deadline and its procedure for further extension under Order 21 Rule 2(6B) could be thwarted by the writing of mere administrative letters to the court.

30. Finally, in response to the plaintiff's third argument, the engrossment of the interlocutory judgment on 18 July 2002 could not constitute a "step or proceeding" subsequent to the order itself, for the reason that it is dated on and takes effect from the day of the pronouncement of the order, by virtue of Order 42 Rule 7.

Striking Out for Want of Prosecution – SIC 3604 / 2002

31. Having ruled that the plaintiff's action was not automatically discontinued under Order 21 Rule 2(6), it was incumbent to consider the defendant's application to strike out the action for want of prosecution arising from the one-year delay.

32. The applicable principles for striking out for want of prosecution are found in LP Thean JA's judgment in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [2001] 4 SLR 1, 16-17:

> (1) An action should only be struck out or dismissed for want of prosecution (a) where the plaintiff's default has been intentional and contumelious, such as disobedience to a peremptory order of court or conduct amounting to an abuse of the process of the court; or (b) where there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyer giving rise to a substantial risk that a fair trial is not possible or giving rise to serious prejudice to the defendant.
>
> (2) Before the expiry of limitation period applicable to the action, an action will not normally be struck out for inordinate and inexcusable delay if fresh proceedings for the same cause of action could be initiated.

33. Counsel for the defendant in this case elected to proceed under limb 1(b), i.e. that there had been inordinate and inexcusable delay on the part of the plaintiff, giving rise to serious prejudice to the defendant. In support of this contention, the defendant had filed an affidavit explaining the extent of prejudice to his case.

34. Firstly, the defendant claimed to have lost his right of redress by way of an indemnity against the foreman and director of Lian Ho Earth Works Pte Ltd, Mr Tan Sok Yong and Mr Goh Joo Kwang respectively. According to the defendant, these were the parties directly responsible for the illegal dumping in the matter. The defendant states that at the commencement of the action by the plaintiff, these parties had expressed their willingness to indemnify the defendant for any liability resulting from the action. However, by January 2002, Goh had been made a bankrupt, and Tan had relocated elsewhere and was no longer contactable.

35. Secondly, the defendant alleged in his affidavit that the delay would likely deprive him of the benefit of testimony of Mr Tan Meng Liang of Messrs Mtech Consultant, the professional engineer appointed by the defendant. The complaint here was that the attendance of the witness may not be secured after such a long delay, and that, in any case, the witness' recollection of the events in early 1997 would be less clear following the passage of time.

36. Having considered the affidavit evidence available, I did not find that there had been

inordinate or inexcusable delay on the part of the plaintiff. It was not disputed that there had been negotiations on settlement between the parties from November 2001 to May 2002, although the letters were not exhibited due to their "without prejudice" nature. Also, it should be noted that the plaintiff had lodged a summons for directions on 29 August 2002, the last possible date before the matter would be automatically discontinued. This did not seem to be the kind of situation where the plaintiff had let the matter go to sleep out of inadvertence. The clear inference from the facts was that the plaintiff had delayed the matter for as long as possible before filing for a summons for direction, in order to give leeway for negotiations with a view to settlement.

37. Furthermore, there did not seem to be any serious prejudice caused to the defendant as a result of the delay. It must be remembered that the burden of proof is on the defendant to show such prejudice, per *Ling Kee Ling v Leow Leng Siong* [1993] 2 SLR 232, 238 and *Trill v Sacher* [1993] 1 All ER 961, 978.

38. I did not think that the defendant had established serious prejudice on either of the reasons given. With regards to the defendant's recourse against the third parties, it should be noted that even if the assessment of damages had proceeded post-haste, it would not likely be completed by January 2002, which was the date from which the defendant's difficulties vis--vis the third parties arose. Furthermore, a defendant who was concerned about his right of indemnity against a third party ought to have taken active steps to protect his position by enjoining the third party in the action. Where he had failed to do so, the attendant difficulties that arose by reason of difficulty of service or bankruptcy could not be laid at the door of the plaintiff. This proposition was established in *Wee Siew Noi v Lee Mun Tuck* [1993] 2 SLR 232, where, after a long delay of nearly 11 years, the defendant claimed she was prejudiced by the fact that she was time-barred from suing her employer. Warren Khoo J (delivering the judgment of the Court of Appeal) disagreed with her contention, holding that insofar as the defendant had not enjoined her employer as a third party in the action, it was difficult to see how this lapse could be blamed on the plaintiff (at p 238). Accordingly, the striking out application was dismissed. In the present case, the defendant could have ameliorated any prejudice caused by the delay by adding the third parties to the action before January 2002. Insofar as he had not opted to do so, it did not lie in his mouth to claim prejudice by virtue of the plaintiff's delay.

39. As far as the testimony of Mr Tan Meng Liang was concerned, the defendant's affidavit contained little more than a bare assertion that the witness would be unavailable or would suffer difficulties of recollection due to the delay. Accordingly, I did not think that the defendant had succeeded in proving serious prejudice on this ground.

40. Finally, it must be borne in mind that the Plaintiff's action was and is still within the 6-year limitation period since the dumping event took place in 1997. Bearing in mind the second limb of the extract from LP Thean JA's judgment in *Jeyaretnam v Lee Kuan Yew* above, it was amply clear that a striking out would not normally be granted if the plaintiff could simply institute fresh proceedings thereafter.

Conclusion

41. Having rejected the defendant's arguments on automatic discontinuance and striking out, the parties were called to attend a further hearing on 6 November 2002, wherein the following orders were made:

42. With regards to the plaintiff's summons for directions under SIC 3297 / 2002, it was ordered that:

1. Leave be granted for extension of time to file this summons of directions.

2. The Plaintiffs do serve on the Defendant a List of Documents and Affidavit Verifying such List by 2 January 2003.

3. The Defendant do serve on the Plaintiff a List of Documents and Affidavit Verifying such List by 2 January 2003.

4. There be inspection of documents by 9 January 2003.

5. Affidavits of Evidence-in-Chief to be filed and exchanged by 27 February 2003, and objections to be taken by 6 March 2003.

6. The list of witnesses that the Plaintiff and Defendant intend, if necessary, to call, will be determined at an adjourned date, fixed on 16 January 2003 @ 9 a.m. before a Registrar.

7. The Plaintiff is given leave to file the Notice of Appointment of Assessment of Damages before the Registrar by 15 May 2003, and to serve the same on the Defendant not later than 22 May 2003.

8. Costs of the application payable by the Defendant to the Plaintiff, fixed at $250.

43. The defendant's application to strike out the action under SIC 3604 / 2002 was dismissed, with costs payable to the Plaintiff fixed at $250.

Sgd:

KENNETH YAP

ASSISTANT REGISTRAR