Victor Adam Ibrahim v Tan Kim Seng trading as Hock Huat Engineering [2003] SGHC 155

Case Number : Suit 1289/2001

Decision Date : 18 July 2003

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Michelle Lim (Salem Ibrahim & Partners) for the plaintiff; Kannan Ramesh (Tan Kok Quan Partnership) for the defendant; Seetha Ramasamy (Tan Kok Quan Partnership) for the defendant

Parties : Victor Adam Ibrahim — Tan Kim Seng trading as Hock Huat Engineering

Civil Procedure – Discontinuance – Delay in taking out assessment – Whether deemed discontinued – O 21 r 2, Rules of Court (1997 Rev Ed.)

Limitation of Actions – Particular causes of action – Judgments – s 6(3), Limitation Act (Cap 163, 1996 Rev Ed.)

1 The plaintiff was a passenger in a motor-car which was involved in an accident on 7 November 1998 with a goods vehicle driven by the defendant; he sustained personal injuries.

2 On 10 October 2001, the writ of summons was filed wherein the plaintiff claimed general and special damages. The defendant entered an appearance to the writ on 5 November 2001.

3 On 16 November 2001, the defendant applied to strike out the statement of claim on the ground that the special damages the plaintiff had claimed were not particularised. The application was heard on 21 November 2001 but was disallowed; instead, the plaintiff was ordered to amend his statement of claim.

4 On 23 November 2001, the plaintiff filed his amended writ of summons and amended statement of claim.

5 On 27 November 2001, interlocutory judgment by consent was entered against the defendant on the basis of 100% liability in favour of the plaintiff; the defendant agreed to pay damages as assessed by the Registrar. Had the plaintiff not filed his writ by 7 November 2001, his claim would have been time-barred under s 24A of the Limitation Act Cap 163.

6 Thereafter, no steps were taken by the plaintiff to have his claim for damages assessed. According to his lawyer, the parties (through their solicitors) were in correspondence since November 2001 on the plaintiff being sent for further medical examination and on documentation to support his claim.

7 On 6 February 2003 the plaintiff filed his summons for directions for assessment of damages. The defendant's solicitors objected, contending that the action had been deemed discontinued on 27 November 2002, pursuant to O 21 r 2 of the Rules of Court (the Rules).

8 On 28 February 2003 the defendant filed summons-in-chambers no. 1193 of 2003 (the defendant's application) praying for a declaration that the plaintiff's claim was deemed discontinued under O 21 r 2 of the Rules.

9 On 24 March 2003, the plaintiff applied to court under summons-in-chambers no. 1716 of 2003 (the plaintiff's application) for a declaration that O 21 r 2(6) of the Rules (as amended) did not

apply. In the alternative, that the action be reinstated and be allowed to proceed pursuant to Order 21 r 2(8) of the Rules.

10 Both the plaintiff's and the defendant's applications were heard on 26 March 2003 by the Assistant Registrar, who granted an order in terms of the defendant's application and dismissed the plaintiff's application.

11 The plaintiff appealed against the Assistant Registrar's decision in Registrar's Appeal No. 108 of 2003 (the Appeal), praying that the orders made below be reversed. The appeal came on for hearing on 29 April 2003 before me and I allowed it; the defendant has now appealed against my decision (in Civil Appeal No. 48 of 2003).

The Appeal

12 Before I address the submissions put forth by the parties, it would be appropriate to set out; the relevant provisions under O 21 r 2 of the Rules, they state:

> (5) An action begun by writ is deemed to have been discontinued against a defendant if the memorandum of service referred to in Order 10 Rule 1(4), is not filed in respect of the service of the writ on that defendant within 12 months after the validity of the writ for the purpose of service has expired, and, within that time --
>
> (a) a memorandum of appearance has not been filed in the action by that defendant; and
>
> (b) judgment has not been obtained in the action against that defendant in respect of the whole or any part of the relief claimed against that defendant in the action.
>
> (6) 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.
>
> (6A) Paragraph (6) shall not apply where the action, cause or matter has been stayed pursuant to an order of court.
>
> (6B) The Court may, on an application by any party made before the one year referred to in paragraph (6) has elapsed, extend the time to such extent as it may think fit.
>
> (7) Paragraph (6) shall apply to an action, a cause or a matter, whether it commenced before, on or after 15th December 1999, but where the last proceeding in the action, cause or matter took place before 1 January 2000, the period of one year shall only begin on 1st January 2000.

Rules 6, 6A, 6B and 7 only came into operation on 1 January 2001.

13 In support of the defendant's application, the defendant himself filed an affidavit wherein he deposed as follows:-

> (i) To start with, it took the plaintiff almost three (3) years to file his writ of summons;
>
> (ii) the plaintiff failed to take any steps between 28 November 2001 to 28 November 2002 and the application for summons for directions could not circumvent O 21 r 2(6) as it fell outside

the one year period;

(iii) his solicitors had written to the plaintiff's solicitors on 29 January 2003 giving notice (in the light of the plaintiff's recalcitrance in prosecuting his claim diligently) that he intended to apply for directions to submit that no interest should be awarded to the plaintiff from the date (27 November 2001) interlocutory judgment was entered. It was in response to this letter that the plaintiff's solicitors filed the application for directions;

(iv) between 27 November 2001 and 6 February 2003, the defendant's solicitors not only sent the plaintiff for re-examination by the defendant's medical specialists but also urged the plaintiff to take steps to have his claim assessed. The plaintiff failed to do so;

(v) his solicitors wrote 14 letters/reminders to the plaintiff's solicitors between 18 March 2002 and 29 January 2003, requesting documents to support the plaintiff's claim particularly for loss of earnings/loss of earning capacity.

(vi) apart from two (2) letters dated 3 April 2002 and 31 January 2003, the plaintiff's solicitors only forwarded some (mainly income tax assessments) of the many documents requested by his solicitors.

14 In support of the plaintiff's application, his counsel Michelle Lim filed a lengthy affidavit wherein she deposed to the law (as she understood it) as well as to the following facts:-

(i) the plaintiff filed his writ of summons shortly before the expiry of the limitation period as he had hitherto been engaged in 'without prejudice communication' directly with the defendant's insurers;

(ii) she alleged that the defendant's solicitors' letter dated 29 January 2003 led her to believe that the defendant would be taking further steps in the proceedings; such conduct contradicted the defendant's stand that automatic discontinuance applied;

(iii) the plaintiff's claim had been (reasonably) quantified as early as 27 September 2001 despite which the defendant made no reasonable offer of settlement. Instead, between 27 November 2001 and 5 March 2002, the defendant's solicitors requested a re-examination of the plaintiff's injuries; no fewer than 11 letters/faxes were exchanged between both firms of solicitors from 20 December 2001 to 28 February 2003 in that regard. The delay in re-examination was due to the tight schedules of both parties' medical specialists, as which result the plaintiff could do nothing in the interval;

(iv) the defendant's solicitors requested the plaintiff to hold his hand by their letter dated 6 February 2003;

(v) there was no dearth of documents from the plaintiff to support his claim as the defendant alleged – she had forwarded on 18 March 2002 to the defendant's solicitors, ten (10) documents followed by the plaintiff's incomes tax forms on 31 May 2002. She had informed the defendant's solicitors on 3 April 2002 that some receipts they had requested (for transport/parking charges) were not available;

(vi) although the plaintiff's claim for loss of earnings was for the period 1 January 1999 to 31 December 2001, the defendant's solicitors had requested for documents pertaining to his earnings for the years 1995 to 1997 causing delay as, the plaintiff's claim related to income earned from

two (2) companies (Sterling Knight Pte Ltd and Silver Knight Pte Ltd). He had to instruct his accountants to go through historical documents (and accounts) in order to quantify his loss of income;

(vii) the accident had caused the plaintiff to suffer lack of attention which in turn resulted in long term contracts for his companies being renewed on poorer terms. Computing the plaintiff's claim was a complex operation citing as an example that the plaintiff had been involved in negotiations to renew the insurance cover for a fleet of vehicles. As a result of his injuries, the plaintiff was unable to carry on with the negotiations and lost at least 50% of the prospective renewals;

(viii) contrary to the defendant's contention, the plaintiff had not been dilatory in prosecuting his claim. The entire toing and froing was to satisfy the defendant's challenge of the quantum of the plaintiff's claim;

(ix) the plaintiff would have no alternative remedy if his claim was not reinstated. This was a situation where the defendant had chosen to take advantage of an interpretation of the Rules in order to avoid liability for which they have formally admitted. The justice of the case was in the plaintiff's favour. There was no prejudice to the defendant as damages would be assessed at exactly the same time as they would have been had the plaintiff complied with the timetable in O 21 of the Rules.

I was neither convinced nor impressed by the above affidavit for reasons which I shall set out later.

(i) the plaintiff's arguments

15 Michelle Lim the deponent of the above affidavit argued the appeal. She submitted that the words *taken any step or proceeding* in O 21 r 2(6) meant any formal or significant step taken before judgment and will include the last interlocutory step taken before judgment is obtained. In this case, the plaintiff had obtained interlocutory judgment. The summons for directions filed by the plaintiff on 6 February 2003 was a step or proceeding taken after and pursuant, to a judgment. Consequently, it should not be counted for purposes of automatic discontinuance (relying on an extract (at p 162) from the article **Automatic Discontinuance under Order 21 Rule 2 - First dormant then dead** by magistrate Ms Lim Hui Min (published in [2001] 13 S.Ac.L.J. Part 1 150)). Counsel also cited *Bank Bumiputra Malaysia Bhd v Syarikat Gunong Tujoh Sdn Bhd* [1990] 1 MLJ 298 where the High Court interpreted the word *proceeding* in O 6 r 3 (of the Malaysian Rules of the High Court 1980) relying *on Mallal's Supreme Court Practice*, to mean a step 'towards' judgment.

16 Counsel also referred to similar provisions in England and their interpretation by English courts. The equivalent rule in England appears in The County Court Rules 1991 (CCR) as Order 17 rule 11; Order 17 refers to pre-trial review while rule 11 provides for automatic directions. The automatic directions applied to all actions (including personal injury claims) save for 18 exceptions set out under rule 1 therein. The automatic provisions included directions for discovery, expert witnesses, hearing dates etc. The closest equivalent to our r 2(6) is found in O 17 r 9 which states:

If no request is made pursuant to paragraph 3(d) [fix a date for hearing within 6 months after close of pleadings] within 15 months of the day on which pleadings are deemed to be closed (or within 9 months after the expiry of any period fixed by the court for making such a request), the action shall be automatically struck out.

17 Counsel cited the Court of Appeal decision in *Gomes v Clark* [1997] P.I. Q.R. 218 where Lord

Woolf MR held that the automatic discontinuance provisions under the CCR had no application to post-judgment proceedings, where the judgment was by consent. The ruling was restated by the appellate court in *Bannister v SGB PLC* [1997] 4 AER 129 as well as in *Limb v Union Jack Removals Ltd (in liquidation*) [1998] 2 AER 513 where the appeal in *Partington v Turners Bakery* (at p 529) was dismissed.

(ii) the defendant's submissions

18 Counsel for the defendant relied on local cases as well as on other passages from Lim Hui Min's article, for his opposite argument that the action had been automatically discontinued and, the court should not exercise its discretion and allow the plaintiff to reinstate his claim. The cases cited were *Norisham bin Minggu v Sim Eng Koon* [D C Suit 8616 of 1992) and *Attorney-General Singapore v Tan Wee Beng* [Suit No. 625 of 2001], both unreported. In *Norisham's* case, District Judge Foo in allowing the plaintiff's application to reinstate his action (for personal injuries arising from a road accident) under O 21 r 2(8), held (see para 11 of her decision) that O 21 r 2(6) applied to an action where there is an interlocutory order for damages to be assessed. Her decision was adopted by Assistant Registrar Kenneth Yap in *Tan Wee Beng's* case where he inter alia, dealt with an application for striking-out for want of prosecution.

19 Counsel also sought to distinguish O 17 r 11(9) of the CCR; he submitted that our O 21 r 2(6) is much wider in scope than the English rule. He pointed out that unlike the UK rule, O 21 r 2(6) applies to <u>all</u> types of actions, at <u>any stage</u> of the proceedings and, it merely requires any step or proceeding to be taken, rather than a specific step, within a one-year period.

20 As for the complaint of Michelle Lim (para 14 (ii) *supra*) that she/the plaintiff had been misled into believing that the defendant would be taking further steps in the proceedings, counsel pointed out that his firm's letter to the plaintiff's solicitors was dated 29 January 2003, <u>well after</u> the action was deemed to be automatically discontinued (on 27 November 2002). In any event he had written to the plaintiff's solicitors on 11 February 2003 to say

In the light of the fact that your client's claim is deemed under Order 21 Rule 2 (6) of the Rules of Court to have been discontinued, our clients have no need to file Summons for Directions.

Further, after interlocutory judgment was entered on 27 November 2001 (the trigger date) and before 27 November 2002 (the guillotine date), the plaintiff took no steps.

21 As for reinstatement of the plaintiff's action, counsel urged the court to follow the English approach in *Bannister v SGB PLC* (*supra*) where the guiding principles for reinstating proceedings (under O 17 r 11 of the CCR), were set out by Saville LJ; he said:-

The court must be satisfied that:-

> (i) the plaintiff, apart from his failure to request a date for trial, is innocent of any significant failure to conduct the case with expedition (or reasonable diligence) between the trigger date and the guillotine date, having regard to the particular features of the case;
>
> (ii) in all the circumstances his failure to apply for a date is excusable and should be forgiven e.g. where he was genuinely and reasonably misled by the court, the defendants or others, although not from his own internal problems such as a change of solicitors; and
>
> (iii) the balance of justice indicates that the action should be reinstated.

> Each case depends on its own facts. The assessment of the weight or otherwise to be given to the circumstances of the case is a matter for the court concerned in the exercise of its discretion and the Court of Appeal will not interfere with the exercise of the discretion unless the decision is so plainly wrong that it is clear that the court must have failed to apply the general guidelines in the light of the object of the rule.

22 Counsel added that the plaintiff must satisfy each of the above limbs sequentially and if he cannot satisfy the first limb, the Court does not have to consider the subsequent limbs and, his application must fail.

The decision

23 I am in full agreement with counsel for the defendant on the three (3) hurdles the plaintiff must overcome sequentially, before he can be allowed to reinstate his action if it was deemed discontinued. If the guidelines set out in *Bannister's* case were applied to the facts of this case, the plaintiff would fail miserably, even on the first limb. I had indicated earlier (para 14) that I found little merit in the reasons put forward by the plaintiff's counsel, for the obvious delay in the prosecution of his claim; I shall now give my reasons.

24 From the chronology of events set out in the affidavits to support the plaintiff's and defendant's applications, it is plain that the delay in the expeditious prosecution of this claim was entirely the plaintiff's doing. Even the writ of summons was filed late, one month before the claim was time-barred. The plaintiff's reason for doing so was remarkable; he had been negotiating his claim direct with the defendant's insurers. One would have thought that the negotiating process comes after not before, the legal process.

25 The plaintiff's dilatory conduct ran foul of O 37 r 1 of the Rules which requires a party obtaining interlocutory judgment to apply, within one month from the date of judgment (in this case on or before 26 December 2001), to the Registrar for directions. It is noteworthy that the plaintiff's application for directions for assessment of damages was filed some 14 months later and even then, only when prompted by the defendant's solicitors. His solicitor's argument that reinstating the plaintiff's claim would not cause prejudice to the defendant (as damages would be assessed at exactly the same time they would have been had the plaintiff complied with the timetable in O 21 of the Rules) flies in the face of O 37 r 1.

26 The plaintiff's counsel had deposed at length to the difficulties the plaintiff had faced in providing discovery/documents to the defendant to substantiate his claim. The short answer to her excuse is, the law stipulates that he who claims must prove. I could not fathom what insurmountable difficulties the plaintiff could possibly have faced which took him so long to quantify his claim for damages. Even if the plaintiff's claim for loss of earnings was on a stratospheric level, there was no reason why (if his claim was bona fide) he should be encountering the many problems his solicitor claimed. If he has accountants, why then the delay in producing accounts to substantiate his claim? The plaintiff's professed difficulties also ran counter to his solicitor's affidavit (para 21) wherein she deposed that the plaintiff had, as early as 27 September 2001 (before he filed his writ) quantified his claim on a very reasonable basis and forwarded copies of his notices of assessment to the defendant/the defendant's solicitors. I had confined my perusal of the cause papers for this suit to the plaintiff's and the defendant's applications and the (amended) statement of claim. Consequently, I have no knowledge of the plaintiff's occupation or the business of his two (2) companies. It should make no difference however to the burden of proof, whether the plaintiff is an ordinary wage earner or a high net-worth individual.

27 If I had dismissed the appeal, I would not have allowed the plaintiff's claim to be reinstated, as he would not have passed the three (3) tests enunciated in *Bannister's* case. I allowed the appeal even though I did not accept the plaintiff's reasons for the delay in assessment, purely because of the conflict between O 21 r 2(6) of the Rules and other legislation.

28 Section 19(c) of the Interpretation Act (Cap 1) states:

> No subsidiary legislation made under an Act shall be inconsistent with the provisions of any Act.

while s 6(3) of the Limitation Act Cap 163 (the Act) states:-

> An action upon any judgment shall not be brought after the expiration of 12 years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due.

29 The Rules are part of the subsidiary legislation passed pursuant to the Supreme Court of Judicature Act Cap 322. If O 21 r 2(6) is interpreted to include interlocutory judgments, it would be inconsistent with s 6(3) of the Act which states that a judgment is valid for twelve (12) years. The Act makes no distinction between interlocutory and final judgments nor is the word *judgment* defined. An interlocutory judgment is final as regards liability. As the Act did not confine the validity of a judgment only to final judgments, how can O 21 r 2(6) apply to say the claim underlying a judgment is deemed discontinued when the judgment itself is valid for 12 years? I should point out that in England, the much vilified CCR were eventually superceded by the Civil Procedure Rules 1998.

30 My view that O 21 r 2(6) cannot/does not apply to interlocutory judgments is reinforced by the commentary in our local White Book (*Singapore Civil Procedure [2003])* where at p 394 (against the reference 21/5/13) to the question **What qualifies as a step or proceeding**, the learned authors (who also relied on *Bank Bumiputra Malaysia Bhd v Syarikat Gunong Tujoh Sdn Bhd*) stated:

A proceeding is essentially any formal and significant step taken before judgment. It should refer to the last interlocutory proceeding taken by a party *i.e*. an act done while the matter is still in controversy *before* judgment is obtained.

31 In the light of the above conflict in subsidiary legislation/legislation, I gave the benefit of the doubt to the plaintiff and held that his action was not discontinued. However, to show the court's disapproval of his past history of delay, I did not award the plaintiff any costs for his appeal. I further directed that if the plaintiff failed to proceed expeditiously with assessment of damages after directions were given on 3 June 2003, his claim would be deemed discontinued. Finally, I ordered that the plaintiff not be awarded any interest before 6 February 2003 on the amount of damages assessed, so that he not the defendant, would suffer the consequences of his own delay.