Projector SA v Marubeni International Petroleum (S) Pte Ltd
[2004] SGCA 34

Case Number : CA 42/2004, NM 51/2004

Decision Date : 11 August 2004

Tribunal/Court : Court of Appeal

Coram : Woo Bih Li J

Counsel Name(s) : Lawrence Teh and Sean La'Brooy (Rodyk and Davidson) for appellant; Werner Tsu (Drew and Napier LLC) for respondent

Parties : Projector SA — Marubeni International Petroleum (S) Pte Ltd

Civil Procedure – Appeals – Notice – Application to amend Notice of Appeal – Whether court obliged to allow amendment if opposing party may be compensated with costs – Factors to be considered by court when deciding whether application should be allowed

11 August 2004

Woo Bih Li J:

Background

1 On 28 November 2003, an interim mandatory injunction order ("the Injunction") was granted on the application of the plaintiff Marubeni International Petroleum (S) Pte Ltd ("Marubeni") against the defendant Projector SA ("Projector") to compel Projector to pay a cash deposit of about US$2.6m into the South Korean court to secure the release of the vessel *Dynamic Express* from arrest in Korea. Projector's obligation apparently arose out of letters of indemnity given by Projector to Marubeni for delivery of cargo carried by the *Dynamic Express* without production of the original bills of lading.

2 The cash deposit was paid by Projector into the South Korean court on or about 5 December 2003.

3 In the meantime, Projector applied on 2 December 2003 to discharge the Injunction. On 19 May 2004, Belinda Ang Saw Ean J made the following orders:

> (1) the Interim Mandatory Injunction ordered on 28 November 2003 be discharged on the condition that the cash deposits in the South Korean Court be retained to abide by the outcome of the proceedings in Korea;
>
> (2) Prayers 3 and 5 be reserved to the trial judge; and
>
> (3) Liberty to apply for both parties.

4 Prayers 3 and 5 of Projector's summons in chambers were as follows:

> (3) following from (2) above, that an inquiry whether the Defendant has sustained any and, if any, what damages by reason of the Interim Mandatory Injunction which the Plaintiff ought to pay according to its undertaking set out in the Order of Court dated 28 November 2003;
>
> …

(5) the costs of and incidental to this application be paid by the Plaintiff to the Defendant; …

5 Projector was dissatisfied with Ang J's order and filed a notice of appeal on 18 June 2004. The notice stated that the appeal was against only such parts of her order as reserved the questions of an inquiry into damages and costs to the trial judge.

6 However, on 6 July 2004, Projector filed an application before the Court of Appeal for liberty to amend the notice of appeal to include an appeal against that part of Ang J's order which imposed the condition that the cash deposit in the South Korean court be retained to abide by the outcome of proceedings in Korea. The application was heard by me. Under ss 36(1) and (2) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), the application was deemed to have been made in the Court of Appeal. The application was resisted by Marubeni. After hearing arguments, I dismissed the application with costs. I set out below, my reasons.

Reasons

7 Projector cited the decision of the Court of Appeal in *Leong Mei Chuan v Chan Teck Hock David* [2001] 2 SLR 17. The headnote of that case summarises the facts of the application there as follows:

> The appellant wife appealed to a High Court judge-in-chambers against certain orders made by the district judge on matters ancillary to divorce proceedings between her and the respondent husband. Subsequent to the filing of the appeal, the appellant applied for leave to amend the notice of appeal to include a prayer for an order concerning certain matrimonial property, specifically, stock options that had vested in the respondent but that had not yet been exercised. This prayer was not included in the original notice of appeal. The judge approximating the application to an application to extend time for the filing of the notice of appeal, applied stringent standards and rejected the application. The appellant appealed to the Court of Appeal.

8 LP Thean JA, delivering the judgment of the Court of Appeal, said at [21]:

> In the present case, the notice of appeal was filed timeously. The only question was whether leave should be given to amend that notice. It is true that the amendment sought was not inconsequential; it was of a substantive character. Be that as it may, the relevant considerations surely ought to be whether the opposing party had been given reasonable notice of the amendment and afforded a sufficient opportunity to address the substance of the amendment, and whether the amendment sought is consistent with the pleadings or the points raised below. Short of grave prejudice or hardship to the opposing party that cannot be addressed by an order as to costs, the court should lean in favour of allowing the amendment.

9 In that case, leave to amend was granted.

10 Relying on that passage, Projector submitted that so long as Marubeni could be compensated by costs, an application to amend a notice of appeal should be allowed. The stringent requirements for an application for extension of time to file an appeal, which I would add are well-known, would not apply to an application to amend a notice of appeal.

11 While I agreed that the decision of the Court of Appeal in *Leong Mei Chuan* meant that the stringent requirements for an application for extension of time to file an appeal would not apply to an application to amend a notice of appeal, I did not agree that that decision also meant that so long as a respondent could be compensated by costs, an application to amend should be allowed.

12 Indeed, [15] of Thean JA's judgment stated:

> In our opinion, the stringent standards required in an application for extension of time to file an appeal are not absolute and applicable to all cases where an extension of time is sought. In this regard, we respectfully adopt the words of Sir Thomas Bingham MR (as he then was) in *Costellow v Somerset County Council* [1993] 1 All ER 952, 959; [1993] 1 WLR 256, 264, and say that the resolution of problems such as the present application for leave to amend a notice of appeal cannot be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate.

13 Yet, Projector was suggesting that I adopt a mechanistic approach. In my view, what the Court of Appeal meant in [21] of Thean JA's judgment was that the fact that a respondent could be compensated by costs was a factor leaning in favour of allowing the amendment. All the relevant facts leading to the application should still be considered even if Marubeni had been given reasonable notice of the amendment and would be afforded a sufficient opportunity to address the substance of the amendment.

14 Mr G Asokan, a partner in the local firm of solicitors representing Projector, executed two affidavits which were filed in support of the application to amend. Paragraphs 4 and 5 of his first affidavit stated that the notice of appeal did not include the condition imposed by Ang J, "as a result of miscommunication within my firm". However, no elaboration was given and this point was made in Mr Werner Tsu's affidavit filed for Marubeni in response to Mr Asokan's first affidavit. In response, Mr Asokan executed his second affidavit. Surprisingly, para 11 thereof stated that Projector believed that sufficient explanation had been given in his first affidavit as to why the condition was not included in the notice of appeal originally. The said para 11 went on to say, "[i]t was a single case of miscommunication in the taking of instructions from clients who are overseas". There appeared to be a contradiction between what was stated in each of Mr Asokan's two affidavits.

15 Projector's counsel explained in arguments before me, that the condition was not overlooked when the notice of appeal was filed. However, upon a further consideration of the matter after it was filed, it was thought that the condition should be included in the notice of appeal as its omission might affect Projector's arguments on the issues about inquiry as to damages and costs.

16 Marubeni's counsel then revealed that, as regards para 11 of Mr Asokan's second affidavit, Projector's solicitors were taking instructions from an English firm of solicitors. The clients who were giving instructions to the local law firm were not lay clients.

17 In response, Projector's counsel acknowledged that there was an English firm of solicitors advising Projector and this English firm had solicitors in Singapore who were instructing his firm *ie* the local law firm.

18 It seemed to me that since the local firm was taking instructions from English solicitors in Singapore, para 11 of Mr Asokan's second affidavit which referred to "the taking of instructions from clients who are overseas" was inaccurate, to put it mildly. It also seemed to me that there was no miscommunication and that a deliberate decision had been taken with the benefit of advice from

solicitors with regard to the contents of the notice of appeal.

19 In view of the circumstances and the lack of candour in the supporting affidavits, I dismissed the application with costs.

20 I would add that after I dismissed the application, Projector's counsel asked if I were minded to state that the dismissal was without prejudice to any fresh application to amend which Projector might decide to make. I had no hesitation in refusing that oral application.

Application dismissed with costs.