United Engineers (Singapore) Pte Ltd v Lee Lip Hiong and Others
[2004] SGHC 190

Case Number : Suit 13/2004, RA 202/2004, 203/2004

Decision Date : 31 August 2004

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Andre Yeap SC and Adrian Wong (Rajah and Tann) for plaintiff / appellant; Foo Yuk Lin (Foo Chia Partnership) for first defendant / respondent; H T Sam (H T Sam and Co) for second and third defendant / respondents

Parties : United Engineers (Singapore) Pte Ltd — Lee Lip Hiong; Tan King Hiang; Sin Yong Constructor Pte Ltd

Civil Procedure – Pleadings – Amendment – Whether amendment of pleadings postponed deemed closure of pleadings thereby extending time limit for summary judgment application – Order 18 r 20(1) Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Civil Procedure – Summary judgment – Whether time bar for taking out of summary judgment application absolute – Whether time limit could be extended by court or by consent of parties – Order 3 r 4(3), O 14 r 14, O 92 r 4 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

31 August 2004

Tay Yong Kwang J:

The legal issues

1 Order 14 r 14 of the Rules of Court (Cap 322, R5, 2004 Rev Ed) states:

> **Time limit for summary judgment applications (O. 14, r. 14)**
>
> **14.** No summons under this Order shall be filed more than 14 days after the pleadings in the action are deemed to be closed.

These appeals raise the following two issues regarding this rule:

(a) can the time limit be extended by the court?

(b) when pleadings are amended, do they postpone the deemed closure of pleadings, thereby extending the time limit in O 14 r 14 automatically?

The facts

2 The plaintiff is in the business of general construction work. The first defendant was its former engineering manager whose duties included negotiating and concluding contracts between the plaintiff and its sub-contractors. Through the first defendant, the plaintiff awarded certain contracts to the second and the third defendants.

3 On 6 January 2004, the plaintiff commenced this action against the defendants to recover secret commissions allegedly paid to the first defendant by the second defendant on numerous occasions over more than a decade, in order to secure contracts for himself and, subsequently, the third defendant. The third defendant filed a counterclaim against the plaintiff for payment for works

done on the contracts in question.

4 Pursuant to O 18 r 20, the pleadings in this action were deemed to be closed on 9 March 2004. The last day for taking out a summons for summary judgment under O 14 was, therefore, 23 March 2004. On that day, the plaintiff took out an application to extend time to file and serve a summons under O 14 r 1 for summary judgment on its claim against the defendants. A couple of days later, the third defendant also applied for an extension of time to file and serve its summons under O 14 r 5 for summary judgment on its counterclaim against the plaintiff.

5 The grounds put forward by the plaintiff for the said extension of time were that the plaintiff had to make enquiries with the Attorney-General's Chambers and had to ask for further evidence relating to the conviction of the first defendant, upon his plea of guilt in August 2003, by a District Court. The first defendant had been sentenced to 18 months' imprisonment. As at 23 March 2004, the deputy public prosecutor in charge of this matter was still reviewing the papers. Since the plaintiff required the further evidence requested for its summary judgment application, it asked for time to be extended until after the Attorney-General's Chambers have reverted on its request. The plaintiff said it also needed time to investigate the documents relating to the various construction projects.

6 The grounds relied on by the third defendant for the said extension of time, were that the case involved voluminous documents and its solicitors were unable to obtain instructions from a director (the second defendant) who had just returned from an overseas trip.

7 Assistant Registrar Joyce Low ("the Assistant Registrar") heard the applications for extension of time and reserved her decision thereon.

8 In the meantime, on 24 May 2004, the third defendant applied to amend its Counterclaim by adding one cent to the amount claimed on the basis that there was a typographical error. Leave to amend was granted on 7 June 2004 with the consequential order that the plaintiff be allowed to file an amended Reply and Defence to Counterclaim by 21 June 2004.

9 On 8 June 2004, the plaintiff took out an application for summary judgment under O 14 r 1 and/or for judgment on admission of facts under O 27 r 3 against the defendants. On 12 June 2004, the third defendant applied for summary judgment under O 14 r 5 on its counterclaim against the plaintiff. Both parties took the view that the amendments to the pleadings re-opened the pleadings and thus revived their right to file O 14 applications. They therefore did not wait for the outcome of their applications for extension of time.

10 The first defendant disagreed with the view of the plaintiff and the third defendant. On 18 June 2004, he applied to set aside their applications under O 14 on the ground that they were made in contravention of O 14 r 14 and were an abuse of process of court as the earlier applications for extension of time had not been determined yet. The first defendant submitted that he had the standing to apply to set aside the third defendant's O 14 application against the plaintiff as he had been served with that application.

11 On 29 June 2004, the Assistant Registrar set aside the plaintiff's and the third defendant's O 14 applications but allowed the plaintiff to proceed with its prayer for judgment under O 27 r 3. She made no order on the applications for extension of time (the proper order should have been a dismissal of those applications). She fixed costs at $6,000 for all the applications dealt with by her, with such costs to be paid equally by the plaintiff and the third defendant to the first defendant.

12 On 13 July 2004, the plaintiff filed these two appeals against the Assistant Registrar's

decisions. The third defendant did not lodge any appeal.

13 I heard the appeals on 11 August 2004 and dismissed them. I ordered the plaintiff to pay the first defendant costs of $1,000 (as requested by the first defendant) for each of the two appeals. I also ordered the plaintiff to pay $200 to the third defendant as it was served with the notices of appeal.

The hearing before the Assistant Registrar

14 The plaintiff and the third defendant argued that the court had three sources of power to grant an extension of the time stipulated in O 14 r 14. They were s 18(2) read with para 7 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"), O 3 r 4(1) of the Rules of Court and the inherent powers of the court. They submitted that an extension of time should be granted in the circumstances of this case.

15 The Assistant Registrar (in her grounds of decision at [2004] SGHC 153) noted that s 18(2) of the SCJA provides that the High Court shall have the powers set out in the abovementioned para 7 of the First Schedule which states:

> Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation.

She reasoned (at [12]), however, that O 14 r 14 "is a written law relating to limitation" and "it functions as any other law relating to limitation does" and the court therefore did not have the power to extend time for the filing of an O 14 application outside the period of limitation prescribed by O 14 r 14.

16 Turning to O 3 r 4(1) of the Rules of Court, the Assistant Registrar held that since this was subsidiary legislation created pursuant to the SCJA to give effect to the power of the court to extend time under para 7 of the First Schedule, O 3 r 4(1) could not be relied on to extend time to file an O 14 application beyond a limitation period when the court had no such power to do so under the SCJA. In her view, the negative phraseology in O 14 r 14 did not come within the purview of O 3 r 4(1) which reads:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.

17 On the question of inherent jurisdiction, she held (at [22]) that:

> [T]he general rule is that the court should not introduce its own notions of justice by the exercise of its inherent powers to contravene a clear, express provision of the Rules.

Even if the court could invoke its inherent powers to extend time here, she was of the view that the reasons put forward by the plaintiff and the third defendant were not compelling enough. She noted (at [24]):

> O 14 r 14 reflects the fine balance arrived at by the Rules Committee between the need for certainty, timeliness and justice. It provides the much-needed certainty to the parties and the

court, as to whether a matter is proceeding on the normal management or summary judgment track, as soon as the time bar lapses. At the same time, the Rules Committee has considered that it is sufficient to give parties 14 days after the deemed closure of pleadings to decide whether summary judgment is appropriate, in the interest of efficiency without any compromise on substantial justice.

18 She therefore concluded that the court did not possess express power to grant an extension of time to file and serve a summons under O 14. She was also of the opinion that the circumstances in this case did not warrant invoking the court's inherent powers in favour of the plaintiff and the third defendant in their respective applications for an extension of time.

19 In a separate judgment relating to the first defendant's application to strike out the O 14 applications (in [2004] SGHC 169), the Assistant Registrar dealt with the arguments on whether the amendments to the pleadings revived the right of the plaintiff and of the third defendant to take out O 14 applications. After analysing several case authorities, she was of the view that the amendments to the pleadings did not postpone the deemed closure of the pleadings. She held that O 18 r 20 referred to the original pleadings and not the amended ones.

20 She accepted that there could be a case for the exercise of the court's inherent powers to allow the O 14 applications if the amendments to the pleadings changed the character of the litigation such that the summary judgment procedure became appropriate for the first time. However, as the amendment here pertained only to an increase of one cent in the third defendant's counterclaim against the plaintiff, the nature of the litigation, whether in the main action or the counterclaim, was not affected at all. She regarded the amendment as "a blatant attempt by (the plaintiff and the third defendant) to circumvent the time bar in O 14 r 14, by filing minor and largely inconsequential amendments" (at [20]).

21 The Assistant Registrar concluded that the O 14 applications contravened O 14 r 14 and she, therefore, set them aside save for the plaintiff's alternative prayer for judgment pursuant to O 27 r 3.

The decision on appeal

22 Order 14 r 14 was introduced by the Rules of Court (Amendment No 4) Rules 2002 on 1 December 2002. The said amendment rules also modified the summary judgment procedure by requiring a Defence to be filed before O 14 could be invoked. Previously, a plaintiff could apply under O 14 once the defendant had entered an appearance in the action.

23 Chan Hock Keng in his case note entitled "Effect of the Amendment to Order 14 Rule 1 on Claimants Relying on Architect's Certificates" (2004) 16 SAcLJ 256 asked (at para 25):

> Does it really matter whether a summary judgment application is filed before or after a defence is delivered?

In proposing the 1 December 2002 amendments to O 14, the Rules of Court Working Party, in its Report no 3 of 2002 dated 7 August 2002, explained as follows:

> 1. One of the persistent problems that plagues plaintiffs in Order 14 proceedings is that they cannot pinpoint the specific defences of defendants.
>
> 2. For reasons including the aforesaid, the plaintiff's affidavit in reply to the defendant's show cause affidavit often raises new issues, which the defendant then requires leave of court to

respond to. This disrupts the timetable for the filing of affidavits set out in Order 14 r 2. In applications under Order 14 r 12, it may be vital for the Defence to be filed so that the court can make a determination of law based on the pleadings.

3. The following amendments are proposed:

(a) Before an Order 14 application is filed, the Defence must be served (see amendments to rr 1 and 5).

(b) Having been given 14 days to define the issues in dispute in his Defence, the defendant should be in the position to file and serve his show cause affidavit in a shorter period of 14 days (instead of the present 21 days) after the service of the plaintiff's summons and affidavit in support (see amendment to r 2(4)).

(c) The suspension of the service of Defence after an Order 14 application is served is no longer relevant and therefore Order 18 r 2(2) is deleted. It is proposed that the time for service of Reply continues to run and Order 18 r 3 is left unchanged.

(d) Order 14 applications should not be taken out late in the proceedings. Once the issues are set out in the pleadings, the plaintiff should be able to decide whether to apply for summary judgment or to go for a full trial. As such, it is proposed that Order 14 applications cannot be made more than 14 days after the pleadings in the action are deemed to be closed (see insertion of a new r 14 and amendment to r 12(1)). The court, on its own motion, may still decide to determine a point of law at any time.

(e) As the existing provision for summons for directions under Order 25 r 1 requires the filing of the summons within one month after close of pleadings and by then the Order 14 application would not have been heard, it is proposed that directions be given by the court after the hearing of the summary judgment application in all cases (see amendments to Order 25 r 1(2)(a) and Order 14 r 6).

(f) To ensure that the automatic directions under Order 25 r 8 do not operate in cases where Order 14 applications have been filed, a new sub-rule (7) is introduced to Order 25 r 8.

24 However unassailable a plaintiff may believe his case to be, it is common knowledge that a fair number of O 14 applications do not result in judgment. Where such applications do not succeed, the normal course of progress of the action is disrupted. If the unsuccessful plaintiff takes the matter on appeal before a judge in chambers and still fails to obtain summary judgment, the delay in progress becomes more pronounced. Similar delays in the progress of the action result where a defendant succeeds, on appeal, in overturning a decision ordering judgment against him.

25 It is axiomatic that the longer a case takes, the higher the costs of litigation are likely to be. The O 14 procedure, an effective means of obviating open court trials in cases with unmeritorious defences, should therefore be resorted to at an early stage of the proceedings where the saving in costs of litigation would be most marked. There have been instances where O 14 applications were taken out just before the trial was to commence. Where the case has already progressed to such an advanced stage, it is highly debatable whether or not it would be much more pragmatic to have the finality of an open court trial rather than to have the uncertainty of parallel proceedings by way of an O 14 application with its attendant appeals.

26 To achieve some measure of certainty for the defendant and for the registrar who is charged with the management of cases, there has to be an absolute point beyond which no application for summary judgment may be taken out. None existed before O 14 r 14 was introduced in the Rules of Court. That provision was inserted for this very purpose and would be negated if the court has to hear applications for extension of time and appeals emanating therefrom.

27 While endorsing the result arrived at by the Assistant Registrar, I respectfully disagree with her that O 14 r 14 is a "written law relating to limitation" within the meaning of para 7 of the First Schedule of the SCJA. Black's Law Dictionary (7th Ed, 1999), offers one definition of "limitation" to be "[a] statutory period after which a lawsuit or prosecution cannot be brought in court". This definition accords with the purpose of the very wide powers in the said para 7 to extend or to abridge the time for doing any act or taking any proceeding without affecting the substantive rights conferred by statutes such as the Limitation Act (Cap 163, 1996 Rev Ed). The words in question relate to the right of action and not to applications (such as O 14 applications) or the steps to be taken within the action. I think, however, that the Assistant Registrar was correct in adopting the view of Pickford J in *Gregory v Torquay Corporation* [1911] 2 KB 556 at 559, that the expression "statute of limitations" could not be confined to statutes which by their title were so styled.

28 I also respectfully disagree with the Assistant Registrar's interpretation of O 3 r 4(1). In my view, there is really no difference in substance between negative phraseology prohibiting something from being done beyond a certain time and positive words mandating that that thing be done by a certain time. Telling someone that all eating must be completed by midnight is effectively saying that no one may eat after midnight. Extending the time allowed for eating merely means allowing the consumption of food after midnight, thereby waiving the prohibition.

29 Despite these differences in opinion with the Assistant Registrar, I believe nevertheless that a purposive interpretation of O 14 r 14 makes it necessary to conclude that the time bar there is an absolute one and may not be extended by the court. For good measure, although this point did not appear to have been canvassed before the Assistant Registrar, it must follow that the parties are not permitted to extend the time in O 14 r 14 by consent under O 3 r 4(3) which is in the following terms:

> The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

30 I would not invoke the inherent powers of the court (see O 92 r 4) to override the clear prohibition in O 14 r 14: "No court should arrogate unto itself a power to act contrary to the Rules" (*per* Chao Hick Tin JA in the Court of Appeal in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 at [12]).

31 If I am wrong in concluding that the said time bar is an absolute one, I would nevertheless not extend time on the facts of this case. It was not immediately clear what other evidence the plaintiff required from the prosecuting authority besides the first defendant's admission of guilt, his conviction and his admission in respect of the other charges taken into consideration for the purpose of sentencing. In any event, the outcome of these appeals does not mean that the plaintiff is deprived of its rights against the defendants. I shall elaborate on this later.

32 I now deal with the second legal issue raised in these appeals. Order 18 r 20 provides:

> (1) The pleadings in an action are deemed to be closed —

(a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim; or

(b) if neither a reply nor a defence to counterclaim is served, at the expiration of 14 days after service of the defence.

(2) The pleadings in an action are deemed to be closed at the time provided by para (1) notwithstanding that any request or order for particulars has been made but has not been complied with at that time.

33 As correctly noted by the Assistant Registrar, O 18 r 20(1) fixes the deemed closure of pleadings with certainty so that it can fulfil its function as a reference point for the reckoning of time for one-time amendments to the writ of summons or the pleadings without leave of the court (O 20 rr 1 and 3); for the taking out of a summons for directions (O 25 r 1); and for the operation of automatic directions (O 25 r 8). There is also, at the close of pleadings, an implied joinder of issue on the pleading last served (O 18 r 14(2)(a)).

34 If an amendment is made with leave of the court after the deemed closure of pleadings and that leads to the postponement of the deemed closure, we would have the very curious situation of an amendment requiring leave of the court resulting in the parties again having the liberty to amend once without leave of the court. Similarly, assuming the plaintiff in an action has already taken out a summons for directions after pleadings are deemed to be closed and the pleadings are then amended with leave of the court. If the deemed closure of pleadings is postponed as a result, we would have an absurd situation where the plaintiff is required to take out another summons for directions after the second deemed closure.

35 In *Pleadings: Principles and Practice* (Sweet and Maxwell, 1990 Ed), the learned authors, Sir Jack Jacob QC and Iain S Goldrein, opined (at p 44) that:

[P]leadings are deemed to be closed, notwithstanding that one or other party may desire or apply to amend his pleadings or that pleadings are in fact subsequently amended.

In *Hackwell v Blue Arrow Plc* The Times, 18 January 1996, a decision of the English Court of Appeal, it was accepted by all that the plaintiff's solicitors' belief that subsequent amendment of defences postponed the date of the closure of pleadings for the purposes of automatic directions was a mistaken one.

36 Similarly, in a later decision of that court, *Bannister v SGB plc* [1997] 4 All ER 129 (at paras 4.1 and 4.2), it was said:

4.1 The new automatic directions start to run after pleadings are deemed to be closed (r 11(3): 'the trigger date'). …

…

4.2 In an action commenced in the county court, pleadings are deemed to be closed 14 days after the delivery of a defence in accordance with Ord 9, r 2 or, where a counterclaim is served with the defence, 28 days after the delivery of the defence (r 11(11)(a)). A defence is delivered in accordance with Ord 9, r 2 when it is delivered at the court office (Ord 9, r 2(6)). If all the original defendants deliver a defence the trigger date is calculated from the date the last defence was delivered. The trigger date is not altered if a defence is later amended.

37 A contrary view on this issue appeared in the Canadian High Court case of *Freeman v Parker* [1956] OWN 561. In that case, pleadings closed on 23 November 1955. On 8 February 1956, the plaintiff was granted leave to amend her Statement of Claim and the defendant was consequently granted leave to amend his Defence. On 15 March 1956, the plaintiff delivered her amended Statement of Claim and served a jury notice at the same time. The defendant sought to strike out the jury notice because s 57 of the Judicature Act, RSO 1950, c 190, provided that a party may deliver a jury notice "not later than the fourth day after the close of pleadings". Gale J, in holding that the jury notice was not irregular, said (at pp 562 and 563):

> The moment the order was on the 8th February there was impliedly a reopening of the pleadings. It is true that the order is not explicit in that respect but I fail to see how any interlocutory amendment to pleadings can be made without the pleadings being reopened. Accordingly, the pleadings were not closed when the amended statement of claim was served, so that the parties were at liberty then to deliver a jury notice, and as the plaintiff has done so before the pleadings again became closed, that jury notice does not contravene [s 57 of the Judicature Act].
>
> …
>
> Unless some express direction is given, pleadings are not reopened in varying degrees. Frequently, of course, they are opened for limited purposes, but when that is so the orders are explicit in that respect.
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> …
>
> It is my opinion, therefore, that if pleadings are reopened to permit amendments and nothing is said about limiting the effect of the order, the right of any party thereafter to serve a jury notice pursuant to the provisions of s 57 of the Act is revived.

38 The Assistant Registrar distinguished the above decision on the basis that it stood only for the proposition that amendments to pleadings postpone the actual closure of pleadings, not their deemed closure. She concluded that even if such amendments postponed the actual closure of pleadings, their deemed closure was not affected and the right to file an O 14 application was therefore not revived. For my part, I am content to decline to follow Gale J's reasoning because of the scheme of our Rules of Court as set out by me above.

39 The plaintiff relied on my decision in *Chun Thong Ping v Soh Kok Hong* [2003] 3 SLR 204 in support of its contention that pleadings are reopened upon amendment and that the time limit in O 14 r 14 is extended accordingly. In that case, the plaintiff failed in his O 14 application against the second defendant before an assistant registrar. He then applied to amend his Statement of Claim by including an alternative averment. Before the application to amend was heard, he appealed against the O 14 decision. When the application to amend went before the assistant registrar, the second defendant objected to it on the ground that it was improper as there was a pending appeal based on the original Statement of Claim. The assistant registrar ordered that the application to amend be heard together with the appeal.

40 Both matters came before me for hearing. The plaintiff wanted to amend his Statement of Claim and to proceed with his appeal on the alternative claim thereafter. I then indicated to the parties that the correct approach was to withdraw the appeal and to proceed with a fresh O 14 application based on the amended Statement of Claim if the plaintiff so wished. The plaintiff then withdrew his appeal and was granted leave to amend his Statement of Claim. After stating that a plaintiff was not allowed to add a new cause of action between the hearing of an O 14 application at

first instance and the appeal therefrom and then proceed on that new cause of action at the appeal, I noted that the position stated was consonant with the decision in *Techmex Far East Pte Ltd v Logicraft Products Manufacturing Pte Ltd* [1998] 1 SLR 483. In *Techmex*, the High Court held that a second O 14 application could be made after the first was dismissed if the factual or legal basis of the claim was altered because of amendments to the pleadings.

41 As observed by the Assistant Registrar in this case, in *Chun Thong Ping*, I did not have to consider the relationship between an amendment of pleadings and the time bar in O 14 r 14 because such an issue did not arise in that case at all. Admittedly, O 14 r 14 appeared to have been overlooked in that case. *Chung Thong Ping* and *Techmex* must now be construed in the light of the present decision and it would appear that a second O 14 application after an earlier unsuccessful one is virtually impossible in view of the time-lines on affidavits in O 14 r 2. I reiterate, however, what I said in *Chun Thong Ping* (at [14]):

> It is incumbent on a plaintiff who wishes to proceed under O 14 to get all his pleadings and evidence in order before launching an application meant to obviate a trial in open court.

42 I therefore hold that amendments to pleadings do not postpone the deemed closure of pleadings and do not extend the time limit in O 14 r 14. I understand that Belinda Ang Saw Ean J held the same view when she struck out an O 14 application, filed in circumstances similar to those here, in Suit No 1129 of 2003.

43 The outcome is not as draconian as it looks. As stated earlier, this decision does not mean the plaintiff is deprived of his rights against the defendants. As demonstrated in this case, he could still proceed under O 27 r 3. In appropriate cases, a plaintiff may also apply to strike out a defendant's pleadings under O 18 r 19 and obtain judgment as a consequence. Preliminary issues may also be tried under O 33 r 2. Order 14 is but one of the modes of obtaining judgment without trial. In any case, trial dates are never far away in our present situation even if the matter should proceed to trial. To ameliorate the situation, proposals may soon be made to extend the 14–day period in O 14 r 14 to 28 days.

Plaintiff's appeals dismissed with costs.