Malayan Banking Bhd v United Arab Shipping Co (S.A.G.) and Another (Agrizala Co (Pte) Ltd, Third Party) and Another Suit
[2008] SGHC 214

Case Number : Suit 388/2007, RA 280/2008

Decision Date : 19 November 2008

Tribunal/Court : High Court

Coram : Lee Seiu Kin J

Counsel Name(s) : Henry Heng Gwee Nam and Vicki Loh (Tan Peng Chin LLC) for the plaintiff; Wendy Tan and Charmaine Fu Simin (Khattarwong) for the second defendant

Parties : Malayan Banking Bhd — United Arab Shipping Co (S.A.G.); Shealth Services Pte Ltd — Agrizala Co (Pte) Ltd

Civil Procedure

19 November 2008

Lee Seiu Kin J:

1 The plaintiff is a bank incorporated in Malaysia with branches in Singapore. The first defendant is a foreign company registered in Singapore in the business of, *inter alia*, shipping. The second defendant is a company incorporated in Singapore in the business of, *inter alia*, general wholesale trade, including export and import, and freight transport by road.

2 The two suits ("Suit No 388 of 2007 and Suit No 391 of 2007") were consolidated by an order of court on 17 September 2007. In both suits, the plaintiff is the same entity, the second defendant is the same entity and the third party is also the same entity. Only the first defendants are different parties. The writ of summons for both suits were filed on 27 June 2007.

3 The plaintiff's claims against the second defendant in both suits arose from three bills of lading ("the Three B/Ls"), which the plaintiff claimed to be the lawful holders thereof, namely:

(a) Bill of Lading No SHL06111155 dated 27 November 2006.

(b) Bill of Lading No SHL0612018 dated 4 December 2006.

(c) Bill of Lading No SHL0612049 dated 11 December 2006.

4 The plaintiff claimed that the cargo of Thai white refined sugar shipped under the Three B/Ls ("the Goods") were released and/or delivered without presentation of the original bills of lading thereby causing the plaintiff to suffer loss and damage.

5 The plaintiff had stated the value/price of the Goods in the statements of claim in both actions as US$124,867.50 and US$427,881.00 respectively (totalling US$552,748.50). The plaintiff relied on the invoiced price of the Goods in the contract of sale between its customer, the third party herein, and B.C.F. Holdings Private Ltd ("BCF").

6 On 18 September 2007, the plaintiff filed Summons No 4230 of 2007 ("the Order 14 Summons") for summary judgment on its claims.

7 The hearing for the Order 14 Summons was held on 9 November 2007. On 23 November 2007, Assistant Registrar Chung Yoon Joo ("AR Chung") granted leave to the second defendant to defend the plaintiff's claim on condition that security in the sum of US$552,748.50 be provided by the second defendant to the plaintiff by 21 December 2007. However the second defendant failed to furnish the security by that date and on 27 December 2007, the plaintiff entered a default interlocutory judgment against the second defendant for damages to be assessed, plus interest and costs.

8 On 25 April 2008, the plaintiff filed the Notice of Appointment for Assessment of Damages No 36 of 2008. The plaintiff had, on 14 and 15 April 2008, filed four affidavits of evidence-in-chief, namely, that of Francis George Ho Fook Choy ("Ho"), Ong Lay Khim ("Ong L K"), Yan Foong Yee ("Yan") and Ong How Thong ("Ong H T"). On 2 June 2008, parties attended before Assistant Registrar Teo Guan Siew ("AR Teo") for the assessment of damages ("AD"), at which the plaintiff opened its case and called its first witness to give evidence. The AD was part heard and was then fixed for a further half day hearing on 3 July 2008. On 25 June 2008 (about one week before the scheduled resumed AD hearing), the plaintiff filed Summons No 2768 of 2008 for "leave be granted to the Plaintiffs to file the joint affidavit of Lim Soh Hoong, Francis George Ho Fook Choy, Ong Lay Khim, Yan Foong Yee and Ong How Thong … and that the said joint affidavit be admitted for the purposes of the hearing of the assessment of damages, interest and costs in this action". On 2 July 2008, the application was heard by AR Teo who ordered, *inter alia*, that:

(a) Leave be granted to the plaintiff to file four supplementary affidavits of evidence-in-chief ("supplementary AEICs") of Ho, Ong L K, Yan and Ong H T limited to the matters deposed to by the respective deponents in the joint affidavit by 9 July 2008.

(b) Leave be granted to the second defendant to file reply affidavit(s) of evidence-in chief limited to the matters raised in the supplementary AEICs by 1 August 2008.

(c) The resumed assessment of damages fixed for hearing on 3 July 2008 be vacated and re-fixed for a full day hearing on 12 August 2008.

9 On 9 July 2008, the plaintiff filed the supplementary AEICs. On 15 July 2008, the second defendant filed the present appeal against the part of AR Teo's decision that gave the plaintiff leave to file the supplementary AEICs. On 6 August 2008, after hearing counsel for the parties, I allowed the appeal in part and dismissed the remaining parts. I increased the costs awarded by AR Teo to the second defendant from $5,500 to $7,500 and awarded part of the costs of the appeal to the second defendant, fixed at $3,000 plus reasonable disbursements, which may be set off against damages that may be assessed against the second defendants. The second defendant had appealed against the part of my decision that dismissed the appeal against the order of AR Teo below and against my order that the costs awarded may be set off by the plaintiff against the damages assessed.

10 The leave granted below for supplementary AEICs to be filed was for further evidence to be adduced in respect of three matters as follows:

(a) Claim for interest based on interest charged under another contract.

(b) The second defendant's notice of objection to certain documents.

(c) Market value of sugar at Colombo, Sri Lanka at the material time.

11 I allowed the second defendant's appeal in relation to (a) and dismissed the appeal in relation to (b) and (c). The second defendant's appeal is in relation to my dismissal of the appeal in relation to

(c) and to my order that the costs awarded to the second defendant may be set off by the plaintiff against any damages assessed. I now give the grounds of my decision on those two points.

Supplementary AEICs on market value of sugar

12 The plaintiff sought to admit the supplementary AEICs on the ground that this would clarify the status of certain original documents which the court had directed to be produced for the hearing of the assessment of damages on 3 July 2008. However it would appear that this did not apply in relation to the evidence on market value of sugar at Colombo. Counsel for the plaintiff submitted that such evidence would "assist the court", but in my view that is neither here nor there. It would appear that the additional evidence is a second string in the plaintiff's bow in relation to its claim for damages that it wanted to introduce in the AD hearing, in case its first string, based on the invoice value, failed.

13 The second defendant's case is that AR Teo ought not to have exercised his discretion in favour of the plaintiff to allow the filing of supplementary AEICs for the purpose of adducing evidence of the market value of sugar at Colombo, Sri Lanka. This was because the plaintiff, having failed to put all its evidence before the hearing was trying to have a "second bite of the cherry". The second defendant relied on the decision of the Court of Appeal in *Auto Clean 'N' Shine Services v Eastern Publishing Associates Pte Ltd* [1997] 3 SLR 409 ("*Auto Clean*"). The headnote for that report states as follows:

> The appellants, a firm carrying on the business of car grooming, brought an action against the respondents, a publishing company, for defamation and malicious falsehood arising out of an article published in two of the respondents' magazines. After the close of pleadings, the appellants took out a summons for directions. The usual orders were made by an assistant registrar on the summons for directions as to discovery, inspection of documents and witnesses (the order of court).
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> Pursuant to the order of court, the parties filed and simultaneously exchanged their affidavits of evidence-in-chief on 26 April 1996. The appellants filed and delivered to the respondents affidavits of evidence-in-chief of nine of their witnesses named in the order of court; they omitted the affidavits of four of their witnesses so named, but added an affidavit of one witness, G, who was not named in the order of court. On 27 and 28 May 1996, the respondents filed a series of objections to the contents of the affidavits filed by the appellants. On 7 and 18 June 1996, the appellants applied by way of two notices for further directions praying, inter alia, for an order allowing 11 new witnesses of fact to be called at the trial of the action. One of the 11 witnesses named in the application was G. The appellants also sought an extension of time for the filing of affidavits of evidence-in-chief of two of the four witnesses, C and L, who were named in the order of court but whose affidavits were not filed and exchanged on 26 April 1996. The assistant registrar allowed the application to add the 11 new witnesses and for time to be extended to allow C and L to file their affidavits of evidence-in-chief.
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> The respondents appealed to a judge in chambers who reversed the assistant registrar's order, save for one witness, H, whom the judge allowed to be included. The judge was of the view that, except for H, the appellants were not entitled to their applications on the ground that they did not provide a satisfactory explanation as to why they could not have named all the witnesses at an earlier stage, why it was necessary to call the new witnesses, and why C and L could not have filed their affidavits of evidence-in-chief in time. The judge found the affidavit filed by the appellants' solicitor in support of their applications to be wholly inadequate. The appellants appealed against the judge's decision.

Held, allowing the appeal:

(1) It was a cardinal principle of our legal system that each party had the prerogative to call all witnesses he deemed fit in support of his case. When this prerogative was being exercised by a party long before the actual trial, the court should have been slow to deny the party the right to call the witnesses, unless it would have resulted in serious prejudice to the opponent that could not have been remedied by costs or by allowing the opponent to adduce new or fresh evidence in reply, if such a need should have arisen. In this case, the proceedings were still at a relatively early stage and no prejudice would have been caused to the respondents by allowing the new witnesses to be called and by granting an extension of time for C and L to file their affidavits of evidence-in-chief. Clearly, the respondents would have had sufficient time to consider, and, if necessary, to respond to the evidence. There would thus have been no element of surprise (see [12]-[18]).

(2) The affidavit of evidence-in-chief of G, together with the appellants' other affidavits, was actually filed and exchanged with the respondents' affidavits on 26 April 1996. Therefore, there was no reason for refusing the application to include G as a 'new' witness (see [19]).

(3) Any attempt by the appellants to re-shape the evidence to meet the case of the respondents could have been tested in cross-examination, and no doubt the trial judge would have been in a position to assess the veracity and credibility of the evidence on the totality of the evidence before him (see [20]).

(4) In the circumstances of this case, the reasons set out in the affidavit filed by the appellants' solicitor in support of their applications to include the new witnesses and to extend time for C and L to file their affidavits of evidence-in-chief was sufficient to justify the exercise of the court's discretion in the appellants' favour (see [26]).

[emphasis in original]

14 Counsel for the second defendant relied on [16] of the judgment in *Auto Clean* which states as follows:

16 Reverting to the instant case, we respectfully agree with the learned judge on the following: that all matters which must or can be dealt with in interlocutory applications and which have not already been dealt with must be included in the summons for directions, that a party seeking to persuade the court to exercise its discretionary power must provide adequate information; and that generally fault or neglect of a solicitor in complying with the rules of court or court orders is not sufficient reason for the court to grant an indulgence to the defaulting party. Lastly, parties to litigation must comply with the rules and the orders of court.

15 However I note that in [17], the Court of Appeal continued in the following manner:

17 That having said, it must be appreciated that an order or orders made under these rules at the interlocutory stage are not immutable and certainly at that stage finality cannot be achieved. With reference to complying with O 25 r 3, the court must always be conscious of the fact that circumstances may and do arise which result in parties being unable to name all their witnesses at the stage of the summons for directions and, consequently, leave should be given to allow the parties to introduce new witnesses subsequent to the directions that have been given. There are multiple reasons for this, such as the failure of parties in giving proper or adequate instructions to their solicitors at the initial stage, failure of the parties and those advising them in properly

weighing or assessing the evidence, subsequent amendments to pleadings, discovery of evidence relevant to the claim or defence or some other new development arising. Whatever the case may be, **we think that the courts should not adopt an unduly rigid or restrictive approach in considering the directions to be given concerning matters pertaining to the trial or hearing. Instead, a balance should be struck between the need to comply with the rules and the parties' right to call witnesses whom they deem necessary to establish their case.** It may well be that the additional evidence to be adduced by the parties may assist in illuminating the issues before the court or result in the expeditious disposal of the proceedings. If, however, it really turns out at the trial that the evidence adduced is unnecessary, irrelevant or vexatious, the trial judge is in full control and is in a position to deal with the party adducing such evidence in an appropriate way, such as by disallowing the evidence which is being elicited from the witness and/or by an order as to costs. It must always be borne in mind that the duty of the court is to examine all the evidence put forward by the parties which is material and relevant to the dispute between the parties and not to shut out potentially material and relevant evidence by a strict adherence to the rules of civil procedure. [emphasis added]

16 The rules of court exist for the purpose of ensuring a fair trial so that justice is done. They do not exist to facilitate injustice by mechanical imposition of strict technical compliance. If the failure by one party to comply with the rules does not result in prejudice to the other party that cannot be compensated by way of costs, then the court should permit it to be rectified. In my view, the consequences of not permitting the plaintiff to adduce the additional evidence are potentially serious and in the circumstances wholly disproportionate to the default. I accordingly dismissed the second defendant's appeal in relation to this point.

Order that costs may be set off

17 The plaintiff had obtained judgment against the second defendant and the AD hearing was underway. The plaintiff would be entitled to costs of the suit and any damages assessed. In my view, the just order to make in respect of the appeal would be to permit the plaintiff to set off the inevitable order for damages and costs that the second defendant would face against this costs order.