AAY and others *v* AAZ
[2010] SGHC 350

Case Number : Suit Y (Summons A and Summons B)

Decision Date : 02 December 2010

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Davinder Singh SC and Joan Lim (Drew and Napier LLC) (counsel) and Chia Chor Leong (Citilegal LLC) (solicitors) for the plaintiffs; Michael Hwang SC and Katie Chung (counsel) and Wong Yoke Cheng Leona (Allen & Gledhill LLP) (solicitors) for the defendant.

Parties : AAY and others — AAZ

Arbitration

2 December 2010

Chan Seng Onn J:

Introduction

1 Summons A ("Sum A") was the defendant's application under O 20 r 1 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) ("ROC") for an amendment to be made to the wording of an Order of Court dated August 2007 ("the Order of Court") made in connection with Summons B ("Sum B"). Subsequent to the hearing of Sum A which took place in March 2010, the parties wanted to settle the matter. Accordingly, I deferred making a decision on the application. However, after waiting more than seven months for the outcome of the settlement negotiations, I called the parties to attend before me in October 2010 and gave the parties one more week to settle the matter. At the next hearing in November 2010, the matter remained unresolved. As I was not prepared to delay the matter any further, I rendered my decision in November 2010.

2 The defendant's application in Sum A to amend the Order of Court was occasioned by a dispute between the parties as to whether the Judgment made in June 2009 ("the Judgment") in respect of Suit Y of 2006 ("Suit Y") ought to be published in view of the plaintiffs' application in Sum B and the Order of Court that was granted pursuant to it. Sum B was an application by the plaintiffs for:

> 1. **[Suit Y] to be heard *in camera* ;**
>
> 2 . **any judgment pronounced or delivered in [Suit Y] not be made available for public inspection;**
>
> 3. the time for service of [Sum B] be abridged; and
>
> 4. the Court give such further directions as may be necessary.
>
> [emphasis in original in bold italics; emphasis added in bold]

Sum B further stated that the application was:

> ... made pursuant to [*sic*] sections 8(2) and 8(3) of the *Supreme Court of Judicature Act* and Order 42 Rule 2 of the *Rules of Court* and/or sections 22 and 23 of the *International Arbitration Act* and Order 69A Rule 3(1)(a) of the *Rules of Court*. The application is made to preserve the confidentiality of matters referred to arbitration. [emphasis in original]

In August 2009, I heard the plaintiffs' application in Sum B and the Order of Court was filed by the plaintiffs to record the order that I made at the hearing. The Order of Court stated:

> UPON THE APPLICATION on the part of the Plaintiffs pursuant to sections 8(2) and 8(3) of the *Supreme Court of Judicature Act* and Order 42 rule 2 of the *Rules of Court* and/or sections 22 and 23 of the *International Arbitration Act* and Order 69A Rule 3(1)(a) of the *Rules of Court* made by way of Summons Entered No. [B] coming on for hearing this day AND UPON HEARING Counsel for the Plaintiffs and Counsel for the Defendant IT IS ORDERED: -
>
> 1. The time for service of the application be abridged.
>
> 2. [**Suit Y] be heard *in camera*** .
>
> 3. **The decision on prayer 2 of the application be adjourned for hearing on a date to be fixed**.
>
> 4. The costs of and arising from the application be costs in the cause.
>
> 5. Liberty to apply.
>
> [emphasis in original underlined and/or italicised; emphasis added in bold]

In Sum A, the defendant sought to amend the Order of Court such that paragraph 2 would read as such:

> 2. [Suit Y] be heard otherwise than in open court, pursuant to the Plaintiffs' application under section 22 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA") ~~*in camera*~~ ."

3 The plaintiffs argued that O 42 r 2 of the ROC governs proceedings heard in camera whereas s 23 of the International Arbitration Act (Cap 143, 2002 Rev Ed) ("IAA") governs proceedings heard "otherwise than in open court". They submitted that as the proceedings were *in camera* (following the plaintiffs' application for this in Sum B and the Order of Court granted subsequently for the proceedings to be heard ***in camera***), there was an absolute bar to publication of the Judgment. It was the defendant's position that the plaintiffs' application eventually proceeded under s 22 of the IAA and that s 23(3)(b) and s 23(4) of the IAA applied such that, at the very least, a redacted version of the Judgment could be published.

4 Notwithstanding the language of the Order of Court, the defendant submitted that the court's true meaning in making the order in Sum B in August 2007 was that it was an order being made pursuant to ss 22 and 23 of the IAA. As such, the defendant applied, via Sum A, for the Order of Court to be amended to reflect this.

The events leading to Sum A

5 In August 2007, the plaintiffs filed Sum B. The text of the application is quoted above at [2]. The supporting affidavit for the plaintiffs' application only referred to s22 and s23 of the IAA. No

mention was made of s 8 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") or O 42 r 2 of the ROC. The relevant paragraphs are:

> 4. Sections 22 and 23 of the IAA implicitly recognise the confidential nature of arbitrations by allowing the Court to hold any proceedings under the IAA "otherwise than in Open Court" and restrict the publication of any information relating to such proceedings respectively.
>
> 5. The confidentiality inherent in arbitration proceedings should extend to the current action. Sections 22 and 23 of the IAA are clear illustrations of the public policy in keeping arbitrations, and all proceedings related to arbitrations, confidential. This policy has to be jealously guarded in order to advance Singapore's attractiveness as an international arbitration hub.
>
> 6. Further, it is expedient in the interests of justice and/or there is sufficient reason that the current action be heard *in camera* and that any judgment pronounced or delivered in the current action not be available for public inspection.
>
> 7. The Defendant has alleged, *inter alia*, that the Plaintiffs have waived the confidentiality of the arbitration proceedings. The Plaintiffs do not agree. There will be no prejudice to the Defendant if the current action is heard *in camera* until the issue of waiver has been decided. On the other hand, there will be irreparable prejudice to the Plaintiffs if the proceedings are not heard *in camera* and it is later held that there has been no waiver.
>
> [emphasis in italics in original]

6 The hearing of the application took place in August 2007. All parties at the hearing, as well as the Court, dealt with the application on the basis of s 22 and s 23 of the IAA rather than s 8 of the SCJA. No mention was made of O 42 r 2 of the ROC. I allowed prayer 1 of the plaintiffs' application for Suit Y to be heard *in camera* but deferred making a decision on prayer 2 concerning the availability of the Judgment for public inspection. Liberty to apply was granted to both parties.

7 In June 2009, I handed down my Judgment, dismissing the plaintiffs' claims in Suit Y. Each party subsequently gave an undertaking of confidentiality in relation to the Judgment until the plaintiffs' application under s23 of the IAA was heard. The undertakings of confidentiality expressly stated that the plaintiffs' application to preserve confidentiality would be made under s23 of the IAA. The plaintiffs' undertaking was set out in a fax dated June 2009 which read:

> We … undertake that copies of the judgment and/or grounds of decision rendered in the captioned matter will not be distributed to non-parties to the captioned matter until the Plaintiffs' application under s 23 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) is heard and determined.

The defendant's undertaking was set out in a fax dated June 2009 and read:

> As requested by His Honour, we … jointly undertake that the said judgment be kept confidential and that it will not be released or copied pending a hearing to be fixed … for the hearing of the Plaintiffs' application under section 23 of the International Arbitration Act, Cap 143A concerning the restriction of the publication of the judgment.

8 In July 2009, solicitors for the defendant submitted a written request for the Judgment to be made available for public inspection without redacting the identity of the parties. The request mentioned that the plaintiffs had indicated that they would be making an application pursuant to s 23

of the IAA (which deals with restrictions on the reporting of proceedings heard otherwise than in open court).

9 The solicitors for the plaintiffs objected to the defendant's request. The reasons for the plaintiffs' objection were set out in a letter dated July 2009 which stated:

> 17. As a preliminary point, the Plaintiffs have given instructions to file a Notice of Appeal against the Judgment. As the Judgment would be subject to appeal, the Court cannot rule out the prospect that the Court of Appeal may come to a decision which is different from that in the Judgment. As such, it would be premature for Your Honour to rule on the Plaintiffs' application under section 23 of the IAA until the matter has been fully and finally determined by the Court of Appeal.
>
> 18. If Your Honour is minded to give directions at this stage, the Plaintiffs request that Your Honour give directions to the effect that the Judgment remain confidential.
>
> ***Section 23 of the IAA***
>
> 19. The Plaintiffs' application is brought under section 23 of the IAA which states:
>
> …
>
> 21. While Your Honour may give directions permitting the publication of the Judgment if Your Honour considers it to be of major legal interest, under s 23(4) of the IAA, this must be subject to such publication not revealing any matter, including the identity of the parties, which any party to the Suit reasonably wishes to remain confidential.
>
> 22. For the following reasons, the Plaintiffs' position is that the unredacted version of the Judgment does not meet the requirements set out in s23(4).
>
> …

The plaintiffs' letter made no reference to O 42 r 2 of the ROC. Rather, the plaintiffs' objection to publication of the Judgment proceeded on the basis of the plaintiffs' application under s23 of the IAA to keep the Judgment confidential. Paragraph 21 of the letter provided that directions may be given permitting the publication of the Judgment if it was of major legal interest and if the Judgment was sufficiently redacted.

10 In July 2009, Sum B was fixed for further hearing and the plaintiffs submitted, pursuant to s23 of the IAA, that the Judgment should be kept confidential and unpublished pending the outcome of the plaintiffs' appeal to the Court of Appeal against the Judgment. I granted the plaintiffs' application save that a copy of the unredacted version of the Judgment may be given to the arbitrator and the costs draftsmen of the defendant's solicitors on their undertaking to keep the Judgment confidential.

11 The plaintiffs filed an appeal against the whole of the Judgment in July 2009.

12 In October 2009, the plaintiffs filed an application to the Court of Appeal for the appeal to be heard *otherwise than in open court* and for an order, *inter alia*, that in any judgment pronounced or delivered in the appeal, there would be no publication of the identity of the parties to the proceedings and/or of any matter which would enable any member of the public to deduce the identities of the parties. This was granted by a consent order in November 2009. The hearing before the Court of

Appeal was in November 2009.

13 The Court of Appeal delivered its decision on the plaintiffs' appeal against the Judgment in November 2009.

14 In November 2009, the defendant, by way of a fax, requested for the issue of confidentiality and publication of the Judgment to be revisited. Subsequently, the parties exchanged correspondence and in its letter dated March 2010, the defendant stated at paragraph 7 that "[i]f necessary, the Defendant will apply under Order 20 rule 11 of the Rules of Court for an amendment to the wording of the [Order of Court] made."

15 In March 2010, the defendant applied, via Sum A, supported by an affidavit of the defendant's solicitor, for the Order of Court to be amended (as discussed above at [2]).

Decision on Sum A

16 The plaintiffs submitted that the defendant's application for an amendment of the Order of Court should not be allowed for the following reasons:

(a) The *in camera* order was not a "clerical mistake" or an "accidental slip or omission" which could be amended by the court under O 20 r 11 of the ROC;

(b) Even if the *in camera* order was made due to a mistake as to its legal effect (*ie*, the absolute bar on publication) or a misunderstanding, the Court had no jurisdiction to amend its own order and the defendant's remedy lay in an appeal for which the defendant was out of time; and

(c) The court had no jurisdiction to entertain the application to rehear or alter the *in camera* order into an order of a fundamentally different nature.

17 I disagreed with the plaintiffs. In my opinion, the *in camera* order was an accidental slip or omission which could be amended under O 20 r 11 of the ROC because it was clear to the parties at the hearing in August 2007 that I had intended, when I made the orders recorded in the Order of Court, for Suit Y to be heard "otherwise than in open court" pursuant to ss 22 and 23 of the IAA.

18 O 20 r 11 of the ROC states:

Amendment of judgment and orders (O 20 r 11)

11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

The commentary to O 20 r 11 in *Singapore Civil Procedure* (Sweet & Maxwell, 2007) states (at 20/11/1):

The error or omission must be an error in expressing the manifest intention of the court; the court cannot correct a mistake of its own in law or otherwise, even though apparent on the face of the order (*Charles Bright & Co Ltd v Sellar* [1904] 1 KB 6, CA; *Re Gist* [1904] 1 Ch 398 at 408) such as a mistake due to a misunderstanding of a rule or legislation (*Bentley v O'Sullivan* [1925] WN 95).

19 In view of the events leading to the defendant's application in Sum A (see [5] – [15] above), I

agreed with the defendant that the court's true meaning and manifest intention in making the order which was recorded in the Order of Court was that it was an order being made pursuant to sections 22 and 23 of the IAA and O 69A r 3(1)(a) of the ROC, *i.e*. for the proceedings to be held "otherwise than in open court", as opposed to s 8(2) and s 8(3) of the SCJA and O 42 r 2 of the ROC. This is evident from [129] of the Judgment where I stated that:

> Even in the present suit, the application under s 22 of the IAA was made in [SUM B] to preserve confidentiality only one day before the trial, and heard on the first day of trial…

That this was the parties' understanding of the Order of Court is also reflected in the submissions and letters from both parties, as detailed above. Additionally, the Order of Court specifically stated that the Court's decision on prayer 2 of the plaintiffs' application (*ie* for any judgment pronounced or delivered in Suit Y not to be made available for public inspection) was to be adjourned for hearing on a date to be fixed. After the conclusion of the trial, the plaintiffs brought an application under s 23 of the IAA to restrain publication of the unredacted version of the Judgment (see [10] above). This clearly indicated that the parties had understood that the order for the hearing to be *in camera* was made pursuant to ss 22 and 23 of the IAA and that no decision had been made in August 2007 to bar publication of the Judgment. I therefore allowed the defendant's application to amend the Order of Court to reflect this correct position.

20 Whilst I agreed with the plaintiffs' submission that a mistake as to the legal effect of a court order is not a ground for amending the court order (see *Molnlycke AB and anor v Proctor and Gamble Limited and ors (No. 6)* [1993] FRS 154), I noted that there is a difference between a mistake as to the legal effect of a court order and a mistake in the use of words to express the court's manifest intention. In the former scenario, the court and the parties intended for the order to be made but did not realise its effect whereas in the latter case, the parties intended for a particular order to be made but this intention was not accurately captured in the wording of the court order. In the latter scenario, the error may be corrected by the Court pursuant to O 20 r 11 of the ROC. In the present case, contrary to the plaintiffs' submission, the *in camera* order had not been made due to a mistake or misunderstanding as to the legal effect of such an order. Rather, the court had clearly intended to make an order for the hearing to be heard otherwise than in open court pursuant to ss 22 and 23 of the IAA but had used the words "*in camera*" to express such an intention.

21 The plaintiffs had also sought to rely on the cases *Regina v Cripps, ex parte Muldoon* [1984] QB 686 and *Preston Banking Company v William Allsup & Sons* [1895] 1 Ch 141 in which the English courts had stated that a trial judge or a court cannot reconsider a final and regular decision once it has been perfected, even if it has been obtained by fraud. In my opinion, these cases did not assist the plaintiffs. The rationale behind the decisions in these cases is that a court should not be allowed to consider or vary his decisions once an order has been perfected. In the present case, an amendment of the Order of Court would accurately reflect the decision that was actually made in August 2007 and did not vary that decision in any way.

Decision on the publication of the Judgment

22 Having allowed the defendant's application to amend the Order of Court, the issue then became whether the Judgment should be published where the hearing had been held otherwise than in open court pursuant to ss 22 and 23 of the IAA.

23 Sections 22 and 23 of the IAA provide as follows:

> **Proceedings to be heard otherwise than in open court**

22. Proceedings under this Act in any court shall, on the application of any party to the proceedings, be heard otherwise than in open court.

Restrictions on reporting of proceedings heard otherwise than in open court

23. —(1) This section shall apply to proceedings under this Act in any court heard otherwise than in open court.

(2) A court hearing any proceedings to which this section applies shall, on the application of any party to the proceedings, give directions as to whether any and, if so, what information relating to the proceedings may be published.

(3) A court shall not give a direction under subsection (2) permitting information to be published unless —

(a) all parties to the proceedings agree that such information may be published; or

(b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.

(4) Notwithstanding subsection (3), where a court gives grounds of decision for a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, the court shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall —

(a) give directions as to the action that shall be taken to conceal that matter in those reports; and

(b) if it considers that a report published in accordance with directions given under paragraph (*a*) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

24 Section 23(3)(b), read with s 23(2), allowed for the publication of the Judgment, on the application of either party to the proceedings, if it was sufficiently redacted to conceal all matters that the parties reasonably wished to be concealed. In my opinion, the redacted version of the Judgment, which had been approved by both parties, adequately concealed the identities of the parties to the proceedings in Suit Y and other matters which the plaintiffs wished to remain confidential. Accordingly, I had the discretion to give directions concerning the redacting and publication of the redacted Judgment.

25 The plaintiffs submitted that I should not allow the Judgment to be published for three main reasons. First, the plaintiffs claimed that to allow publication of the Judgment would undermine the Court of Appeal's direction that the Court of Appeal's decision should remain confidential. The parties disagreed as to the directions given by the Court of Appeal with regards to the confidentiality of its decision. The plaintiffs claimed that the Court of Appeal had directed that its decision should be kept confidential with liberty to the parties to apply for directions if there was a change in circumstances. On the other hand, the defendant claimed that the Court of Appeal merely directed that the relevant application to publish the Court of Appeal's decision should first be filed and the Court of Appeal would then decide the matter upon hearing the application. Until then, the Court of Appeal's decision would

remain confidential. Regardless of the actual order made by the Court of Appeal with regards to publication of the Court of Appeal's decision, it suffices for me to note that the Court of Appeal has not specifically directed that there shall be no publication of the redacted Judgment (of the High Court).

26 Second, the plaintiffs argued against publication of the Judgment on the ground that since the Court of Appeal had not published its decision, publication of the High Court Judgment would lead to unhelpful speculation as to which of the grounds the Court of Appeal agreed or disagreed with. I agreed with the defendant that this should not be a concern militating against publication.

27 Third, the plaintiffs' claimed that publication of the Judgment would defeat the general principle in Singapore's arbitration law that arbitrations are not only private but also confidential. I agreed with the defendant that the confidentiality of the arbitration was sufficiently preserved by redacting the Judgment to be published.

28 In any event, section 23(4) of the IAA allows the publication of any judgment considered by the Court to be of "major legal interest" in accordance with directions given by the Court to conceal any matter reasonably desired by any party to the proceedings. The Judgment in issue considered the most recent jurisprudence on confidentiality in arbitration, including the recent English Court of Appeal decision of *Emmott v Michael Wilson & Partners* [2008] EWCA Civ 184 ("*Emmott*"). The decision in *Emmott* had never been discussed by a Court in Singapore. The Judgment in issue contained a comprehensive discussion on the law of confidentiality in arbitration and set out the legal position on the implied obligation of confidentiality in arbitration. I took the view that the Judgment was of major legal interest and its publication after redacting was justified.

29 Even if I had dismissed the defendant's application to amend the Order of Court in Sum A such that the proceedings were indeed heard *in camera*, I disagreed with the plaintiffs' submissions that this would be an absolute bar to publication of the Judgment. The application in Sum B for the confidentiality of the proceedings was granted pursuant to s 22 of the IAA. The plaintiffs submitted that regardless of whether the *in camera* order was made under s 22 of the IAA or s 8 of the SCJA, the common law and O 42 r 2 of the ROC barred publication of the judgment. Order 42 rule 2 provides that:

> **Judgment in proceedings heard in camera**
>
> 2. Where proceedings are heard in camera pursuant to any written law, any judgment pronounced or delivered in such proceedings shall not be available for public inspection except that the Court may, on such terms as it may impose, allow an inspection of such judgment by, or a copy thereof to be furnished to, a person who is not a party to the proceedings.

The plaintiffs claimed that O 42 r 2 of the ROC applies specifically to proceedings heard *in camera* whilst s 23 of the IAA only imposes restrictions on the reporting of proceedings heard *otherwise than in open court*. The plaintiffs relied on the maxim *generalia specialibus non derogant* to argue that O 42 r 2 takes precedence over s23 of the IAA in the event that a hearing is held *in camera*. The plaintiffs also cited the cases of *Clibbery v Allan and anor* [2002] EWCA Civ 45 and *Department of Economics, Policy and Development of the City of Moscow and another v Bankers Trust Co and another* [2004] EWCA Civ 314 ("*Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co*"), as authority for the proposition that there should be no subsequent publication of information arising from proceedings heard in camera.

30 The maxim *generalia specialibus non derogant* provides that "where the literal meaning of a

general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to be dealt with by the specific provision rather than the later general one" (Francis Bennion, *Statutory interpretation: a code*, London: LexisNexis 2008, 5th Ed at p306). In my opinion, the maxim did not apply in the plaintiffs' favour in the present case. Section 23 of the IAA deals specifically with proceedings under the IAA whilst O 42 r 2 of the ROC deals generally with proceedings held *in camera*. Section 23 of the IAA cannot be construed as a general enactment vis-à-vis O 42 r 2 of the ROC on the issue of proceedings heard in camera. Section 23 of the IAA deals in detail with the situation where proceedings under the IAA are heard otherwise than in open court (including where the proceedings are heard *in camera*) and should be applied in the present case instead of the cases cited by the Appellant as listed in the preceding paragraph. Moreover, in *Department of Economics, Policy and Development of the City of Moscow v Bankers Trust Co*, the English Court of Appeal accepted that where judgment could be given without disclosing significant confidential information, the public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militated in favour of a public judgment, even though the hearing might have been in private. In the words of Mance LJ at [39]:

> Further, even though the hearing may have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this can be done without disclosing significant confidential information… Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners…

Even if the defendant had not applied to amend the Order of Court, I would agree with the defendant that s 23 of the IAA applied, instead of O 42 r 2 of the ROC, so that publication of the Judgment (with the appropriate redactions) may be ordered where the hearing was held *in camera* pursuant to an application granted on the basis of ss 22 and 23 of the IAA.

Conclusion

31 For the foregoing reasons, I allowed the defendant's application in Sum A to amend the Order of Court and ordered that the redacted version of the Judgment may be published. I further ordered that without the leave of the court, there shall be no disclosure of the unredacted Judgment and the identities of the persons, entities and matters anonymised in the redacted version of the Judgment. After hearing the parties on costs, I decided that there should be no order as to costs.