Ng Giok Oh & 3 Others v Sajjad Akhtar & 2 Others
[2002] SGHC 169

Case Number : OS 655/2002

Decision Date : 31 July 2002

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Glenn Cheng (Lee & Lee) for the first, second and fourth plaintiffs; Manjit Singh and Sree Govin Menon (Manjit & Partners) for the third plaintiff; Yip Weng (Shook Lin & Bok) for the first defendant; Lawrence Quahe and Yeo Yen Ping (Harry Elias Partnership) for the third defendant

Parties : —

Civil Procedure – Discovery of documents – Pre-action discovery – Whether notes or drafts of court assessors discoverable

Courts and Jurisdiction – Court judgments – Role of court assessors – Whether advice of court assessors open to scrutiny

essentially a technical expert for the judge to consult and takes no part in the judgment. What an assessor (as opposed to a court expert) says is not evidence upon which the parties are entitled to cross-examine. The use of an assessor is a privilege of the court and the privilege of the assessor is that his errors will only be exposed through the judgment, or else be buried with it. ([7] – [8])

CASE(S) REFERRED TO

Arensen v Casson Beckman Rutley & Co

[1975] 3 All ER 901 (refd)

Kuah Kok Kim v Ernst & Young

[1997] 1 SLR 169 (refd)

Richardson v Redpath, Brown & Co Ltd

[1944] AC 62 (folld)

Sutcliffe v Thackrah

[1974] AC 727

The Beryl

[1884] 9 PD 137 (folld)

Judgment

GROUNDS OF DECISION

1. This was an application for pre-action discovery. The plaintiffs in this Originating Summons were the second, third, fourth, and fifth defendants in Originating Summons No. 727 of 1996. By this present application the plaintiffs sought discovery of documents consisting of working drafts, draft

reports, correspondence, and attendance notes (including notes with the judge in Originating Summons No. 727 of 1996). The three defendants were all court appointed assessors (nominated by consent of all parties) in the Originating Summons 727 of 1996 proceedings where Mr. Haridass appeared for the plaintiffs and Mr. Wong Meng Meng appeared for the defendants in the Originating Summons No. 727 of 1996 proceedings. Mr. Wong has since been discharged and Mr. Cheng presently acts for three of the defendants, now the first, second, and fourth, plaintiffs in this Originating Summons No. 655 of 2002. Mr. Manjit Singh acts for the fifth plaintiff in Originating Summons No. 655 of 2002. Mr. Yip appeared for Mr. Sajjad Akhtar, the first defendant here, and one of the assessors in Originating Summons No. 727 of 1996. Mr. Quahe appeared for Mr. Philip Leow, the third defendant, who was also an assessor in Originating Summons No. 727 of 1996. Mr. Chee Keng Hoy, the second defendant here, also an assessor in Originating Summons No. 727 of 1996, was served in Malaysia but had not entered an appearance. The intended action against the three defendants, or any of them, according to counsel, is based on negligence. It will be necessary to refer to the historical background, namely the Originating Summons No. 727 of 1996 proceedings in order to appreciate what this application is about.

2. The plaintiffs in Originating Summons No. 727 of 1996 were essentially the Bajumi family (the Bajumis) from Indonesia. The defendants were essentially the Tan family (the Tans) in Singapore. The respective patriarchs of the Bajumis and Tans started off as good friends and business partners. Together they built up a successful business which, at the time of the Originating Summons No. 727 of 1996 proceedings, included a large rubber plantation in Indonesia, the Afro-Asia Building in Singapore, and a substantial investment in a public company called Ssangyong Cement Singapore Ltd. In the course of time, the divergent vision, and the size of the families severely tested the old Bajumi-Tan partnership and it buckled, resulting in litigation; initially with a winding-up petition, but eventually in Originating Summons No. 727 of 1996. It is not necessary for present purposes to set out all the details of the previous proceedings and I shall only set out the main ones such as are relevant for an understanding of the present Originating Summons.

3. When Originating Summons No. 727 of 1996 came up for hearing in April 1998 counsel for the parties informed the court (and I should mention for the present record that I was the judge who heard the Originating Summons No. 727 of 1996 proceedings) that the parties had reached an agreement to settle their dispute and to that end, have agreed on a formula. The general consensus was that all three assets, which I had mentioned above, were to be valued and the Bajumis would buy over the Tans' interests in the rubber plantation in Indonesia; and likewise, the Tans would buy over the Bajumis' interests in the Afro-Asia Building and Ssangyong Cement (S) Ltd's shares in Singapore. Consequently, the parties recorded a consent order which provided the mechanism and formula for the valuation of the assets, and thereafter, the valuation of the shares of the respective holding companies. This consent order was varied by consent in November 1999. For present purposes, it is sufficient to note that one of the keys in the formula envisaged in the April 1998 consent order was that the valuation of the assets must include a consideration of the market value on six specifically agreed dates in respect of the Ssangyong shares, and four specifically agreed dates in respect of the Afro-Asia Building. The significant variation in November 1999 was to qualify the formula by adding the words "if possible" to qualify the requirement of using the market value of those six and four given dates respectively. The parties could not eventually agree on the value of the assets using the formula that they had agreed. The discrepancy was far too great. The expert advising the Bajumis in respect of the Ssangyong shares valued the shares at S$3.34 a share, and the Afro-Asia Building at about S$66m. The expert advising the Tans was of the view that the sums should be S$1.03 and S$37m respectively. The disagreement over the value of the rubber plantation was even greater. The Bajumis say that it was worth US$66m. The Tans say it should be US$3.5m. The matter reverted to the court because of the impasse.

4. When the hearing commenced it was agreed between the parties that relevant assessors be appointed to assist the court in view of the complicated valuations that have to be carried out and evaluated. The parties specifically declined the alternative of engaging a court expert, preferring assessors. The first defendant was thus engaged jointly with the second defendant to assist the court as assessors in respect of the rubber plantation, and by himself in respect of the Ssangyong shares. The first defendant was also appointed jointly with the third defendant as assessors in respect of the Afro-Asia Building. The first defendant featured in all three assets because he was an accountant by training and the valuation of the three assets required an accounting input, Furthermore, he was also appointed by the parties under the April 1998 agreement as the "Independent Auditor" with the view of helping the parties to evaluate the share value of the holding companies. At the end of a difficult and complex proceedings, the court valued the Ssangyong shares at S3.4; the Afro-Asia Building at S$57,625,000; and the plantation at US17.54m. The parties were dissatisfied with the decision and appealed to the Court of Appeal. The appeal was not heard because the parties again agreed to settle out of court. This time, by consent, they set aside the judgment of the first instance court and agreed to sell all the assets by auction and divide the proceeds in the manner set out in the consent order before the Court of Appeal.

5. We may now revert to the application at hand. The plaintiffs' (essentially the Tans) stance is straightforward. It was put by Mr. Manjit in this way. The judge in Originating Summons No. 727 of 1996 (that would be me) was not technically trained and therefore could have arrived at a decision to value the assets by averaging the values of the six and four dates in respect of the Ssangyong shares and the Afro-Asia Building respectively, only by relying on the assessors' advice. That, of course, is not necessarily a correct conclusion, but I move on. They (the plaintiffs) are able to prove that it was not possible to value the assets in this way. The assessors were therefore wrong and negligent to have so advised the court. Mr. Cheng further affirm that the plaintiffs already have an accrued cause of action in negligence but believe that they will uncover others if the discovery application is granted.

6. It must not be forgotten that the six and four dates were agreed by the parties. The only variation was that they subsequently added the words "if possible" to the relevant term. Fundamentally, the dispute over the valuations arose because the Bajumis believe that it was possible to apply the said dates, but the Tans believe that it was not. The judge of first instance agreed with the submissions of counsel for the Bajumis on this point. The assessors were at hand to assist him, but ultimately, the judge must form his own view. No court will allow any party to take over and make decisions for it. The court may, of course, adopt part, or substantially, or even entirely, the submission of one side. It may do this in respect of an issue or part of an issue, or even the entire case. The assessors take no part in the judgment. As Brett MR held in *The Beryl* [1884] 9 PD 137:

> "The assessors who assist the judge take no part in the judgment whatever; they are not responsible for it, and have nothing to do with it."

They only advise and it is for the judge to decide how much of that advice should be accepted. The issues of the case are decided upon the responsibility of the judge, and upon the evidence before him, and, as Brett MR said, "upon his view of the evidence". The advice of a court's assessor is not an appendage of the court's judgment; and only the judgment is directly subject to scrutiny in the appeal court, the advice of the assessor only obliquely so. The use of an assessor is a privilege of the court. And the privilege of the assessor is that his errors will only be exposed through the judgment, or else be buried with it.

7. What an assessor (as opposed to a court expert) says is not even evidence upon which the

parties are entitled to cross-examine. As Viscount Simon in *Richardson v Redpath, Brown & Co Ltd* [1944] AC 62, 70 reminds us, no one is to treat the assessor as an "unsworn witness in the special confidence of the court". He is only an expert for the judge to consult. "The judge may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or as to the extent of the difference between apparently contradictory conclusions in the expert field." Apart from the technical nature of the subject of valuation, it was because the partisan expert opinion on both sides in the Originating Summons No. 727 of 1996 proceedings that necessitated the appointment of the present defendants as court assessors. Hence, in my view, it is doubtful whether their notes or drafts are discoverable at all; certainly not under the circumstances of this case, and under an application for pre-action discovery. Pre-action discovery is not an instrument for private detectives snooping for action. If, as Mr. Cheng conceded, the cause of action had already accrued, then the plaintiffs ought to commence the writ action and proceed to discovery in the usual course. I would also adopt what was said by Lai Kew Chai J in the Court of Appeal in *Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169, 181 "The court's duty is only to ensure that the application was not frivolous or speculative or that the applicants were on a fishing expedition". In this case, I will reserve any comment as to whether the application is frivolous or speculative merely to avoid an unnecessary dispute over the plaintiffs' motives. That aspect can be more appropriately dealt with elsewhere; but I am bound to at least express my view that even neutrally perceived, this application does appear to be a "fishing expedition". In view of the special circumstances and facts of this case, I would declare a "No Fishing Zone" until the usual discovery process can take place and the application is made again.

8. Finally, although this is a pre-action discovery application, it is also necessary to consider whether there is indeed any cause of action against the assessors. Even if it is assumed that the assessors had given wrong or negligent advice, and that that advice was accepted or adopted by the court in its entirety (assuming, for the moment, that it would be wrong to do that), what damage was there in this case when the 'wrong' judgment had been set aside (by consent)? I am not making any pronouncement as to the undesirability on grounds of public policy to allow such action against the assessors and shall leave that to the more appropriate forum since the only issue before me is whether a pre-action discovery order ought to be made on the facts of this case. Mr. Manjit referred to a dicta by Lord Kibrandon and Lord Fraser in *Arensen v Casson Beckman Rutley & Co* [1975] 3 All ER 901, 918 for the proposition that a court assessor should not be immune from suit if no such immunity is granted to an arbitrator. Since this case was brought up in submission, I shall only say that it is not helpful in the present application. First, the dicta was made by a minority of the Law Lords, and it will be seen that Lord Kilbrandon's poser that an arbitrator could still get immunity by asking for it from the parties who appointed him, Lord Salmon disagrees with the wisdom of that approach. It will also be useful to remember that in Lord Kilbrandon's analysis, an arbitrator ought to be liable to suit because he has held himself out as a man with special skills to assist the parties who appoint him. Therefore, it follows, that he should be treated as any other such professional. Finally, the facts of that case, as well as *Sutcliffe v Thackrah* [1974] AC 727, upon which Lord Kilbrandon paid homage, are entirely different. They concern the question of an auditor who valued the shares of a company knowing that his valuation was being relied on by the parties fighting over the shares. And in *Sutcliffe*, the defendants were appointed as architects who negligently over-certified payments to the builder. To rely on these authorities in the present application is, borrowing Lord Simon's phrase, if I may, to "start the argument from the wrong place and arrive at an impossible place".

9. For the reasons above, the application was dismissed. I have also ordered that the separate Originating Summons taken out by the first defendant for payment of his costs be heard separately. I ordered that the costs of this application be paid by the plaintiffs to the first defendant in the sum of $2,00 and to the third defendant in the sum of $8,000. The third defendant had raised a preliminary objection to Mr. Manjit Singh acting for any of the plaintiffs by reason of a conflict of duties. I ruled that that should be a matter of an inquiry elsewhere. I mention this only because Mr. Manjit informed

me that the third defendant refused to serve his papers on Mr. Manjit's firm because of the objection that he was not entitled to act for the third plaintiff. I do not think that that is right. As long as he is the solicitor on record, all papers ought to be served on him.

Sgd:

Choo Han Teck
Judicial Commissioner