Lee Ngiap Pheng Tony *v* Cheong Ming Kiat (Zhang Minjie) (trading as Autohomme Automobiles)
[2010] SGHC 216

Case Number	: DC Suit No 501 of 2002; RAS51 of 2010
Decision Date	: 03 August 2010
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Parwani (Parwani & Company) for the Defendant; Claire Nazar (Kalpanath & Company) for the Plaintiff
Parties	: Lee Ngiap Pheng Tony — Cheong Ming Kiat (Zhang Minjie) (trading as Autohomme Automobiles)

Civil procedure

3 August 2010

Tay Yong Kwang J:

Introduction

1 The Defendant, Cheong Ming Kiat (Zhang Minjie) t/a Autohomme Automobiles, applied by way of Summons 21202/2009 ("the Summons") to set aside a judgment entered against him by the Plaintiff, Tony Lee Ngiap Pheng, after a hearing some seven years ago on 30 January 2003. The Defendant also sought to have the action restored for trial. District Judge Leslie Chew (the "DJ") dismissed the Defendant's application and awarded the Plaintiff costs of $2,000 (inclusive of disbursements). The Defendant appealed to the High Court against the DJ's decision. I dismissed the appeal with costs.

Background

2 In February 2001, the Defendant set up a sole-proprietorship which dealt with the purchase and sale of second hand cars ("the business"). The Plaintiff approached the Defendant and suggested that they enter into a partnership. The Defendant agreed and the Plaintiff was made an equal partner in April 2001.

3 In the middle of 2001, the Plaintiff was arrested on a drug related charge. As a result, his name had to be removed from the partnership to prevent the licence granted to the business from being revoked.

4 According to the Defendant, the attack on the World Trade Centre in New York in September 2001 affected the business adversely. Matters were compounded when the Plaintiff had to serve time in prison. It was therefore agreed that the Plaintiff would cease to be a partner of the business as from 1 November 2001. However, the terms for the parting of ways were disputed.

5 The Plaintiff contended that despite the depressed market condition, the Defendant agreed to repay him the amount that he had put into the business with interest at 6.5% per annum. Thus, he asserted that he was entitled to a total of $133,482.02. In addition, the Plaintiff claimed that the

Defendant had made unauthorized withdrawals from the partnership assets amounting to $215,170.53 over a period of seven months from 1 April 2001 to 30 October 2001. Accordingly, the Plaintiff argued that he was entitled to half this amount which is $107,585.26. The Plaintiff therefore claimed the sum of $241,067.28 (comprising $133,482.02 and $107,585.26) ("the sum") from the Defendant. As the Defendant refused to pay the sum to the Plaintiff, the Plaintiff commenced this action on 2 February 2002.

6 The Defendant's version of events was totally different. According to him, due to bad market conditions, the Plaintiff and he agreed to end the partnership on the basis that the Plaintiff would forgo his capital investment of slightly over $100,000.

7 At the commencement of the trial on 30 January 2003 in a district court, the Defendant did not turn up but his counsel (not the present solicitors) was present. His counsel informed the court that he had no instructions to defend the case but was still on record as counsel for the Defendant. He did not ask the Plaintiff and his three witnesses any questions during cross-examination. The Defendant's counsel also offered no witness and no submissions at the conclusion of the Plaintiff's case. On the same day, the Plaintiff obtained judgment against the Defendant for the sum with interest at 6% per annum from 5 February 2000 to the date of judgment. The court also awarded costs of $13,000 plus reasonable disbursements to the Plaintiff ("the 2003 judgment").

8 The Plaintiff did not attempt to enforce the 2003 judgment. This was apparently because the Defendant was then in a poor financial state. When the Defendant's financial situation improved markedly over the years, the Plaintiff took action in 2009 to execute the 2003 judgment. In response, the Defendant filed the Summons to set aside the 2003 judgment.

9 On 25 March 2010, the Summons was heard. As mentioned above, the DJ dismissed the Defendant's application.

10 On 1 April 2010, the Defendant filed notice of appeal against the DJ's decision and the appeal came up before me for hearing.

The DJ's decision

11 The DJ held that the action had not been decided on its merits. He took the view that the 2003 judgment was given pursuant to O 35 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)("the Rules"). However, he noted that by virtue of O 35 r 2(2) of the Rules, an application to set aside the judgment must be made within 14 days. In this case, the application to set aside the 2003 judgment was made on 17 December 2009, almost seven years after the 2003 judgment.

12 The DJ stressed that the court's predominant concerns in setting aside a judgment entered in default under O 35 of the Rules were the reasons for the defendant's absence from the trial and his delay in applying to set the judgment aside rather than the merits of the case. The factors that he took into account included the issue of prejudice to the other party and the prospects of success on the part of the Defendant if a retrial was ordered. The DJ found that the Defendant had no good and valid reasons to explain his absence from the trial in 2003 and his long inaction in not applying to set aside the 2003 judgment. He therefore dismissed the Defendant's application to set aside the 2003 judgment.

The appeal

13 Order 35 r 1(2) of the Rules provides:

(2) If, when the trial of an action is called on, one party does not appear, the Judge may proceed with the trial of the action or any counterclaim in the absence of that party, or may without trial give judgment or dismiss the action, or make any other order as he thinks fit.

O 35 r 2 goes on to state that:

(1) Any judgment or order made under Rule 1 may be set aside by the Court on the application of any party on such terms as the Court thinks just.

(2) Unless the Court otherwise orders, an application under this Rule must be made within 14 days after the date of the judgment or order.

The words "Unless the Court otherwise orders" in O 35 r 2(2) were inserted on 1 January 2010. The Summons here was taken out in December 2009 but nothing turns on this as the said words were inserted for clarification rather than to change the procedure under this rule.

14 The Defendant contended that the 2003 judgment had not been obtained on the merits of the case as he was not present at the trial and his counsel did not take part in the proceedings. He asserted that this was clear from the Notes of Evidence ("NE") of the hearing which indicated that his counsel did not cross-examine the Plaintiff and his witnesses, who merely appeared in the witness box to confirm the truth of the contents of their affidavits of evidence in chief ("AEIC").

15 In contrast, the Plaintiff, who pointed out that the Defendant's counsel had made no attempt to explain to the court why his client had absented himself from the trial, asserted that the NE clearly showed that the trial judge did proceed with the trial and that the merits of the case were considered. He pointed out that:

(a) The Defendant's counsel (not his present solicitors) was present at trial;

(b) The Defendant's counsel informed the trial judge that he had no instructions to defend the case;

(c) The Defendant's counsel informed the trial judge that he wanted to cross-examine the Plaintiff's witnesses as he had not been discharged as Defence counsel;

(d) The Plaintiff and his witnesses were called to the witness stand and offered for cross-examination but no questions were asked by the Defendant's counsel.

16 In my view, the Plaintiff's position is the correct one. The trial judge did proceed with the trial in accordance with O 35 r 1(2) of the Rules. After all, the truth of the contents of the AEICs of the Plaintiff and his three witnesses was confirmed and the said AEICs were admitted. The Defence counsel was also present and had the opportunity to cross-examine the Plaintiff and his witnesses but chose not to do so despite his earlier indications to the trial judge. In any event, whether or not the

trial proceeded makes no material difference to the outcome as any application to set aside the judgment must still be made within 14 days after the date of the judgment.

17 In determining whether a judgment under O 35 of the Rules should be set aside, the decision of the Court of Appeal in *Su Sh-Hsyu v Wee Yue Che* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*") is instructive. In that case, the Court of Appeal stressed at [41] that two broadly different categories of applications involving the setting aside of judgments must be recognised. The first concerns judgment given in default of appearance or pleadings or discovery and the second concerns judgment given after a trial, albeit in the absence of the party who later applies to set it aside. With regard to the second category, which is applicable in the present case, the Court of Appeal explained at [44]:

> In contrast, where judgment has been entered after a trial in the defendant's absence, the predominant consideration in deciding whether to set aside the judgment is the reason for the defendant's absence. In [*Shocked v Goldschmidt* [1998] 1 All ER 372], Legatt LJ itemised (at 381) the other relevant factors that the court should take into consideration:
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> (a) prejudice - whether the successful party would be prejudiced by the judgment being set aside, especially if the prejudice was irremediable by an order of costs;
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> (b) applicant's delay - whether there was any undue delay by the absent party in applying to set aside the judgment, especially if during the period of delay the successful party acted on the judgment, or third parties acquired rights by reference to it;
>
> (c) whether complete retrial required - whether the setting aside of a judgment would entail a complete retrial on matters of fact which have already been investigated by the court;
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> (d) prospects of success - whether the applicant enjoyed a real prospect of success; and
>
> (e) public interest - whether the public interest in finality in litigation would be compromised.
>
> To these broad-ranging factors we would also add the overriding consideration of whether there is a likelihood that a real miscarriage of justice has occurred.
>
> [emphasis in original]

As for the predominant consideration, namely the reason for the Defendant's absence, in *Su Sh-Hsyu*, the Court of Appeal stated at [48] that there could be wholly innocent defendants, such as those who had been genuinely misled by a court official into thinking that their attendance was unnecessary: see *Grimshaw v Dunbar* [1953] 1 QB 408. However, in the case of persons, such as the Defendant in this case, who deliberately decided not to attend the trial, the Court of Appeal noted at [49] that the courts have generally been unforgiving.

18 In the present case, the Defendant said that he was absent from the trial in 2003 because he was being "hounded by creditors", he "did not think that the trial would be fruitful" without auditing the accounts and he "did not fully appreciate the necessity for the trial attendance". The Defendant claimed that on hindsight, he realised that it was his mistake to absent himself from the trial. Undoubtedly, these reasons were not valid to explain his deliberate absence from the trial. A party cannot be allowed to absent himself from trial simply because he is facing financial pressure or assumes that the trial would not be fruitful. Moreover, being represented by a solicitor at the material time, it was highly unlikely that the Defendant was unaware of the consequences of his non-appearance at the trial.

19 The Plaintiff pointed out that there would be great prejudice to him if a re-trial is ordered and that such prejudice cannot be compensated by costs. He said that it would be difficult to locate his witnesses for a fresh trial after all these years and that his then wife, who was a key witness at the trial, would not be willing to testify on his behalf anymore as they have divorced. The Plaintiff also rightly argued that the documentary evidence relevant to the trial would have probably been destroyed given that the matter concluded some seven years ago.

20 There can be no argument that the Defendant's delay of seven years is a long delay by any standards. In his affidavit dated 12 January 2010, the Defendant stated that the reason for his delayed application was as follows (at paragraph 60):

> After the judgement, I did not do anything as the Plaintiff did not take any steps against me either. I was led to believe that he himself knew that the claim was false, otherwise he would have pursued it earlier with much vigour.

21 The Defendant's excuse is unacceptable. Even if the Plaintiff has delayed enforcing the 2003 judgment, the fact remains that by virtue of O 35 r 2(2) of the Rules, the Defendant's application to set the judgment aside must be made within 14 days. Of course, in the case of a judgment where six years or more have elapsed since the date of the judgment, the party enforcing it is required by O 46 r 2(1)(a) of the Rules to obtain the leave of the Court to issue a writ of execution to enforce the judgment. The Defendant made no submissions about this and I therefore assumed there is no issue about this here. The Plaintiff had good reasons to bide his time – the Defendant was in no position to pay up on the 2003 judgment until recently and it would therefore have been foolish of the Plaintiff to incur more costs in fruitless execution.

22 The Defendant relied on *Su Sh-Hsyu* to support his contention that the 2003 judgment should be set aside but that case did not help him at all. In that case, the respondent claimed that the appellant had not paid for shares sold by him to her in Shanghai. The appellant's case was that the respondent had requested payment be made to a specified account of another person with the Standard Chartered Bank ("SCB") in Singapore and had signed on the SCB slip to confirm his instructions. However, the respondent denied having signed the SCB slip and claimed that he did not know that other person to whose SCB account the appellant had transferred the money for the shares. On the morning of the trial, the appellant's counsel applied for an adjournment on the ground that the appellant and two of her witnesses had to attend last-minute meetings in Shanghai regarding a university with which they were involved. The trial judge proceeded with the trial in the appellant's absence and entered judgment against her for $414,200 on 6 July 2006. On 20 July 2006, the appellant applied to set aside the judgment. Apart from the fact that the appellant had applied to set aside the judgment within the 14 days' deadline in O 35 r 2(2) of the Rules, what swung the balance in the appellant's favour was that she had obtained a report from the Health Sciences Authority ("HSA"), which concluded that the respondent's signature on the SCB slip was genuine. The Court of Appeal accepted at [63] that the appellant's decision not to attend trial was wholly deliberate in nature and could not be countenanced. However, the Court pointed out at [64] that an "exceptional feature" in this case was the real possibility that Respondent had attained a judgment through fraud in light of the HSA report. In those circumstances, the Court of Appeal allowed the appellant's application to adduce the fresh evidence from the HSA, set aside the judgment and ordered a fresh trial.

23 The present case is wholly distinguishable from *Su Sh-Hsyu*. No allegation of fraud has been raised so as to constitute an exceptional circumstance that may be taken into account in determining whether the 2003 judgment should be set aside. Furthermore, unlike the appellant in *Su Sh-Hsyu*, who applied to set the judgment within 14 days, the Defendant in the present case took almost seven

years to do so. It is noteworthy that despite the possibility of fraud and the fact that the application to set aside the judgment had been made on time, the Court of Appeal said at [78] that the exceptional circumstances only "marginally" tilted the balance in favour of setting aside the judgment. In the present case, with a delay of almost seven years and no allegation of fraud, there is no reason why the 2003 judgment should be set aside. The Defendant is merely seeking to do in 2010 what he should have done in 2003, that is, turn up and defend the case brought against him. He has compounded his difficulties by letting the 2003 judgment against him stand on record all these years. In my view, there would be no miscarriage of justice if the Defendant's application to set aside the 2003 judgment is not allowed. Instead, there would be serious prejudice to the Plaintiff as he is now unlikely to be able to muster the evidence for his claim.

Conclusion

24 I therefore dismissed the Defendant's appeal and awarded the Plaintiff costs of $2,000 and reasonable disbursements.

Appeal to the Court of Appeal

25 The Defendant has appealed to the Court of Appeal against my decision. The 2003 judgment was for $241,067.28 which is below the threshold of $250,000 for an appeal provided in s 34(2)(a) of the Supreme Court of Judicature Act. When I was notified of the notice of appeal, I informed the registry to ask the Defendant's solicitors whether leave to appeal is necessary here and, if so, whether such leave has been obtained. They replied that they were of the view that leave is not required.

26 In response to the Defendant's solicitors' letter, the Plaintiff's solicitors by their letter of 8 July 2010 pointed out that the Court of Appeal held in *Virtual Map (Singapore) Pte Ltd v Singapore Land Authority and another application* [2009] 2 SLR(R) 558 that non-contractual interest and costs are not to be taken into account for the purpose of determining whether the threshold of $250,000 for an appeal to the Court of Appeal has been met as these were merely consequential matters.

27 In their further letter of 12 July 2010, the Defendant's solicitors stated:

> We wish to highlight that our present appeal to the Court of Appeal does not arise from an appeal against the judgment of [the trial judge] made on 30 January 2003.
>
> Our present application stems from the decision of [the DJ] made on 25 March 2010 in refusing to set aside the default Judgment of [the trial judge] and ordering a retrial of the matter. The value of the Judgment that [the DJ] was asked to set aside exceeded the sum of $250,000.
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> In the premises, we are of the respectful view that no leave pursuant to section 34(2)(a) is required.