Tang Da-Yan *v* Bar None (S) Pte Ltd (Refine Construction Pte Ltd, third party) [2011] SGHC 49

Case Number	: Suit No 168 of 2010 (Summons in Chambers No 279 of 2011)
Decision Date	: 03 March 2011
Tribunal/Court	: High Court
Coram	: Joel Chen AR
Counsel Name(s)	: Nagaraja S Maniam and Shelley Lim (M Rama Law Corporation) for the defendant; Adrian Ee (Ramdas & Wong) for the third party.
Parties	: Tang Da-Yan — Bar None (S) Pte Ltd (Refine Construction Pte Ltd, third party)

Civil Procedure

3 March 2011 Judgment reserved.

Joel Chen AR:

Introduction

1 This was an application by the third party to strike out the defendant's statement of claim against it on the basis that the material evidence relating to their dispute has been destroyed.

The facts

2 The defendant was at all material times the occupier of premises situated at the basement of Marriott Hotel ("the Premises"), where it carried on business as a bar and pub. Sometime in February 2003, the defendant engaged the third party contractor to carry out renovation works to the Premises. Part of the renovation works included the installation of wall tiles which, apparently, had been provided to the third party by the defendant.

3 On 30 March 2007, the plaintiff was seated in the Premises as a customer when some tiles fell from a feature wall located next to him. One of the tiles struck him on the head, causing injury. The defendant informed its insurers of the accident shortly thereafter and the insurer appointed a loss adjuster to investigate the matter. While this was going on, the insurers were liaising with the plaintiff's solicitors with a view to settling the matter out of court.

4 It is not disputed that during this period, neither the defendant nor its insurer had identified the third party as being potentially liable to indemnify the defendant against the plaintiff's claim. The loss adjuster deposed in his affidavit that he was informed by the defendant's assistant manager, one Shaun Sebastian Das ("Das"), that the wall where the tiles had fallen from had been installed some three years prior to the accident. However, Das had also informed the loss adjuster that he could not recall the name of the renovation contractor who had installed the tiles. The loss adjuster took a few photographs of the wall and the spaces where the tiles fell off, but no detailed inspection was ever carried out. It is unknown what eventually happened to the dislodged tiles.

5 Subsequently, in September 2007, the defendant engaged a separate contractor to renovate the Premises, which resulted in all traces of the feature wall and the remaining tiles being obliterated.

6 The plaintiff was unable to come to a settlement with the defendant's insurers and accordingly filed the present suit in March 2010. The insurers sought legal advice and realised for the first time that the defendant might have a claim against the contractor who installed the fallen tiles. It was at this stage where the defendant's former managing director, one Marco De Miranda ("Miranda"), managed to identify the third party as the contractor in question. The defendant thus commenced third party proceedings in July 2010. In its statement of claim dated 27 September 2010, the defendant pleaded that the plaintiff's injuries were caused by the third party's negligence and/or breach of contract in installing the fallen tiles, and claimed an indemnity from the third party in respect of any sums it might be held liable to pay or might agree to pay the plaintiff.

7 The third party served interrogatories and sought further and better particulars from the defendant, but obtained little information relating to the state of the Premises when the accident occurred. The defendant stated that it neither knew what materials the tiles were made from, nor the manner in which they were installed. Apparently, both the defendant and the third party had also wanted to appoint an expert to conduct a joint inspection of the Premises (after the latest renovation in September 2007) to see if there was any leftover evidence. However, the expert informed them that there was nothing he could do as the Premises had been completely changed. The third party then brought this application, contending that the defendant's statement of claim should be struck out because the material evidence relating to the dispute had been destroyed. The plaintiff is not involved in this application.

Defendant's lack of evidence

8 Counsel for the third party, Mr Adrian Ee, first submitted that the defendant had insufficient evidence to prove its claim against the third party and thus its action should be struck out. I am unable to accept this argument because whether the defendant has sufficient evidence to establish its claim is a question for the trial judge alone to determine.

Third party's lack of evidence

9 Mr Ee next submitted that since the Premises had been renovated after the accident, the third party has been left with virtually no evidence with which to defend itself. Mr Ee highlighted that the third party was only alerted to the accident after the current proceedings were commenced in 2010, three years after the accident took place. Since the Premises had already been renovated, the third party never had the opportunity to inspect the wall where the tiles had fallen off. As a result, the third party has no way of knowing whether the fallen tiles had been installed properly, whether they had been dislodged by external factors or not, or whether they were even the same tiles it had installed in 2003. Mr Ee concluded that in the circumstances, the third party had been severely prejudiced by the defendant's reckless destruction of evidence and a fair trial would not be possible.

10 Counsel for the defendant, Mr Nagaraja Maniam, accepted that the third party was in a difficult position but stressed that the defendant had acted innocently throughout. He explained that after the accident in 2007, the defendant had left the matter to its insurers and the loss adjuster. Nobody anticipated legal proceedings at the time and the loss adjuster was unable to find out then that the third party had been the contractor responsible for installing the fallen tiles. Mr Maniam also drew my attention to the affidavit of the defendant's former managing director Miranda, which stated that the September 2007 renovation to the Premises had been planned even before the accident occurred. The destruction of evidence was therefore not deliberate or even reckless. Mr Maniam concluded by submitting that the court can only order a striking out where the destruction of evidence was deliberate or wilful.

The law

11 It is established law that where a party has deliberately destroyed relevant evidence to prevent another party from using it against him at trial, the court may make such order as it thinks just, including an order that the defaulting party's action be dismissed or, as the case may be, an order that his defence be struck out and judgment entered accordingly: see *Alliance Management SA v Pendleton Lane P* [2008] 4 SLR(R) 1; *K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254 ("*K Solutions*"). The justification behind ordering a striking out in such circumstances is that the defaulting party's breach of his discovery obligations has either caused prejudice to the other party which cannot be compensated by costs, and/or amounts to such a disregard of the rules and orders of the court so as to constitute an abuse of process.

12 A far more difficult question arises where the destruction of evidence was done for a purpose other than to frustrate legal proceedings because there is no general duty on a party to preserve evidence when litigation is not ongoing or anticipated. In *K Solutions*, Woo Bih Li J implicitly accepted that a striking out was still possible even in these situations, although the learned judge also cautioned at [130]:

> ...it must be rare for a court to order a striking out if the destruction is entirely innocent. The cases in between of negligent or reckless conduct resulting in destruction will be more difficult...

13 I am of the view that the question of whether to strike out a claim or defence on the basis of destruction of evidence essentially boils down to a balancing exercise where the court will consider both the culpability of the party who destroyed the evidence, and the prejudice caused by such destruction to the other party. As a starting point, I would say that if the destruction of evidence was not done deliberately or wilfully, then the other party must show at the minimum that he has suffered such extreme prejudice that he would not have a fair trial without the aid of such evidence. This is because, where evidence was not destroyed deliberately or wilfully, the defaulting party would not have breached its discovery obligations and the only principled basis for ordering a striking out in such circumstances is that the court would otherwise be forcing substantive injustice upon the other party by making him go to an unfair trial.

14 Even if the innocent party can show that he would not get a fair trial without the aid of the destroyed evidence, the court is still faced with the unenviable task of choosing which of the two parties to deprive of a fair trial because that is the exact effect of striking out the defaulting party's claim or defence. This is where the relative conduct of the parties will come in as part of the court's balancing exercise. With these principles in mind, I turn to the present facts.

The defendant's culpability

15 I am of the view that as between the parties to this application, the defendant was certainly the party more at fault as it should have informed the third party about its potential liability for the accident before renovating the Premises in September 2007. Although the defendant's assistant manager Das could not identify the third party as the contractor responsible for the earlier renovations, its former managing director Miranda had this information. Since Miranda only left the defendant's employ in 2008, the defendant could and should have pinpointed the third party as a potential contributory early on.

16 Mr Maniam's explanation that the defendant's insurer was in settlement talks with the plaintiff at the time was not good enough. However the defendant wanted to handle the matter *vis-à-vis* the plaintiff did not change the fact that it should have realised from the start that the third party would

be potentially liable to indemnify it for any judgment or settlement sums the defendant might be liable to pay to the plaintiff.

17 Nevertheless, even if the defendant was the party more at fault, it was at worst only careless or negligent. The destruction of evidence was certainly not wilful or reckless in this case. I accept Mr Maniam's submission that the defendant had acted in good faith throughout.

Prejudice to the third party

18 I am further of the view that the prejudice caused by the destruction of evidence was not so extreme such that it was no longer possible for the third party to have a fair trial. Although it is true that the third party now has minimal evidence due to the renovation to the Premises, it must be remembered that the destroyed evidence was just as relevant to the defendant as it was to the third party. Ultimately, it is the defendant who bears the burden of proof at trial that the tiles fell off the wall due to the third party's negligence in installing them, and not for other reasons such as being knocked loose or being inherently defective (as I noted earlier, the tiles were apparently provided by the defendant and not the third party). As such, the defendant itself would encounter considerable difficulty in proving its claim without the destroyed evidence and this was implicitly accepted by Mr Ee in his first submission.

19 Since the relative prejudice caused by the renovation to the Premises was not overwhelmingly one-sided against the third party, I am of the view that it would still be able to have the benefit of a fair trial even though much of the available evidence has already been destroyed. Ultimately, it is for the trial judge to consider whatever little evidence is left and arrive at the appropriate findings accordingly. The situation might have been different if the defendant already had other strong evidence against the third party and the destroyed evidence was the latter's only serious hope of mounting a successful defence.

20 I accept that the trial judge might well eventually arrive at a completely different result than he or she would have if all the relevant evidence was before him or her. Unfortunately, the reality of litigation is that evidence does get lost or destroyed and the mere fact that both parties have very little to work with does not necessarily mean that a fair trial would not be possible. One analogy that can be drawn is that of two combatants entering an arena to do battle. If both combatants are armed or unarmed, it would be a fair fight between them even if the result in one scenario would have been different from the other. It is only where one combatant is armed and the other is not that a fair fight would not be possible. That is not the situation here.

21 Since the defendant's culpability in destroying the evidence was relatively minor, and the prejudice caused to the third party was not so extreme as to deprive it of a fair trial, I am of the view that a striking out order is not warranted.

Conclusion

22 For these reasons, the third party's application is dismissed. I will hear the parties on costs.