The "Melati"
[2004] SGCA 25

Case Number : CA 134/2003

Decision Date : 28 June 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Woo Bih Li J

Counsel Name(s) : Lim Tean and Probin Dass (Rajah and Tann) for appellants; Kenneth Lie and Chow Sy Hann (Joseph Tan Jude Benny) for respondents

Parties : —

Civil Procedure – Discontinuance – Without leave – Whether irregularly filed pleading amounting to "step or proceeding" – Order 21 r 2(6) Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Civil Procedure – Extension of time – Principles governing grant of extension of time for filing and serving Statement of Claim – Whether extension of time should be granted on facts

28 June 2004 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

1 This appeal raises a procedural matter of considerable importance to litigation lawyers. It relates to the construction of O 21 r 2(6) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the ROC") which provides for a regime of automatic discontinuance of an action in a certain specified circumstance. The appeal raises the question as to whether a statement of claim, which was filed and served out of time, should be regarded as a "step or proceeding" within the meaning of O 21 r 2(6) so as to preclude the application of the rule.

2 Another issue which the appeal raises is whether the court, on the facts of the case and in exercise of its discretion, should extend time to regularise the statement of claim which was filed and served out of time.

The facts

3 On 24 December 2000, a casualty occurred while the vessel, *Melati*, was on its voyage from Batam, Indonesia to Huangpu and Shanghai, China. Goods carried on board had to be salvaged. The shipowners, the defendants in the present action, declared general average. The cargo owners, who are the plaintiffs in the action, provided a general average bond and a salvage guarantee to the shipowners.

4 On 5 March 2002, the plaintiffs commenced *in rem* proceedings against the vessel *Melati*. The writ was served and the defendants entered appearance on 20 March 2002. However, no further step was taken by the plaintiffs until 18 March 2003 when a statement of claim was served on the defendants who duly objected to the service on the ground that it was served out of time and without the leave of the court. They took the view that the service could, therefore, be disregarded.

5 Obviously appreciating that the statement of claim served on 18 March 2003 might well be defective, the plaintiffs applied, on 4 April 2003, for an extension of time to serve the statement of claim. In the alternative, the plaintiffs applied for the action to be reinstated pursuant to O 21 r 2(8) of the ROC. On 24 April 2003, the assistant registrar refused the plaintiffs' application for an extension

of time to serve the statement of claim and ordered that the statement of claim filed on 18 March 2003 be struck out.

6 The plaintiffs appealed to the judge in chambers. Belinda Ang Saw Ean J held that although the statement of claim was filed and served out of time and without leave, and thus was an irregular step, it was nevertheless a "step" for the purposes of O 21 r 2(6). Ang J regularised the irregular step by extending the time for service of the statement of claim. She also ordered that the statement of claim filed and served on 18 March 2003 was to stand.

7 The delay in filing and serving the statement of claim on the part of the plaintiffs was caused by their decision to await the outcome of the salvors' arbitration which was then in progress in London. The plaintiffs wanted to be able to quantify the indemnity sought by them against the defendants when filing the statement of claim. While Ang J noted that this decision of the plaintiffs to wait might not have been justifiable, she felt that this failure in filing and serving the statement of claim within the period prescribed in O 18 r 1 of the ROC was only an irregularity, which was curable since it did not cause the defendants any real prejudice. Ang J explained at [16] and [17] of her judgment (reported at [2003] 4 SLR 575):

> The only prejudice raised by the defendants is that the defendants … would be deprived of a limitation defence under the Hague Rules. This is a circular form of argument. The defendants only have a limitation defence if the application to extend time is refused or if the action has been discontinued and consequently reinstatement is sought in either event. … On 18 March 2003, it made no difference at all to the defendants whether or not the statement of claim was served out of time and without leave since any which way the defence of time bar was not available.
>
> The grant of an order to cure the irregularity cannot be viewed as prejudicial to the defendants' interests. They still have the full opportunity to defend the action. On the other hand, a refusal of the time extension would for the plaintiffs mean an end to the action.

8 Ang J also added that this was not a case where there was a wholesale disregard of the rules of court. There had been no breach of any court order. Being dissatisfied with her decision, the defendants have appealed to us.

The appeal

9 The defendants argued that the object of O 21 r 2(6) is to ensure that every action instituted in court is conducted expeditiously and efficiently. This aim must be borne in mind when the court construes the meaning of the expression "step or proceeding" in O 21 r 2(6). In this light, an irregular step, such as a statement of claim filed and served out of time, should not and cannot be regarded as a "step or proceeding" within the meaning of the rule. In any event, in the circumstances of this case, particularly having regard to the long delay, the judge should not have regularised the position by granting an extension of time to enable the plaintiffs to serve the statement of claim out of time.

The meaning of "step or proceeding"

10 We agree with counsel for the defendants that the object of O 21 r 2(6) is to ensure that actions instituted in court should be proceeded with expeditiously and not be allowed to become dormant. Nevertheless, how the expression "step or proceeding" in the rule should be construed must necessarily be viewed in the light of the other rules in the ROC.

11 Under the previous rules of court, an action could be left hanging for a long time especially where both the plaintiff and the defendant were, for their own respective reasons, happy to let the action remain dormant. All that the plaintiff needed to do to bring a dormant action to life would be to give notice to the defendant that the plaintiff intended to prosecute the action.

12 Order 21 r 2(6) brought a dramatic change to all that. It was first introduced in 1996 and subsequently amended in 1999. It places the onus on the plaintiff to ensure that the action is not allowed to become dormant for more than a year. Under the scheme, the Registry need not allocate scarce manpower to police the management of cases. The plaintiff should monitor his action closely, failing which he runs the risk of the action being deemed discontinued.

13 The starting point in the consideration of how the expression "step or proceeding" should be construed, is O 18 r 1 which provides that the plaintiff shall serve his statement of claim within 14 days of appearance having been entered by the defendant. Order 18 r 21 provides that all pleadings must be filed with the Registry. Clearly, from both these rules, the statement of claim must also be filed within the said 14 days. It seems to us that O 18 r 1 emphasises service because while filing and serving need not be on the same day, service must still be effected within 14 days of appearance having been entered.

14 Next, O 19 r 1 provides that where the plaintiff fails to so serve his statement of claim, the defendant may apply to court to have the action dismissed. However, the defendant is not compelled to make the application. The option is his. No such application was made by the defendants in the present case.

15 While there is nothing in the ROC which provides that a step or proceeding which ought to be taken within a prescribed time may not be taken thereafter, quite clearly the proper procedure would have been for that party to apply to court for an extension of time to take that step or proceeding pursuant to O 3 r 4. The question that arises is whether a step taken out of time, and without leave, is a nullity or is only an irregularity. Counsel for the defendants did not contend that the filing of the statement of claim and its service on the defendants on 18 March 2003 were nullities. We think he is correct to regard the statement of claim served on the defendants as an irregularity and this is explicitly recognised in O 2 r 1(1) which reads:

> *Where*, in beginning or purporting to begin any proceedings or *at any stage in the course of* or in connection with *any proceedings*, there *has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules*, whether *in respect of time*, place, manner, form or content or in any other respect, *the failure shall be treated as an irregularity and shall not nullify the proceedings*, any step taken in the proceedings, or any document, judgment or order therein. [emphasis added]

16 The failure as regards the statement of claim, filed and served by the plaintiffs on the defendants on 18 March 2003, was in respect of time. Thus, pursuant to O 2 r 1(1), the step taken by the plaintiffs is accordingly only an irregularity, not a nullity.

17 It is common ground between the parties that what we are concerned with is whether the irregular filing and/or service of the statement of claim on 18 March 2003 is a "step" within the meaning of O 21 r 2(6). Neither O 21 r 2(6), nor any other rule in the ROC, defines this term. Some of the difficulties relating to the words "step" and "proceeding" are raised in the article entitled "Automatic Discontinuance under Order 21 Rule 2 – First Dormant, Then Dead …" by Ms Lim Hui Min, published at (2001) 13 SAcLJ 150. While there may be difficulties in determining whether some acts would constitute "steps" or "proceedings" within the meaning of O 21 r 2(6), there can be no doubt

that the filing of a statement of claim with the Registry is a "step" as it is clearly an act to move the action forward towards resolution.

18 The thrust of the defendants' argument here is that an irregular step should not be regarded as a "step" within the meaning of O 21 r 2(6). In this connection, references were made by counsel for the defendants to various policy statements made by the Minister for Law and the Chief Justice (in non-judicial contexts) in relation to the object of the scheme under the rule. The defendants averred that the court should not readily accept arguments which would have the effect of diluting the draconian effect of O 21 r 2(6). It was submitted that O 2 r 1 does not elevate an irregular "step" to the level of a proper and regular step.

19 At this juncture, it may be expedient to look at the manner in which the ROC deal with an irregularity. Order 2 r 1(2) reads:

> Subject to paragraph (3), *the Court may*, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, *set aside* either wholly or in part the proceedings in which the failure occurred, *any step taken in those proceedings* or any document, judgment or order therein or *exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.* [emphasis added]

20 The combined effect of O 2 r 1(1) and r 1(2) is that a step or proceeding, though taken out of time, is to be treated as regular unless set aside. There is effectively a presumption of validity in favour of the irregular step. As was held in *Metroinvest Ansalt v Commercial Union Assurance Co Ltd* [1985] 1 WLR 513 ("*Metroinvest Ansalt*"), an irregular order or proceeding continues to operate until it is successfully set aside. The initiative to have the irregular step set aside must be taken by the other party. Until that is done, and an order to the contrary is made by the court, the step or proceeding taken is valid. Thus, it follows that with the statement of claim being filed and served by the plaintiffs on the defendants on 18 March 2003, the period of one year prescribed by O 21 r 2(6) ceased to run as from that date. While it is true that the period 20 March 2002 to 18 March 2003 is just two days short of a year, the fact remains that the prescribed condition is not satisfied and so O 21 r 2(6) is not triggered. For the reasons alluded to later, an irregular step, unless and until it is set aside, is nevertheless a "step" for the purposes of O 21 r 2(6).

21 Before we turn to address the next issue, we ought to touch on another point canvassed by the parties. It would be recalled that O 18 r 1 lays down that service of the statement of claim must be effected within 14 days of appearance having been entered by the defendant. Order 21 r 2(6) refers to "any step or proceeding in the action … that appears from records maintained by the Court". In a fact situation like the present, where the filing and service of the statement of claim both occurred on the same day, it does not really matter whether it is the filing or the service of the statement of claim which is the "step" for the purposes of O 21 r 2(6). However, where the "filing" and "service" were not carried out on the same day, the consequences could be different, depending on whether it was the "filing" or "service" which constituted a step for the purposes of O 21 r 2(6).

22 Counsel for the defendants argued that the "filing" of a statement of claim could not be a "step" within the meaning of O 21 r 2(6). This was because a filing of the statement of claim *per se*, without service on the other party, would not move the case forward. And if "filing" alone sufficed to constitute a "step", then the plaintiff could simply file without serving it on the defendant, thus buying himself another 12 months to procrastinate. Thus, the object of O 21 r 2(6) could all too easily be circumvented.

23 On the other hand, there is the judgment of Prakash J in *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR 429, where she appears to have held that it was the "filing" and not the "service" which ought to be reckoned with. This was because the "service" of a writ (or in the present case, of a statement of claim) would not be "recorded in the court's record" and O 21 r 2(6) expressly provided that the "step" for the purposes of the rule should appear from the "records maintained by the Court".

24 While we appreciate the force of the argument of the defendants, we cannot ignore the explicit words of O 21 r 2(6) that the "step" must be one which appears from the records maintained by the court. Thus, we endorse the views expressed by Prakash J in *Moguntia-Est Epices*. Moreover, we think the argument that this interpretation would give rise to abuse is probably a little exaggerated. In our opinion, the cause for concern is more apparent than real. Take the example given by counsel for the defendants, of a plaintiff who, having filed his statement of claim, delayed serving it. In this situation, if the defendant were vigilant, as he should be, he would, upon the expiry of the 12-month period, have taken up with the plaintiff that the action had already been deemed discontinued under O 21 r 2(6) since he would have been unaware of the mere filing of the statement of claim. At that point, everything would have come to light and the plaintiff would have had to apply to court to obtain leave to serve the statement of claim out of time and he would have had to adequately explain why the pleading was not served at the time it was filed. If it appeared to the court that the filing without service was just a ploy to buy more time, the court would be entitled to refuse leave to serve the pleading out of time and to also strike out the pleadings already filed. The court has sufficient arsenal to deal with a party who abuses its process. We seriously doubt there would be many litigants who would deliberately take such a risk and put the court's patience to the test.

Exercise of discretion to regularise the service

25 We have, in [19] above, quoted O 2 r 1(2) which sets out the power of the court to deal with an irregular step. The rule does not prescribe the parameters as to how, or the circumstances under which, the discretion should be exercised. When the English equivalent of our O 2 r 1 was first introduced in England, Lord Denning MR said in *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at 735:

> This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.

26 In *Metroinvest Anstalt*, Cumming-Bruce LJ, in commenting on how the court should exercise its powers under O 2 r 1 (2), said (at 521) :

> I would say that in most cases the way in which the court exercises its powers under Ord 2 r 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Ord 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.

27 This view of Cumming-Bruce LJ was endorsed by a later Court of Appeal decision in *The Goldean Mariner* [1990] 2 Lloyd's Rep 215. Of course, we should remind ourselves of the caution uttered by Lloyd LJ in *The Goldean Mariner* (at 219) that:

> [T]hough prejudice is always a factor to be taken into account, absence of prejudice is by no

means conclusive in favour of the plaintiffs: see *Leal v Dunlop Bio-Processes*, where Lord Justice Stephenson said that though the defendants had suffered no prejudice, nevertheless the mistake was not an irregularity fit to be cured under O 2, r 1; see also *Metroinvest Ansalt v Commercial Union Assurance Co Ltd,* [1985] 1 WLR 513 at p 521, where Lord Justice Cumming-Bruce said that the discretion to set aside proceedings is not confined to cases where the defendant has suffered prejudice, although that will usually be so.

28 In *The Goldean Mariner,* some of the defendants were served with copies of the writ which were intended for different defendants, although each of the defendants so served was in fact named as a defendant. The English Court of Appeal, reversing the first instance judge, treated the defective service as an irregularity and did not set it aside. With respect to another defendant who was served with only a form of acknowledgment of service, again, the court (on this point by majority) refused to set aside the service. The rationale for the court's decision was that there was no real prejudice to the defendants.

29 Ang J quite rightly indicated that the issue here revolved round the question of whether the time for service of the statement of claim should be extended. She recognised that in each case, the tension was between the efficient administration of justice on the one hand and the effect the granting of relief would have on the parties on the other hand, but always bearing in mind that the paramount consideration was to ensure that justice was done between the parties. In coming to her conclusion that the plaintiffs were not sleeping on their claim, the judge alluded to the following circumstances (at [12]):

> The plaintiffs filed on 26 May 2003 an affidavit deposed by Matthew Robinson, a case handler with W K Webster Co Ltd who are claims recovery agents for the plaintiffs, to explain why it took the plaintiffs 11 months to serve the statement of claim. Mr Robinson explained that it was not unusual for parties to agree to solve the salvage claim before the main cargo claim. A protective writ was issued since the defendants refused their request to extend suit time. The salvage claim took some time to resolve. The salvors had problems getting up their claim. The salvors took their first step towards arbitration in October 2002. The arbitration fixed for hearing on 3 February 2003 was adjourned by consent to 7 February 2003. Eventually, the arbitration in London involving the bills of lading in this action was settled amongst the defendants as shipowners, salvors and the plaintiffs as cargo interests on 17 February 2003. After that, instructions were given to the lawyers in Singapore to prepare the statement of claim. It was served without thinking of obtaining leave of court or consent of the defendants under O 3 r 4(3).

30 As we have cited, in [7] above, Ang J also did not think that the irregular service caused any prejudice to the defendants. On the other hand, she felt that to refuse relief in the present case would be a disproportionately harsh response to the plaintiffs' failure to file and serve the statement of claim in a timely manner, as the plaintiffs would be forever precluded from pursuing their claim.

31 The defendants took issue with the judge's finding that the plaintiffs always had the intention to pursue their claim. They questioned how it could reasonably be found that there was such an intention where the other party did nothing for almost one whole year. What we find to be significant is the fact that, as soon as the arbitration proceedings were finally concluded in London, the plaintiffs forthwith filed and served their statement of claim. This corroborated their assertion that they were waiting for the final quantification so that the appropriate sum could be included in the statement of claim. Of course, they need not have waited. The fact is that, rightly or wrongly, they did. So, we do not accept the defendants' argument that the judge was wrong to have found that the plaintiffs had, at all times, the intention to pursue the action.

32 The defendants next contended that the approach adopted by the judge is out of sync with the modern thinking on court administration. They relied, in particular, on the following passage of Lord Woolf MR in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 2 All ER 181 at 191:

> In *Birkett v James* [[1978] AC 297] the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

33 They submitted that the court, in exercising its discretion to extend time, should look beyond the issue as to whether the other party would suffer any prejudice as a result of any extension to be granted.

34 There is no one test or criterion which can be decisive in answering the question of whether an extension of time should be granted. It will always be a balancing exercise involving a consideration of all relevant factors such as the nature of the act which was not fulfilled, the reason for the failure, the prejudice which an extension will cause and any other extenuating circumstances. If observing timelines is all important, from which there can be no deviation, the rules of court would not have provided for the possibility of the court granting an extension of time. In *The Mortgage Corporation Ltd v Sandoes* (1996) 141 SJ LB 30, the English Court of Appeal recognised the principle that the plaintiff should not ordinarily be denied an adjudication of his claim on its merits merely because of a procedural default, unless the default causes prejudice to the opposing party for which an award of costs is not adequate to compensate that party. However, it also recognised that this rule should not be applied rigidly. Otherwise, it would mean that a well-to-do plaintiff could flout the rules with impunity. Thus, the ultimate decision would depend on all the circumstances of the case. The facts must be sufficient to persuade the court that granting indulgence in favour of the party in default would not be out of place.

35 The defendants submitted that, in this case, there was a very blatant disregard by the plaintiffs of the timelines. They emphasised that they did not, in any way, induce the plaintiffs into not complying with the ROC. The fault was entirely that of the plaintiffs and the defendants could not be said to be seeking a tactical advantage from the failure of the plaintiffs to comply with the timelines.

36 While it cannot be denied that the plaintiffs were late by almost 11 and a half months in filing and serving the statement of claim, we also share Ang J's view that the delay was not because the plaintiffs had no serious intention to pursue the action. The plaintiffs and the defendants were both, together with the salvors, actively involved in the arbitration proceedings in London to determine the amount due to the salvors which, in turn, would have a direct bearing on what the plaintiffs were entitled to claim against the defendants. Even if the plaintiffs were to have filed a holding statement of claim in time in order to comply with the rules, it would probably not have been expedient for the action to proceed further before the arbitration was concluded. Thus, there would, in any case, have been a delay in bringing the action to trial. Of course, the correct thing which the plaintiffs should have done would have been to file an application to court to ask for an extension of time to file the statement of claim, before the time expired. They did not do that.

37 Even under the present rule of case management, it does not follow that every non-compliance should necessarily lead to the striking out of a claim or a defence. As indicated before, the entire circumstances must be carefully considered, including the nature of the step that should have been taken but was not, the reason for the non-compliance, the likelihood of prejudice to the other party, its effect on the due administration of justice and any other extenuating circumstances. A plaintiff should, except for sufficient grounds, have his claim adjudicated upon by the court on its merits and not be defeated by some non-compliance with procedural requirements. On the other hand, the situation involving the filing of a notice of appeal out of time should be distinguished: see *The Tokai Maru* [1998] 3 SLR 105 at [20] and [23]. Where a notice of appeal is involved, there is already an adjudication by the court and if a losing party is dissatisfied, he should file his notice of appeal within the prescribed time. The paramount consideration there is the need for finality.

38 For all the aforesaid reasons, we do not think the judge was in error in exercising her discretion to grant an extension of time and to regularise an otherwise defective service.

39 In the premises, we would dismiss the appeal with costs and with the usual consequential orders.