Khng Thian Huat and Another v Riduan bin Yusof and Another
[2004] SGHC 237

Case Number : Suit 929/2003

Decision Date : 21 October 2004

Tribunal/Court : High Court

Coram : V K Rajah JC

Counsel Name(s) : Hri Kumar, Tan Teck San Kelvin and Wong Chin Soon Wilson (Drew and Napier LLC) for plaintiffs; Mohamed Hashim and N Kanagavijayan (A Mohamed Hashim and Madelene Sng) for defendants

Parties : Khng Thian Huat; Choy Mei Har — Riduan bin Yusof; Sa'adiah binte Mohamed Shaffi

Civil Procedure – Costs – Principles – Proceedings not conclusively resulting in triumph for any party – Court's approach to assessment of costs in such circumstances – Whether issue-based approach to allocation of costs appropriate – Factors to consider – Order 59 rr 5, 6A Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Landlord and Tenant – Covenants – Failure to hand over property in same condition as at commencement of third tenancy – Whether tenant obliged to deliver property inclusive of alterations made to property during first and second tenancies

Landlord and Tenant – Creation of tenancy – Whether letter of intent sufficient acknowledgment and acceptance of existence of tenancy – Whether property being occupied purely on periodic basis – Whether tenants wrongfully holding over property

21 October 2004

V K Rajah JC:

1 Legal costs conventionally follow the event or in common parlance, the result of the proceedings. However from time to time, proceedings may not conclusively result in triumph for any of the parties. In such cases, should the court be inclined to eschew the normal practice of granting costs on a broad all-embracing basis? When should costs be awarded solely by reference to the outcome of each of the various issues canvassed? The resolution of this issue emerged as a significant point of interest in these proceedings.

2 The first and second plaintiffs, who are husband and wife respectively, are the owners of 95 Telok Kurau Road, Singapore 279022 ("the property"). The first defendant was the tenant of the property. The second defendant, the first defendant's wife, owned and managed a kindergarten at the property for the duration of the first defendant's tenancies. The first tenancy initially ran from 1 January 1995 to 31 March 1997 ("the first tenancy") but was subsequently extended from 1 April 1997 to 31 March 2000 ("the second tenancy").

3 In January 2000, the first plaintiff signed a letter of intent ("the letter of intent") with the first defendant to let the property for a further period from 1 April 2000 to 31 March 2003 ("the third tenancy"). The material terms of the third tenancy were contained in the letter of intent that also stipulated that "[a]ll other terms and conditions shall be stated in an *official lease* agreement to be signed by both parties" ("the official lease"). For a variety of reasons, the precise details of which are now largely irrelevant, the official lease was not signed.

4 In these proceedings the plaintiffs claimed against the defendants double rent for holding over

the property after the expiry of the second tenancy, damages for failing to restore the property to its original condition when the property was eventually vacated on 10 April 2003, as well as the consequential loss of usage arising from the property's state of disrepair. At the conclusion of the trial, I dismissed the plaintiffs' claim for double rent but allowed their claim for damage to the property and loss of its usage for the period required to effect restorative repairs. I also ordered that the parties bear their own costs incurred in these proceedings. The first defendant, after discharging his solicitors, now appeals against my decision on damages as well as costs.

5 I shall briefly deal with the events leading to the dispute, as it will assist in clarifying my decision on the costs order.

Factual matrix

6 Soon after the letter of intent was signed, the parties' relationship rapidly deteriorated. The first defendant was habitually late in making rental payments. Promises were made and repeatedly broken; excuses were given and inexplicably forgotten; deadlines for payment were serially overlooked by the first defendant. The defendants claimed to be having cashflow problems. Quite understandably the plaintiffs became increasingly frustrated. The defendants in turn claimed that the plaintiffs lacked empathy and had themselves repeatedly reneged on their oral commitments. Deep feelings of mistrust and unhappiness permeated the parties' relationship. The official lease was not signed. In these proceedings each side vehemently and unflinchingly assigned the sole responsibility for this unhappy state of affairs to the other side.

7 After a lapse of several months, matters came to a head on 2 March 2001. The plaintiffs sent a letter to the first defendant asserting that the property was being occupied purely on a periodic basis, thereby denying the validity and indeed existence of the third tenancy. The exchange of solicitors' correspondence that swiftly followed only served to exacerbate the tension between the parties. In addition, the plaintiffs received a notice from the Urban Redevelopment Authority ("URA") drawing their attention to complaints about the usage of the property. The complaints related to noise and traffic congestion generated by the kindergarten's operations. The URA warned the plaintiffs that if the complaints were not satisfactorily addressed it would have to reappraise approval of the existing usage of the property. The plaintiffs drew the defendants' attention to this letter but were not satisfied with the measures taken by the defendants. On 29 March 2001, the plaintiffs' solicitors served on the defendants a notice of "termination". The defendants immediately rejected the unilateral termination of their occupancy rights and refused to vacate the premises. In addition, they refused the plaintiffs any access to the property when the plaintiffs sought to inspect it.

The plaintiffs' claims

8 The plaintiffs then asserted that the first defendant was liable for double rent pursuant to s 28(4) of the Civil Law Act (Cap 43, 1999 Rev Ed) for wrongfully holding over the property. Proceedings were commenced against the defendants in the District Court. The plaintiffs' claim exponentially increased with the passage of time. After the plaintiffs' claim for summary proceedings failed, the proceedings were transferred by consent to the High Court. The double rent claimed in these proceedings extended from 1 May 2001 to 10 April 2003, the latter being the date the plaintiffs finally gained access to the property. After deducting the rental payments actually paid during this period, the plaintiffs' total claim for double rent amounted to $458,000. I dismissed the plaintiffs' claim on the basis that, notwithstanding the omission to sign the official lease, both parties had by their earlier conduct acknowledged and accepted the existence of the third tenancy. The plaintiffs have not appealed against this decision.

9 The plaintiffs also claimed compensation for the damage caused by the defendant's failure to hand over the property in the same condition as it was at the commencement of the third tenancy. It could not really be disputed that there was some damage to the property caused by the defendants. The real issues were the degree of damage, the apportionment for fair wear and tear and the quantum of the claim. Both parties engaged experts to assess the quantum. The disparity between their respective experts' evidence was unfortunately quite substantial. Acceding to the court's suggestion, both parties' solicitors sensibly agreed to abide by the decision of a court-appointed expert on the issue of identifying and quantifying the alleged damage to the property. The agreed terms of reference negotiated by the parties included the following stipulations:

> 5 The Expert shall determine the time that it would take to perform rectification works …
>
> 6 The Expert's decision on the matters … *shall be final and binding on both parties, and no appeal or revision shall be brought in respect of the Expert's decision*.
>
> [emphasis added].

The terms of reference also directed the court expert to allow both parties to make submissions and adduce evidence for her consideration. The court expert subsequently carried out three site inspections and duly met the parties' experts. The court expert thereafter concluded that the defendants were responsible for damage to the property in the sum of $110,575.00, in addition to the sum of $15,595.00 which the parties' experts had earlier jointly accepted as the sum due from the defendants. She also stated that it would have taken seven weeks to repair the damage and reinstate the property.

Findings

10 I accepted the court expert's views and findings. Defence counsel had no complaints about the process the court expert had employed in arriving at her conclusions, which to all intents and purposes appeared to be amply and objectively supported by facts. Indeed, it was plainly not open to the defendants to take issue with her "decision" in light of the explicit agreement the parties had reached that it was to be "*final and binding*". Damages were awarded only against the first defendant *qua* tenant and on the basis of the plaintiffs' pleaded case. The first defendant was held liable for damages in the sum of $79,170.00 derived in the following manner:

> (a) compensation in the sum of $110,575.00 as assessed by the court expert, plus the sum of $15,595.00 agreed as being due to the plaintiffs by the parties' experts;
>
> (b) loss of use of property for seven weeks assessed on the basis of the applicable rental amounting to a total of $40,250.00;
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> (c) reimbursement of the sum of $2,750.00 being the portion of the court expert's fees paid earlier by the plaintiffs;
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> less credit for the sum of $90,000.00 which had been held by the plaintiffs as a security deposit for the third tenancy.

11 The sole legal issue to be determined in relation to the plaintiffs' claim for property damage was whether the first defendant was obliged to deliver the property inclusive of the additions and

alterations ("alterations") made to the property before the commencement of the third tenancy. The defendants obdurately took the position that they were contractually *obliged* to deliver the property to the plaintiffs in its original state, *ie* at the commencement of the *first* tenancy.

12 I upheld the defendants' submission only in so far as it asserted that the terms of the third tenancy were identical to that of the second tenancy *mutatis mutandis*. The legal obligation apropos the restoration of the property is contained in cl 2(I) of the second tenancy agreement, which reads:

> *At the expiration of the said term* to peaceably and quietly deliver up to the Landlord the Premises *together with all the fixtures and fittings in like condition as the same were delivered to the Tenant at the commencement of the said term*, authorised alterations or additions and damage by fair wear and tear and acts of God excepted. [emphasis added]

13 A simple interpretation of this clause clearly reveals that it was untenable for the defendants to argue that they should strip the property of all authorised alterations effected to the property. The operative phrase "at the commencement of the said tenancy" axiomatically refers to the commencement of the *third* tenancy and not the commencement of the *first* tenancy as tenuously construed by the defendants. I accepted the plaintiffs' counsel's assertion that the word "said" refers to the last antecedent reference to the word that follows the word "said" (in this case "term"): *Esdaile v Maclean* (1846) 15 M & W 277; 153 ER 854. Indeed, the second tenancy expressly employs the phrase "the said term" as referring to the duration of *that* tenancy.

14 Alterations that had been effected during the first and second tenancies had become *de facto* fixtures and fittings by the time the third tenancy commenced and were important accretions to the property that the defendants could no longer remove on a whim without the plaintiffs' prior consent. Indeed, it is pertinent to note that defendants' counsel did *not* seriously contend that the relevant alterations had not become "fixtures and fittings". It should be noted that contractual clauses similar to the clause in question are usually inserted for the protection of landlords, who may at their option require that the property be restored to its original state or that the property be vacated with the alterations left intact. It ought to be recognised, however, that different considerations may come into play when machinery and proprietary equipment are involved. In the final analysis it is a matter of objectively ascertaining the parties' intentions.

15 It was abundantly clear that by removing the authorised alterations the defendants were motivated purely by malice and ill will. The plaintiffs had unequivocally requested that they do not tamper with or remove the alterations made to the property. The plaintiffs had intended to continue with the usage of the property as kindergarten premises and the defendants had more than an inkling of such an intention. The approved statutory usage of the property as a kindergarten would expire only on 5 April 2006. The defendants were fully aware that there was no legal requirement to remove the alterations.

16 The defendants' pettiness is patently exemplified by their demand through their solicitors' letters of 12 and 14 March 2003 of "consideration" in return for leaving the "benefit" of the alterations intact. When the plaintiffs refused to accede to this unreasonable demand, the defendants then wilfully removed the alterations, disregarding the plaintiffs' reasonable and legitimate request to leave the property as it stood. In doing so, the defendants wilfully damaged the property. The fact that the defendants went as far as to incur costs to remove the alterations is testament to the lengths they were prepared to go so as to manifestly express their rancour with the plaintiffs, *inter alia*, for initiating these proceedings.

Costs

17 The Singapore Court of Appeal in *Tullio v Maoro* [1994] 2 SLR 489 at 496 embraced the general discretionary approach in relation to the assessment of costs articulated in the headnote of *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232:

> The principles on which costs were to be awarded were (i) that costs were in the discretion of the court, (ii) that costs should follow the event except when it appeared to the court that in the circumstances of the case some other order should be made, (iii) that the general rule did not cease to apply simply because the successful party raised issues or made allegations that failed, but that he could be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings, and (iv) that where the successful party raised issues or made allegations improperly or unreasonably the court could not only deprive him of his costs but could also order him to pay the whole or part of the unsuccessful party's costs.

18 In applying this general approach, Chan Seng Onn JC in *Harte Denis Matthew v Tan Hun Hoe* [2001] SGHC 19 at [42] declared apropos the relevance of the parties' conduct in assessing costs that:

> [A] successful party may be deprived of his costs in full or in part, if [his] conduct has been sufficiently blameworthy. Disallowing his entitlement to costs is one way that the court can effectively express its view of the misconduct of the successful party during the pre-litigation or litigation process and show its displeasure. In an exceptional case, the court may even order the successful party to pay the costs of the unsuccessful party.

The importance and specific relevance of the parties' conduct in assessing costs is now legislatively encapsulated in O 59 r 5 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("ROC"). The sub-rule, *inter alia*, now states that:

> The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, *take into account … the conduct of all the parties, including conduct before, as well as during, the proceedings …* [emphasis added]

While the parties' conduct prior to and/or during the proceedings is usually only one of the multifarious factors to be considered in determining the appropriate costs order, in certain cases it may take centre stage. Where a party has no other recourse but to initiate proceedings so as to obtain a measure of certitude in a situation engendered by the other party's capricious or tempestuous behaviour, the court will usually pay particular attention to the parties' conduct in deciding what the appropriate costs order ought to be.

19 Perhaps in an attempt to obviate any judicial expression of disapproval of the defendants' conduct, defence counsel invited me to adopt an issue-based approach to the allocation of costs in these proceedings. This approach, if applied clinically, would have appreciably mitigated the overall costs repercussions for the defendants, allowing them to recover a substantial portion of their costs. Their counsel, in pursuing such an approach, relied on certain general *dicta* by Chadwick LJ in *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020 at [27]:

> … *An issue based approach requires a judge to consider, issue by issue in relation to those issues to which that approach is to be applied, where the costs on each distinct or discrete issue should fall. If, in relation to any issue in the case before it the court*

> *considers that it should adopt an issue based approach to costs, the court must ask itself which party has been successful on that issue. Then, if the costs are to follow the event on that issue, the party who has been unsuccessful on that issue must expect to pay the costs of that issue to the party who has succeeded on that issue*. That is the effect of applying the general principle on an issue by issue based approach to costs. Further, there will be cases (of which this is not one) where, on an issue by issue approach, a party who has been successful on an issue may still be denied his costs of that issue because, in the view of the court, he has pursued it unreasonably. The question, therefore, can be re-stated: was the judge entitled to approach the costs in this case on an issue by issue basis? In my view, for the reasons set out by the judge and by Longmore LJ, I am not persuaded that the judge can be criticised for adopting that approach in what he described as an *unusual case, having circumstances which were special and particularly strong*. If judges are to approach the question of costs on an issue by issue basis, then their decisions as to cases in which that approach is appropriate must be respected. [emphasis added]

20 I make two brief observations in relation to this approach. First, the approach to costs in the cited case was inspired by the new English Civil Procedure Rules, which effectively redefined the legal costs landscape in England. Second, such an approach should in any event be adopted only in unusual cases. The judge of first instance in that case had instructively observed (as quoted by the English Court of Appeal at [11]):

> I think that issue based costs orders such as I believe are appropriate in this case will be *exceptional*. *I would not want to be thought to be encouraging or believing that there will develop a general trend in the majority of cases for the courts to make costs order in both directions*. [emphasis added]

The Court of Appeal did not demur from this approach in dismissing the appeal.

21 The normal costs order in trial proceedings ought to be on an all-encompassing basis taking into account the circumstances adverted to in [17] above. The usual direction is for costs to follow the event. However, in some cases such as this, there is no clear demarcation as to which party has been successful on an overall basis. A sterile issue-based approach or a pure time-based approach might create mathematical partisanship that will not embrace the entire spectrum of discretionary factors inherent in trial proceedings. The assessment of costs ought not to be a clinical scientific exercise divorced from considerations of intuitive fairness. The court almost invariably ought to "look at all the circumstances of the case including any matters that led to the litigation": *Ho Kon Kim v Lim Geok Kim Betsy (No 2)* [2001] 4 SLR 603 at [12]. It would therefore be preferable to deploy such an issue-based approach, or alternatively a time-based approach, only in unusual cases or on occasions where the raising of particular issues has "unnecessarily or unreasonably protracted, or added to the costs or complexity of … proceedings" (see O 59 r 6A of the ROC).

22 These proceedings arose primarily because of the defendants' failure to pay the rent timeously after signing the letter of intent. The plaintiffs had initially adopted a restrained and pragmatic approach. Indeed, throughout the duration of the earlier tenancies they did not take issue with several delays in rental payment. They were however finally constrained to take a stand during the third tenancy in light of the defendants' recalcitrant and capricious behaviour. It can be fairly said that the defendants forced the plaintiffs' hands culminating in the initiation of these proceedings; the plaintiffs were compelled to state and stake their legal position in an attempt to define more precisely their rights given the unsatisfactory state of affairs then prevailing between the parties.

23 In this case it is relevant to take into account the parties' conduct both prior to as well as during the trial proceedings. The first defendant did not testify in these proceedings; instead, he left it entirely to the second defendant to bear the evidential cross. I found the second defendant to be an unsatisfactory witness prone to bouts of theatrics and evasiveness. Indeed, even counsel for the defendants in his submissions conceded that the second defendant's conduct was "undeniably disruptive of the proceedings". This regrettably and unnecessarily added to the length of the hearing and exacerbated the already palpable tension between the parties. It seemed patently clear to me from the evidence that it was the second defendant, and not the first defendant, who called all the shots and who was indeed largely instrumental in creating the unhappy state of affairs between the parties.

24 In the circumstances, while recognising that the parties had spent an inordinate length of time in these proceedings addressing the plaintiffs' unsuccessful claim for double rent, I felt that the appropriate order for costs should not be determined by the outcome of each individual contentious issue. The financial consequences of such an approach would have been distinctly more favourable to the defendants. On the contrary, fairness dictated that the appropriate order of costs ought to be determined by reference to the totality of the circumstances, taking into account, in particular, the parties' conduct both prior to and during these proceedings. Accordingly, the appropriate order in my view was that the parties bear their own costs. Despite succeeding on the main issue the defendants had in reality only achieved a Pyrrhic victory.

Plaintiffs' claim allowed in part.