Econ Corp Ltd and Another v Econ-NCC JV
[2008] SGHC 205

Case Number : Suit 786/2006, RA 180/2008

Decision Date : 12 November 2008

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Tan Cheow Hin (CH Partners) for the plaintiffs; John Wang (Robert Wang & Woo LLC) for the defendant

Parties : Econ Corp Ltd; Econ Industries Pte Ltd — Econ-NCC JV

Civil Procedure

12 November 2008

Lai Siu Chiu J:

1 This claim was a dispute regarding equipment supplied by two companies Econ Corporation Limited ("the first plaintiff") and Econ Industries Pte Ltd ("the second plaintiff") to Econ-NCC JV ("the defendant") for civil engineering works relating to the construction of two stations for the Mass Transit System at MacPherson and Upper Paya Lebar ("the project").

2 The plaintiffs' writ of summons was filed on 23 November 2006. The defendant's original Defence and Counterclaim was filed on 8 January 2007 and that was followed by the filing of the amended Defence and Counterclaim Amendment No. 1 on 9 February 2007 and Amendment No 2 on 2 November 2007.

3 On 26 March 2008, by way of summons No. 1391 of 2008 ("the amendment application"), the defendant applied to court for leave to file Amendment No. 3 to the Defence which removed entirely the defendant's counterclaim. The amendment application was heard and granted by the court below on 28 April 2008 as follows:

(a) the plaintiffs be granted leave to amend the statement of claim (Amendment No 1) and the statement of claim (Amendment No. 2) filed on 13 February 2007 do stand;

(b) the defendants be granted leave to amend the defence (Amendment No. 3) filed on 30 January 2008 by:

(i) deleting "18" and adding "16" in paragraph 17;

(ii) deleting the sentence "Also, they are not obliged to return the 7,508 pieces of Sumi-Decking to the first plaintiffs and/or the second plaintiffs for the reason that the contract period of the LTA contract has not expired" in paragraph 18.

(c) the defendants to file and serve the Defence (Amendment No. 4) by 6 May 2008;

(d) the plaintiffs to file and serve the Reply (Amendment No. 2) (if any) by 21 May 2008.

(e) there be no order for costs.

4 The plaintiffs appealed to a judge in chambers against the above orders by way of Registrar's Appeal No.180 of 2008 ("the Appeal") and asked that the orders made by the Assistant Registrar ("AR") be reversed. I heard and dismissed the appeal but awarded costs below and of the appeal to the plaintiffs in any event. As the plaintiffs have filed a Notice of Appeal against my decision (in Civil Appeal No. 82 of 2008), I shall now set out the reasons.

The background

5 The statement of claim sets out the relationship between the parties to the suit. As can be seen from their names, the first and second plaintiffs are related companies both being subsidiaries of a listed entity Econ International Limited which is now known as Jasper Investments Limited. The first plaintiff's business is piling, civil engineering works and building construction while the second plaintiff is a supplier and trader of building materials and hardware. The defendant was a joint-venture between the first plaintiff and a company called NCC.

6 The defendant successfully tendered from the Land Transport Authority ("LTA"), contract no. 822 ("the Contract") which was to carry out engineering works for the Circle line including underground train stations and tunnels. The letter of acceptance of the defendant's tender from the LTA was dated 1 August 2002. The completion date for the project was extended to 30 November 2007 as the original deadline could not be met. It would also appear that the extended completion date may need to be revised further.

7 The statement of claim pleaded that by an agreement made on or about 14 January 2003, the first plaintiff entered into an agreement to rent to the defendant metal decking known as sumi-decking, as well as to perform services incidental to the renting, as required by the defendant for the Contract. The plaintiffs referred to this as the P1 contract. This was followed by another agreement on or about 1 November 2003 whereby the second plaintiff agreed to rent sumi-decking to the defendant to perform services required by the defendant under the Contract. The plaintiffs referred to this as the P2 contract.

8 Pursuant to the two rental contracts, the first plaintiff supplied 6,483 pieces of sumi-decking to the defendant while the second plaintiff delivered 1,025 pieces, acting as the first plaintiff's agent.

9 The first plaintiff's claim was for $146,796.00 whilst the second plaintiff's claim was for $197,600.00 for the outstanding rental for the sumi-decking delivered. Both plaintiffs made further claims for the residuary values of the sumi-decking due to the refusal of the defendant to admit that the equipment was their property. The plaintiffs also claimed a declaratory order for the return of the sumi-decking, alternatively damages. The plaintiffs also alleged that there had been repudiatory breach by the defendant of the P1 and P2 contracts.

10 In the original defence as well as the later versions in Amendments No 1 and 2, the defendant lodged a counterclaim. As stated earlier at [3], the counterclaim was subsequently withdrawn when the defendant filed Amendments No. 3 and 4 to the defence. As the parties' pleadings are central to the appeal, it is necessary for me to refer to them in some detail at this stage.

11 The plaintiffs had without leave of court filed the statement of claim (Amendment No. 2) on 13 February 2008, after having obtained leave of court to file the statement of claim (Amendment No. 1) on 25 October 2007. In the Amendment No. 2 version of the statement of claim, the plaintiff had deleted the following paragraphs of the statement of claim and the reliefs (in paras 4, 5 and 6) relating to those paragraphs:

17. In further breach or repudiation of the P1 and P2 Contracts, the Defendants have also by their solicitors' letter of 14/11/2006 made no admissions of the P1 and P2 Contracts and/or that they will return any of the ~~6648~~ 6483 and 1025 pieces of sumi-decking ~~are the property of~~ to the 1st and 2nd Plaintiffs respectively ~~and/or that they will return any of the 6483 and 1025 pieces of sumi decking to the 1st and 2nd Plaintiffs respectively.~~

18 In the premises the 1st and 2nd Plaintiffs suffered loss and damage or will suffer loss and damage if the Defendants fail and refuse to admit that property in the 6483 and 1025 pieces of sumi decking belong to the 1st and 2nd Plaintiffs respectively and/or fail and refuse to return the same to the 1st and 2nd Plaintiffs respectively at the end of Contract 822 or when no longer required by the Defendants for Contract 822.

12 In the defence (Amendment No. 3) the defendant applied to add the following paragraphs to the defence:

17. Paras ~~11~~ 13 to ~~15~~ 18 of the Statement of Claim (Amendment No.1) are denied.

18. The Defendants aver that they do not owe the 1st Plaintiffs and/or 2nd Plaintiffs the alleged sums of S$146,796.20 and S$197,600.00 ~~and/or~~. Also, they are not ~~contractually~~ obliged to return the 7,508 pieces of Sumi-Decking to the 1st Plaintiffs and/or the 2nd Plaintiffs for the reason that the contract period of the LTA Contract has not expired. ~~by reasons of the matters pleading paras 9 to 12 16 herein.~~

19. Further as/or in the alternative, the Defendants aver that the 1st Plaintiffs are estopped from denying the Settlement Agreement.

13 The defendant's reasons for the third amendment was to make it clear that the plaintiffs' claims for the return of the sumi-decking was premature, given that the Contract had not yet expired (see [6] above). The defendant wanted Amendment No. 2 to the statement of claim to be withdrawn as it had been filed without leave of court.

14 The court below adopted a pragmatic approach to the amendment application. The AR granted the plaintiffs (retrospectively) leave to amend the statement of claim. Given that Amendment No. 2 had been filed (albeit without leave of court), it should stand. Consequentially, that meant that the defendant would be entitled to amend the defence to delete any reference to the claim for return of the sumi-decking, since those claims had been deleted from (Amendment No. 2) to the statement of claim.

Earlier amendments

15 At the hearing of the appeal, counsel for the plaintiffs referred to an earlier Registrar's Appeal No. 390 of 2007 ("the plaintiffs' appeal") heard on 28 January 2008. The plaintiffs' appeal was against the decision of AR Chan in granting (with costs against the plaintiffs) Summons No. 5013 of 2007 ("the defendant's application") wherein the defendant applied to strike out paras 17 and 18 as well as the reliefs in prayers (4) to (6) of the statement of claim (Amendment No. 1) pursuant to Order 18 r 19 of the Rules of Court Revised 2006 edition ("the Rules"), on the basis *inter alia* that those paragraphs disclosed no reasonable cause of action.

16 Counsel for the defendant explained that he was prompted to make the defendant's application

as the plaintiffs' claims in paras 17 and 18 of the statement of claim (Amendment No. 1) were premature and were obviously unsustainable. The two offending paragraphs in the statement of claim (Amendment No. 1) read as follows:

> ~~15~~ 17. In further breach or repudiation of the P1 and P2 Contracts, the Defendants have also by their solicitors' letter of 14/11/2006 made no admissions of the P1 and P2 Contracts and/or that ~~they will return any of~~ the ~~6648~~ 6483 and 1025 pieces of sumi-decking are the property of ~~to~~ the 1st and 2nd Plaintiffs respectively and/or that they will return any of the 6483 and 1025 pieces of sumi decking to the 1st and 2nd Plaintiffs respectively.
>
> 18 In the premises the 1st and 2nd Plaintiffs suffered loss and damage or will suffer loss and damage if the Defendants fail and refuse to admit that property in the 6483 and 1025 pieces of sumi decking belong to the 1st and 2nd Plaintiffs respectively and/or fail and refuse to return the same to the 1st and 2nd Plaintiffs respectively at the end of Contract 822 or when no longer required by the Defendants for Contract 822.

17 At that stage, the defendant's defence and counterclaim (Amendment No. 1) filed on 9 February 2007 contained inter alia the following paragraphs:

> 7 Paragraphs 7 to 9 of the statement of claim are denied. The defendants aver that, at all material times, the defendants had only entered into the Contract with the 1st plaintiffs. The defendants did not enter into any contract with the 2nd plaintiffs.
>
> ~~15~~ 18 The defendants aver that they are not contractually obliged to return the 7,508 pieces of sumi-decking to the 1st plaintiffs by reason of the matters pleaded in paragraphs 9 to ~~12~~ 16 above.
>
> ~~16~~ 19 Further and/or in the alternative, if the defendants are contractually obliged to return the 7,508 pieces of sumi-decking to the 1st plaintiffs and/or 2nd plaintiffs (which is denied), the defendants aver that the 1st plaintiffs' and/or 2nd plaintiffs' cause of action is premature given the contract period of the LTA Contract has not expired.

18 Counsel for the defendant had pointed out to AR Chan it was the plaintiffs' own pleaded case (in para 5 of the statement of claim set out in [7] above) that under the P1and P2 contracts, the defendant was not obliged to return the sumi-decking until the end of the Contract which would be no earlier than 30 November 2007. Therefore the cause of action in paras 17 and 18 set out in [16] was premature as at the date of the writ (23 November 2006). Moreover, under the Conditions of the Contract, the sumi-decking was deemed to be the property of the LTA until completion of the works under the Contract. The first plaintiff being a party to the Contract was bound by the terms. Hence, its claim for the return of the sumi-decking was doomed to fail.

19 At the hearing of the plaintiffs' appeal on 28 January 2008, counsel for the defendant repeated the arguments he made to the court below. Counsel added that there was no evidence that the defendant intended to repudiate the P1 and/or P2 contracts by not returning the sumi-decking at the expiry of the Contract. Even if there was repudiation, the plaintiffs had elected to continue with the P1 and P2 contracts.

20 The judge drew counsel's attention to paras 18 and 19 of the defence (set out in [17]) which he opined seemed to suggest that the defendant was denying the plaintiffs' title to the sumi-decking.

In response, counsel for the defendant explained that his client had not taken a position on the P1 and P2 contracts. He indicated he was prepared to amend the defence (Amendment No. 2) to make clear the defendant's position. The judge than gave leave to the defendant to amend para 18 of the defence to add the following words at the end of the paragraph:

> for the reason that the contract period for the LTA contract has not expired

and to delete para 19 of the defence.

21 The judge then inquired from counsel for the plaintiffs whether he would still proceed with the plaintiffs' appeal. The reply was in the negative but counsel wanted his costs. Although counsel for the defendant resisted the plaintiffs' request, the judge ordered costs against the defendant on the basis that had the defendant been clearer in its pleadings, the plaintiffs would not have included the offending claims in [16] in the statement of claim. The order for costs below was also rescinded.

22 At the hearing of the amendment application, the AR was initially doubtful on the need for the amendments requested by the defendant. Counsel for the defendant explained that he wanted to make clear the defendant's stand that it did not take any position on the return of the sumi-decking as that was premature. However, a witness for the plaintiffs, one Joseph Sin Kam Choi had alleged in his affidavit of evidence-in-chief, that the defendant had admitted to the P1 and P2 contracts and to the obligation to return the sumi-decking in future when the two contracts expired. The defendant wished to correct the wrong impression the plaintiffs may have had and/or to avoid any misunderstanding.

23 The AR then questioned the plaintiffs' counsel on the filing of the statement of claim (Amendment No. 2) without leave. Instead of accepting the fact that no leave had been granted, counsel sought to justify his action on the ground that he wanted to give clarity to the order made (presumably by the judge on 28 January 2008).

24 Based on the AR's directions, the defence filed as Amendment No. 4 deleted para 19 while paras 17 and 18 read as follows:

> ~~14~~ 17 Paragraphs ~~11~~ 13 to ~~15~~ ~~18~~ 16 of the Statement of Claim (Amendment No ~~1~~ 2) are denied.
>
> ~~15~~ 18 The Defendants aver that they do not owe the 1st Plaintiffs and/or 2nd Plaintiffs the alleged sums of S$146,796.20 and S$197,600.00 ~~and/or. Also, they are not contractually obliged to return the 7,508 pieces of Sumi-Decking to the 1st Plaintiffs and/or the 2nd Plaintiffs for the reason that the contract period of the LTA Contract has not expired by reason of the matters pleaded in paragraphs 9 to 12 16 herein~~.
>
> ~~16 19 Further and in the alternative, if the Defendants are contractually obliged to return the 7,508 pieces of sumi-decking to the 1st Plaintiffs and/or 2nd Plaintiffs (which is denied), the Defendants aver that the 1st Plaintiffs' and/or 2nd Plaintiffs' cause of action is premature given the contract period of the LTA Contract has not expired~~.

The appeal

25 At the appeal, counsel for the plaintiffs complained that the AR's orders below would appear to be ignoring the orders made by the judge who hear the plaintiffs' appeal. Again he did not accept that

it was wrong to have filed Amendment No 2 of the statement of claim without leave. His excuse was that as at the date of the filing (13 February 2008) the defendant's application was pending (it was filed on 7 November 2007 and first came on for hearing on 21 November 2007). In other words he attempted to pre-empt the defendant's application by his amendment. I rejected the excuse.

26 Counsel for the defendant had referred to O 20 r 8 of the Rules as the basis for the defendant's application – it was for the purpose of determining the real question in controversy between the parties or of correcting any defect or error. He pointed out that although the parties had exchanged affidavits of evidence-in-chief, no trial dates had been fixed yet. Reliance was placed on *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1994] 1 SLR 513 and the House of Lords decision in *Ketteman v Hansel Properties* [1987] 1 AC 189 for the submission that amendment of pleadings would be allowed, subject to penalties in costs, unless the amendment would cause injustice and/or injury to the opposing party which could not be compensated by costs or otherwise.

27 The defendant submitted that the plaintiffs would be entitled to bring a fresh action at the appropriate time on the claims that were now premature. Counsel argued that the plaintiffs' motive in resisting the amendments proposed was so that they could rely on the defence (Amendment No. 3) to argue in a future action that the defendant had admitted to the claims relating to the return of the sumi-decking. Counsel referred to a commentary in *Singapore Civil Procedure* 2007 Sweet & Maxwell at p 525 on O 27 r 3 of the Rules, and contended that admissions in a defence in one action are not binding in other proceedings between the same parties on a different issue, citing *Dawson v Great Central Railway Company* (1919) 121 LT 263. In that case, the dependents of the deceased made a claim against the employer for the deceased's death because of an industrial accident. The court held that the employer was not bound at the second trial by an admission made by their counsel at the first trial for the purpose of that trial. Reliance was also placed on *British Thomson-Houston Co v British Insulated & Helsby Cables* [1924] 1 Ch 203.

27 As counsel for the plaintiffs did not/could not persuade me that his clients would be prejudiced by the amendments that were allowed by the AR below, I dismissed the appeal.

28 Although I dismissed the appeal, I nonetheless awarded costs of the appeal and of the defendant's application below to the plaintiffs. Counsel for the defendant readily admitted that the court below should not have made no order for costs but should in fact have awarded costs to the plaintiffs for the defendant's amendments. Accordingly, I awarded costs to the plaintiffs.