

Asian Corporate Services (SEA) Pte Ltd v Impact Pacific Consultants Pte Ltd and Others
[2008] SGHC 180

Case Number : OS 1034/2008
Decision Date : 21 October 2008
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Andy Leck and Li Yuen Ting (Wong & Leow LLC) for the plaintiff; Ooi Oon Tat (Salem Ibrahim & Partners) for the first to seventh defendants; Lim Dao Kai (Allen & Gledhill) for the eighth defendant
Parties : Asian Corporate Services (SEA) Pte Ltd — Impact Pacific Consultants Pte Ltd; Impact Pacific Management Pte Ltd; Eastwest Management Ltd (Singapore Branch); Fullcircle Pte Ltd; Duncan Samuel Rothwell Merrin; Norhayati Bt Malek; Mark Justin Baile; Gregory James Kennedy; Quek Ka Joo

Civil Procedure – Costs

21 October 2008

Woo Bih Li J:

Background

1 This application would not have been necessary but for the unreasonable position taken by some defendants.

2 The plaintiff, Asian Corporate Services (SEA) Pte Ltd (“ACS”) had commenced an action in Suit No. 834 of 2004 (“Suit 834/2004”) in the High Court on or about 15 October 2004 against nine defendants who are the same nine defendants in the present originating summons (“OS”).

3 Parties in Suit 834/2004 settled the matter in the Suit (including a counterclaim) by entering into a Settlement Agreement (“SA”) dated 30 October 2007. The material parts of the SA provided:

2.1 [The defendants] jointly and severally, agree and undertake to pay ACS the sum under clause 2.2 and the total sum S\$650,000.00 which ACS accepts is in full and final settlement of the Claims,...

2.2 [The defendants] agree to pay [ACS] costs in the Suit to be assessed by the High Court of Singapore within 14 days of such Order for costs being made.

2.3 ACS agrees to file its Bill of Costs relating to Singapore High Court Suit No. 834/2004/V no earlier than 2 January 2008.

2.4 Upon signing this Settlement Agreement:

a. ACS shall file a Notice of Discontinuance within 3 days from the delivery of all post-dated cheques mentioned in clause 2.1 above.

b. [the 5th and 6th defendants] shall file a Notice of Discontinuance of their Counterclaim within 3 days from the delivery of all post-dated cheques mentioned in clause 2.1 above.

4 The Notice of Discontinuance for the main action was filed on or about 7 November 2007. The Notice of Discontinuance for the counterclaim was also filed on or about 7 November 2007.

5 Subsequently, ACS filed two bills of costs on or about 7 April 2008. Bill of Costs 53 of 2008 was to tax the costs in respect of the counterclaim and Bill of Costs 54 of 2008 was to tax the costs in respect of ACS' claims.

6 Both bills of costs were fixed for hearing on 22 April 2008. At the request of some defendants, ACS agreed to adjourn the taxation for one week, *ie*, to 29 April 2008.

7 On 29 April 2008, the first to seventh defendants ("the objecting defendants") objected to the taxation of the bill of costs on the ground that ACS was not entitled to tax the same because it had not obtained an order for taxation. The ninth defendant was apparently contented to leave it to the court to decide. The present counsel for ACS, Mr Andy Leck, said that the eighth defendant did not object.

8 Mr Ooi Oon Tat, counsel for the objecting defendants asserted that it was his duty to bring to the attention of Assistant Registrar Chung Yoon Joo, who was then taxing the bills of costs, that an order for taxation was required under O 59 rule 3(1) of the Rules of Court. However, according to Mr Leck, the counsel for the eighth defendant had proposed before AR Chung that an oral application be made for a consent order for costs or for taxation in ACS' favour and AR Chung had indicated that she was willing to grant such an order but Mr Ooi refused to give such a consent. AR Chung then adjourned the taxation for ACS to obtain an order for taxation.

9 However, ACS instead appealed against AR Chung's decision by filing Registrar's Appeal 192 and 193 of 2008 on or about 13 May 2008. The appeals were heard on 2 June 2008 by Justice Lee Siu Kin.

10 According to Mr Leck, an oral application was made by ACS' counsel before Lee J for an order for costs or for taxation. Counsel for the eighth defendant agreed but Mr Ooi did not. Mr Ooi argued that a formal application for such an order had to be filed. In the circumstances, Lee J upheld the AR's decision.

11 On 3 June 2008, the two bills of costs came up for taxation again before another assistant registrar, Chew Chin Yee. According to the written submissions before me for the objecting defendants, AR Chew had directed that ACS was to decide by 24 June 2008 how it intended to proceed on the two bills of costs and if nothing was done, they would be dismissed. This submission gave the impression that the two bills of costs would be automatically dismissed if nothing else was done by 24 June 2008. I have looked at the notes of arguments for 3 June 2008 which suggest something different. According to those notes, ACS' then counsel, Li Yuen Ting, had said that instructions were being obtained about an appeal against Lee J's decision. Accordingly, AR Chew directed ACS to confirm its position and file a petition of appeal, if any, by 24 June 2008. The Registry was to track the deadline and, if no appeal was filed, then to fix the bills of costs for further hearing. By then, parties were to consent to taxation or the bills would be dismissed. So, there was no automatic dismissal of the bills of costs if there were a want of prosecution.

12 In any event, ACS filed the present OS on 5 August 2008 for, *inter alia*, orders that costs of the proceedings in Suit 834/2004 be paid by all the defendants, with such costs to be taxed, and that, upon such an order being made, the Registrar was to proceed to tax the two bills of costs already filed.

13 I should mention that counsel for the eighth defendant disagreed that the eighth defendant had been prepared to consent to an order for costs or for taxation in the hearings before AR Chung or Lee J. In the hearing before me, the eighth defendant joined the objecting defendants in resisting the present OS whereas the ninth defendant left it to the court to decide.

Arguments before the present court and conclusion

14 Before me, Mr Ooi made several arguments.

15 His first argument was that even if ACS had applied for an order for taxation in Suit 834/2004, before it had filed its Notice of Discontinuance in that suit, it was open to the objecting defendants to argue that they were not liable for such costs. He submitted that clause 2.2 of the SA refers to an order for costs whereas, in reality, the defendants would only be liable after the costs were quantified pursuant to a Registrar's certificate and not an order, as such.

16 Secondly, Mr Ooi submitted that the bargain under the SA was for the defendants to pay \$650,000, only, in exchange for the discontinuance by ACS of its claims.

17 I did not agree with these two submissions. It was clear to me that under clause 2.1 and 2.2 of the SA, the defendants were liable to pay ACS, both \$650,000 and costs. That was the bargain. Clause 2.2 of the SA also envisaged the costs to be taxed by the reference to an assessment of such costs even though there was no explicit reference to a registrar's certificate upon taxation.

18 Mr Ooi's third argument was that it was too late for ACS to seek an order for taxation as ACS had already filed its Notice of Discontinuance for Suit 834/2004 and had omitted to obtain such an order in the same action. For this proposition, he relied on [26] of the judgment of the Court of Appeal in *Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd* [2000] 1 SLR 137 ("*Bobby Chin*").

19 Before I set out [26] of that judgment, it is appropriate to bear in mind the facts in that case.

20 In *Bobby Chin*, Siong Huat Shipyard Pte Ltd ("Siong Huat") had commenced arbitration proceedings against Hong Lam Marine Pte Ltd ("Hong Lam Marine") and Hong Lam Marine had filed a counterclaim in those proceedings. In the course of arbitration, Mr Chin and another person were later appointed receivers and managers ("receivers") of Siong Huat. The claim by Siong Huat was subsequently withdrawn with costs awarded against Siong Huat. Hong Lam Marine proceeded with its counterclaim. Prior to the publication of the final award, a winding-up order was made against Siong Huat. Eventually, Hong Lam Marine obtained an award for Siong Huat to pay about \$3.87 million and costs to it.

21 Subsequently, Hong Lam Marine filed a fresh action against the receivers to claim that they should be personally liable for the costs which Siong Huat were liable for as the receivers had adopted the arbitration proceedings. At first instance, the receivers were ordered to pay the costs of the entire arbitration. However, the Court of Appeal allowed their appeal for a few reasons, one of which was that Hong Lam Marine should have obtained in the arbitration proceedings themselves an order for costs against the receivers and, having failed to do so, it could not claim such costs in a fresh action. Thus, Yong Pung How CJ said at [26]:

While we were prepared to recognize that under O 59 r 2(2) the court had the jurisdiction and discretion to order, in circumstances where it was just to do so, a non-party such as a receiver to be personally liable for costs of court proceedings, we did not think that such a jurisdiction existed in the instant case. The respondents' alternative argument was fundamentally flawed in

two ways. First, O 59 r 2(2) does not create an independent cause of action under which a party may bring an action to sue for costs of earlier proceedings that had been awarded in its favour. An order for costs is a consequential order that follows the principal decision reached by the court with regard to the issues of the case. This is easily illustrated by the general rule that "costs follows the event": see O 59 r 3(2). A consequential order such as an order for costs must therefore be sought within the same or related proceedings under which the order would arise. A party who does not seek a specific order for costs in the relevant proceedings cannot later start a fresh action to recover costs of the earlier proceedings from the person or entity sought to be made liable for such costs.

It is unnecessary for me to set out the second flaw in that case.

22 Mr Ooi's fourth argument was that ACS was in any event estopped from filing the present action to seek an order for costs and for taxation. This was because AR Chung had applied *Bobby Chin* on 29 April 2008 and so did Lee J on 2 June 2008 and there was no further appeal by ACS.

23 I will deal with the fourth argument first. I did not agree that either AR Chung or Lee J had applied *Bobby Chin* to the facts before either of them. All the respective decisions meant was that ACS had to obtain an order for payment of costs (or for taxation which would include payment of costs). There was no specific indication from either of them that either had applied *Bobby Chin*. Indeed, in the notes of arguments written by Lee J, he specifically mentioned that "the SA pertains to a new cause of action".

24 This brings me to Mr Ooi's third argument. I was of the view that *Bobby Chin* was distinguishable because, unlike Hong Lam Marine in *Bobby Chin*, ACS did have the benefit of the SA which constitutes a new cause of action. If, for example, the defendants had not paid the \$650,000, ACS could have filed a fresh action for the same. Likewise, in my view, if the defendants were contesting their liability for costs of the proceedings in Suit 834/2004, ACS could file a fresh action to obtain an order for the defendants to pay costs. True, one could say that ACS should have obtained an order for costs in Suit 834/2004 and this might even have been envisaged under clause 2.2 but clause 2.2 does not preclude ACS from obtaining such an order in fresh proceedings, if necessary. In other words, clause 2.2 allows ACS to obtain an order for costs either in Suit 834/2004 or in a fresh action.

25 I would add that Mr Ooi sought to rely on other cases but as they involved different facts, I do not propose to deal with them.

26 In the circumstances, I was of the view that the position taken by the objecting and eighth defendants was untenable. It was but an attempt to wriggle out of the clear obligation to pay costs of the action in Suit 834/2004. Accordingly, I made an order that the costs of the claim and counterclaim in that Suit be taxed and paid forthwith and that the taxation of the bills of costs in question be proceeded with. I also ordered the first to eighth defendants to pay costs of the OS fixed at \$5,000 forthwith to ACS.

27 The objecting and the eighth defendants have appealed against my decision.

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