Tan Yeow Hiang Kenneth and Others v Tan Chor Chuan and Others
[2005] SGHC 212

Case Number : BOC 206/2005, SIC 5052/2005, 5081/2005

Decision Date : 10 November 2005

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Gregory Vijayendran and Prakash Pillai (Wong Partnership) for the applicants / plaintiffs in SIC 5081/2005; Alvin Tan and Raymond Wong (Wong Thomas and Leong) for the applicants / defendants in SIC 5052/2005

Parties : Tan Yeow Hiang Kenneth; Chan Lai Fung; Chia Chung Mun Alphonsus; Tan Lian Ann; Nicholas Giles Aplin; Yeo Kok Ching Alan; Chong Yeh Shen Jason; Goh Hin Tiang; Lim Ting Fai Lawrence; Seow Yongli; Wong Loong Tat — Tan Chor Chuan; Yap Swee Chee; Ee Boon Peng Lawrence; Ong Chong Ghee; Rolles Rudolf Jurgen August; Chern Seng Pau; Yung Yew Kong; Nelly Menon; Tan Lian Seng

Civil Procedure – Costs – Taxation – Defendants succeeding only in respect of one of three defences pleaded – Review of assistant registrar's refusal to adopt issue-based approach in taxation of costs – Whether judge in chambers having power to allow reduction in costs on account of failed defences in light of costs order made by trial judge

10 November 2005 *Judgment reserved.*

Andrew Ang J:

1 Following an unsuccessful defamation action brought by nine members of the Singapore Chess Federation ("SCF") against the eleven members of the SCF Executive Council personally, an order for costs was made by the court on 10 August 2005 at a separate hearing at which the court awarded the defendants 95%, the 5% taken off being intended to reflect the court's disapproval of the defendants' conduct in regard to discovery.

2 In its oral judgment, the court had indicated that at least one of the defences (*viz*, fair comment) was successful. When the defendants' Bill of Costs No 206 of 2005 was taxed before the assistant registrar ("the AR"), the grounds of decision of the trial had not yet been released.

3 The plaintiffs sought to defer taxation until after the grounds of decision were released arguing that it was still not known whether the defendants succeeded on the remaining defences.

4 The AR declined to do so pointing out that the judge had already ordered 95% of the costs to be borne by the plaintiffs. She further questioned how a further reduction could be reconciled with the judge's cost order. She declined to adopt an issue-based approach to the taxation and in awarding costs in the amount of $225,000 for the 13-day trial, she took into account work done to run all three defences. When the grounds of decision were released, the defendants succeeded on only one out of three defences.

5 Both parties applied for a review of the taxation but at the hearing before me, the defendants withdrew their application save in respect of reimbursement of the costs of an unsuccessful mediation under section 3 of the Bill. Nothing further needs to be said in regard to that and the issues raised by the plaintiffs under section 3. Instead, I shall deal only with two issues arising under section 1, *viz*:

(a) whether sitting as a judge reviewing the section 1 costs, it was open to me to give a further percentage reduction of the costs to take account of the two failed defences; and

(b) if so, whether a reduction ought to be allowed in the circumstances of the case.

6 At the initial hearing of the review, I allowed a reduction of 25% of the costs to take into account the two failed defences rather than the two-thirds reduction sought by the plaintiffs. Unfortunately, apart from submitting that

(a) the court's order of 95% costs had already taken care of the issue (which clearly was not its intent); and

(b) that the plaintiffs' arguments for a reduction ought to have been raised at that stage (which clearly was impossible since the grounds of decision had not been released),

the defendants did not raise the objection that I was *functus officio* and could not order the 25% reduction at the review of taxation. It was raised only after the decision was made to allow the 25% reduction.

7 Subsequent to the hearing, I allowed the defendants' request for me to hear further arguments. After considering further submissions by both parties, I have decided that I did not have the power to allow a further reduction on account of the failed defences. I have also decided that, even if it were open to me to grant a reduction, in view of the authorities cited to me and taking into account the circumstances of the case, no reduction ought to be allowed. My reasons are as follows:

Whether the court was *functus officio*

8 I accept the submissions of the defendants that the order of court dated 10 August 2005 under which the plaintiffs were to pay the defendants 95% of the costs of the action to be agreed or taxed precluded the plaintiffs from asking for a further reduction by reason of the failed defences. As the order of court had been extracted, the court was *functus officio* and could not allow what would in effect be a variation of the order as distinct from a clarification. The distinction between the two is brought out in *Wee Soon Kim Anthony v UBS AG* [2005] SGCA 3, where the Court of Appeal held at [69] as follows:

> It is absurd to suggest that when clarification is given, the court is *functus officio*, which was the stand taken by Mr Wee. In giving the clarification, the court is not making a new or additional order but merely clarifying what was already ordered. It is in the inherent jurisdiction of the court to do so and this jurisdiction has been exercised from time to time. This jurisdiction is consistent with logic and justice.

Neither is it possible, in my view, to invoke the inherent jurisdiction of the court under the Rules of Court (Cap 322, R 5, 2004 Rev Ed) O 92 r 5. The rule states:

> Without prejudice to Rule 4, the Court may make or give such further orders or directions incidental or consequential to any judgment or order as may be necessary in any case.

An order to vary the Order of Court of 10 August 2005 would not be consequential or incidental thereto or to the judgment as it does not follow as a matter of course from such order or judgment. As distinct from, for example, a subsequent order supplying an obvious omission, or clarifying what was already ordered, the variation of an earlier order goes against the intent of the earlier order.

9 It has to be stated that the plaintiffs did not go so far as to dispute the foregoing. What they said was that a reduction of the costs on account of the failed defences was but a *reduction* of the *quantum* of costs and therefore within the power of the judge reviewing the taxation of costs to do under O 59 r 27(2) in his determination of what was a "reasonable amount" of costs which had been "reasonably incurred". In my view, that cannot be right. In so doing, the judge would not be merely reducing the quantum but also laying down the proportion of the costs to be allowed in view of the failed defences. He would thereby be straying beyond his power of review of the taxation and usurping the functions of the trial judge.

What reduction (if any) should be allowed

10 Having so decided, it is not strictly necessary for me to proceed further to consider what reduction ought to be given were it within my power so to do. Nevertheless, as, after considering the authorities cited to me in the course of further arguments, I have decided to revoke my earlier decision to allow a 25% reduction, it is appropriate that I give my reasons for so doing.

11 In *Tullio v Maoro* [1994] 2 SLR 489 ("*Tullio*"), the appellant was successful in a petition against oppression under s 216 of the Companies Act (Cap 50, 1990 Rev Ed). The trial judge, however, awarded the appellant only half his costs, stating that as a written agreement between the appellant and the respondent provided for recourse to arbitration, the appellant should have considered that option but had failed to do so. The Court of Appeal set aside the order for costs of the trial judge and awarded the appellant his full costs, saying that the trial judge had disregarded the principle that a successful party who had acted neither improperly nor unreasonably should not be deprived of any part of his costs. In so doing, the Court of Appeal cited (at 496, [24]) the headnotes from the decision of the English Court of Appeal in *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. The fourth principle implied, moreover, that a successful party who neither improperly nor unreasonably raised issues or made allegations which failed ought not to be ordered to pay any part of the unsuccessful party's costs …

These principles were re-affirmed in *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 3 SLR 337 where the Court of Appeal set aside the trial judge's order awarding the plaintiff only 60% of his costs on the basis that the plaintiff had spent a great deal of time trying to prove pleadings that were at the end of the day not established. In awarding the plaintiff his full costs, the Court of Appeal noted that the plaintiff had succeeded on the fundamental issue, *ie*, that the words complained of were defamatory of him. (The Court of Appeal also doubted that a significant amount of time could have been wasted by reason of the disparity between the meaning pleaded and the meanings found by the judge.)

12 Another authority cited by the defendants was *MCST No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 ("the *De Beers Jewellery case*"). In that case the defendants succeeded on mistake which was a late amendment to their counterclaim but failed on the doctrine of *colore officii* which was the original basis of their counterclaim. The trial judge, nevertheless held, after submissions, that

the defendants should be awarded their full costs. This was upheld by the Court of Appeal which once again relied on the principles governing the award of costs set out in *Re Elgindata Ltd (No 2)* ([11] *supra*) which had been adopted in *Tullio* ([11] *supra*). It held that as the successful party in the counterclaim the defendant should be awarded costs in spite of one failed ground. In arriving at this decision, it noted that the trial ended within the allotted time, that the same facts were relied on for proving mistake as for proving *colore officii* and that it was unlikely that the defendants' pleading caused a significant increase in the cost of the proceedings. Finally, the Court of Appeal noted that as it had not been alleged that the defendants had raised issues improperly or unreasonably, it had not been ordered to pay the party's costs.

13 The last authority cited by the defendants was *Progress Software Corp (S) Pte Ltd v Central Provident Fund Board* [2003] 2 SLR 156. In that case, three issues were raised in the High Court. Two were preliminary issues of procedure. They were decided in favour of the appellants. The third was a substantive issue and was decided in favour of the respondents. The judge having dismissed the appellant's application with costs, the latter appealed to the Court of Appeal contending that as the respondents had succeeded on only one out of three issues, they should have been awarded one-third of their costs below. The appellants relied on O 59 r 6A of the Rules of Court which came into effect on 15 December 2001 in support of their contention. Rule 6A provides:

> In addition to and not in derogation of any other provision in this Order, where a party has failed to establish any claim or issue which he has raised in any proceedings, and has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings, the Court may order that the costs of that party shall not be allowed in whole or in part, or that any costs occasioned by that claim or issue to any other party shall be paid by him to that other party, regardless of the outcome of the cause or matter.

The Court of appeal held, at [52] and [53], that:

> 52 … *The crux of O 59 r 6A is thus whether the party has unnecessarily or unreasonably added to the costs of the proceedings*. In the present case, we saw no evidence that the respondents had acted in such a manner. The trial judge certainly did not consider the procedural issues raised before him as either unnecessary or unreasonable. The trial judge stated in his grounds of decision that he in fact saw merit in the respondents' procedural arguments. However, the facts of the case did not allow him to accept those arguments.
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> 53 This made the present case very different from the authorities cited by the appellants. In those cases, the court clearly expressed its distaste for arguments raised by a particular party, notwithstanding the fact that that party was eventually successful on the merits. The court thus refused to award full costs to the ultimately successful party. For example, in both *Rajabali Jumabhoy v Ameerali R Jumabhoy (No 2)* [1998] 2 SLR 489 and *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 2 SLR 274, the court expressly stated that the party had acted unreasonably in putting forward unmeritorious arguments.
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> [emphasis added]

14 In both *Goh Chok Tong v Jeyaretnam Joshua Benjamin* ([11] *supra*) and the *De Beers Jewellery case* ([12] *supra*), one of the circumstances taken into account was that there had not been a significant increase in the length (and therefore the costs) of the proceedings. This was presumably *apropos* one of the principles enunciated in *Re Elgindata Ltd (No 2)* ([11] *supra*), *viz*, that the successful litigant *could* be deprived of his costs in whole or in part where he had caused a significant increase in the length of the proceedings. However, it does not follow, as plaintiffs in the

present case seemed to suggest, that whenever a successful litigant has lengthened the duration of the trial by reason of advancing any claim or issue that ultimately failed, he should be penalised in costs.

15 The trial judge should obviously have regard to the totality of the circumstances: *Ho Kon Kim v Lim Gek Kim Betsy* [2001] 4 SLR 603 at [12]. In my view, the paramount consideration in such a case is whether the successful litigant had acted reasonably. This has now been made clear in O 59 r 6A where the criterion is whether he has "unnecessarily or unreasonably protracted, or added to the costs or complexity of those proceedings".

16 In the present case, it could not be said that the defendants acted unreasonably or improperly in putting up the defences of fair comment and qualified privilege. As noted in the judgment, the defence of fair comment failed for a technical reason, *viz*, the failure to plead facts (which did exist) based upon which the comment could be made.

17 Similarly, the defence of qualified privilege failed only because of the finding that the publication on the internet was a disproportionate response. All the other elements of the defence were made out and the plaintiffs' allegation that the defendants were actuated by malice was expressly rejected by the court. Invariably, in running the two failed defences, some time would have been spent which the plaintiffs would characterise as "wasted". However, on the view I have taken of the reasonableness of running the two defences, the defendants could not be said to have lengthened the proceedings needlessly.

18 In the result, I hold that even if I were competent to allow a reduction, I would be disinclined to do so. I acknowledge that this about-turn may occasion some surprise to the plaintiffs. I can only say in mitigation that in the much cited *Re Elgindata Ltd (No 2)* ([11] *supra*), Nourse LJ (whose statement of the principles on which costs were to be awarded have been approved on many occasions by our Court of Appeal) also admitted [at 239] to changing his mind.