Tan Kok Ing v Ang Boon Aik and Others
[2002] SGHC 215

Case Number : Suit 991/1994, SIC 600910/2002, SIC 600911/2002

Decision Date : 17 September 2002

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Muthu Kumaran (W T Woon & Company) for the plaintiff; Joseph Tan (Kenneth Tan Kong & Tan) for the first and second defendants; Charles Ezekiel and Akram Jeet Singh (Khattar Wong & Partners) for the third and fourth defendants

Parties : Tan Kok Ing — Ang Boon Aik; Famco Boat Services; Eyo Boon Hok; Singapore Piling & Civil Engineering Pte Ltd

Judgment

GROUNDS OF DECISION

Introduction

1. There were two applications which I heard in this action ('the High Court action'). The first application was Summons for Further Directions Entered No 600910 of 2002. This was filed by the Third and Fourth Defendants. The second application was Summons for Further Directions Entered No 600911 of 2002 filed by the First and Second Defendants. The primary relief sought by each application was identical i.e that the Plaintiff's claim be struck off and his action be dismissed, alternatively, that his damages be assessed at $0.

2. After hearing arguments, I allowed each application with costs by ordering that the Plaintiff's damages be assessed at $0. I also made consequential orders. The Plaintiff has appealed against my decision. I now give my written reasons.

Background

3. The First Defendant is the steersman of SG611, a bumboat. The Second Defendant is the owner of SF611. The Third Defendant is the steersman of SP633F, another bumboat. The Fourth Defendant is the owner of SP633F.

4. The Plaintiff Tan Kok Ing was a passenger in SF611 on 24 November 1991 when there was a collision between SF611 and SP633F ('the first accident'). The Plaintiff alleged that he suffered injuries, the most significant of which was injury to his neck and spine.

5. On 27 October 1993, Mr Tan commenced his action in DC Suit No. 9633 of 1993. This action was subsequently transferred to the High Court as Suit No 991 of 1994 i.e the High Court action. On 10 September 1996, interlocutory judgment was entered with damages to be assessed.

6. The Defendants then complained that Mr Tan was dilatory in pursuing his action and had failed to comply with various orders. Indeed, the First and Second Defendant s filed an application on 6 April 2001 to strike out Mr Tan's claim, while the Third and Fourth Defendants applied for similar relief on 19 April 2001. On 25 June 2001, the court declined to strike out Mr Tan's claim but costs were awarded in favour of the Defendants.

7. On 2 June 2002, the First and Second Defendants again applied to strike out Mr Tan's claim for failure again to comply with another order of court. On 8 January 2002, Mr Tan applied to be allowed to file and serve a further list of documents and for an extension of time to file the Affidavit-of-Evidence-in-Chief ('AEIC') of his expert and his own AEIC.

8. On 16 January 2002, both applications were heard together by AR Phang Hsiao Chung. The court again declined to strike out Mr Tan's claim but awarded costs to the First and Second Defendants. However, AR Phang made various orders including an order that the parties were to file and serve a further list of documents, if any, by 6 February 2002. There was also an unless order i.e. that if the Plaintiff

should default, his damages would be assessed at $0.

9. Mr Tan filed and served a further list of documents by 6 February 2002. He was apparently one minute late in his service, but no issue was taken by the Defendants on this.

10. The First and Second Defendants appealed against AR Phang's order of 16 January 2002 and the Third and Fourth Defendants appealed against the extension of time granted by AR Phang to Mr Tan. Both appeals were heard by me on 27 March 2002. After hearing arguments, I dismissed both appeals and made various orders. One of the orders I made was at the request of Mr Tan's counsel. This was to extend time for service of Mr Tan's documents to 7 February 2002 to avoid any argument arising from the late service of one minute. There is no appeal against my orders made that day.

11. However, there was subsequently an important development. Mr Charles Ezekiel, Counsel for the Third and Fourth Defendants said he happened to see another Counsel Ms Adeline Chong one morning. He was inspecting a court file and noticed that Ms Chong was inspecting the court file in relation to the High Court action. He asked her why she was doing so and she said that she was acting for a defendant in a motor accident on 11 July 1997 ('the second accident'). In the second accident, Mr Tan was a passenger in a pick-up which was involved in a collision with another vehicle that day. Mr Tan had filed his claim arising from the second accident in the Magistrate's Court in 2000 ('the MC action'). Eventually Mr Ezekiel obtained a copy of Mr Tan's AEIC filed in the MC action and some other medical reports in respect of Mr Tan's condition after the second accident. By then, it was late April 2002 and Mr Joseph Tan, Counsel for the First and Second Defendants in the High Court action, came to learn about the second accident and the MC action from Mr Ezekiel.

12. As a result, the two applications I have mentioned in my introduction were filed on 22 May 2002. For the First and Second Defendants, this was their third application to strike out Mr Tan's claim and for the Third and Fourth Defendants, this was their second application.

The reasons for the two applications

13. The crux of the two applications was Mr Tan's omission to disclose two important documents or sets of documents which the Defendants discovered only after they learned of the MC Action.

14. The first was a letter dated 16 September 1997 from one of Mr Tan's previous employers Marunda Utama Engineering Pte Ltd ('Marunda'). In summary, that letter accused him of irresponsible conduct in failing to keep in touch with Marunda after the second accident and after Marunda's last conversations with him on 29 and 30 August 1997, even though several attempts had been made to contact him. I need only cite two paragraphs from that letter which was signed by Rachel Wong, a director of Marunda:

> 'I am shattered by your care free attitude towards the company during your absence from work. I have always regarded you as a responsible person and that you would have concern for the work progress in the company. During your months of absence from duties, you have demonstrated a complete care-free attitude as we have not received a single phone call from your end as to your concern on projects handled by you. You have no doubt painted the impression that you are both physically impaired in movement and speech. An attitude which up until today I find it hard to digest. We hereby will not be giving you a one month notice or salary in lieu of.
>
> In short, our company had analyzed the whole situation, including your performance and had to come to the conclusion to discontinue your service with immediate effect from 1st Sept 97.'

15. The second document is actually a set of documents i.e. the medical reports on Mr Tan's condition after the second accident.

16. The Defendants' position was that the termination letter from Marunda was relevant because in Mr Tan's AEIC in the High Court action, he was suggesting that he had to leave Marunda because of his injuries arising from the first accident. The Defendants also said that as the injuries Mr Tan complained of in relation to the second accident were similar to the first accident, the medical reports after the second accident were obviously relevant.

17. The Defendants relied on O 24 r 16(1) of the Rules of Court which states:

> '**Failure to comply with requirement for discovery, etc. (O.24, r.16).**
>
> 16. (1) If any party who is required by any of the foregoing Rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that Rule or with that order, as the case may be, then, …, the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.'

18. Relying on *Manilal & Sons (Pte) Ltd v Bhupendra K J Shan* [1989] SLR 1182, they submitted that Mr Tan knew that the documents were relevant and that his failure to disclose the documents was deliberate or was so negligent as to be wilful.

19. To reinforce their submission, the Defendants stressed that not only did Mr Tan have separate law firms representing him in each action, he had also consulted different doctors. Indeed, his doctors in respect of the second accident appeared to be unaware of the first accident, even though his alleged injuries from each accident were similar. There was no reference in the second set of medical reports to the first accident. The use of separate law firms and different doctors was not innocent.

20. Aside from deliberate or wilful failure, the Defendants argued that Mr Tan had in any event failed to comply with the unless order of 16 January 2002 made by AR Phang. They argued that the fact that I had granted an extension of time on 27 March 2002 for service of documents was to meet the concern of Mr Tan's Counsel to avoid any argument about his service of a further list of documents one minute late, as mentioned above, and did not make the unless order of AR Phang any less peremptory.

21. Thirdly, the Defendants argued that there was a serious risk that a fair trial was not possible, even though Mr Tan was now prepared to disclose the medical reports in respect of the second accident and to undergo a medical examination by the Defendants' medical expert, because of the time lapse of about five years between the date of the second accident and the applications before me.

Mr Tan's explanation and submission for him

22. Mr Muthu Kumaran, Counsel for Mr Tan, did not dispute that the alleged injuries arising from the second accident were similar to those arising from the first accident. He also did not dispute that the documents omitted from disclosure were relevant and should have been disclosed by Mr Tan.

23. Mr Tan's explanation was that as he was separately advised by two different firms of solicitors, he was unaware of the relevance of the documents until the Defendants complained about the non-disclosure. Mr Tan said that he had not mentioned the second accident and the MC action to his first firm of solicitors because, aside from not realising its relevance, he was also embarrassed to tell the first firm that he had another legal case but did not ask them to handle it. He stressed that when he was asked in interrogatories in the MC action about any previous accident, he had disclosed the first accident and the High Court action openly.

24. He also said that when the matter came to light, he had been advised by Mr Kumaran that as the two actions were different, he could not disclose documents obtained in discovery in the MC action until the two actions were consolidated, a step which he was in any event undertaking.

25. Furthermore, as regards the termination letter from Marunda, he claimed that he no longer had a copy in his possession although he did not deny having received it after it was sent to him. He claimed he then saw a copy of it when the defendants in the MC action disclosed it. However, it was not disputed that he should have disclosed the existence of the letter as a document which had once been in his possession, even if he genuinely no longer had it in his possession.

26. Mr Kumaran stressed that although Mr Tan was a marine engineer at the time of the first accident, his highest academic qualification was 'O' levels, which he had obtained after studying in night classes. All further qualifications were obtained from technical courses. There

were medical reports from different doctors because, for example, Mr Tan had been taken to a different hospital at the time of the second accident and the private practitioner he was relying on in the MC action was someone appointed by his solicitors in that action.

27. Relying on the Litigation Library on Disclosure, Mr Kumaran submitted that the omission by Mr Tan was not deliberate and was not continuing. It was due to ignorance.

28. As for the unless order made on 16 January 2002, Mr Kumaran's position was that it was permissive and not mandatory. Also, the order pertained to documents which were created after the prior list was filed and not to those which should have already been covered by the prior list. Hence the unless order did not apply to existing documents.

29. Mr Kumaran also submitted that it was not too late to have a fair trial because Mr Tan was prepared to disclose the documents, if he could do so legally, and to undergo a medical examination by the Defendants' expert.

My reasons

30. The documents in question were not only relevant. They were material. Although Mr Tan only had 'O' Level qualifications, he had undergone and passed various courses which demonstrated that he was not the simpleton that he wanted me to believe.

31. I noted also that Mr Tan gave no reason why he chose to instruct another firm of solicitors when he already had one firm acting for him in respect of the first accident. While it is the right of any litigant to instruct whoever he wishes in respect of different causes of action, the situation before me called for an explanation. He had said he was embarrassed to tell the first firm of solicitors about the second accident but he did not say why he chose different solicitors for the second accident in the first place.

32. As for the doctors, it may well be that he was brought to a different hospital at the time of the second accident and the second firm of solicitors had used a different doctor from private practice as his expert. However, this begged the question why he did not even tell the second set of doctors about his first accident when the alleged injuries from the second accident were similar to those from the first.

33. As regards Mr Tan's purported ignorance of the relevance of the documents, this was laid to rest when Mr Ezekiel pointed out during arguments to an affidavit of Edna Ngo filed on 28 February 2002 for Mr Ezekiel's clients in support of an earlier application. She had mentioned in paragraphs 15 and 18 of her affidavit her concern about the delay in Mr Tan's pursuit of his action and in particular the difficulty of finding out the reason why Marunda had terminated Mr Tan's employment and whether Mr Tan had had a subsequent accident between the date of the first accident and the pending assessment of damages. These concerns turned out to be prophetic. Mr Tan must have read Ms Ngo's affidavit. Indeed, Mr Kumaran did not suggest otherwise. Yet, Mr Tan continued to avoid disclosing the documents.

34. As regards Mr Tan's alleged candid response to interrogatories in the MC action, I am of the view that he responded 'candidly' because he knew it was dangerous for him to lie when faced with a specific question about any other accident he had suffered. Indeed, when faced with that interrogatory, and since he chose to answer it, he must have realised by then, if not earlier, the importance of one accident to the other and vice versa. His answer to the interrogatories in the MC action was on 20 March 2002 and yet when Mr Kumaran appeared before me on 27 March 2002, Mr Tan still had not told Mr Kumaran about the second accident and the medical reports pertaining thereto.

35. There was no doubt in my mind that Mr Tan was aware of the relevance and materiality of the documents. In my view, Mr Tan's choice of different solicitors and his failure to disclose to either of them the other accident and the failure to disclose to the different sets of doctors the other accident was deliberate. The fact that he filed his two actions in different courts was suspicious, to say the least.

36. Accordingly, I concluded that the omission to disclose the documents was deliberate. I did not agree that the omission must be continuing before a court can act on the default. If so, every defaulter can quickly offer to make disclosure once his deception has been discovered. Each case depends on its own facts and on the facts before me, Mr Tan's conduct satisfied me that he was culpable.

37. I was also satisfied that Mr Tan was in breach of the unless order of 16 January 2002. I agreed that my order of 27 March 2002 did not change AR Phang's unless order into a non-peremptory order. Indeed, Mr Kumaran did not seriously contend that my said order had that effect. As for the effect of AR Phang's order, I was of the view that while it may have been primarily intended to apply to documents created

subsequent to the prior list of documents, it was wide enough to also cover any relevant document not previously disclosed. Furthermore, while the order did not compel Mr Tan to file a further list of documents, if there was no other relevant document, he was obliged to do so if there was any relevant document not yet disclosed.

38. I also did not accept the explanation that Mr Tan could not disclose documents he had obtained during discovery in the MC action. The medical reports in respect of the second accident were in his possession. He did not obtain them from the other side. While he purportedly obtained a copy of the termination letter from the other side in the MC action during discovery, this would in any event have jogged his memory that he once had the letter in his possession but no longer had it.

39. As Mr Joseph Tan, Counsel for the First and Second Defendants, had submitted, the Plaintiff Mr Tan had exhibited a copy of the termination letter in his affidavit of evidence-in-chief affirmed on 30 January 2002 in the MC action. Furthermore, in another affidavit of Mr Tan, affirmed also on 30 January 2002, to support an application to transfer the MC action to the District Court, Mr Tan had said that he intended to file a supplementary list of documents in the MC action which would include the termination letter. By then, he could not have forgotten about its existence or its relevance. Yet when he filed his further list in the High Court action on 6 February 2002, pursuant to AR Phang's order, he still made no mention of the existence of the termination letter.

40. In any event, it is not as though Mr Tan had sought advice on these documents from Mr Kumaran prior to any complaint by the Defendants and that his omission was due solely to Mr Kumaran's advice. He had sought Mr Kumaran's advice after his omission had been discovered. His reference to that advice was a red herring.

41. As for the argument that there was a serious risk that a fair trial would no longer be possible, there was no evidence from the Defendants' medical expert asserting this. In the circumstances, I did not rest my decision on this ground although the long delay did not assist Mr Tan's cause.

Sgd:

WOO BIH LI

JUDICIAL COMMISSIONER

SINGAPORE