Riduan bin Yusof v Khng Thian Huat and Another
[2005] SGCA 8

Case Number : CA 72/2004

Decision Date : 07 February 2005

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

Counsel Name(s) : Appellant in person; Hri Kumar and Wilson Wong (Drew and Napier LLC) for the respondent

Parties : Riduan bin Yusof — Khng Thian Huat; Choy Mei Har

Civil Procedure – Appeals – Clause stating no appeal from decision of court-appointed expert – Whether appellant prevented from appealing – Whether decision of judge separate from decision of court expert

Civil Procedure – Appeals – Leave – Appeal on damages struck out due to appellant's failure to obtain leave to appeal – Whether appeal on costs should be automatically struck out

Civil Procedure – Appeals – Notice of Appeal – Whether notice of appeal irregular – Whether notice of appeal frivolous, vexatious or abuse of process – Order 57 r 3 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Civil Procedure – Striking out – Notice of appeal – Whether notice of appeal frivolous, vexatious or abuse of process – Whether clear and obvious case for striking out – Order 57 r 3 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

7 February 2005

Lai Siu Chiu J (delivering the judgment of the court):

1 Khng Thian Huat and Choy Mei Har ("the respondents") applied by Notice of Motion No 98 of 2004 ("the application") to strike out the Notice of Appeal ("the Notice of Appeal") filed by Riduan bin Yusof ("the appellant") in Civil Appeal No 72 of 2004. We refused the appellant's request for an adjournment (in order to engage counsel), proceeded to hear the application and dismissed it with no order on costs. We now give our reasons.

The facts

2 The appeal arose out of a dispute over a tenancy agreement between the parties. The respondents were the owners of a property at 95 Telok Kurau Road, Singapore 279022 ("the property"), which was tenanted by the appellant for three successive periods:

(a) The first tenancy ran from January 1995 to March 1997;

(b) The second tenancy ran from April 1997 to March 2000; and

(c) The third tenancy ran from April 2000 to March 2003.

3 For various reasons, the formal lease for the third tenancy was never signed. Nevertheless, the parties did sign a letter of intent which contained the material terms of the third tenancy. Soon after the letter of intent was signed, the parties' relationship deteriorated rapidly. The appellant was habitually late in making rental payments. Subsequently, the respondents attempted to assert, through correspondence, that the property was occupied by the appellant on a periodic basis,

thereby denying the validity and existence of the third tenancy.

4 The respondents' solicitors then served on the appellant a notice of "termination". The appellant rejected this unilateral termination of occupancy rights and refused to vacate the premises. Further, he denied the respondents any access when they sought to inspect the property.

5 The respondents then proceeded with a claim against the appellant in the District Court for payment of double rent pursuant to s 28(4) of the Civil Law Act (Cap 43, 1999 Rev Ed) for wrongfully holding over the property from 1 May 2001 to 10 April 2003. Subsequently, the respondents' claim for double rent increased with the passage of time. After the respondents' application for summary judgment failed, the proceedings were transferred by consent to the High Court as Suit No 929 of 2003: see *Khng Thian Huat v Riduan bin Yusof* [2005] 1 SLR 130.

The trial in the High Court

6 In the High Court, the respondents claimed against the appellant:

(a) double rent for holding over the property after the expiry of the second tenancy;

(b) damages for failing to restore the property to its original condition when the property was eventually vacated on 19 April 2003; and

(c) damages for consequential loss of usage arising from the property's state of disrepair; and

7 At the trial, the respondents claimed compensation for the damage caused by the appellant's failure to hand over the property in the same condition as it was at the commencement of the third tenancy. It was not in dispute that the appellant had caused some damage to the property. However, the parties could not agree on the degree of damage, the apportionment of fair wear and tear and the quantum of the claim.

8 In this regard, both parties engaged experts to assess the quantum of damages. However, the disparity between the evidence of their respective experts was quite substantial. At the court's suggestion, both parties then agreed to abide by the decision of a court-appointed expert ("the "court expert") on the issue of identifying and quantifying the alleged damage to the property.

9 Notably, the agreed terms of reference negotiated by the parties in relation to the court expert included the following provision:

6. The Expert's decision [on the quantum of damages] shall be final and binding on both parties, and no appeal or revision shall be brought in respect of the Expert's decision.

10 The court expert carried out three site inspections, and met with the parties' experts. The court expert then concluded that the appellant was 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 appellant. The court expert also stated that it would have taken seven weeks to repair the damage and reinstate the property. The learned trial judge accepted the court expert's views and findings.

11 At the conclusion of the trial, the judge allowed the respondents' claim in part but dismissed their main claim on the issue of double rent. The appellant was held liable for damages in the sum of

$79,170.00 arrived at as follows:

(a) compensation in the sum of $110,575.00 as assessed by the court expert, plus the sum of $15,595.00 agreed by the parties' experts as being due to the respondents;

(b) loss of use of the property for seven weeks assessed on the basis of the applicable rental amounting to a total of $40,250.00; and

(c) reimbursement of the sum of $2,750.00 being the portion of the court expert's fees paid earlier by the respondents;

less credit for the sum of $90,000.00 which had been held by the respondents as a security deposit for the third tenancy.

12 Notably, at the conclusion of the trial, both parties were ordered to bear their own costs incurred in the proceedings.

The Notice of Appeal

13 The appellant filed the Notice of Appeal on 19 August 2004 in person, having discharged his previous solicitors on 11 August 2004. The Notice of Appeal raised two issues for appeal: (a) damages and (b) costs.

14 On the issue of damages, the appellant asserted that:

(a) The respondents had undertaken demolition works and had removed various items in the property before the court expert could inspect the property. The appellant therefore contended that the respondents had intentionally removed evidence relevant to the subject matter of the dispute, thereby adversely affecting the findings reached by the court expert.

(b) The respondents themselves had failed to carry out maintenance works pursuant to their obligations as set out in the rental receipt they issued. The appellant also asserted that the respondents had intentionally altered the terms contained in the rental receipt by subsequently issuing the appellant with a new rental receipt without informing the appellant of the changes made. The appellant therefore argued that the order for damages should have taken into account the respondents' own failure to carry out maintenance works pursuant to the terms set out in the rental receipts.

15 On the issue of costs, the appellant contended that:

(a) The respondents had themselves wasted the court's time by adopting certain arguments in the original version of their Defence, which they knew to be unmeritorious and which they eventually retracted by way of subsequent amendments to the Defence. The appellant contended that the order on costs failed to take into account the respondents' role in wasting the court's time in this manner.

(b) The respondents should have engaged counsel to explain the terms of the tenancy agreement to the appellant. In particular, the respondents had failed to clarify their requirement in the first tenancy agreement for the property to be returned in its "original condition". The appellant contended that the order on costs should have also considered the conduct and omission by the respondents in this regard.

(c) The respondents had deliberately coaxed the appellant to enter into the third tenancy by claiming that unless he entered into the third tenancy, the appellant would have to bear a great deal of costs in order to reinstate the property to its original condition. The appellant therefore contended that the order on costs should have also taken into account the conduct of the respondents in this regard.

The application

16 The respondents raised the following grounds in support of the application to strike out the Notice of Appeal:

(a) the Notice was irregular;

(b) the Notice was frivolous, vexatious and/or an abuse of process.

Principles applicable to striking out notices of appeal

17 The principles applicable to striking out notices of appeal are stated in *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) ("the White Book") at para 57/3/7:

> The Court of Appeal has the inherent jurisdiction to strike out a notice of appeal where an appeal is plainly not competent (see *Aviagents Ltd v. Balstravest Investments Ltd* [1966] 1 W.L.R. 150; [1966] 1 All E.R. 450; or where the appeal is frivolous, vexatious or an abuse of the process of the court (see *Burgess v. Stafford Hotel Ltd* [1990] 1 W.L.R. 1215; [1990] 3 All E.R. 222). An appeal can be struck out in the exercise of that jurisdiction, if there is no possibility that the grounds of appeal are capable of argument.

18 While as a general principle it is possible to strike out a notice of appeal in certain circumstances, the present application should be distinguished from the more conventional situation where notices of appeal are usually struck out because they are filed out of time. As the White Book notes at para 57/3/7:

> *Cases involving striking out of notices of appeal are usually linked to O. 57, r. 4 (time for appealing)*. … See *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1991] S.L.R. 118 and *Ooi Phee Cheng v. Kok Yoon San* [1951] 1 M.L.J. 135. [emphasis added]

19 This is not the case here. Following the judgment of 19 July 2004, there was a one-month time limit for the appellant to file his Notice of Appeal, under O 57 r 4(c) of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the Rules"). He did file the Notice of Appeal on 19 August 2004 and deposited the sum of $10,000 as security for the costs of the appeal. Therefore, the Notice of Appeal was not filed out of time. On 27 August 2004, the trial judge indicated that he did not wish to hear further arguments from the appellant on the issue of damages.

20 The burden to show that the Notice of Appeal should be struck out therefore lay on the respondents. They must show either that the grounds of appeal are not capable of argument, or that the appeal is frivolous, vexatious or an abuse of process. We were of the view that the respondents had failed to do so.

21 A court will only exercise its power to strike out notices of appeal in "clear and obvious cases". In *Burgess v Stafford Hotel Ltd* [1990] 1 WLR 1215, Glidewell LJ cautioned at 1222:

> The jurisdiction to make orders striking out notices of appeal is one that is just as capable of abuse as is the power to put in hopeless notices of appeal. *In my view the power to strike out should be confined to clear and obvious cases*. [emphasis added]

Was the Notice of Appeal "irregular"?

22 In para 9 of the affidavit filed by the first respondent ("Khng") in support of the application, Khng deposed, "I am advised and verily believe that the Notice of Appeal filed by the appellant is irregular as it does not comply with Order 57 rule 3, and does not conform with Form 115, of the Rules of Court." However, Khng did not elaborate on his assertion of irregularity. The respondents also did not explain how the supposed irregularity (if any) in the Notice of Appeal would be so serious as to merit a decision by the court to strike out the Notice of Appeal. Asked in court to explain the "irregularity", counsel for the respondents sidestepped the issue by stating that the second ground was the main ground for the application, although he did say that the Notice of Appeal seemed to contain submissions rather than grounds.

23 The following passage from the White Book at para 57/3/6 makes it clear that errors in a notice of appeal would not invalidate the notice if its intention is clear and the Rules are otherwise complied with:

> The fact that there are errors in the notice of appeal will not invalidate the notice if its intention is clear and the rules are otherwise complied with, as, for example, mentioning a date for the hearing which is not a date during the sittings (*Re Coulton, Hamling v. Elliott* (1886) 34 Ch. D. 22). [emphasis added]

24 Further, para 57/3/4 of the White Book states clearly that even if the Notice of Appeal did not adhere to the form (Form 115) prescribed in the Rules which was the respondents' complaint here, the court has the discretion under O 2 r 1 of the Rules to allow amendments to remedy the irregularity (if any). In addition, unless the alleged irregularity was so fundamental or serious that the court ought not to exercise its discretion under O 2 r 1 of the Rules, "mere irregularities" do not render the proceedings void. It would be a different matter if, for example, the respondents had complained that they had been somehow misled or had suffered damage due to the alleged "irregularities" (*Hong Kim Sui v Malayan Banking Bhd* [1971] 1 MLJ 289). Otherwise, the Notice of Appeal should only be struck out if the breach for non-compliance was so fundamental that "it went to the very root of the legal process" (*Dato Wong Gek Meng v Pathmanathan a/l Mylvaganam* [1998] 5 MLJ 560 at 566).

25 Given Khng's lack of explanation in his affidavit and his counsel's inability to do so, the respondents' contention that the Notice of Appeal was irregular was no more than a bare assertion.

Was the Notice of Appeal frivolous, vexatious and/or an abuse of process?

26 The respondents claimed that the first ground of appeal in the Notice of Appeal was "frivolous, vexatious or an abuse of process". There are no local authorities that define the phrase "frivolous, vexatious or an abuse of process" in relation to striking out a notice of appeal. We would therefore have to consider these terms in the context of applications to strike out pleadings, under O 18 r 19 of the Rules.

27 For striking out of pleadings under O 18 r 19 of the Rules, it is a well-established principle that a court will not readily accede to an application to strike out an endorsement or pleading unless there is a very clear case for making out one of the grounds. The reluctance of courts to strike out claims summarily was explained in *Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] SLR 798 where

G P Selvam JC (as he then was) held at 803, [31]:

> This is anchored on the judicial policy to afford a litigant the right to institute a bona fide claim before the courts and to prosecute it in the usual way. *Whenever possible the courts will let the plaintiff proceed with the action unless his case is wholly and clearly unarguable.* [emphasis added]

28 Similarly, it was held by the Court of Appeal in *The Tokai Maru* [1998] 3 SLR 105 at [37] that: "The power to strike out an action for abuse of process is thus to be exercised only in cases of an exceptional nature."

29 In *Afro Asia Shipping Co (Pte) Ltd v Haridass Ho & Partners* [2003] 2 SLR 491 I had defined (at [22]) the words "frivolous or vexatious" under O 18 r 19(1)(b) of the Rules to mean "cases which are obviously unsustainable or wrong, [and where] the words connote purposelessness in relation to the process or a lack of seriousness or truth and a lack of *bona fides*". The definition as held by Yong Pung How CJ in *Goh Koon Suan v Heng Gek Kiau* [1990] SLR 1251 at [15], also included proceedings where a party "is not acting bona fide and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result".

30 Similarly, the phrase "abuse of process" under O 18 r 19(1)(d) of the Rules was explained by the Court of Appeal in *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 at [22] thus:

> It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose, as was raised by the respondents. In *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

31 The above cases which define the terms "frivolous or vexatious" and "abuse of process" in relation to striking out of pleadings under O 18 r 19 of the Rules, would assist us in deciding whether the Notice of Appeal was indeed "frivolous, vexatious, or an abuse of process".

32 As was held in *Burgess v Stafford Hotel Ltd* ([21] *supra*), the court's discretion to strike out notices of appeal should be confined to only "clear and obvious cases". We were of the view that the respondents had failed to show "a clear and obvious case" here.

33 At [10] of his Grounds of Decision, the trial judge indicated that he had adopted the court expert's findings on damages. The respondents based their argument on the terms of reference for the court expert, which stated in cl 6 (see [9] above) that "there shall be no appeal or revision in respect of the Expert's decision". Citing this clause, the respondents suggested in para 64 of Khng's affidavit that the decision of the judge, read together with the terms of reference, precluded the appellant from bringing any appeal on damages.

34 The respondents had wrongly equated the court expert's report with the judge's order on damages. Even though the judge decided to adopt the findings of court expert, his decision to do so was still separate from the decision of the court expert.

35 We are mindful that an appellant must show a "manifest error" in order to challenge the findings of a nominated valuer. In *Tan Yeow Khoon v Tan Yeow Tat* [2003] 3 SLR 486 (affirmed on appeal), Choo Han Teck J held at [12]:

> [W]here the parties had agreed to accept a price that their nominated valuer had determined so that litigation could thereby be avoided, they were bound by that valuation even if the valuer was wrong. The only possible exception is where there is a *manifest error* that justly requires judicial intervention. [emphasis added]

36 Therefore, any appeal against the findings of the court expert in relation to damages is likely to be without merit, unless the appellant can show "manifest error". However, the question of whether there was "manifest error" requires an inquiry into the facts that the court should only undertake at the actual hearing of the appeal, and not for the purposes of the application to strike out. As was held by Ralph Gibson LJ in *Deutsche Hypothekenbank Frankfurt AG v Vasaliki Demetriou Staikos* (unreported judgment dated 25 March 1993, Court of Appeal (Civil Division), transcript via LexisNexis):

> I have reached the conclusion that this court should dismiss the plaintiffs' application on the ground that this is not an appropriate case for the use of the power to strike out a pending appeal. *There is no clear basis for us to hold that the notice of appeal was an abuse of process without such inquiry into the facts as would be necessary for a decision of the appeal on the merits.* [emphasis added]

37 At the hearing of the appeal, the burden will be on the appellant to prove his allegations, including the issue of whether he should be allowed to adduce new evidence on appeal. However, the merits of the appellant's submissions should only be extensively examined at the actual hearing of the appeal, and not at the hearing of an application to strike out. In *Burgess v Stafford Hotel Ltd* ([21] *supra*), Glidewell LJ had cautioned at 1222:

> In my view the power to strike out should be confined to clear and obvious cases. It should not be utilized, and *an order to strike out should not be made, where any extensive inquiry into the facts is going to be necessary.* [emphasis added]

38 Further, as long as the appellant was not seeking to challenge the accuracy of the findings of the court expert, the Notice of Appeal on the issue of damages would not constitute an abuse of process. A distinction must be made between the findings of the court expert, and the decision of the trial judge to decide the quantum of damages based on such findings. At least one of the appellant's submissions in relation to damages was clearly not a challenge to the findings of the court expert, but rather, a challenge to the judge's decision on the order for damages.

39 The appellant made two claims in relation to damages: (a) that the respondents had intentionally removed evidence relevant to the subject matter of the dispute, thereby adversely affecting the findings reached by the court expert; (b) that the judge's order for damages should have taken into account the respondents' own failure to carry out maintenance works pursuant to certain terms set out in the rental receipts.

40 While it may be argued that ground (a) may be an indirect challenge to the court expert's findings, ground (b) was clearly not related to the court expert's findings. As ground (b) was not a challenge to the court expert's findings, the court should be reluctant to exercise its power of striking out because an extensive inquiry into the facts is necessary in order to evaluate the merits of ground (b).

41 The position at law for such striking out applications was neatly summarised by Hirst LJ in *Allason v Campbell* [1997] EWCA Civ 1668:

> The Court of Appeal has inherent jurisdiction to strike out a notice of appeal where the appeal is frivolous, vexatious or an abuse of process of the court, on the footing that there is no possibility that the grounds of appeal are capable of argument. … *However, the jurisdiction to make such a striking out order should only be exercised in plain and obvious cases and should not be utilized where any extensive inquiry into the facts is necessary* … [emphasis added]

42 The burden lay on the respondents to show a "clear and obvious" case for striking out both grounds of the appellant's appeal on damages; they failed to discharge the burden.

The appeal on costs

43 The respondents failed to explain why the appellant's appeal on costs should be struck out. Khng merely alleged at para 86 of his affidavit that "[t]he Appellant's argument and allegations in respect of the issue of costs [are] also misconceived, and the Respondents' solicitors will deal with the same in greater detail at the hearing of this application". Despite their failure to substantiate their argument, the respondents then attempted to tie their argument on costs to their earlier argument on damages, alleging in paras 88 and 89 of Khng's affidavit, that if the claim on damages failed, the appeal on costs should be automatically struck out because the appellant did not seek leave to appeal. This was a fallacious argument. Leave to appeal was not required precisely because the Notice of Appeal was not based solely on the ground of costs.

44 Even if we were to decide to strike out the Notice of Appeal on the issue of damages, we could have exercised our discretion to grant leave to the appellant to appeal on costs only. The respondents had alleged at para 87 of Khng's affidavit that "there is again no evidence to support the Appellant's allegations on [costs]". However this alleged "lack of evidence" is really an issue for consideration during the actual appeal, and not at the hearing of an application to strike out the notice itself. As was held by Jonathan Parker LJ in *Barings plc v Coopers & Lybrand* [2002] EWCA Civ 1155 ("*Barings*") at [36]:

> *The fact that the appeal is now relevant on costs only* is a matter which can (and no doubt will) be brought to the attention of the court hearing the substantive appeal, and the court will give that factor such weight as it sees fit in disposing of the appeal. *But it cannot in my judgment amount to a compelling reason for setting aside* the grant of permission [for leave to appeal]. [emphasis added]

Conclusion

45 By the application, the respondents in effect invited the court to examine the merits of the appellant's appeal before the actual hearing and requested that we dispose of the appeal by granting the application; we were not so inclined. Granting such an application would create an undesirable precedent and encourage advocates and solicitors to engage in tactical manoeuvres designed to wear down the opposition before the hearing of the actual appeal. As was held by Clarke LJ in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2003] 2 Lloyd's Rep 645 at [5], citing with approval vol 1 of the UK *Civil Procedure 2002* (Sweet & Maxwell, 2002) (The White Book) at para 52.9.2:

> This tempting provision [allowing the striking out of notices of appeal] should not lure advocates into tactical skirmishing or into manoeuvres designed to wear down the opposition. Save in

exceptional circumstances, *it is a misuse of the court's resources and a waste of costs for the court to consider the substance of an appeal on some intermediate date between the permission hearing and the full appeal*. [emphasis added]

46 However questionable may be the merits of the appellant's appeal, the court's task at this stage is not to hear the actual merits of the appeal, or to undertake a detailed examination of the substantive issues raised. We considered the application a wholly unnecessary step taken by the respondents in these proceedings – one that they ought to have known would have had little or no chance of success. In this regard, we endorse the words of Jonathan Parker LJ in *Barings* at [39] where he said:

> I would accordingly dismiss this application [to set aside a grant of permission to appeal], and in doing so I would express the hope that in future practitioners will think twice about launching an application of this kind, in the knowledge that *only in very limited circumstances will such an application be likely to succeed*. [emphasis added]

47 The respondents failed to discharge their burden to show that the appellant's appeal was frivolous, vexatious or an abuse of process. They also made a bare and unsubstantiated assertion that the Notice of Appeal was "irregular". Such unmeritorious applications meant to wear out the appellant do little to further the interests of justice and only serve to waste the time and resources of our courts; they are not to be condoned.

48 Accordingly, we dismissed the application. As the appellant was not represented, no order for costs was made.