Koh Toi Choi v Lim Geok Hong and Another
[2007] SGHC 87

Case Number : OS 15/2007

Decision Date : 29 May 2007

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Tan Oi Peng (Low Yeap Toh & Goon) for the plaintiff; Roy Manoj (Roy & Partners) for the first defendant; M P Rai (Cooma & Rai) for the second defendant

Parties : Koh Toi Choi — Lim Geok Hong; Ang Kee Huat Charcoal Trader (suing as a firm)

Civil Procedure – Appeals – Leave – Application for leave to appeal – Whether trial judge's decision containing prima facie case of error of law – Section 21(1) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

Civil Procedure – Pleadings – Striking out – Defence and third-party statement of claim struck out at trial stage under O 18 r 19(1) of Rules of Court – Whether weak defence ground for striking out – Whether striking out at trial stage causing unfairness to one party – Order 18 r 19(1) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

29 May 2007

Belinda Ang Saw Ean J

1 By this Originating Summons No 15 of 2007, the plaintiff, Koh Toi Choi ("Koh"), sought leave to appeal against the order of the District Judge ("the trial judge") striking out Koh's Defence in MC Suit No 25641 of 2005 and his Third Party Statement of Claim. As a corollary of the striking out order, final judgment was entered against Koh on 30 October 2006 for the agreed sum of $11,460 with costs fixed at $4,000. Koh was also ordered to pay the third party's costs fixed at $4,500. Koh was further ordered to bear the disbursements incurred by both Lim Geok Hong (as the plaintiff in MC Suit No 25641 of 2005) and the third party, the quantum of which was to be taxed, if not agreed.

2 The background facts are as follows. Koh was involved in an accident along Bendemeer Road on 12 December 2004. Koh was the driver of taxi SH 6884J. The other vehicles involved in the accident were the motor car SDR 9673G and the lorry YL 7597P. The motor car was owned by Lim Geok Hong ("Lim") and the driver of the vehicle at the time of the accident was Lim Choon Hoong ("LCH"). The lorry YL 7597P was driven by one Chan Choon Poh ("Chan"). The owner of the lorry was Ang Kee Huat Charcoal Trader against whom Koh sued as a third party.

3 According to Koh, Chan negligently drove the third party's lorry and caused or contributed to the damage at the rear of Lim's motor car ("prior collision"). He alleged in his Accident Statement dated 13 December 2004 that the motor car cut into his lane in front of the lorry. The lorry could not stop in time and consequently, it collided into the rear of the motor car. Although Koh applied his brakes, Koh's taxi unavoidably collided into the third party's lorry. What was in dispute was the sequence of the collisions. Notably, LCH's version was that the taxi first collided into the lorry, which in turn collided into the motor car. This was consistent with Chan's Accident Statement dated 13 December 2004.

4 Koh did not in his Defence dated 3 March 2006 plead any prior collision between the third

party's lorry and Lim's motor car. On 30 October 2006, before the trial started, Koh's counsel, Ms Tan Oi Peng, was given an opportunity to consider amending Koh's pleadings. She chose not to amend, believing the pleadings to be in order. The trial then commenced with LCH taking the stand. In the course of cross-examination, Ms Tan put to LCH questions about the prior collision. This was objected to by counsel for the third party, Mr M P Rai. The trial judge halted the cross-examination and adjourned the proceedings in open court to deal with Mr Rai's objections in chambers.

5 In chambers, Mr Rai submitted that before the trial started, Koh had passed up the opportunity to amend his Defence to raise the allegation of a prior collision. It was a considered decision. Hence, Koh's counsel was not entitled to put to LCH a version of the accident that was not part of Koh's pleaded case. Further, Mr Rai argued that the defence raised was not a proper defence as it skirted all the relevant issues and did not address the material facts. In effect, the defence did not disclose any plea of any collision between the lorry and the motor car, or between the lorry and the taxi, or of any sequence of how the accident occurred. In short, the facts pleaded were not sufficiently clear that Koh was alleging that LCH and/or Chan were responsible for the collision. Mr Rai, citing *Rajendran a/l Palany v Dril-Quip Asia Pacific Pte Ltd* [2001] 3 SLR 274 in support of his arguments, concluded that the defence did not show a *prima facie* defence to Lim's claim, and the third party proceedings did not show any basis for a claim by Koh for contribution. Counsel for both sides (Lim and the third party) applied for the Defence and the Third Party Statement of Claim to be struck out under O 18 r 19(1) of the Rules of Court (Cap 322, R 5 2006 Rev Ed) which reads:

> 19 —(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

6 Ms Tan maintained that the issue of prior collision was contained in paragraph 4 of the Defence, but if the trial judge was not with her on this point, she would make an oral application to amend Koh's Defence to plead that the lorry collided into the motor car thereby causing the taxi to collide into the lorry. In short, there was a prior collision.

7 The trial judge was not disposed to hear any arguments on amendments to the Defence without a formal application before her. No draft of the proposed amendments was tendered to assist the court. In any case, the trial judge found that the omissions in Koh's pleadings concerned material facts that were fundamental to his case against both Lim and the third party. Agreeing with counsel, the trial judge struck out the Defence and Third Party Statement of Claim and gave final judgment in Lim's favour against Koh. At the conclusion of the hearing in chambers, LCH who was still on the stand, so to speak, was formally released as a witness.

8 On 28 December 2006, Koh applied to the District Court for leave to appeal against the decision of the trial judge, but leave was refused. Leave to appeal was required under s 21(1) of the

Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) as the amount in dispute was less than $50,000. In the present application, Koh argued that leave to appeal ought to be granted on the ground that the trial judge made a *prima facie* error of law by firstly, striking out the Defence and the Third Party Statement of Claim at the trial stage, and secondly, refusing to allow Koh to amend the Defence.

9 In addition, Koh sought to set aside the judgment of 30 October 2006 on the basis that Koh had a more than arguable defence in the light of the evidence of an accident reconstruction expert, one Leo Chi Yung ("Leo"). In that connection, Koh sought leave to adduce Leo's affidavit dated 6 December 2006.

Whether leave to appeal should be granted

Was there a prima facie case of error of law

10 The application was made on the basis that the trial judge had erred in law in striking out the Defence and the Third Party Statement of Claim. That is one of the threeguidelines for granting leave to appeal (see *Lee Kuan Yew v Tang Liang Hong and another* [1997]3 SLR 489 at [16] and *Abdul Rahman bin Shariff v Abdul Salim bin Syed* [1999] 4 SLR 716 at [31]).

11 Recently, the Court of Appeal in *IW v IX* [2006] 1 SLR 135 clarified that '*prima facie* error' related to errors of law, not fact. The appellate court at [20] stated:

> In *Abdul Rahman bin Shariff v Abdul Salim bin Syed*, Tay Yong Kwang JC (as he then was) clarified at [30] that the test of *prima facie* case of error would not be satisfied by the assertion that the judge had reached the wrong conclusion on the evidence. Leave should not be granted when there were mere questions of fact to be considered. He said that it must be a *prima facie* case of error of law that had a bearing on the decision of the trial court. In our opinion, this is a useful amplification of the first guideline set out in *Lee Kuan Yew v Tang Liang Hong*.

12 Even though the defence was not amended to include a plea that there was a prior collision, Mr Roy Manoj, as counsel for Lim, and Mr Rai, for the third party, accepted, and rightly so, that there was nonetheless a residual defence apparent from a reading of the Defence. The Defence had averred to various negligent acts or omissions on the part of LCH and Chan in paragraph 4 of the Defence under "particulars of negligence of [LCH]" and "particulars of negligence of the third party". Koh alleged that LCH and Chan failed to slow down, swerve and stop. Essentially, Koh's position was that Chan's (the third party's agent) sudden stop or braking led to the collision of the vehicles. Koh testified to this in his affidavit of evidence-in-chief filed in a related suit and notice of intention to use this affidavit in MC Suit No 25641 of 2005 was given.

13 I hasten to add that for the purposes of O 18 r 19, a weak defence did not mean that there was no defence and the pleadings struck out on that account. In *The "Tokai Maru"* [1998] 3 SLR 105, the Court of Appeal at [44] observed:

> The principles governing the court's discretion to strike out a pleading under O 18 r 19 on the ground that no reasonable defence is disclosed are well established. A reasonable defence means one which has some chance of success when only the allegations in the pleadings are considered: per Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094, cited with approval by Rubin J in *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1996] 1 SLR 478. The hearing of the application should not therefore involve a minute examination of the documents or the facts of the case in order to see whether there is a

reasonable defence. To do that is to usurp the position of the trial judge and the result is a trial in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way (see *Wenlock v Moloney & Ors* [1965] 2 All ER 871). *The mere fact that the defence is weak and not likely to succeed is no ground for striking it out, so long as the pleadings raise some question to be decided by the court* (see *A-G of Duchy of Lancaster v London and North Western Railway Co* [1892] 3 Ch 274). In short, the defence has to be obviously unsustainable on its face to justify an application to strike out.

[emphasis added]

14 Before I come to the application proper, I must refer to one more authority. A judge is said to have erred in law if his discretion was exercised in a way that was plainly wrong. This was so held by the English Court of Appeal in *Instrumatic, Ltd v Supabrase* [1969] 1 WLR 519. So the question of whether the trial judge was right in exercising her discretion in the way she did is a matter of law.

15 In my judgment, the trial judge misdirected herself in concluding that there was no defence disclosed in the Defence and in so doing, erred as to the law, and with that, she further erred in the exercise of discretion by deciding to strike out the Defence and Third Party Statement of Claim and to enter judgment in favour of Lim without turning to consider the right of Koh as a defendant to test Lim's case. It behoved the trial judge to be scrupulous to minimise any prejudice to Koh especially after the trial has started. Justice to Koh overwhelmingly required that he be given the opportunity to further cross-examine LCH which could have been done as LCH was still on the stand. The trial could have resumed following the trial judge's decision not to entertain Ms Tan's oral application to amend the Defence. This right to cross-examine LCH at the trial proper could not be taken away, however strong Lim's case was. As Choo Han Teck J pointed out in *Soh Lup Chee and others v Seow Boon Cheng and another* [2004] SGHC 8 at [20],

> The basic rule is that the plaintiff must first prove its case to the court. The task of the Defence is to expose the weaknesses and flaws in that case so that the court may, on a balance of probabilities, find that the plaintiff's case cannot be sustained.

A striking out of the Defence summarily, particularly at the trial itself, enables judgment to be entered, by which process the basic rule is bypassed and that is unfair. Besides, Koh's pleaded Defence was also a live issue which could only be determined after hearing oral evidence upon examination of the witnesses in open court. Striking out the Defence and the Third Party Statement of Claim in the course of the trial prevented Koh from offering evidence of witnesses.

16 Although O 18 r 19 expressly states that the court "may at *any* stage of the proceedings" order to strike out any pleading, case authority has shown that pleadings were usually struck out at the interlocutory stage of the action in order to save time and costs (see *Chee Siok Chin and another v Attorney-General* [2006] 4 SLR 541 at [27]). If the case has reached the point of trial without having been struck out, it must be only in an exceptional case that such an application is granted and on receipt of a valid explanation for the lateness of the application (see *Halliday v Shoesmith and another* [1993] 1 WLR 1 at 5, a decision of the English Court of Appeal where the application to strike out the pleadings was made at the commencement of the trial after the costs of preparation for the trial had been incurred). Nothing exceptional about the case was brought up to the trial judge, and I could not imagine the sort of situations that might justify a striking out once the trial has started given my views in [15] above.

17 The decision of *Blockbuster Entertainment Limited v James* [2006] EWCA Civ 684 is not an analogous case, but a parallel can be drawn from the principle reaffirmed by the English Court of

Appeal which is of general application and of relevance to this application. James, a former employee, had made claims against the appellant company ("Blockbuster"), alleging racial harassment, victimisation and discrimination. James was ordered to particularise his claim and reply to a request for further information. Exchange of witness statements and the preparation of lists of documents were also ordered. James did not comply with the orders. On the morning of the hearing, James brought documents which he wished to rely on but had not served on Blockbuster. He had also added matters to a witness statement which were not in the draft that had been provided to Blockbuster. He had also not complied with the order for further particulars and had not given proper exchange of witness statements. The tribunal ordered a striking out of the claim. The tribunal found that James had deliberately flouted its orders. The Employment Appeal Tribunal reversed the decision. Blockbuster appealed against the decision that it was inappropriate to strike out the claim. The Court of Appeal held that striking out on procedural grounds was only justified in an extreme case especially of a claim that had arrived at the point of trial. It could only be in a wholly exceptional case that a history of unreasonable conduct which had not until that point caused the claim to be struck out could now justify its summary termination.

18 As mentioned earlier, with respect to the trial judge, her finding that there was no defence on the face of the pleadings where there was a residual defence was an erroneous conclusion of law, and her subsequent order striking out the Defence and the Third Party Statement of Claim was plainly a wrong exercise of discretion. It is not a valid reason to strike out the pleadings merely because the case is weak (see [14] above), and more so at the trial stage for the reasons given in [15] above. On both counts, there was an error of law constituting sufficient ground to allow leave to appeal.

19 It was urged upon me by Mr Rai that I should not grant leave to appeal given the relatively small underlying claim, citing Kan Ting Chiu J's observations in *Goh Kim Heong & others v A T & J Company Pte Ltd* [2001] 4 SLR 262 at [33] in support of his proposition. That case is distinguishable. As I have stated, with respect, the decision of the trial judge was in the circumstances as a whole unjust such that court time and costs would have to be expended on this small claim by allowing the application.

Other Matters

20 Having reached the conclusions above, it was not necessary for me to deal with the other arguments canvassed by Ms Tan. Suffice it to say that Ms Tan had not identified in what way an error of law had occurred in the court's refusal to entertain Ms Tan's oral application to amend the Defence after she had earlier been given an opportunity to consider the matter. Second, Ms Tan's application to set aside the judgment in default under O 13 r 8 on the ground that Koh had a meritorious defence was misconceived. She conflated an application to set aside the judgment under O 13 r 8 with an application for leave to appeal. Third, the application for leave to use the affidavit of Leo, an Engineering Executive at LKK Auto Consultants Pte Ltd, who prepared an Accident Reconstruction Report dated 15 November 2006, was not relevant for this application.

Conclusion

21 For the foregoing reasons, I allowed Koh's application for leave to appeal with no order as to costs. I made it clear that the leave to appeal was confined to Koh's pleaded Defence in MC Suit No 25641 of 2005 and, needless to say, this included his case in the third party proceedings.