The Owners of the Ships or Vessels "Ah Lam II" and "Pu 1804" v The Owners of the Ship or Vessel "Bonito"
[2000] SGHC 210

Case Number	: Adm in Rem 69/1992, RA 600197/2000, RA 600224/2000
Decision Date	: 19 October 2000
Tribunal/Court	: High Court
Coram	: Lim Teong Qwee JC
Counsel Name(s)	: Danny Chua and Mohamed Goush Marikan (Joseph Tan Jude Benny) for the plaintiffs; Collin Seah and Habib Anwar (Rajah & Tann) for the defendants
Parties	: The Owners of the Ships or Vessels "Ah Lam II" and "Pu 1804" — The Owners of the Ship or Vessel "Bonito"

JUDGMENT:

Gounds of Judgment

1. Registrar's Appeal No 600224 of 2000 ("RA 600224/2000") is an appeal against the decision of an assistant registrar dismissing the plaintiffs' application for extension of time to file and serve the reference to registrar for assessment of damages ("reference"). I allowed the appeal on 11 July 2000. Registrar's Appeal No 600197 of 2000 ("RA 600197/2000") is an appeal against the decision of another assistant registrar ordering that the reference filed on 13 April 2000 be struck out and/or removed from the court file and that the letter of guarantee dated 31 January 1992 issued by Mitsui Marine & Fire Insurance Co Ltd and the letter of undertaking dated 19 August 1995 issued by Britannia Steamship Insurance Association Ltd be returned to the defendants' solicitors. I heard this appeal immediately after RA 600224/2000 and allowed it. The defendants have given notice of appeal in respect of both appeals and these are my written grounds.

2. In this action commenced by writ issued on 29 January 1992 the plaintiffs claim damages arising out of a collision between the defendants' vessel "Bonito" and the plaintiffs' vessel "Ah Lam II". On 12 September 1996 the defendants served on the plaintiffs an offer to settle the plaintiffs' claim fully and finally. On 27 November 1996 they confirmed that they had no claim against the plaintiffs and on 4 December 1996 the plaintiffs gave notice of acceptance of the offer. Under the terms of settlement the defendants would pay the plaintiffs 50% of the plaintiffs' claim in this action as proved or agreed together with interest thereon at the rate of 6% per annum from 28 January 1992 to the date of the offer and unless the quantum of damages claimed was agreed there was to be a reference to the registrar to assess damages.

3. On 27 March 1997 there was a pre-trial conference but no agreement had yet been reached by then. Counsel for the defendants informed the court that liability had been settled and that the parties were likely to agree on quantum once the documents were completed and counsel for the plaintiffs said that prospects of settlement were good. Nevertheless it was ordered that the plaintiffs file a notice of discontinuance by 12 July 1997 failing which they were to file a notice of appointment for damages to be assessed by 19 July 1997 failing which the action was to stand dismissed with costs.

4. On 4 July 1997 the plaintiffs' solicitors delivered to the defendants' solicitors a statement containing a claim under 32 heads of claim supported by 75 documents in 30 annexes or bundles. This was done no doubt with a view to reaching agreement on quantum but not having heard further from the defendants' solicitors the plaintiffs applied for extension of time fixed by the order of 27 March 1997. At the hearing on 18 July 1997 counsel for the defendants said the documents were only received on 4 July 1997 and that the parties were actively working on a settlement. An order was made extending to 30 August 1997 the time to file the notice of appointment for damages to be assessed. The notice of appointment was the reference and to avoid confusion I shall refer to it as the reference.

5. On the same day that the order was made extending time the defendants' solicitors requested further information and documents in respect of the plaintiffs' claim. On 28 July 1997 the plaintiffs filed an application to further extend time but the application was only fixed for hearing on 3 September 1997. Meanwhile on 19 August 1997 the plaintiffs' solicitors provided

further information in respect of part of the claim and they also filed and served on the defendants a list of documents and an affidavit verifying the list. On 27 August 1997 they complied with the defendants' request for further information and documents and also provided further claim documents. The list of documents and the affidavit verifying the list were presumably filed and served with a view to proceeding with the reference and in anticipation of directions being given.

6. When the plaintiffs' application came on for hearing on 3 September 1997 it was not opposed by the defendants and an order was made extending the time to 30 November 1997 for the reference to be filed. On 9 September 1997 less than a week after time had been extended the defendants' solicitors again requested further information and documents in respect of part of the claim. Presumably the request was made with a view to "working on a settlement".

7. There was no response to the defendants' last request for further information and documents and about one and a half years later on 11 March 1999 the defendants' solicitors informed the plaintiffs' solicitors that the action had been dismissed. They referred to the orders of 27 March 1997, 18 July 1997 and 3 September 1997. The plaintiffs' solicitors did not agree and there was an exchange of correspondence as to the effect of the several orders made. Subsequently the plaintiffs changed solicitors but in reality there was no change as it was a case of the solicitor personally having the conduct of the matter retiring from one firm and being admitted to another and continuing to have personal conduct of the matter.

8. On 20 March 2000 the plaintiffs' solicitors submitted a revised breakdown of the claim and the supporting documents and requested the defendants' response within 14 days. On 22 March 2000 the defendants' solicitors repeated their assertion that the action had been dismissed and on 17 May 2000 the plaintiffs filed an application for further extension of time to file and serve the reference. On 9 June 2000 the application was dismissed and the plaintiffs now appeal to this court.

9. The plaintiffs' case is that the action had not been dismissed for failure to comply with an "unless order". Mr Chua referred to the order of 27 March 1997 and the subsequent orders of 18 July 1997 and 3 September 1997. He said that while the first order was expressed as an "unless order" the second and third orders were not. They merely extended time without any default provision. He referred to *Hitachi Sales (UK) Ltd v Mitsui OSK Lines Ltd* [1986] 2 Ll LR 574.

10. In *Hitachi Sales* the order made was in these terms:

> "Unless the Defendants do serve within 14 days the Further and Better Particulars of the Points of Defence … the Points of Defence be struck out, and the Plaintiffs be at liberty to enter judgment against the Defendants for damages to be assessed ...."

The order was made on 13 May 1985, drawn up and date-stamped 16 May 1985 and served a few days later. The further and better particulars were not served and on 29 May 1985 judgment was signed in default. O 42 r 2(1) of the Rules of the Supreme Court then in force provided:

> "… a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time, within which the act is to be done."

O'Connor LJ said at p 579:

> "… the basis must be that the party against whom [the order] is made knows of its existence, the order must be unambiguous and specify the time limit from a starting time."

The order dated 16 May 1985 did not specify a starting time for the 14 days and it was held that it did not comply with the requirement and the defendants were entitled to an order setting aside the judgment *ex debito justitiae*.

11. *Hitachi Sales* was not concerned with a subsequent order extending time after an "unless order" that complied with O 42 r 2(1) (in pari materia with the local O 42 r 6(1)) had been made and it does not directly assist the plaintiffs. I wholly accept though that an order to which O 42 r 6(1) applies must be unambiguous and it must be unambiguous not only in terms of the time within

which the act required to be done must be done but also in terms of the consequence of any failure to do the act within the time fixed. The consequence contended for by the defendants is the most serious and far reaching. The action is to stand dismissed even though an offer to settle has been accepted.

12. The order of 27 March 1997 was not drawn up and entered. It ought to have been. See O 42 r 9(1). It was an "unless order" and r 9(2) does not apply to such an order. See *Hitachi Sales* at p 576. The assistant registrar's minute of the order states:

> "Plaintiffs to file and serve Notice of Discontinuance by 12 July 97, failing which Plaintiffs to file Notice of Appointment for Damages to be assessed by 19 July 97, failing which action stands dismissed with costs."

As noted above counsel for the defendants had said that the parties had agreed on liability and were likely to agree on damages and counsel for the plaintiffs had said that prospects of settlement were good. The plaintiffs were not in default. Under the terms of settlement a reference to the registrar to assess damages would only arise if and when damages could not be agreed and that event had not occurred yet. I think an "unless order" ought not to have been made at that stage but it was made and it would be too late now to take exception to it.

13. The application that led to the order of 18 July 1997 was for an order that:

> "The time for the Plaintiffs to file and serve the Notice of appointment for assessment of damages be extended to 19 October 1997."

The grounds of the application as stated in the notice included this statement:

> "The parties have reached agreement on the apportionment of liability and are now actively engaged in negotiating the issue of quantum of their respective claims.
>
> A short deferment of the date of filing the Notice of Appointment for Assessment of Damages would not only give the parties a better chance in coming to an amicable settlement but also avoid incurring further cost in subjecting the issue of the quantum of their respective claims before the Court for assessment."

According to the assistant registrar's note of the proceedings counsel for the defendants said:

> "No objections ….
>
> Parties are actively working to settle."

The minute of the order made states:

> "OIT.
>
> Extension granted and limited to a period of 6 weeks from 19 July 97."

Time was extended to 30 August 1997. This order was not drawn up.

14. O 42 r 9(2) provides:

> "An order –
>
> (a) which –

(i) extends the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act; … and

(b) which neither imposes any special terms nor includes any special directions other than a direction as to costs,

need not be drawn up unless the Court otherwise directs."

This rule applies to the order of 18 July 1997 and there was no direction that it should be drawn up. There were no special terms or special directions. It was quite properly not drawn up. This rule does not apply to an "unless order" which imposes special terms.

15. The application that led to the order of 3 September 1997 was for an order to extend time to 30 November 1997 and the grounds stated on the application included this statement:

> "The parties have been exchanging correspondence and are in the process of negotiating a settlement of the Plaintiffs' claim on documents provided by the Plaintiffs to the Defendants. The Plaintiffs are requesting for a short deferment of the date to file and serve the Reference to the Registrar for Assessment of Damages in order to give them an opportunity to fully address the various queries raised by the Defendants on the Plaintiffs' earlier forwarded claim documents."

As earlier noted the application was not opposed by the defendants and the assistant registrar's minute of the order only recorded that an order in terms of the application was made. Again in accordance with O 42 r 9(2) this order was not drawn up. There were no special terms or special directions.

16. Having regard to the terms of the orders made and the circumstances surrounding the making of the orders and the grounds of the applications for extension of time it must be at least doubtful whether the order of 3 September 1997 extending time to 30 November 1997 read with the orders of 27 March 1997 and 18 July 1997 was an "unless order". I do not think that it was. I also do not think that the "unless order" of 27 March 1997 can be read as if the date 30 November 1997 was substituted for the original date 19 July 1997. When the plaintiffs applied on 9 June 2000 for a further extension of time the action had not been dismissed pursuant to the order of 27 March 1997 or to any other order and the application ought to have been heard on its merits.

17. Mr Chua submitted that the application for further extension of time ought to be allowed in view of the absence of prejudice suffered by the defendants as a result of the delay. He referred to *The Tokai Maru* [1998] 3 SLR 105 where Tan Lee Meng J (delivering the judgment of the Court of Appeal) said at para 37:

> "The power to strike out an action for abuse of process is thus to be exercised only in cases of an exceptional nature. We are of the view that the delay in the instant case cannot be characterised as an abuse of process, as was contended by the respondents."

He also referred to *Costellow v Somerset County Council* [1993] 1 All ER 952.

18. In *The Tokai Maru* the defendants (respondents in the appeal) and the third parties (appellants) were ordered to file and exchange their affidavits for the purpose of the trial by 11 October 1996. The appellants defaulted. They filed their affidavit and purportedly served it on the respondents only several months later on 1 July 1997. The respondents refused to serve their affidavits in exchange. The appellants applied for extension of time for filing and exchanging affidavits. The respondents applied to strike out the appellants' defence in the third party proceedings. The learned judge in the High Court dismissed the appellant's application and allowed the respondents' application. He struck out the defence and made the usual orders for

judgment and costs. In the Court of Appeal Tan Lee Meng J said at para 21 that the principles applicable to the case were to be found in *Costellow*. Continuing at para 23 he said:

> "… these principles are as follows:
>
> (a) ….
>
> (b) The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff's claims and have a determination of the issues on the merits as a punishment for a breach of these rules unless the other party has been made to suffer prejudice which cannot be compensated for by an appropriate order as to costs.
>
> (c) Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time where the denial would have the effect of depriving him of his defence because of a procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs."

I think that with appropriate changes involving the substitution of "plaintiff" for "defendant" these principles apply to the case before me.

19. If the plaintiffs are denied an extension of time they will be deprived of their right to a reference to the registrar to assess damages. An offer to settle fully and finally as regards liability has been made by the defendants in accordance with the rules and the offer has been accepted and it would be quite extraordinary that the defendants should have been bound to pay but will not have to pay anything because the amount cannot be ascertained.

20. The substantial part of the plaintiffs' claim is for loss of hire and the market value of the tug. Mr Seah said that it would be more difficult to obtain the evidence now than if the orders had been complied with. I am unable to agree. The evidence is not in relation to events as to which specific witnesses would have to be called and their memory is likely to be affected by passage of time. The evidence is in relation to rates of hire and the value of a tug prevailing at the material time and I should have thought that a surveyor or any competent person would be in no worse position to testify as to these matters if the assessment of damages is proceeded with now rather than in November 1997.

21. Since July 1997 the plaintiffs have been providing the defendants with information and documents relating to their claim. It has not been suggested that the information or documents were inadequate although the defendants have called for further information and documents and they did that each time after time had been extended to file the reference. They were "actively working to settle". I think they would have obtained or "worked at" obtaining the necessary evidence and if they had not done so then they cannot be heard to complain that they had lost the opportunity to do so or been otherwise prejudiced.

22. The defendants are the owners of the "Bonito". They have provided an undertaking given by a P & I club in addition to a guarantee given by an insurer. These parties are I think the "real" defendants. They are not unaccustomed to having to dispute claims before the courts and before other tribunals. They were prepared to make some payment and only desired to have the amount agreed or assessed by the court failing agreement. I asked Mr Seah and he was unable to say that the delay was in some other way prejudicial to the defendants or the "real defendants" than only as regards evidence.

23. Having regard to all the circumstances I am satisfied that an extension of time as asked for by the plaintiffs will not cause any prejudice to the defendants for which they cannot be compensated by an award of costs. An extension of time in favour of one party in a sense causes an injustice to the other just as the refusal to grant an extension of time causes an injustice to the party out of time but here I think the balance of justice favours the making of an order to extend time. It remains to consider whether this is a special case or if there are any exceptional circumstances to refuse the extension of time asked for.

24. Under the terms of settlement there would only be a reference to the registrar to assess damages if the parties cannot reach an agreement. The plaintiffs submitted a claim under 32 heads and they provided information and documents in support of the claim. They later revised the claim under 34 heads but otherwise the revision did not result in a departure from the original claim. The defendants called for further information and documents. Quite clearly both parties were engaged in negotiations to reach an agreement as to damages. The defendants themselves said so.

25. After the order was last made for extension of time the defendants called for more information and documents. It has not been suggested that without these they were unable to consider the plaintiffs' claim but the plaintiffs could have provided the further information and documents last asked for or applied for more time to do so or they could have treated the negotiations as at an end and proceeded with the assessment of damages if they could not provide the information or documents. They could have taken one of these steps before 30 November 1997 to which day time was last extended or some time after that. To do so more than two years later is hardly justifiable but I do not think that this is so special a case or that the circumstances are so exceptional that it can be right to deny the plaintiffs an extension of time.

26. In my judgment the plaintiffs ought to have been granted an extension of time. I accordingly allowed the appeal save as regards costs and extended the time for filing the reference to expire immediately after 13 April 2000 which was the day the reference was in fact filed. I further ordered the plaintiffs to issue a summons for directions for the further conduct of the assessment of damages within two weeks of the order and made an order for costs which I considered appropriate in the circumstances. Having regard to my decision in RA 600224/2000 the parties agreed that it would follow that the appeal in RA 600197/2000 should also be allowed. I agree. I allowed the appeal save as regards costs. The effect was to dismiss the defendants' application for the reference filed on 13 April 2000 to be struck out and for the guarantee and undertaking to be returned.

Lim Teong Qwee

Judicial Commissioner