ABC Supermarket Pte Ltd v Kosma Holdings Pte Ltd
[2005] SGHC 44

Case Number : DC Suit 1850/2002, RAS 34/2004

Decision Date : 28 February 2005

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Madan Assomull, Rathna Nathan, Lee Ming Hui Kelvin and Andrew Goh (Assomull and Partners) for the appellant; Gan Theng Chong (Lee and Lee) for the respondent

Parties : ABC Supermarket Pte Ltd — Kosma Holdings Pte Ltd

Damages – Compensation and damages – Appellant operated supermarket at premises leased from respondent – Respondent failed to provide proper air-conditioning – Whether appellant could claim operational losses from respondent – Whether audited profit and loss figure of a company was good reflection of operational losses – Whether appellant's claim for loss of profits properly quantified – Whether respondent was prevented from contesting the audited profit and loss accounts – Whether appellant proved that the supermarket would have made a profit but for the defective air-conditioning system – Whether the defective air-conditioning system aggravated the appellant's losses

28 February 2005 *Judgment reserved.*

Kan Ting Chiu J:

1 This is an appeal from the decision of a district judge. The matter went before the district judge on appeal from a deputy registrar's assessment of the damages to be paid by the landlord of business premises to its lessee: see [2004] SGDC 193.

2 The lessee ABC Supermarket Pte Ltd (hereinafter referred to as "the appellant") rented a part of the basement of the Peninsula Plaza from Kosma Holdings Pte Ltd (hereinafter referred to as "the respondent"). The lease was for five years commencing 1 September 2001.

3 The appellant operated a supermarket known as ABC Supermarket at the leased premises, but it was not a successful venture. The appellant complained that the respondent did not provide proper air-conditioning to the premises as covenanted in the lease, resulting in the temperature of the supermarket being unsuitably high.

4 The supermarket started business in September 2001 and closed nine months later in May 2002. The appellant held the respondent responsible for the failure of the business and sued for damages in the Subordinate Courts. It obtained interlocutory judgment in its action, with an order for damages to be assessed.

5 At the assessment before a deputy registrar, the appellant divided the damages it claimed into three parts:

(a) $250,368.93 being losses incurred during the nine months of operation, that is, $184,628.06 from September 2001 to March 2002, and $65,740.87 from April to May 2002 (seven months in one financial year and two months in the following financial year);

(b) lost profits of $80,000, or between $75,000 and $100,000; and

(c) $9,623.50 incurred in rectification work on the air-conditioning system.

6 The deputy registrar assessed the appellant's loss over the nine months at $250,368.93. Having done that, he awarded the appellant $250,000, the maximum that could be awarded by the Subordinate Courts, without deciding on the rectification costs and loss of profits.

7 The respondent appealed against the deputy registrar's award. After hearing counsel, the district judge allowed the appeal and varied the award to $9,623.50 for the rectification costs and nominal damages of $500.

8 The appellant was unhappy to have the damages reduced so drastically, and brought this appeal which came before me.

9 In her grounds of decision, the district judge considered the background to the appellant's failed venture. The appellant operated two supermarkets, one at Yishun ("the Yishun supermarket") which it had bought as a going concern in August 2000, and the supermarket in this action ("the Peninsula supermarket"). It was also operating a chain of convenience stores known as ABC Bargain Centres at eight locations, including one on the ground floor of Peninsula Plaza.

10 In support of the claim for losses incurred, the appellant relied solely on the audited profit and loss accounts covering the period September 2001 to March 2002, and for the following financial year, April 2002 to March 2003.[1] Without the benefit of expert evidence, it cannot be assumed that the audited profit and loss figure of a company is a good reflection of its operational losses (*ie*, the losses or profits from the operation of the supermarket) for the period under audit. Audited accounts may, for example, cover financial activities beyond its operational or trading activities, and profits or losses carried over from the previous year.

11 Thus, while the operational profits or losses would fall within the audited profits or loss accounts of a company, the operational profit or loss figure has to be carefully extracted from those accounts, and should not be equated with the audited profit or loss figure. Ironically, the appellant also makes this point when the audited loss figures do not support its case: see [19].

12 When the appellant apportioned the loss to the trading months, the method it adopted was not correct. The appellant put its loss of $65,740.87 for the second financial year by taking one-sixth of the total audited loss for that year. Leaving aside the question whether the audited loss figures should be applied directly, the one-sixth apportionment cannot be a correct quantification of the operational losses for the two months as trading was conducted during those two months only in that financial year, and not for the other ten months. The losses cannot be treated notionally to have been incurred evenly through the trading and non-trading months of the year.

13 The appellant's claim for loss of profits of $80,000, or between $75,000 and $100,000, was not properly quantified.

14 The district judge noted in her grounds of decision that Mr Naraindas s/o Gangaram, a director of the appellant, testified that an annual profit of $80,000 was easy to achieve on the basis that the ABC Bargain Centre on the ground floor of Peninsula Plaza which occupied 900 sq ft had sales of $5,000 a day, so the supermarket in the basement covering 3,200 sq ft should have had sales of $8,000 a day.[2] This, as the district judge noted, was postulated without regard to the fact that the bargain centre and the supermarket did not sell the same mix of goods (although there was some

overlap), and without establishing any sale-to-profit ratios.

15 Mr Naraindas did not work out the basis for quantifying the lost profits. Instead, he relied on a comparison with the Yishun supermarket, which was 9,200 sq ft in area. The audited accounts showed that this supermarket made a profit of $282,595.06 for the financial year 2002/2003. On that basis, he said that the Peninsula supermarket of 3,200 sq ft (37.4% of the area) should have made $75,000 to $100,000 a year ($98,060.47 at 37.4%).

16 No study or projection was produced to support those claims. The appellant did not commission any expert report. Instead, it relied on its experience of having been in business for 20 years, during which it was largely engaged in running bargain centres as it did not operate any supermarkets before August 2000 when it took over the Yishun supermarket from the previous operators.

17 It was quite apparent that no direct comparison could be made between the two supermarkets. They were in very different locations, one in a residential heartland, and the other in the heart of town. One was about three times larger than the other. The clientele were different, being the residents in the neighbourhood of the supermarket in Yishun as contrasted to the office workers and tourists in the vicinity of Peninsula Plaza.

18 There was also one significant matter that the appellant did not take into account in presenting its claim. It was that the Yishun supermarket was not an overnight success. Although it was taken over as a going concern, it was operated by the appellant at a loss of $432,289.08 for 17 months before it began to turn in a profit. Even the bargain centres were not all profitable despite the appellant's experience with them. Three of the eight centres were run at a loss.[3]

19 Counsel for the appellant attempted to diminish the significance of these losses by arguing that:

> Much has been said of the losses in Yishun supermarket for the first 17 months but it is submitted that these were only notional losses largely due to the amortisation (goodwill payments), directors' fees and very significant depreciation. Notional losses are losses that would not have come about but for their voluntary inclusion.
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> |---|---|
> | Amortisation | S$236,111.11 |
> | Directors' Fees | S$100,000.00 |
> | Depreciation | S$209,689.97 |
> | Total | S$545,801.08 |
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> If these items were not deducted from the gross profits, then Yishun supermarket would have made a nett profit in the first 17 months.[4]

This submission underscored the point that bare audited profit and loss figures may not reflect the operational profit and loss position of a business. Beyond that, I am unable to accept, without proper analysis and explanation, that the three listed items should be excluded from the computation of operational loss or profit. It strikes me that the appellant is being inconsistent when it seeks to rely on the audited accounts as evidence of profits, and rejects or qualifies them as evidence of loss.

20 The appellant took the position that the respondent was not entitled to raise any issues on the audited profit and loss accounts. The district judge noted in her grounds of decision ([1] *supra*, at [6]) that:

> The plaintiffs [*ie*, the appellant] submitted, as a preliminary point, that the rule in *Browne v Dunn* (1893) 6 R 67 (which was followed in the case of *Arts Niche Cyber Distribution Pte Ltd v PP* [1999] 4 SLR 111) applies and that it is not open to the defendants [*ie*, the respondent] to show that the losses as shown in the audited accounts were not the proper measure of damages as the defendants' counsel had failed at the hearing to put to the plaintiffs' witnesses that their estimation of losses was unreasonable.

21 That argument was misconceived. It was for the appellant to prove its losses. If the appellant chose to prove them by relying on the accounts, the respondent did not have to put expressly to the appellant's witnesses that the estimation of the losses was unreasonable. Short of admitting expressly or impliedly that the estimation was reasonable, which admission would estop it from changing its position, the respondent was entitled to submit that the appellant had not discharged its onus to prove its losses. There was never any doubt that the respondent did not accept the appellant's quantification of its losses, and no question of the respondent having agreed with the appellant's approach to quantifying its losses.

22 The rule in *Browne v Dunn* (1893) 6 R 67 was expressed by Lord Herschell LC at 70–71 as follows:

> [I]t seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is *not speaking the truth* on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought *not to be believed*, to argue that he is a witness *unworthy of credit*. … I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play dealing with witnesses. … [I]t will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted. [emphasis added]

23 The rule is that where there is an intention to challenge the credibility of a witness, the witness should be given the opportunity to respond to the challenge. For example, if the intention is to assert that A's evidence that he saw B at a certain place cannot be believed because B was not there, that should be put to A. But if the intention is to point out that although B was present, his presence has no bearing on the issue at hand, that is the relevance of A's evidence, and not his credibility that is in question. In such a situation, the rule does not apply.

24 The respondent's stance on the appellant's audited loss figures was, in essence, "So these are your audited losses, but they do not prove your operational losses." The respondent was not questioning the authenticity of the figures, but was disputing their probative value. The appellant always knew that the respondent was disputing that.

25 The application of the rule has been discussed and explained sufficiently and does not require

further clarification. In *Liza bte Ismail v PP* [1997] 2 SLR 454, Yong Pung How CJ explained:

> 67 The rule in *Browne v Dunn* is not inflexible. This was noted in that case itself by Lord Morris in particular (at p 79), who emphasised the need for caution against 'laying down any hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit'. Similar sentiments were expressed by Gleeson CJ in *R v Birks* (1990) 19 NSWLR 677, a decision of the New South Wales Court of Criminal Appeal. Having set out the observations of the House of Lords in *Browne v Dunn*, Gleeson CJ observed (at p 688):
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> > It is plain that their Lordships, whilst recognising and affirming a rule of practice in the terms in which they expressed themselves, also recognised the need for flexibility in its application. That need arises from the very nature of the subject matter which it concerns. The central purpose of the rule is to secure fairness in the conduct of adversary proceedings. That consideration provides the best guide, both to the practical requirements of the rule in a given case, and to the consequences which may properly flow from its non-observance, including the remedies that are available to deal with a problem so created.
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> 68 It is settled law then that the rule in *Browne v Dunn* is a flexible rule of practice, intended to ensure procedural fairness in litigation. The mere failure to cross-examine does not necessarily mean that adverse inferences must be drawn against the 'defaulting' party as there may be other explanations for this failure: *R v Birks*; *R v Manunta* (1989) 54 SASR 17.
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> …
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> 72 Although the general proposition is that testimony not subjected to contradiction in cross-examination may be treated as unchallenged and thus accepted by the opposing party, the court is still entitled to reject such testimony: *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505, per Samuels JA at p 507; see also Hunt J's observations at p 18 in *Allied Pastoral Holdings* [*Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1]. A careful evaluation of the totality of the evidence must still be undertaken to determine the cogency and weight of such testimony. …

26 That being the case, there is no basis for saying that the respondent cannot assert that the audited loss figures do not represent the appellant's operational losses.

27 In the event, the appellant's claim came up against a greater difficulty on a more fundamental issue. The district judge found that the appellant had failed to prove that the defective air-conditioning had caused it to suffer loss. The reliance on comparisons with the Yishun supermarket and the bargain centres was not enough to establish that the poor air-conditioning caused the Pennisula supermarket to lose profits. If the Yishun supermarket, an existing business, ran for 17 months at a loss under the appellant, there was no basis to assume that the Peninsula supermarket would have turned a profit immediately or within the first nine months of operation if the air-conditioning worked properly. A different position might have been taken if the supermarket had operated at a profit before air-conditioning problems intervened, or if some reliable study had been done before the operations commenced of the profits that could be earned if there were no problems.

28 In the appeal before me, the appellant contended that damages for lost profits should have been awarded because of the low rental, good location and business concept of the supermarket. It cited the unreported decision of the Supreme Court of the Australian Capital Territory in *Battik Pty Ltd v Hawkesbury Nominees Pty Ltd* [1999] ACTSC 55. In that case the plaintiff took a lease on premises to operate a restaurant. To its disappointment, the exhaust and air-conditioning systems were

defective and the restaurant failed. It sued the lessors for loss of profits, and succeeded. In his grounds of decision Higgins J found:

> In my view, although I have no doubt that [the plaintiff], if conditions had permitted, would have run an attractive and moderately successful restaurant, it was not going to be a big money-earner. It is realistic to suppose that in terms of returning a living to the staff and management, it would have been successful. It probably would have returned a small profit on the investment.

The finding that the restaurant would have returned a small profit, which was made on an examination of the evidence before the court, was a crucial element in the decision in favour of the plaintiff.

29 That is a vital point of difference from the present case. The district judge found as a fact that the appellant had not shown that it would have made a profit from the supermarket if the air-conditioning system was not defective.

30 If there had been a finding that the business could have made a profit, it would not be necessary for the business to have commenced to attract an award for loss of profits. In *Straits Engineering Contracting Pte Ltd v Merteks Pte Ltd* [1996] 1 SLR 227, one company, which I will refer to as "Merteks", entered into an agreement with another company, which I will refer to as "Straits", to purchase Straits' shares in its subsidiary company. The purpose of the acquisition was for Merteks to gain access to a leasehold seafront property of the company that Merteks needed to expand its existing ship repair, mechanical engineering and fabrication work. The acquisition of the shares was aborted, and Merteks did not get to expand its business to the seafront property. When Merteks sued Straits, the trial judge found Straits liable for the breakdown of the transaction and awarded $1,430,000 for loss of profits to Merteks. Straits appealed against the making of such an award, as well as the amount awarded.

31 The Court of Appeal upheld the decision to make an award for lost profits, but reduced the sum of the award to $250,000. In its decision, the Court noted at 239–240, [36]:

> [T]he trial judge found that the respondents had suffered a real loss occasioned by the breach of contract by the appellants, and once more he referred to the profit projections and considered the various factors for and against the enhancement of the respondents' capacity by the proposed acquisition. Again, on a close examination of his judgment it is clear to us that *the trial judge found that there was a real chance of the respondents making a profit* if they had been successful in the acquisition. On the authority of *Chaplin v Hicks* [1911] 2 QB 455 he awarded to the respondents damages for the loss of a chance of making profits. [emphasis added]

32 In deciding whether to make an award, a court has to distinguish between a real chance and a mere chance. In the *locus classicus* on this issue that the Court of Appeal referred to, *Chaplin v Hicks* [1911] 2 QB 455, the plaintiff was one out of 50 short-listed applicants from whom 12 would secure engagement as an actress, but the defendant caused her to be absent for the selection and she was not engaged. She was found to have suffered loss for which she was entitled to compensation.

33 At the other end of the spectrum, if A contracts with B to buy a lottery ticket for him and fails to do that, B may only be entitled to nominal damages from A because he is unlikely to be considered to have a real chance of winning the lottery with one ticket. Whether a lost chance in a particular case is a real chance or a mere chance is a finding that has to be made from all the relevant facts in a given case.

34 It merits repeating and emphasising that a court will make such an award only when it finds that there is a real chance that a profit would have been made if nothing untoward happened. Thus, when the district judge did not make such a finding, she could not make an award.

35 However, we need to go further into the matter. While the supermarket may have been unprofitable even with proper air-conditioning, could the defective air-conditioning have aggravated its losses? It is entirely reasonable to assume that a comfortable supermarket would have attracted more customers than one with air-conditioning problems, and if the supermarket had more customers it would suffer less loss although it was not a profitable venture. And if the respondent's default caused the appellant to suffer greater loss than it would have suffered if there were no default, the respondent should compensate the appellant for the additional losses. To be fair to the district judge, this argument was not made before her and was raised in the course of the appeal before me after I alluded to it.[5]

36 It is not possible to quantify with any degree of precision the additional losses that were caused by the defective air-conditioning. There is really no data to enable that to be done. In the circumstances, taking into account the nature and scale of the business, I award the appellant $45,000 as compensation for the additional loss incurred over the nine months of operation.

37 The damages payable to the appellant are therefore increased to $54,623.50: $45,000 in place of the nominal damages of $500 and the rectification costs of $9,623.50.

38 That leaves the question of the costs of the appeal. The appellant has succeeded in obtaining a higher award, but has failed to have the deputy registrar's award of $250,000 reinstated. It has succeeded on a point not raised before the district judge, but which arose in the course of the appeal before me. I think it is proper that each party should bear its own costs in the appeal.

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[1][2004] SGDC 193 at [12].

[2][2004] SGDC 193 at [15].

[3][2004] SGDC 193 at [17(iii)]; Appellant's Further Submissions, para 20.

[4]Appellant's Further Submissions, para 63.

[5]Appellant's Further Submissions, paras 24 and 25.