Lim Kok Koon v Tan JinHwee Eunice and Lim ChooEng (a firm)
[2004] SGCA 9

Case Number : CA 106/2003/Z, NM 121/2003

Decision Date : 18 March 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; MPH Rubin J; Yong Pung How CJ

Counsel Name(s) : Allan Tan Chwee Wan (JHT Law Corporation) for appellant; Vinodh Coomaraswamy and David Chan (Shook Lin and Bok) for respondent

Parties : Lim Kok Koon — Tan JinHwee Eunice and Lim ChooEng (a firm)

Civil Procedure – Appeals – Notice – Judge giving order on merits and costs on same day – Judge agreeing to hear further arguments on costs alone – Whether order on merits suspended – Whether appellant filing Notice of Appeal out of time

18 March 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 By way of a motion, the respondent, Tan JinHwee Eunice & Lim ChooEng, ("the firm") who was the defendant in the action below instituted by the appellant, Lim Kok Koon ("LKK"), sought to have LKK's notice of appeal set aside on the ground that the notice was filed out of time. The appeal of LKK was against a High Court decision dismissing his claim against the firm in relation to a fraud committed by a person who was at the material time a partner of the firm.

2 While at the conclusion of the hearing of the motion we were in agreement with the arguments of the firm that the notice was filed out of time, we nevertheless made no order on the motion and instead granted LKK's oral application for an extension of time to file the Notice of Appeal out of time and thus regularised the notice filed. We now give our reasons why we disagreed with the submission of LKK and held that the notice was late.

The facts

3 First, let us set out in brief the facts leading to the motion. On 23 May 2003, LKK took out a writ against the firm on the ground of certain alleged fraud committed by a then partner of the firm. On 19 June 2003, the firm applied to strike out the writ on the ground that it did not disclose any reasonable cause of action and/or it was frivolous or vexatious and an abuse of the process of the court. The application was dismissed by the deputy registrar. However, on 26 August 2003, the judge in chambers allowed the appeal and struck out the claim and awarded the firm costs in the sum of $3,000.

4 The firm was dissatisfied with the sum fixed by the judge as to costs. Thus, on the very day, the firm wrote in requesting for further arguments only in relation to the question of costs. On 1 September 2003, apparently to comply with s 34(1)(c) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA"), LKK wrote to the judge asking for her certification that she required no further arguments.

5 On 2 September 2003, the High Court Registry informed the parties, with specific reference to the letter of 26 August 2003 from the firm, that the judge would hear further arguments on 16 September 2003. There was no reference whatsoever in that notification to the letter of

1 September 2003 from LKK. Neither was there any subsequent response from the Registry to that letter.

6 At the hearing on 16 September 2003, counsel for the parties submitted only on the question of costs, at the end of which the judge increased the amount of costs which she had earlier awarded. Neither party sought to argue on the merits of the case.

7 On 3 October 2003, the respondent filed an appeal against the whole of the judgment as if it was given on 16 September 2003.

Issues

8 The issue which arose from the motion was, did the fact that the judge agreed to hear further arguments on the question of costs mean that the entire judgment given by the judge on 26 August 2003 was also put on hold? In such a situation, how should the prescribed one month period to file a notice of appeal be reckoned?

9 Before we proceed to examine the issues, there is a related point which we need to address and this arose from LKK's request of 1 September 2003 to the judge to certify that she required no further arguments. This request was to comply with s 34(1)(c) of the SCJA which prescribes that no appeal shall be brought to the Court of Appeal in relation to an interlocutory order made by a judge in chambers unless "the judge has certified, on application within 7 days after the making of the order by any party for further argument in court, that he requires no further argument".

10 Now, the question is, in relation to the judgment of 26 August 2003, did LKK require a certification by the judge before he could appeal against it? The answer to that question would depend on whether the decision made that day was interlocutory or final. It would appear that there are two tests to determine the question. One is the "application" test enunciated in *Salaman v Warner* [1891] 1 QB 734 ("*Salaman*") and the other, the "order" test which was propounded in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 ("*Bozson*"). This court reviewed the cases in *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 4 SLR 441 ("*Aberdeen Asset*") and was of the view that the *Bozson* test seemed more logical. This test, in the words of Lord Alverstone CJ in *Bozson* at 548–549, is:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then … it ought to be treated as a final order; but if it does not, it is then … an interlocutory order.

11 In fact there is a whole line of decisions of this court which held that the Bozson test is the appropriate test: see *Tee Than Song Construction Co Ltd v Kwong Kum Sun Glass Merchant* [1965–1968] SLR 230; *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1992] 1 SLR 73; *Ling Kee Ling v Leow Leng Siong (No 2)* [1996] 2 SLR 438 and *L v L* [1997] 1 SLR 222.

12 In *Aberdeen Asset* this court also recognised that the question of whether an order is interlocutory or final is sometimes not an easy one to decide. But in so far as the present case is concerned, it would make no difference whichever test is applied. The result would still be the same. Under the *Bozson* test, as the judge's order was to dismiss the action as disclosing no reasonable cause of action, it was clearly a final order. Under the *Salaman* test, as the application was to dismiss the action as disclosing no reasonable cause of action, the judge was being asked to make nothing less than a final order.

13 Having said that, it does not follow that just because an order is a final order a party may

not request for further arguments on either the whole judgment or a part of it. The discretion rests entirely with the judge: see *Thomson Plaza Pte Ltd v The Liquidators of Yaohan Department Store Pte Ltd* [2001] 3 SLR 248 at [6] ("*Thomson Plaza*"). In the present case, by agreeing to hear further arguments as requested by the firm in its letter of 26 August 2003 in relation to the question of costs, the judge was effectively saying that she was prepared to review her order on costs and to that extent the order on costs had become suspended until the hearing of further arguments. It is really no different from the situation where the judge has ruled that he would hear arguments on costs later.

14 Should it follow that just because the judge agreed to hear the firm's request for further arguments on costs the entire order made on 26 August 2003 was suspended? We were unable to see why it should, bearing in mind that the question of costs was quite distinct from the substantive merits of the case. It would be different if the request for further argument relates to a point on merits. This is because if the judge should agree with those arguments he may have to vary or reverse his earlier decision on the merits. Thus, in that situation, by agreeing to hear further arguments it must follow that the judge has agreed to suspend his earlier order on the merits until the further arguments are concluded.

15 LKK argued that because the judge agreed to hear further arguments on costs, the entire judgment of 26 August 2003 was suspended, and he relied on the case of *Thomson Plaza*. In *Thomson Plaza*, the judge in chambers on 29 November 2000 rejected a creditor's proof of debt in a company winding up. Costs were awarded against the creditor. On that very day, the creditor wrote asking for further arguments on the judge's decision to reject his claim against the company. A week later the Registrar informed the parties that the matter would be fixed for further arguments on 15 January 2001 before the judge. There, this court said that once the judge agreed to hear further arguments (at [9]):

> … the decision already made would, as a result, be put on hold or suspended until the hearing of further arguments. … [T]here was really no "decision" anymore against which an appeal could have been lodged. The whole question which the court had earlier decided had thereby become "open".

16 The above statement does not warrant the suggestion that, in relation to the present case, just because the judge had agreed to hear further arguments on costs, the decision of the judge on the merits was also thereby suspended. That statement must be read in the context of the fact situation in *Thomson Plaza*. How could it be said that just because the judge had in our present case agreed to review the costs she awarded to the firm that there was no "decision" against which a notice of appeal could be filed? Indeed, towards the end of the judgment in *Thomson Plaza* (at [12]) this court stated:

> Once the parties were notified by the Registrar that the judge would hear further arguments, *all decisions made, to which that request related*, would be put on hold. [emphasis added]

To which orders of the court a request for further arguments relates must necessarily depend on the facts of the case and the nature of the orders.

17 LKK also pointed out that it would be administratively more convenient to treat the entire judgment of 26 August 2003 as being suspended, otherwise two notices of appeal might have to be filed. We would make three observations in this regard. First, convenience can hardly be a sufficient reason to affect the rights of a successful party. Second, in the context of this case, after the hearing of further arguments on costs on 16 September 2003, LKK still had ten days, up to

26 September 2003, to file his notice of appeal against the entire judgment. Thirdly, if LKK had wanted more time to consider appealing, he could have, at the hearing on 16 September 2003, asked the judge for an extension of time to do so. The judge would have the discretion to extend time provided the application was made before the expiry of the one-month period from 26 August 2003: see *Chen Chien Wen Edwin v Pearson* [1991] SLR 578 and the present O 57 r 17 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("ROC").

18 The next point to consider is: Would the fact that on 1 September 2003 LKK asked the judge for a certification that she required no further arguments alter the position? Three points may be made here. First, in the light of our decision above that the order of the judge was not an "interlocutory" order but a "final" order, there was no need to obtain such a certification. LKK was entitled to file a notice of appeal forthwith. The second observation is that, in any case, under O 56 r 2(2) of the ROC, unless the Registrar within 14 days informs the party making the application that the judge requires further arguments, the judge shall be deemed to have certified that he requires no further arguments. Thirdly, in any event, on such a request, whether the judge certifies that he will not hear further arguments, or there is simply no reply, the effect will be that the order of the judge stands and any notice of appeal must be filed within the prescribed time reckoned from the date the order was first made. Otherwise it would mean that a party could, by just requesting for further arguments, extend time to file his notice of appeal.