Syarikat Bekalan Air Selangor Sdn Bhd v Kerajaan Negeri Selangor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(1M)(NCC)-365–09 OF 2012
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND DAVID WONG JJCA
19 OCTOBER 2013

Civil Procedure — Striking out — Application for — Third party notices and statements of claim — Whether appellant had right to claim indemnity or contribution from third party — Whether claim disclosed reasonable cause of action — Existence of another identical suit by appellant against third party — Whether claim abuse of court's process — Rules of the High Court 1980 O 16 r 1 & O 18 r 19

Civil Procedure — Striking out — Principles applicable — Whether pleadings obvious unsustainable — Court's duty when faced with issues of law — Court's duty when faced with dispute of facts

Civil Procedure — Third party — Third party notice — Striking out third party notice and statement of claim — Whether appellant had right to claim indemnity or contribution from third party — Whether claim disclosed reasonable cause of action — Existence of another identical suit by appellant against third party — Whether claim abuse of court's process — Rules of the High Court 1980 O 16 r 1 & O 18 r 19

The plaintiff Konsortium Abass Sdn Bhd ('Abass') under a Privatisation Cum Concession Agreement ('PCCA') with the Selangor State Government ('the respondent') was tasked with treating the water prior to supplying it to the appellant for distribution and supply throughout Selangor. This arrangement was encapsulated in a novation agreement dated 15 February 2005 between Abass, the appellant and the respondent. The appellant failed to pay Abass which resulted in Abass taking out this action to recover the sum of RM149,478,553.02. To meet that claim, the appellant sought indemnity from the respondent under section 5.01 of the novation agreement by taking out third party proceedings premised on the following grounds: (a) The respondent's alleged failure to terminate the respondent's concession dated 15 December 2004; and (b) The respondent's refusal to agree to an adjustment of the prevailing *Gazette Tariff*. The respondent applied to set aside the third party notice under O 16 r 6 of the Rules of the High Court 1980 ('RHC') as

well as to strike out the third party claim under O 18 r 19 of RHC. The learned judicial commissioner ('JC') allowed the application. The appellant brought this appeal against that decision.

Held, dismissing the appeal with costs of RM20,000:

(1) The appellant had failed to pay Abass which resulted in the application for indemnity from the respondent. The Federal Government had not given consent to the respondent to terminate the Syabas Concession Agreement. Pursuant to cll 28.1(a) and 28.2 of the concession agreement, unless and until the Federal Government gave its consent the respondent's hand was literally tied. Faced with such stark reality, the JC was fully entitled to find that the appellant's statement of claim was bound to fail at trial as it was an unarguable issue (see paras 18–21).

(2) The appellant had filed a separate suit against the respondent at the High Court under Suit No 22NCC-1478–09 of 2011 ('Syabas Main Suit') which contained claims that were substantially the same as the statement of claim in this third party proceeding. The main complaint of the appellant here and in the Syabas main suit was simply that it was and still not able to fulfill its payment obligations due to financial difficulties caused by the respondent's refusal to pay compensation. In short both suits raised the same issue. Hence, this suit was an abuse of the process of the court (see paras 23, 25 & 27).

[Bahasa Malaysia summary

Plaintif Konsortium Abass Sdn Bhd ('Abass') di bawah Perjanjian Konsesi Penswastaan ('perjanjian') dengan Kerajaan Negeri Selangor ('responden') diberikan tugas untuk merawat air sebelum membekalkannya kepada perayu untuk pengagihan dan pembekalan di seluruh Selangor. Pengaturan ini terkandung di dalam perjanjian novasi bertarikh 15 Februari 2005 di antara Abass, perayu dan responden. Perayu gagal untuk membayar Abass mengakibatkan Abass mengambil tindakan ini untuk mendapatkan balik wang sejumlah RM149,478,553.02. Untuk memenuhi tuntutan ini, perayu memohon indemniti daripada responden di bawah seksyen 5.01 Perjanjian Novasi dengan mengambil tindakan prosiding pihak ketiga berdasarkan atas alasan-alasan berikut: (a) dakwaan kegagalan responden untuk menamatkan konsesi bertarikh 15 Disember 2004; dan (b) Keengganan responden untuk bersetuju kepada pelarasan *Tarif Warta*. Responden memohon untuk mengetepikan notis pihak ketiga di bawah A 16 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan juga untuk membatalkan tuntutan pihak ketiga di bawah A 18 k 19 KMT. Pesuruhjaya kehakiman ('PK')

membenarkan permohonan tersebut. Perayu merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos sebanyak RM20,000:

(1) Perayu telah gagal untuk membayar Abass yang mengakibatkan permohonan untuk indemniti daripada responden. Kerajaan Persekutuan tidak memberikan izin kepada responden untuk menamatkan Perjanjian Konsesi Syabas. Berikutan klausa 28.1(a) dan 28.2 Perjanjian Konsesi, kecuali dan sehingga Kerajaan Persekutuan memberikan izinnya pihak responden tidak dapat berbuat apa-apa. Berdepan dengan kenyataan nyata ini, PK berhak sepenuhnya untuk memutuskan bahawa penyataan tuntutan perayu akan gagal pada masa perbicaraan kerana ia adalah isu yang tidak dapat dipertikaikan (lihat perenggan 18–21).

(2) Perayu telah memfailkan guaman berasingan terhadap responden di Mahkamah Tinggi Guaman No 22NCC-1478–09 Tahun 2011 ('Guaman Utama Syabas') yang mengandungi tuntutan yang secara substansial sama seperti penyataan tuntutan dalam prosiding pihak ketiga ini. Aduan utama perayu di mahkamah ini dan dalam guaman utama Syabas adalah hanya bahawa ia masih tidak dapat memenuhi tanggungjawab membayar akibat masalah kewangan yang disebabkan keenganan responden untuk membayar pampasan. Pendek kata kedua-dua guaman membangkitkan isu yang sama. Maka, guaman ini adalah penyalahgunaan proses mahkamah (lihat perenggan 23, 25 & 27).]

Notes

For cases on application for, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 8364–8383.

For cases on third party notice, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 9668–9871.

Cases referred to

Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Lai Kim Loi v Datuk Lai Fook Kim [1989] 2 MLJ 290; [1989] 2 CLJ 107, SC (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 2 MLJ 105; [1984] 1 CLJ (Rep) 211, FC (refd)

Mooney & Ors v Peat Marwick Mitchell & Co & Anor [1967] 1 MLJ 87 (refd)

Pengiran Othman Shah bin Pengiran Mohd Yusoff (formerly known as Lipkland (Sabah) Sdn Bhd & Ors v Karambunai Resorts Sdn Bhd [1996] 1 MLJ 309, CA (refd)

Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1; [1973] 1 LNS 133, PC (refd)

Legislation referred to

Rules of the High Court 1980 O 16 r 6, O 18 r19

Appeal from: Suit No 22 NCC-543 of 2011 (High Court, Kuala Lumpur)

Harpal Singh Grewal (Lua Ai Siew, Fadzilah Pilus and Reny Rao with him) (Soo Thien Ming & Nashrah) for the appellant.
Malik Imtiaz Sarwar (Fahda Nur Ahmad Kamar and Ain Fahana Mohd with him) (Fahda Nur & Yusmadi) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court wherein the learned judicial commissioner upon an application by the third party respondent under O 18 r 19 of the RHC struck out the third party claim made by the appellant. The basis of the learned judicial commissioner's decision was that the third party claim did not raise any triable issue to warrant the court to order a trial of the same.

[2] We heard the appeal and after due consideration of the submissions of respective counsel, we dismissed the appeal with costs. The appellant has recently obtained leave to appeal to the Federal Court and to facilitate that appeal we now give our reasons.

BACKGROUND FACTS

[3] The plaintiff Konsortium Abass Sdn Bhd ('Abass') under a privatisation cum concession agreement ('PCCA') dated 9 December 2000 between the Selangor State Government and Abass is tasked with treating the water prior to supplying it to the appellant for distribution and supply throughout Selangor. This arrangement is encapsulated in a novation agreement dated 15 February 2005 between Abass, the appellant and the respondent.

[4] The purpose of the novation agreement is to pave the way for the appellant to take over the obligations of the respondent in respect of the purchase of treated water from Abass. The payment arrangement is for the

appellant to pay Abass for the treated water on a monthly basis on terms as set out in the PCCA between the respondent and Abass wherein Abass was awarded the concession to operate and maintain certain water facilities in Selangor.

[5] The appellant failed to pay Abass which resulted in Abass taking out this action to recover the sum of RM149,478,553.02 together with interests and costs. To meet that claim the appellant sought indemnity from the respondent under section 5.01 of the novation agreement by taking out this third party proceedings which claim is premised on the followings:

(a) the Selangor State Government's (respondent here) alleged failure to terminate the respondent's concession dated 15 December 2004; and

(b) the Selangor State Government's refusal to agree to an adjustment of the prevailing *Gazette Tariff*.

[6] That third party notice application was made on 6 July 2011 and was duly served on the plaintiff and the respondent. The learned deputy registrar allowed the application on 3 November 2011 and on appeal to the judge by the plaintiff, the same was dismissed on 8 December 2011.

[7] The third party statement of claim was served on the respondent on 14 December 2011 and on 4 January 2012 a defence was served on the appellant. However on 30 January 2013, the respondent took out an application to set aside the third party notice under O 16 r 6 of the RHC as well as to strike out the third party claim under O 18 r19 of the RHC 1980.

[8] On 31 July 2012, the learned judicial commissioner sustained the application to strike out the third party notice and the statement of claim of the appellant against the respondent. The appeal before us is against that order of the learned judicial commissioner.

ISSUES FOR DETERMINATION

[9] Learned counsel for the appellant in his submission raises four grounds which are as follows:

(a) the learned judge erred in applying the wrong test when deciding upon the respondent's application;

(b)
(i) the learned judge erred in not holding that the appellant had established that it had an arguable case against the respondent;

(ii) whether the respondent had elected not to terminate the concession agreement is an issue of fact on which viva voce evidence is required.

(c) the learned judge erred in law and/or in fact in dismissing the appellant's preliminary objection to the respondent's application; and

(d) the learned judge erred in law and/or in fact in holding that there was a multiplicity of proceedings.

GROUND 1 — CORRECT TEST FOR O 18 R 19

[10] It is submitted by the appellant that the correct test is that as long as the pleadings disclose some cause of action, it does not matter that it is a weak case and not likely to succeed at trial. To support that contention learned counsel relied on the decisions of *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ 105; [1984] 1 CLJ (Rep) 211 and *Mooney & Ors v Peat Marwick Mitchell & Co & Anor* [1967] 1 MLJ 87.

[11] If we understand learned counsel's submission correctly, the court's only duty is to discern from the pleadings whether there is a cause of action and nothing more. In another words, there is no duty on the court to ask the further question whether the case is so weak that it is unlikely to succeed in trial.

[12] With respect, we cannot agree with submission of learned counsel for the appellant. In our considered view, the correct approach in an application to strike out and the exercise of its discretion in respect thereof is premised on the following principles:

(a) obvious unsustainable pleadings only will be struck out;

(b) to determine whether pleadings are obviously unsustainable, the court is duty bound to scrutinise the evidence before it in minute detail;

(c) if a question of law becomes an issue, the court is entitled still to strike out the pleadings provided that the court is satisfied that the issue of law is unarguable and unsustainable; and

(d) if the affidavit evidence discloses a dispute of facts, such facts must be analysed and if found inconsistent with the undisputed contemporaneous evidence or inherently improbable in themselves, the court is entitled to reject those facts and proceed upon the undisputed contemporaneous documentary evidence.

[13] Such approach was adopted in the case of *Pengiran Othman Shah bin Pengiran Mohd Yusoff (formerly known as Lipkland (Sabah) Sdn Bhd & Ors v Karambunai Resorts Sdn Bhd* [1996] 1 MLJ 309 at pp 20–321 where the Court of Appeal held as follows:

A The discretionary power to dismiss an action summarily under O 18 r 19 and under the inherent jurisdiction of the Court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (see *Tractor (M) Bhd v Tio Chee Hing* [1975] 2 MLJ 1) Whether a case is plain or obvious does not depend upon the length of time it takes to argue the case, but that when the case is argued B on the affidavit evidence available, it becomes plain and obvious that the case has no chance of success. (see *Mckay & Anor v Essex Area Health Authority & Anor* [1982] 2 QB 1166; [1982] 2 AER 771; [1982] 2 WLR 890)

When a question of law becomes an issue, this in itself will not prevent the Court from granting the application, for as long as the Court is satisfied that the issue of C law is unarguable and unsustainable it may proceed to determine that question. (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 40) Likewise, where the affidavit evidence discloses a dispute of facts, such facts must be analysed and if they are found to be inconsistent with undisputed contemporary documents or inherently improbable in themselves, the Court is entitled to reject those facts and D proceed upon the undisputed contemporaneous documentary evidence.

[14] Similarly in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 at p 23 the then Supreme Court expresses the same sentiments:

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… the learned judge in the court below, who is very experienced and very able, and who referred very much on the same issues, appears to be much exercised by the fact that the application was made under O 18 r 19, in reversing the learned registrar's decision, in holding, 'On the facts of this case I consider that O 18 r 19 is not F appropriate to shut out the plaintiffs from pursuing their claims'.

The cautionary words are words which have been frequently employed in connection with an application under O 14. It was unfortunate that the case of *Tractors Malaysia Bhd v Tio Chee Hing*, a Privy Council case was not cited in the Court below, though it was cited to us here.

G In Tractors, the defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Federal Court, on appeal, regarded themselves as precluded from examining the evidence for determining whether the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was H bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a fine-toothed comb and decided to agree with the learned judge at first instance and restored the High Court's decision. It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly I called for or not in an application under O 18 r 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be.

[15] In this appeal, the learned judge in our view did what the Privy Council

did in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; [1973] 1 LNS 133 and that is he said 'went through the evidence with a fine-toothed comb' and then decided that the case could be disposed off by interpreting a provision in the novation agreement in the context of the concession agreement.

[16] Accordingly we see no error in the approach of the learned judge in dealing with the application to strike out.

GROUND 2 — INTERPRETATION OF SECTION 5.01 OF THE NOVATION AGREEMENT

[17] The two issues raised by learned counsel can be dealt with together as it concerns substantially construction of section 5.01 of the novation agreement which reads as follows:

> Notwithstanding the provisions herein and the SYABAS Concession Agreement, in the event of any breach by SYABAS of the payment of the Monthly Payments based on the Bulk Supply Rate to ABASS, the parties hereto agree and acknowledge that such a default shall be deemed a breach referred to under Clause 28.1 of the SYABAS Concession Agreement wherein the State Government shall have the right to terminate the SYABAS Concession Agreement. In the event that the State Government elects not to exercise its right to terminate the SYABAS Concession Agreement, the State Government shall take over SYABAS's obligation to make payment of the Monthly Payments based on the Bulk Supply Rate to ABASS …

[18] It is an undisputed fact that the appellant had failed to pay Abass which has resulted in this application for indemnity from the respondent. It is also an undisputed fact that the Federal Government had not given consent to the respondent to terminate the Syabas concession agreement.

[19] In dealing with this issue, we must look at what is provided in the concession agreement in particular cll 28.1(a) and 28.2 which respectively read as follows:

> *Clause 28.1 (a)*
>
> (a)… the State Government, with the consent and agreement of the Federal Government, shall be entitled to give notice in writing to the Company specifying details of the relevant default ('Default Notice') …
>
> *Clause 28.2*
>
> If the company fails to remedy the default referred to in the Default Notice issued pursuant to Clause 28.1(a), within the period provided for or it a Default Notice is issued pursuant to Clause 28.1(b) within the period provided for or it a Default Notice is issued pursuant to Clause 28.1(b), then the State Government, with the

> consent and agreement of the Federal Government, may terminate this Agreement forthwith by giving notice in writing to that effect to the Company.

[20] In our considered view, it is plain from reading the words in the above two clauses that unless and until the Federal Government gives its consent the respondent's hand is literally tied. In fact the respondent had written to the Federal Government for such consent and none was forthcoming. This is made clear by the learned judicial commissioner when he said this:

> From the undisputed and undisputable facts, the Selangor State Government has not elected not to exercise its right to terminate the Concession Agreement. From the undisputed and undisputable facts, the Selangor State Government has elected not to exercise its right to terminate the Concession Agreement. The opposite is true, it has elected to exercise its right to terminate the Concession Agreement though it cannot do so effectively without the Federal Government consent

[21] Faced with such stark reality, we find that the learned judicial commissioner was fully entitled to find that the appellant's statement of claim as bound to fail at trial as it was an unarguable issue.

[22] Accordingly we find no merit in the appellant's contention on these two issues raised in this ground.

GROUND 3— MULTIPLICITY OF PROCEEDINGS

[23] The factual matrix behind this issue is simply that the appellant had filed a separate suit against the respondent at the Kuala Lumpur High Court under Suit No 22NCC-1478–09 of 2011 ('Syabas Main Suit') which has been found by the learned judicial commissioner to contain claims that are substantially the same as the statement of claim in this third party proceeding.

[24] The learned judicial commissioner compared the paragraphs in the statement of claim in both the Syabas main suit and this third party suit and observed as follows:

> paras 15.1 to 15.6 is a summarised version of the Syabas main suit. Paragraphs 15.1 to 15.6 bear striking resemblance to paras 14, 17, 19, 21 and 22 of the Syabas' main suit in the statement of claim.

[25] We have also taken the trouble of looking at the two statements of claim and if you put them side by side, they are in substance a reflection of each other. The main complaint of the appellant here and in the Syabas main suit is simply

that it was and still not able to fulfil its payment obligations due to financial difficulties caused by the respondent's refusal to pay compensation. In short both suits raised the same issue.

[26] The law is clear and suffice for us to refer to what was said by the then Supreme Court in the case of *Lai Kim Loi v Datuk Lai Fook Kim* [1989] 2 MLJ 290; [1989] 2 CLJ 107:

> On the question of multiplicity, Mr Lim has conceded that the issues raised and the relief sought in Suit No S235 of 1985 have been largely duplicated in the said petition. Although the issues raised and the relief sought in both are not totally similar yet we consider that the substantial duplication of issues and relief sought in both actions amounted to multiplicity of actions and in all circumstances of this case, the petition presented is vexatious and is an abuse of the process of the court and ought to be struck out as the learned judge has done and not stayed or the petition be allowed to be amended as suggested by counsel of the petitioner.

[27] Accordingly we find no merit in the submission of counsel for the appellant on this ground and agree with learned counsel for the respondent that this suit is an abuse of the process of the court.

CONCLUSION

[28] For reasons stated above, we dismissed the appeal with costs in the sum of RM20,000 and further ordered that the deposit to be refunded to the appellant.

Appeal dismissed with costs of RM20,000.

Reported by Kanesh Sundrum