

Projector SA v Marubeni International Petroleum (S) Pte Ltd (No 2)
[2004] SGCA 58

Case Number : CA 42/2004, NM 71/2004
Decision Date : 03 December 2004
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Judith Prakash J
Counsel Name(s) : Lok Vi Ming, Govind Asokan, Lawrence Teh and Sean La'Brooy (Rodyk and Davidson) for the appellant / applicant; Ian Koh and Werner Tsu (Drew and Napier LLC) for the respondent
Parties : Projector SA — Marubeni International Petroleum (S) Pte Ltd

Civil Procedure – Appeals – Notice – Applicant seeking leave to amend notice of appeal displaying lack of candour as to reason for seeking amendment – Respondent challenging application on grounds that amendment prejudicial – Whether leave to amend notice of appeal should be granted

3 December 2004

Judith Prakash J:

Background

1 This matter came before us by way of a motion, pursuant to s 36(3) of the Supreme Court of Judicature Act (Cap 32, 1999 Rev Ed) (“the Act”), seeking to set aside or discharge an order made by Woo Bih Li J in respect of an application made by Projector SA (“Projector”) for leave to amend its notice of appeal: see *Projector SA v Marubeni International Petroleum (S) Pte Ltd* [2004] 4 SLR 241.

2 Projector is the appellant in the main appeal and the defendant in the original action commenced by Marubeni International Petroleum (S) Pte Ltd (“Marubeni”). In late November 2003, Marubeni started the action to enforce its rights under two letters of indemnity. Shortly thereafter, it obtained a mandatory injunction order against Projector whereby Projector was ordered to pay a cash deposit of approximately US\$2.6m into court in South Korea to secure the release of the vessel *Dynamic Express* from arrest in Korea. Projector made the necessary payment on 5 December 2003.

3 In the meantime, on 2 December 2003, Projector applied to discharge the injunction. The matter was heard before Belinda Ang Saw Ean J on 19 May 2004: see *Marubeni International Petroleum (S) Pte Ltd v Projector SA* [2004] 4 SLR 233. The judge ordered that:

- (a) the injunction be discharged on the condition that the cash deposits in the South Korean court be retained to abide the outcome of the proceedings in Korea;
- (b) Projector’s prayers in relation to damages and costs be reserved to the trial judge; and
- (c) each party be given a general liberty to apply in connection with the orders made.

4 Projector was dissatisfied with the above orders and filed a notice of appeal on 18 June 2004. The notice stated that the appeal was against such part only of the decision as reserved the questions of an inquiry into damages and costs to the trial judge. On 6 July 2004, however, Projector filed an application before the Court of Appeal for liberty to amend its notice of appeal to include an appeal against that part of Ang J’s orders which imposed the condition that the cash deposit be retained in the South Korean court pending the outcome of those proceedings. This was the

application that was placed before Woo J for hearing pursuant to s 36(1) of the Act.

5 Woo J dismissed the application with costs. He noted that the decision of this court in *Leong Mei Chuan v Chan Teck Hock David* [2001] 2 SLR 17 meant that the stringent requirements for an application for an extension of time to file an appeal would not apply to an application to amend a notice of appeal. He did not agree, however, that that decision also meant that so long as a respondent could be compensated by costs an application to amend should be allowed. If that were so, it would be applying a rigid mechanistic approach to such an application. His interpretation of the *Leong Mei Chuan* decision was that the fact that a respondent could be compensated by costs was one factor leaning in favour of allowing the amendment, but that all relevant facts leading to the application should still be considered in coming to a decision whether to allow it or not.

6 Woo J then pointed out that in the two affidavits of Mr Govind Asokan, a partner in the local firm of solicitors representing Projector, there was a contradiction in the explanation given as to why the appeal against the condition was initially not included in the Notice of Appeal. He found that in the first affidavit the reason given was that there was "miscommunication within [the] firm", but in the second affidavit, the reason was that there was a "miscommunication in the taking of instructions from clients who [were] overseas". It turned out that Projector's solicitors were taking instructions from English solicitors in Singapore so the statement in the second affidavit was inaccurate. The judge found that there was, in reality, no miscommunication. It seemed to him that a deliberate decision had been taken with the benefit of advice from solicitors with regard to the contents of the notice of appeal. In view of these circumstances and the lack of candour in the supporting affidavits, Woo J dismissed the application.

7 We allowed Projector's application and set aside the order made on 16 July 2004 by Woo J. We then granted Projector leave to amend its notice of appeal by adding an appeal against the condition imposed in relation to the cash deposits. We now give our reasons for this decision.

The applicable principles

8 The only local case that deals with the issue of amendment of a notice of appeal is the *Leong Mei Chuan* decision. This court held (*per* L P Thean JA at [15]) that the stringent standards required in an application for extension of time to file an appeal are not absolute and applicable to all cases where an extension of time is sought. The resolution of problems like an application for leave to amend a notice of appeal cannot be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach would be inappropriate. The court, therefore, was stating that in certain areas of procedural default, the barrier to correcting such defaults should not be raised too high. This is clear from the way that the decision was arrived at. In the course of his judgment, L P Thean JA quoted extensively from the "salutary observations" made in the English Court of Appeal case of *Costellow v Somerset County Council* [1993] 1 All ER 952. One of the passages cited was the following portion of the judgment of Sir Thomas Bingham MR (at 960):

Save in special or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension [of time to file the statement of claim] (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under O 3 r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.

9 Having set the stage, when it came down to establishing the applicable principles, Thean JA stated (at [21]):

In the present case, the notice of appeal was filed timeously. The only question was whether leave should be given to amend that notice. It is true that the amendment sought was not inconsequential; it was of a substantive character. Be that as it may, the relevant considerations surely ought to be whether the opposing party had been given reasonable notice of the amendment and afforded a sufficient opportunity to address the substance of the amendment, and whether the amendment sought is consistent with the pleadings or the points raised below. Short of grave prejudice or hardship to the opposing party that cannot be addressed by an order as to costs, the court should lean in favour of allowing the amendment.

10 Thus, in context, the most significant part of the quoted passage is the last sentence which echoes the holding in *Costellow*. Accordingly, our interpretation of the paragraph is that if the circumstances are such that the opposing party will not sustain grave prejudice or hardship that cannot be compensated by costs, then the court should generally be inclined to grant the amendment. In assessing whether grave prejudice or hardship would be inflicted, the court will consider factors like notice to the opposing party, the time available for the opposing party to deal with the amendment, and whether the argument was brought up below or is a new one. There could possibly be other factors not mentioned above but *Leong Mei Chuan's* case has identified the main "relevant considerations". The task of the court is to establish whether such grave prejudice or hardship exists so as to make it unjust (and not merely inconvenient) to allow the amendment. If the court finds that any prejudice sustained by reason of the amendment can be addressed by an order as to costs, then the order permitting the amendment should be granted unless the other circumstances of the case are exceptional. Since the rule admits the possibility of exceptional circumstances affecting the outcome of the application, we do not think that the rule is a rigid, mechanistic one.

11 Having regard to the way in which the principles set out in the *Leong Mei Chuan* case were derived, we have, respectfully, to differ from the view of Woo J that the question of whether prejudice can be addressed by an order as to costs is merely one factor in determining the issue and not the most important factor.

The circumstances of the case

12 When we came to apply the principles set out above to the facts of the present case, we could not find that permitting Projector to amend its notice of appeal would result in grave prejudice to Marubeni. The Notice of Motion to amend the Notice of Appeal was filed on 6 July 2004. At that time the appeal proper was only scheduled to be heard in November. Even on 22 October when we heard the present Notice of Motion, there was still a month to go before the hearing of the appeal. If the amendment were to be allowed therefore, Marubeni would have reasonable notice of the amendment and would be afforded a sufficient opportunity to address the substance of the amendment. Furthermore, the amendment did not bring up a new point. By the amendment, Projector sought to renew arguments that it had made all along. Its Summons in Chambers asked for the injunction to be discharged and, after Ang J's decision, Projector had put in a request for further arguments which included further arguments on the condition relating to the cash deposit. Since Marubeni had dealt with these arguments before Ang J, it appeared to us that it would not be prejudiced if the Notice of Appeal was amended so as to allow Projector to raise the points again.

13 Marubeni argued that in reliance on the condition imposed regarding the cash deposits, it had taken steps to participate in the proceedings in South Korea to protect the cash deposit and prevent it from ending up in the hands of the claimant banks. It would therefore be prejudiced if the amendment were allowed. We took the view that that was an issue that could be adequately addressed by an order as to costs as the prejudice caused by Marubeni's participation in the South

Korean proceedings would be the expenditure incurred for such participation.

14 Having found that there was no grave prejudice to Marubeni that could not be addressed by an order as to costs, we then considered whether there were any exceptional factors that would lead the court to reject the application to amend. In our view, the lack of candour discerned by Woo J in the affidavits filed for Projector as to the reason for the initial failure to appeal against the condition relating to the cash deposits was not such an exceptional factor as should lead to the application being rejected. In the *Costello* case, the English Court of Appeal identified abuse of process and the use of questionable tactics as exceptional factors justifying the rejection of an application to cure a procedural default. In this court's decision in *The Tokai Maru* [1998] 3 SLR 105 at [36]–[37], it was held that the power to strike out an action for abuse of process would be exercised only in cases of an exceptional nature where the conduct of the party in default amounted to an affront to the court and its rules.

15 In this case, the lack of candour was not serious enough to amount to an abuse of process. In further affidavits filed after the hearing before Woo J, Projector's solicitors gave additional explanations as to how miscommunication had led to the filing of a notice of appeal that left out one of the main grounds that the parties wanted to challenge. Mr Asokan explained that initially he had not given a full account of how the mistake arose because he considered, on the authority of *Leong Mei Chuan*, that since the amendment of the notice would not cause Marubeni grave prejudice, such detail was not required. Whilst Projector was not entirely candid initially and its explanations left something to be desired, we were satisfied that its conduct was not serious enough to constitute an exceptional factor that would justify barring it from obtaining the relief asked for. We would state, however, that it is good practice for parties who seek the indulgence of the court to assist them in remedying their defaults that they make full disclosure of the circumstances that led to the default. Otherwise, unnecessary and undesirable consequences can, as in this case, ensue.