RBG Resources plc (in liquidation) v Banque Cantonale Vaudoise and Others [2004] SGHC 167

Case Number : Suit 1175/2002

Decision Date : 06 August 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Sarjit Singh Gill SC and Seah Yi-Lein (Shook Lin and Bok), Matthew Saw (Lee and Lee) for plaintiff; Lawrence Teh and Loh Jen Wei (Rodyk and Davidson) for second defendant

Parties : RBG Resources plc (in liquidation) — Banque Cantonale Vaudoise; Credit Lyonnais; Westdeutsche Landesbank Girozentrale; BNP Paribas (Suisse) S.A.; Ing Bank N.V.; Banque Bruxelles Lambert; GMAC Commercial Finance PLC

Civil Procedure – Costs – Certification of costs – Whether plaintiff should be given certification of costs for more than one counsel – Rules of Court (Cap 332, R5, 2004 Rev Ed) O 59 r 19.

Civil Procedure – Costs – Plaintiff obtained judgment against defendant – Whether plaintiff entitled to costs for entire proceedings even though plaintiff failed on one issue raised during trial – Whether plaintiff entitled to claim costs of preparing and filing affidavit of evidence-in-chief that was primarily on the unsuccessful issue.

Civil Procedure – Costs – Plaintiff did not call an intended witness to give evidence – Whether plaintiff entitled to costs of preparing and filing affidavit of evidence-in-chief of such witness – Whether costs reasonably incurred.

Civil Procedure – Offer to settle – Two offers to settle given one after another – Whether earlier offer deemed withdrawn – Subsequent offer given a day after commencement of trial – Whether offer serious and genuine – Whether plaintiff should have benefit of indemnity costs from date of service of offer.

Tort – Conversion – Damages – Interest payable on damages – Appropriate rate of interest – Appropriate date from which interest should run.

6 August 2004

Woo Bih Li J:

Background

1 In my judgment of 7 June 2004, I declared that the plaintiff, RBG Resources plc ("RBG"), remained the legal and beneficial owner of metals in certain warehouses which had been held for the account of RBG prior to any dealing of the metals between RBG and the second defendant, Credit Lyonnais ("CL"), save for one drum of nickel identified as 519-W127 by SGS Testing & Control Services Singapore Pte Ltd. I also ordered that the sale proceeds of RBG's metal be released to RBG or its solicitors.

2 I further ordered CL to pay damages to RBG for conversion of nickel briquettes which CL had taken delivery of from one of the warehouses, such damages being the net purchase price or prices which CL had obtained for the briquettes as CL had sold the same.

3 Consequently, CL's counterclaim for the metals in the warehouses, which also formed the subject matter of RBG's claim, was dismissed, save for the one drum of nickel identified as 519-W127. CL was consequently entitled to the sale proceeds of that one drum of nickel.

4 I reserved the question of costs and interest for counsel's submissions. After hearing submissions, I made certain orders on costs and interest. I set out below the arguments and my orders and reasons.

Costs

5 On the question of costs, RBG sought an order for costs of the entire proceedings to be paid by CL although it did not succeed on an issue under s 62(4) of the Sale of Goods Act (Cap 393, 1999 Rev Ed). I will refer to this legislation as "the Act".

6 RBG relied on the decision of the Court of Appeal in *MCST No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1 where Yong Pung How CJ said at [57]:

> The principles governing the award of costs are elucidated in *Re Elgindata (No 2)* [1993] 1 All ER 232, and adopted in Singapore in *Tullio v Maoro* [1994] 2 SLR 489. The relevant passage in *Re Elgindata (No 2)* provides (at p 237):
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> > The principles are these. (1) Costs are in the discretion of the court. (2) They should follow the event, except when it appears to the court that … some other order should be made. (3) The general rule does not cease to apply simply because that successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (4) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or a part of the unsuccessful party's costs … the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs.
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> As the respondent was the successful party below, according to principle (2), prima facie, it should be awarded costs. As for principle (3), the starting point was that the respondent failed on one ground, *colore officii*. However, it should not be deprived of its costs. Firstly, the trial ended within the allotted time. Secondly, as the respondent relied on the same facts for proving mistake of law and for proving *colore officii*, and as the appellant relied on the same defences to both claims, it was unlikely that the respondent's pleading *colore officii* caused a significant increase in the cost of the proceedings. The respondent had also paid costs to the appellant for the late amendment of its pleadings. Since it was not alleged that the respondent had raised issues improperly or unreasonably, according to principle (4), it was not ordered to pay the appellant's costs.

7 RBG argued that it was entitled to the costs for the entire proceedings because, firstly, the trial ended within the number of days for which it was fixed for hearing and, secondly, the s 62(4) issue was a legitimate one raised in response to CL's own reliance on another provision of the Act, *ie* s 20A. It would have been irresponsible not to raise the s 62(4) issue.

8 RBG also disclosed that it had made offers to settle. The first offer was served on 22 December 2003 but was subsequently withdrawn. The second offer was served on 23 December 2003. The third offer was served on 9 January 2004, a day after the commencement of trial.

9 The second offer was on the following terms:

(i) The Plaintiff is to discontinue its claim against the 2nd Defendant for damages for

conversion of 300mt of nickel briquettes while the 2nd Defendant is to discontinue its counterclaims against the Plaintiff;

(ii) Each party is to bear its own legal costs.

10 The third offer was on the following terms:

(i) The Plaintiff is to discontinue its claim against the 2nd Defendant for damages for conversion of 300mt of nickel briquettes.

(ii) The 2nd Defendant is to discontinue all its counterclaims against the Plaintiff, namely, the 2nd Defendant's counterclaim for the nickel cathodes, copper cathodes and tin ingots in the Warehouses.

(iii) The 2nd Defendant is to withdraw its defence to the Plaintiff's claim to the nickel cathodes, copper cathodes and tin ingots in the Warehouses.

(iv) The Plaintiff is to pay the 2nd Defendant the sum of US$100,000.

(v) Each party is to bear its own legal costs.

11 I should add that the value of the metals in the warehouses which were the subject of RBG's and CL's claims was between US$8m and US$9m and the value of the nickel briquettes under the claim for conversion was over US$2m.

12 As RGB was successful in its claim for the metals in the warehouses and also successful in its claim for conversion, RBG sought indemnity costs from the date of service of the second offer or, alternatively, from the date of service of the third offer, and party to party costs for the period before. For its primary position, RBG relied on the judgment of Kan Ting Chiu J in *LK Ang Construction Pte Ltd v Chubb Singapore Pte Ltd* [2004] 1 SLR 134 where he said at [18]:

> I do not think that an offer should be deemed to withdraw a previous offer. The rules do not provide for deemed withdrawals other than by expiration of time (r 3(4)). A subsequent offer will have that effect if it states that expressly, but that should not be a deemed effect. If no withdrawal is expressed then both offers remain open for acceptance as long as they remain and have not expired. It may be purposeless for the offeree to consider a $50,000 offer that is followed by a $100,000 offer, but that is meaningful to the offeror if judgment is entered for less than $50,000 as his entitlement to indemnity costs runs from the date of service of the $50,000 offer. Offers of different sums may have different attractions. An offer of $50,000 to be paid immediately may not be less attractive than a $75,000 offer to be paid in instalments, and there is no reason why the offeree should not be allowed to choose between them.

13 RBG also sought a certification of costs for two counsel under O 59 r 19 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). RBG submitted that the case involved complex factual and legal issues and novel questions of law. On the factual side, the case involved metal trading which has its own rules and processes. Both sides had to consult and engage experts to understand and explain to the court these rules and processes. On the legal side, RBG submitted that s 20A had not been previously considered by any court in the Commonwealth which relies on the English Sale of Goods Act as does Singapore. RBG further submitted that the issues were diverse. I should also mention that RBG were represented by Sarjit Singh Gill SC and Quek Mong Hua who were from different law firms and each of

these counsel had his own colleague or colleagues assisting too.

14 CL did not agree that RBG should be awarded the entire costs of the action. Furthermore, its position was that all costs in relation to the defences and counterclaims of other defendants should be excluded.

15 CL submitted that work done up to and including the filing of RBG's relamended statement of claim, excluding the claim for conversion, should not be awarded to RBG as its statement of claim, prior to amendment, disclosed no reasonable cause of action and/or was an abuse of court process.

16 CL also objected to costs being awarded to RBG for work done in relation to affidavits of evidence-in-chief ("AEIC") of three persons ie Tay Choon Peng, Clement Paul Danin and Kon Yin Tong, and also asserted that costs in relation to the AEIC of Malcolm Shierson should be reduced significantly. Various reasons were given for the objections.

17 As for the s 62(4) issue, CL submitted that not only should RBG be deprived of costs thereof, RBG should pay such costs to CL.

18 On the offers to settle, CL submitted that the second offer was not complete as it did not address the rest of the proceedings, *ie* what CL was to do about RBG's claim and its defence thereto. Indeed, CL's solicitors had written to RBG's solicitors regarding this on 24 December 2003. There was no response and instead, the third offer to settle was served. CL submitted that as the third offer to settle was served so late, it was not designed to encourage a settlement but to put pressure on CL. By then, the mind-set of CL was to go to trial. CL argued that an offer to settle should have been served with an ample amount of time for CL to consider. Accordingly, CL submitted that the court should disregard the offers to settle. CL relied on, *inter alia*, *Track-Truss Technologies Pte Ltd v UTi Worldwide (Singapore)* [2004] SGDC 42, a judgment of the District Court which referred to an unreported supplementary judgment on costs dated 31 March 1999 of the Court of Appeal in *Neo Hock Pheng v Teo Siew Pheng* in Civil Appeal No 170 of 1998.

19 CL also submitted that the second offer was incomplete as it did not mention what was to happen to RBG's claim to the metals in the warehouses. Hence, if RBG were to be granted indemnity costs, it should run from the date of service of the third offer.

20 As for the question of a certification of costs for two counsel, CL submitted that RBG had over-manned the litigation. CL had effectively had only one counsel as Mr Lawrence Teh's colleague who assisted him, did not address the court. Also, a lot of the work was done in respect of other defendants.

21 CL therefore proposed a rather detailed and complicated order on costs which I was not in favour of as costs are usually ordered in the round and I saw no reason to depart from such a practice.

22 I was of the view that although it was not unreasonable for RBG to have raised the s 62(4) issue, much time was spent on this issue. Furthermore, if not for this issue, expert evidence from each side would not have been necessary. Although the trial was concluded within the period fixed, I was of the view that this was not a strong argument as a longer period than necessary was taken for trial partly because of the s 62(4) issue and the use of expert evidence thereon. The s 62(4) issue had caused a significant increase in the length and costs of proceedings.

23 In the circumstances, I was of the view that while CL should not be awarded costs on the

s 62(4) issue, there should be a reduction of costs awarded in favour of RBG. In addition, certain specific areas of costs should also be excluded from RBG's entitlement.

24 Accordingly, looking at costs in the round, I awarded 70% of the costs of RBG's claim and CL's counterclaim to RBG on a standard basis up to and including 9 January 2004, being the date of service of the third offer to settle, and 70% of such costs on an indemnity basis from 10 January 2004 up to and including the date of my decision on costs. However, I disallowed RBG the costs of preparing and filing the AEICs of Tay Choon Peng and Clement Paul Danin and Danin's fees and disbursements.

25 I excluded the costs for preparing Tay's AEIC because he was not called as a witness and RBG did not contest CL's submission that such costs be excluded. I should add that I am not suggesting that it is the general rule that a party should be denied the costs of preparing an AEIC for an intended witness who did not in fact give evidence at trial. The omission to call the intended witness to give evidence is but a factor, although the most obvious factor, in the determination whether the costs of preparing his AEIC have been reasonably incurred.

26 I excluded the costs of preparing Danin's AEIC because it was primarily, if not solely, on the s 62(4) issue. Danin was RBG's expert.

27 I saw no reason to exclude the costs for preparing the AEIC of Kon Yin Tong or to reduce the costs for preparing Malcolm Shierson's AEIC, beyond the 70% figure already mentioned.

28 As regards the existing offers to settle, the Court of Appeal said in *Neo Hock Pheng* (*supra* [18])at [24]:

> The date the offer to settle is made is singled out as one of the factors to be taken into account in the exercise of the court's discretion whether to award costs on the indemnity basis or not when an offer is not accepted. This is significant. Clearly the lesser time the party receiving the offer is given to consider whether to accept it or not is a material factor in deciding whether the offer was a genuine offer to settle or whether it was made with a view to pressurising or coercing the other party to settle. We have no doubt that an offer to settle made barely five days before the commencement of the trials falls into the latter category and would disentitle the party making the offer, the third respondents in this case, to an order for costs on the indemnity basis.

However, it must be borne in mind that in that case, the offer to settle was made five days before the date of commencement of trial and nine days before the claim was disposed of. Accordingly, the offeree did not have 14 days to consider the offer before the claim was disposed of. The Court of Appeal did not lay down a general rule that an offer to settle made before or even after the commencement of trial would be considered as one which is not genuine. Indeed, CL did not suggest that *Neo Hock Pheng* amounted to such a general rule. It would depend on the circumstances.

29 As for the point that an offer to settle may put pressure on an offeree, I was of the view that the purpose of such an offer was indeed to put pressure on an offeree. The real question was whether the purpose of an offer was to put such pressure on an offeree as not to amount to a serious and genuine offer to settle.

30 In the case before me, I was of the view that the pressure was not illegitimate. I also did not accept that CL had inadequate time to consider the third offer. The terms thereof were simple enough. Although the second offer was technically incomplete, its effect was clear. If CL were to discontinue its counterclaim for the same metals as RBG was claiming, it would follow that CL's

defence to RBG's claim would be withdrawn too and RBG would then be entitled to judgment on its claim. By the time the third offer to settle was served, which specifically stated that CL was also to withdraw its defence to the metals in the warehouses, CL could not have been completely surprised by its terms although there was also an additional $100,000 included in the third offer. Furthermore, CL did have 14 days from the date of service of the third offer to consider the same.

31 As for the operative date when indemnity costs should run, I was initially of the view that it was artificial to expect an offeree to accept an earlier offer when an obviously better offer is made subsequently. Accordingly, it seemed to me that the third offer had superseded the second offer, even if the second offer were complete in terms. However, upon further consideration, I was of the view that while it was not realistic to expect an offeree to accept an initial and less advantageous offer, it did not necessarily follow that an offeror should be deprived of the advantage of the earlier offer.

32 Accordingly, I agreed with the views expressed by Kan J in *LK Ang Construction* (*supra* [12]) that, in the context of the costs regime, an earlier offer should not be deemed withdrawn. Otherwise, the effect will be to discourage an offeror from improving on what may already be a reasonable, or even generous, offer. An offeror should be encouraged to improve his offer so long as the process is not abused by multiple offers, each of which is not genuine in the sense I have mentioned.

33 However, as the second offer was technically incomplete, I was of the view that RBG should have the benefit of indemnity costs from the date of service of the third offer.

34 As regards the question of a certification of costs for two counsel, I recalled that Mr Quek had informed me that Mr Gill SC was instructed to be lead counsel because the other defendants who had reached a settlement with RBG had wanted this. There was no suggestion then that the case was so novel or complex that only two counsel could represent RBG.

35 I was of the view that while the scenario was initially complicated by the claims of other defendants, it had become a relatively straightforward battle between RBG and CL after the other defendants dropped out. The s 20A issue was novel but not particularly complex.

36 As RBG had not succeeded on the issue of s 62(4), it did not lie in its mouth to suggest that because this issue was novel and complex, it should be granted a certification of costs for two counsel.

37 In the circumstances, I declined to grant such a certification.

38 There was no dispute that RBG's costs should not include costs incurred solely in respect of a claim by any other defendant and I so ordered, for the avoidance of doubt.

Interest

39 In the light of my finding that RBG had succeeded on its claim for CL's conversion of nickel briquettes, I had ordered CL to pay damages being the net purchase price or prices which CL had obtained for the briquettes. The parties were able to agree on the quantum of the same, leaving the question of interest to be paid thereon to be decided by me. On such interest, there were two sub-issues if interest were ordered to be paid: the period for which interest should be paid and the rate of interest.

40 RBG suggested various starting dates for the interest period:

(a) 9 May 2002. This was the date when CL took delivery of the nickel briquettes and was considered to be the date of conversion.

(b) 17 June 2002. This date was the last of three dates when CL sold the nickel briquettes.

(c) 13 December 2002. This was the date when RBG's claim for the nickel briquettes was filed as an amendment to its statement of claim.

RBG obviously wanted interest to run from as early a date as possible whereas CL wanted no interest to be payable, suggesting that no interest should be payable on a conversion claim. If interest were to be paid, CL obviously wanted it to run from a date as late as possible. CL submitted that interest should run from the last date of the sale of other metals by RBG's liquidators. These other metals had remained in the warehouses until the liquidators sold them. CL's argument was that RBG would not have received the sale proceeds from the sale of the nickel briquettes earlier than when the other metals were sold by RBG's liquidators. In response, RBG submitted that there was some delay in the sale of other metals because of other disputes and it was speculative to say when the sale of the nickel briquettes would have been achieved if CL had not converted the same.

41 As regards the rate of interest, RBG sought 6% per annum although it acknowledged that the sale proceeds of the other metals were deposited in a fixed deposit US$ account. CL's position was that the deposit rates for US$ would be less than 6% per annum. However, no specific rate was mentioned at the time I was receiving submissions as to the question of interest which CL should pay. I rejected a late attempt by CL to adduce evidence on the US$ deposit rate. RBG also did not provide the rate for the same, although it did not dispute that it would be less than 6% per annum. On the other hand, CL also did not say how CL had used the funds from the sale proceeds of the nickel briquettes.

42 I was of the view that since the nickel briquettes had been sold, and CL had received the net sale proceeds, which would otherwise have been received by RBG, interest should be payable by CL.

43 As for the date when interest was to accrue, the two logical dates from the dates proposed in submissions would be the date when CL sold the nickel briquettes or the date when the liquidators would have sold the nickel briquettes if not for the conversion. On the latter date, I assumed that it would be one of the dates during the period from 25 October 2002 to 19 April 2003, mentioned to me as the period when the other metals were sold by the liquidators.

44 To choose either of the two competing dates would result in a larger windfall for one side. The date of last sale by CL, *ie* 17 June 2002, would reduce CL's windfall but, on the other hand, it would more than compensate RBG for its loss as its liquidators were unlikely to have sold the nickel briquettes by 17 June 2002. RBG was put into compulsory liquidation in England only on 12 June 2002 and the sale of the other metals by the liquidators commenced only from 25 October 2002. On the other hand, if interest were to accrue from, say, 25 October 2002 only, then CL would have a larger windfall since it had received the sale proceeds about four months earlier.

45 The rate of interest would also affect the considerations of windfall and the extent thereof.

46 In trying to minimise the windfall to either side, I decided that CL was to pay interest on the agreed quantum from the date of last sale by CL, *ie* 17 June 2002, to the date of my decision on interest, *ie* 4 August 2004, at the rate of 3% per annum.

47 There remained one minor issue regarding interest. RBG had to pay the sale proceeds of one

drum of nickel to CL pursuant to my judgment of 17 June 2004. By that, I meant the net sale proceeds. I was informed that the principal sum thereof was a small sum of around US$2,000. RBG reminded me that under orders for appointment of provisional liquidators and for the winding up of RBG in Singapore and the appointment of liquidators, various orders were made allowing the liquidators to sell metals in the warehouses and to place the gross sale proceeds in a US$ fixed deposit account to earn interest. The expenses of the survey and sale, as well as of any liens, were to be deducted from the gross sale proceeds. These orders were made with the knowledge of CL and other defendants. Accordingly, I ordered RBG to pay CL whatever interest was earned on the net sale proceeds of that one drum of nickel.

48 The default prescribed rate of interest after judgment, *ie* 6% per annum, would apply to each sum which CL was to pay to RBG and RBG was to pay to CL from 5 August 2004 until the date of payment.

Costs and interest as ordered.

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