Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak dan Gas Bumi Negara [2006] SGHC 195

Case Number : OS 342/2002

Decision Date : 25 October 2006

Tribunal/Court : High Court

Coram : Sundaresh Menon JC

Counsel Name(s) : Alvin Yeo SC, Tan Kay Kheng and Tan Hsiang Yue (Wong Partnership) for the applicant; Chew Kei-Jin and Ang Gek Joo (Tan Rajah & Cheah) for the respondent

Parties : Karaha Bodas Co LLC — Perusahaan Pertambangan Minyak dan Gas Bumi Negara

Civil Procedure – Costs – Principles – Whether costs should fall on plaintiff or respondent where a particular matter has been withdrawn, discontinued or set aside without a final determination on the merits

25 October 2006

Sundaresh Menon JC:

1 On 18 August 2006, I gave judgment in *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak dan Gas Bumi Negara* [2006] SGHC 148. That judgment is related to the present. They both concern proceedings which arose out of an *ex parte* order ("the *ex parte* order") that had been obtained by Karaha Bodas Company LLC ("the applicant") to enforce an arbitration award which had earlier been made in its favour against Perusahaan Pertambangan Minyak dan Gas Bumi Negara otherwise known as "Pertamina" ("the respondent"). Enforcement actions had been initiated by the applicant against the respondent in several jurisdictions. The respondent resisted these efforts and in relation to the present proceedings had sought to set aside the *ex parte* order. The furthest along of the various enforcement actions taken by the applicant was in the United States. In the United States, a final petition for a writ of *certiorari* had been presented by the respondent to the Supreme Court ("the petition").

2 As the applicant considered it most likely that the petition would be dismissed, it sought to stay the present proceedings pending the outcome of the petition. Its application was dismissed by the learned assistant registrar and the appeal before me against that decision was dismissed. The applicant then sought to set aside the *ex parte* order on its own motion. This was resisted by the respondent on various grounds. I allowed that application and did set aside the *ex parte* order in the judgment I have referred to above. However, I reserved the question of costs and also indicated that I would hear arguments on any other orders that were thought necessary. The further background is set out in that judgment and I do not propose to repeat the same here.

3 The matter was subsequently restored for hearing before me on 29 September 2006 in order to dispose of two issues:

(a) whether I should impose any terms upon the applicant curtailing its ability to commence fresh proceedings in Singapore to enforce the arbitration award; and

(b) what, if any, order I should make in relation to costs.

4 As to the first issue, it proved unnecessary for me to deal with this in the event given the applicant's undertaking that any such future application would be made *inter partes* with notice to

the respondent. Mr Alvin Yeo SC, who appeared for the applicant, noted that this served to postpone the argument on this issue to a point if, and when, it ever became necessary to deal with it. Mr Chew Kei-Jin, who appeared for the respondent, agreed with this.

5 In the premises, it was only necessary for me to deal with the question of costs. On 6 October 2006, I informed the parties of my decision. As the point is of some interest, I thought it useful to set out briefly the reasons underlying the decision I reached. I am grateful to both counsel for the assistance I have received in this regard.

6 Both counsel submitted, and I accept, that the applicable principles are as set out in the unreported decision of May J (as he then was) in *R v Warley Justices ex parte Callis* (8 December 1993) (Queen's Bench Division (Crown Office List)) ("*Callis*") and the unreported decision of Henry J in *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* The Independent (8 December 1988) ("*Barretts & Baird*") which is cited there. I have also found assistance in the judgment of Karthigesu J in *Lin Securities (Pte) v Official Assignee of the Property of Tan Koon Swan* [1992] 2 SLR 1017 ("*Lin Securities*") which I drew to counsel's attention.

7 In *Callis*, the plaintiff had failed to pay certain charges and a warrant was issued against him. He moved for judicial review on the issue of the warrant on the basis that the proceedings leading to its issuance were out of time. The same point was being taken in a number of other cases and, on 4 November 1992, just over a year before the case was heard by May J, one of these challenges was resolved in *R v Wolverhampton Justices ex parte Mould* 157 JP 1017 ("*Mould*") with the court holding that the challenge on this ground failed.

8 At that point, the plaintiff had no basis for proceeding with the matter but he did not withdraw his action until days before it came on for hearing. By that stage, he had also paid the charges. He then sought an order for the action to be withdrawn by consent with no order for costs.

9 May J cited certain extracts from the report of the decision of Henry J in *Barretts & Baird* and I set out portions of the judgment of May J in some detail because the case is not reported:

> Henry J. had referred to the general rule concerning discontinuance … that in the ordinary way defendants would recover their costs, but held that the general rule should only apply when the discontinuance could safely be equated with defeat or an acknowledgement of likely defeat. …
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> The position is, however, entirely different where, as here, the discontinuance follows some step which has rendered the challenge no longer necessary, which in other words renders the proceedings academic. That may have been brought about for a number of reasons. If, for instance, it has been brought about because the respondent, recognising the high likelihood of the challenge against him succeeding, has preempted his failure in the proceedings by doing that which the challenge is designed to have achieved – even if perhaps no more than agreeing to take a fresh decision – it may well be just that he should not merely fail to recover his own costs but indeed pay the applicants'.
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> On the other hand, it may be that the challenge has become academic merely through the respondents sensibly deciding to shortcircuit the proceedings, to avoid their expense or inconvenience or uncertainty without in any way accepting the likelihood of their succeeding against him. He should not be deterred from such a course by the thought that he would then be liable for the applicant's costs. Rather in those circumstances it would seem to me appropriate that the costs should lie where they fall and there should accordingly be no order. That might equally be the case if some action wholly independent of the parties had rendered the outcome

of the challenge academic. It would seldom be the case that on discontinuance this court would think it necessary or appropriate to investigate in depth the substantive merits of what had by then become an academic challenge. That ordinarily would be a gross misuse of this court's time and further burden its already overfull list.

In my judgment, this case is clearly one where this court cannot hope, in a short time, to discern what the likely outcome of the challenge would have been had it been litigated to a conclusion.

All that it is possible to say with certainty is that, without accepting the validity of the challenge the respondents, following the grant of leave, acted so as to render academic any continuing interest in the proceedings on the part of those who NALGO represent. In short, the case seems to me to fall clearly into the category of those in which it is appropriate to allow discontinuance without penalty to the applicants.

10 May J then considered the facts before him and noted that by reason of the decision in *Mould* ([7] *supra*) which made the challenge before him unarguable, as well as the fact that the charges in question had been paid in full, the proceedings were academic. He further noted that if the applicant had applied to withdraw the application within a reasonable time of the decision in *Mould* having been given, the proper order would have been to allow the withdrawal with no order as to costs. However, the applicant only took that course three days prior to the hearing and he held that in those circumstances, it was reasonable to require the applicant to pay costs.

11 In my judgment, the principles set out there and in *Lin Securities* ([6] *supra*) are applicable in the present circumstances and these may be summarised thus:

(a) Costs in such instances ultimately remain a matter for the discretion of the court.

(b) In considering the exercise of such discretion, the court may usefully have regard to of the reasons for which a particular matter is withdrawn, discontinued or set aside without a final determination on the merits.

(c) Where the withdrawal (which term for convenience I use also to refer to discontinuance or setting aside in circumstances such as the present) takes place in circumstances that are indicative of an acknowledgement of defeat or likely defeat then the withdrawing party should pay the costs.

(d) Where the withdrawal follows what in effect is a surrender on the part of the party against whom the action has been brought, then that party against whom the action was brought should bear the costs.

(e) Where the withdrawal takes place in circumstances where it is not directly related to the merits of the case and especially where it is a consequence of a neutral event that has made the proceedings academic or unnecessary to prosecute then it would be appropriate to make no order as to costs and let the costs lie where they fall.

(f) All of these principles are to be applied with due regard to the reasonableness with which the parties have conducted themselves.

(g) Where the case is not litigated to a conclusion because the parties have come to a settlement save as to costs, the terms of the settlement should be disclosed to the court for any bearing it may have on the court's determination of the appropriate order as to costs.

(h) Where the only issue left in a litigation is one of costs, then as a general rule, the court will not embark on an in-depth investigation of the merits of the case, though occasionally, where it is possible *readily* to discern the likely outcome had the matter been litigated to a conclusion, the court may choose to consider this.

(i) However, the court may have regard to all the circumstances before it, including the conduct of the parties, and may draw the appropriate inferences from this in order to determine what the appropriate order as to costs should be.

12 Mr Yeo submitted that the burden was upon the respondent to show that there was something wrong with the procedure adopted by the applicant in these proceedings or that the award was patently liable to be set aside failing which the applicant should get its costs. He submitted that this followed because the applicant was taking this course of action as it considered it almost certain that it would get full satisfaction on the award in the United States.

13 Mr Chew responded to this by noting that it was untenable:

(a) for the applicant on its own motion to have set aside the *ex parte* order as it has done in the present case over the respondent's objections;

(b) in so doing dispense with the opportunity for the court to adjudicate the merits of the respondent's application to set aside the *ex parte* order; and

(c) to base this course of action upon the argument that it would mostly likely be a waste of the court's time to have such an adjudication because of what it expected would happen in the United States,

and then to submit that these were the very things the respondent had to show in order to get its costs or worse, in default of which, face the prospect of paying the applicant's costs. I think there is much force in Mr Chew's argument.

14 It is clear that the setting aside of the *ex parte* order in this case does not fall in the category of cases where this course of action follows a surrender on the part of the respondent. In fairness to the respondent, and as apparent from my earlier judgment in these proceedings, I should state that it appeared to have every desire to contest the matter. It opposed the withdrawal vehemently asserting that it stood to be deprived of the opportunity to vindicate itself. Nor did I consider this to be a case falling within that class where the court could, without careful investigation, discern the likely outcome of the matter had it been litigated to a conclusion. I note in passing that it was set down for three days and Mr Yeo had earlier submitted that there might be a need for cross-examination of witnesses and also for other interlocutory directions.

15 On that basis alone, this does not appear to me, therefore, to be a case where the respondent ought to bear the applicant's costs. It is all the more so given the arguments made by Mr Chew which I have noted above.

16 Equally, I do not think this case can be seen as one falling within that group of cases where the withdrawal is indicative of an acknowledgement of likely defeat by the applicant. The question then is whether the costs should lie where they fall or whether for some reason they should nonetheless be borne in whole or in part by the applicant. In arriving at my determination, I have considered a number of factors.

17 Firstly, in my view, in the context of international arbitration, a party who has obtained an award is entitled to take steps to enforce the award in as many jurisdictions as it chooses, at least, as long as it acts reasonably. This, after all, is one of the primary advantages of international arbitration.

18 In the present case, the respondent challenged the enforcement proceedings in every jurisdiction where the applicant initiated such proceedings. It was entitled to do this but the fact that in the United States for instance, which both parties agreed had been the main forum for the dispute, the respondent took issue even with ownership of certain funds which had been attached there upon the applicant's motion, meant that it was reasonable for the applicant to initiate and maintain enforcement proceedings in multiple jurisdictions since it had no way of knowing whether it had in hand sufficient assets of the respondent to meet the award.

19 Both parties had then come to a consensual understanding that the enforcement proceedings in Singapore should be held in abeyance pending the outcome of the enforcement proceedings that were afoot in the United States. That again was a perfectly reasonable course of action on the part of both parties which had held good until January 2006. In January 2006, the respondent withdrew from that arrangement or understanding, as it was entitled to do, and filed an affidavit raising a fraud allegation.

20 Shortly after that, on 9 March 2006, the US Court of Appeals dismissed the last of the respondent's appeals in the United States (bar the subsequent attempt by the respondent to petition the Supreme Court of the United States).

21 In relation to the proceedings before me, the applicant subsequently:

(a) sought and obtained an extension of time to file an affidavit in reply to the applicant's affidavit which raised the fraud allegation;

(b) successfully made an application to vacate certain hearing dates scheduled for May 2006 on the basis of Mr Yeo's unavailability; and

(c) filed its affidavit in reply to that which had earlier been filed by the applicant,

before applying to the registrar to stay these proceedings. When that failed, it appealed and after I dismissed the appeal, the applicant then applied to me to set aside the *ex parte* order.

22 Mr Chew submitted that whatever may have been the position before January 2006 when the consensual understanding was in place, once the respondent had indicated that it wished to proceed and at the very latest by March 2006 when the applicant knew that the respondent's appeal to the United States Court of Appeals had been dismissed, the applicant was obliged to decide whether it wished to proceed or run the risk of paying costs. Mr Chew noted that throughout the period from March 2006 until the stay application, nothing was said about the matter having been rendered academic. He submitted that the respondent incurred substantial costs from March to July 2006 in the expectation that it would have to deal with the substance of its application and it would be unfair to treat the respondent as if it was in the same position as it would have been if the applicant had taken this course soon after the appeal was dismissed by the United States Court of Appeals and thus spared the respondent from incurring these wasted costs.

23 Mr Yeo's principal rejoinder to this was that his clients expected the respondent to attempt to bring an appeal against the dismissal by the United States Court of Appeals to the Supreme Court.

However, as Mr Chew noted, that fact, if and when it transpired, would have made the proceedings before me somewhat less academic and therefore did not afford the applicant a justification for not acting promptly after the United States Court of Appeals had rendered its decision. He submitted that by July 2006 when the applicant did apply to set aside the *ex parte* order on the basis that there was no need for it to maintain these proceedings, it was aware that the respondent had already petitioned the United States Supreme Court. According to Mr Chew, if, despite the petition, the applicant was willing to set aside the *ex parte* order, then there was no justification at all for it not to have taken this course much earlier.

24 In my view, Mr Chew is right. On these facts, and having regard to the applicable principles identified above, the question of costs should be disposed of in the manner I set out below.

25 For the period until 16 January 2006 when the respondent filed its affidavit raising the fraud allegation and thus withdrew from the consensual standstill understanding, it is apparent to me that both parties were acting reasonably. The applicant was entitled to initiate the enforcement proceedings; the respondent was equally entitled to defend it; and both parties quite reasonably decided to hold the proceedings in abeyance. As those proceedings were not finally disposed off on the merits, it seems to me that it would be reasonable to let the costs for that period lie where they fall and I order that each party is to bear its own costs.

26 For the period after 17 January 2006, the key development was the initiation of the fraud allegation by the respondent. The respondent was certainly entitled to withdraw from the consensual standstill and raise this. Equally, the applicant was entitled to a reasonable period to consider its position. That reasonable period in my view came to an end on 30 March 2006 on or by which date three things happened. The United States Court of Appeals had dismissed the respondent's appeal on 9 March 2006 and I accept Mr Chew's argument that the position as far as the applicant was concerned with respect to its enforcement actions outside the United States was at least as academic then as it was in July 2006. Secondly, a pre-trial conference was held in these proceedings and the applicant was given time to prepare its response. Lastly, hearing dates were taken.

27 In my view, that was the time at which the applicant should reasonably have taken the position that any further expenditure would be academic and should have sought to set aside the *ex parte* order. Had it done so at that time, it would have avoided incurring any liability for costs.

28 However, it did not do that and I think Mr Chew has a legitimate complaint that his clients incurred some substantial costs after that date in the expectation that there would be a contest on the merits. Hence, it is clear to me that the applicant ought to bear all the respondent's costs after 30 March 2006 save to the extent already disposed of in any orders that have been made. Such costs are to be taxed if not agreed.

29 That leaves the costs for the period from 17 January 2006 to 30 March 2006. Having regard to the fact that the matter was ultimately resolved without an adjudication on the merits; that there had been a consensual understanding before that; and that the applicant was entitled to a reasonable time to consider its position when the respondent withdrew from that understanding, I am satisfied the costs for this period also should lie where they fall.

30 In summary, therefore, each party is to bear its own costs from the commencement of these proceedings until 30 March 2006. Thereafter, the applicant is to pay the respondent its costs, save to the extent already dealt with in any other order and such costs are to be taxed if not agreed.