Lian Kok Hong v Ow Wah Foong and Another
[2007] SGHC 158

Case Number : Suit 149/2006

Decision Date : 21 September 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Chan Chin Ling (Tan Lian Ker & Co) for the plaintiff; Andrew Tan Tiong Gee and Anna Png (Andrew Tan Tiong Gee & Co) for the defendants

Parties : Lian Kok Hong — Ow Wah Foong; Ow-Tsai Ay Giok

Limitation of Actions – When time begins to run – Action in contract and tort against architects for wrongfully issuing termination certificate – Whether time began to run from date of accrual of cause of action or date which house owner had knowledge of architects' negligence in issuing termination certificate – Sections 6, 24A(3) Limitation Act (Cap 163, 1996 Rev Ed)

21 September 2007 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is a businessman who decided to build a house at Wilby Road in 1997. He awarded a contract on 29 August 1997 to Sin Kian Contractors Pte Ltd ("Sin") to carry out the building works. The defendants are architects practising in the firm of Pan-Indo Architects International. The plaintiff testified that the first defendant and he were friends from school. The first defendant was the project architect in the construction of the plaintiff's house at Wilby Road. Sin commenced work on 14 September 1997. It was scheduled to complete the work by 14 September 1998, but did not do so and time for completion was extended to 28 April 1999. On 3 March 1999, the plaintiff complained of various defects and asked Sin to rectify them. Sin disputed the allegations of defect and did not carry out any rectification work. The plaintiff then had a meeting with his consultants including the defendants on 11 March 1999, with a view of terminating Sin's employment as builder. Sin was not present at this meeting.

2 The plaintiff wrote to the defendants on 12 March 1999, the day after their meeting, to say:

> Due to numerous failure of Sin Kian Contractor Pte Ltd in taking instructions from yourself, I have decided to terminate Sin Kian as the main contractor for the above project.

On the same day the defendants sent to the plaintiff the minutes of the meeting held on 11 March 1999 where *inter alia* the defendants' advice to the plaintiff on how a Termination Certificate might be issued under the plaintiff's contract with Sin was recorded. In paragraph 2.3.7, the defendants advised as follows:

> On the final judgment, should the issuance of Termination Certificate be shown to have been unjustified in the verdict, the Contractor shall be entitled to compensation from the Employer for all damage and loss suffered by him as a consequence of the termination of his employment.

Five days later, on 17 March 1999, the plaintiff wrote another letter to the defendants. The letter stated, *inter alia,* as follows:

> I would like to summarise our common goal is for you to issue termination certificate. In return I

> will officially terminate Sin Kian Contractor Pte Ltd. I fully aware the consequence of calling the Bond. However, judging from the previous Sin Kian's claim, I believe that I am overpaying them if consider the defective and omission work. To the extend of the rectification works, I feel safe to call the Bond now. The retention money is definitely not enough. [*sic*]

3 The defendants thus issued a Termination Certificate dated 17 March 1999 addressed to Sin certifying as follows:

> Pursuant to Clause 32(4) of the Contract Conditions, I hereby certify that the Employer is entitled to terminate the Employment of the Contractor under this Contract forthwith on the grounds stated in paragraphs (d), (e) and (h) of Clause 32(3) of the Contract Conditions, in that (Paragraph (d) – Contractor has failed to proceed with diligence and due expedition and continued to do so for one month after receipt of written notice from us vide our letter ref H10/96/C/153/M0217 ref. dated 1st February 1999 in regards to the rectification works. Paragraph (e) – Contractor has failed and unreasonably delayed in complying with a written direction of the Architect requesting the removal and replacement of defective tiling works vide our letters ref. H10/96/C/150/M0146 and H10/96/C164/M0350 and dated 22nd January 1999 and dated 22nd February 1999 respectively. Paragraph (h) – Contractor has failed following one month's written notice by the Architect to comply with written direction vide our letter ref. H10/96/C/156/M0261 dated 5th February 1999.)

Accordingly, by a letter dated 19 March 1999, the plaintiff, referring to the defendants' Termination Certificate, terminated Sin's employment ("Notice of Termination"). In its letter to the plaintiff dated 22 March 1999, Sin disputed "the validity of the Architect's Terminate [*sic*] Certificate" as well as the plaintiff's Notice of Termination. By the same letter, Sin gave notice that it wished to commence arbitration proceedings under clause 37 of its contract with the plaintiff. The defendants wrote to the plaintiff on 23 April 1999 reassuring the plaintiff that the Termination Certificate was properly issued. It went on to note that the Termination Certificate might be challenged on the ground that it did not comply with clauses 32(3)(d), (e), and (h) of the plaintiff's contract with Sin. It is not necessary to set out the merits of Sin's dispute with the plaintiff in the arbitration except to say that the alleged irregularities of the Termination Certificate involved procedural defects such as the failure to give notice to Sin to remove or replace the work complained of within 14 days from a requisite notice to Sin. The arbitrator issued the Interim Award on 7 April 2003 and the Final Award on 21 July 2006 in favour of Sin. The arbitrator found the Termination Certificate to be invalid and his reasons were set out in the Interim Award. He found that the defendants' Termination Certificate was procedurally incorrect and was in breach of clauses 32(3)(e) and (h) as alleged by Sin.

4 The plaintiff commenced this action against the defendants in contract and tort for failing to supervise the construction of the project, wrongfully issuing an interim certificate of payment (no. 15), and wrongfully issuing the Termination Certificate. This action was commenced on 17 March 2006. The defendants subsequently applied to strike out the action on the ground that it was time-barred. The defendants argued before the assistant registrar that the cause of action in contract as well as in tort had been extinguished by virtue of the effluxion of time provided in s 6 of the Limitation Act (Cap 163, 1996 Rev Ed). It was conceded by counsel for the plaintiff before the assistant registrar, and also in the course of the proceedings before me, that the plaintiff's causes of action were indeed barred by virtue of s 6. The assistant registrar noted the concession by counsel that time ran from the issuance of the Notice of Termination of 19 March 1999 after receiving the Termination Certificate of 17 March 1999. The causes of action were thus extinguished on 18 March 2005. Counsel for the plaintiff submitted that the plaintiff's action were not governed by s 6 but by s 24A(3) of the Limitation Act. The relevant provisions of the Limitation Act are set out below for

ease of reference:

6. —(1) Subject to this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued:

(a) actions founded on a contract or on tort;

…

Time limits for negligence, nuisance and breach of duty actions in respect of latent injuries and damage.

24A. —(1) This section shall apply to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under any written law or independently of any contract or any such provision).

(2) An action to which this section applies, where the damages claimed consist of or include damages in respect of personal injuries to the plaintiff or any other person, shall not be brought after the expiration of —

(a) 3 years from the date on which the cause of action accrued; or

(b) 3 years from the earliest date on which the plaintiff has the knowledge required for bringing an action for damages in respect of the relevant injury, if that period expires later than the period mentioned in paragraph (*a*).

(3) An action to which this section applies, other than one referred to in subsection (2), shall not be brought after the expiration of the period of —

(a) 6 years from the date on which the cause of action accrued; or

(b) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (*a*).

(4) In subsections (2) and (3), the knowledge required for bringing an action for damages in respect of the relevant injury or damage (as the case may be) means knowledge —

(a) that the injury or damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;

(b) of the identity of the defendant;

(c) if it is alleged that the act or omission was that of a person other than the defendant, of the identity of that person and the additional facts supporting the bringing of an action against the defendant; and

(d) of material facts about the injury or damage which would lead a reasonable person who had suffered such injury or damage to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

(5) Knowledge that any act or omission did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant for the purposes of subsections (2) and (3).

(6) For the purposes of this section, a person's knowledge includes knowledge which he might reasonably have been expected to acquire —

(a) from facts observable or ascertainable by him; or

(b) from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek.

(7) A person shall not be taken by virtue of sub-section (6) to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice.

5 Mr Chan, counsel for the plaintiff, argued that under s 24A(3)(b), time did not run against the plaintiff until he had knowledge that the defendants were negligent in issuing the Termination Certificate, and that knowledge became certain only when the arbitrator issued his Interim Award on 7 April 2003. The relevant portion of the provision relied on says that the plaintiff "first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action". Relying on *Prosperland Pte Ltd v Civic Construction Pte Ltd and others* [2004] 4 SLR 129 ("*Prosperland*"), Mr Chan argued that the plaintiff in the present case was in the same position as the plaintiff in *Prosperland*. The plaintiff in that case was a property developer who sued the contractor (among others) for damages for breach of contract, and in tort for negligence. The story there begun in August 1997 when the plaintiff's agent noticed that a solitary ceramic tile had become loose, though it did not fall off from the building's façade. There were about 100,000 tiles on the building and the plaintiff did not think that one loose tile would threaten the integrity of the entire façade or indicate that legal action ought to be contemplated. Nonetheless, the plaintiff notified the contractor who denied any liability and claimed that the tile was not loose but had cracked because of 'stress'. Nothing eventful occurred until two years later when more loose tiles were noticed, and a month after that, two tiles actually fell off the façade. The contractor replaced those tiles in March 2000, but the plaintiff was not satisfied and it engaged the services of a surveyor to determine the cause of the loose tiles. The surveyors issued a report in May 2000 and expressed the view there that the loose tiles were the result of poor workmanship on the part of the contractor.

6 The question that arose in *Prosperland* was whether, when the plaintiff eventually sued the contractor, its claim was time-barred. The plaintiff there contended that it did not have the requisite knowledge under s 24A(3)(b) of the Limitation Act until May 2000 when its experts presented a clearer account of the cause of the falling tiles, and in any event, not earlier than September 1999 when the tiles fell off. The contractor claimed that the plaintiff had the requisite knowledge in August 1997 when the first loose tile was noticed. Judith Prakash J held that the action commenced on 2 May 2002 in respect of the fallen tiles was not time-barred and that the plaintiff did not have the requisite knowledge beyond three years. Mr Chan referred to *Prosperland* whenever he could, and placed great emphasis on paragraphs 9, 10, and 11 of the judgment. I shall now set out the material parts of those passages from *Prosperland*:

9. First, if the writ is not issued within the prescribed period from the date when the cause of action arose, the onus is on the plaintiff to plead and prove that the date on which it had the requisite knowledge was a date within the prescribed period preceding the date of issue of the writ…

10. Second, for time to start running under s 24A, an injured party is not required to know that he has a possible cause of action. What he must know are the material facts founding that cause of action… [in] this case, the material facts founding the causes of action against [the contractor] and the architect would be the existence of defects in the tiled façade ... that were sufficiently serious to justify starting an action for damages and the fact that the defects were attributable to acts or omissions of those parties.

11. Third… "knowledge" for the purposes of s 24A is a state of mind experienced by a plaintiff which actually existed or which might have existed had the plaintiff, acting reasonably, acquired knowledge from the facts ascertainable by him or which he could have acquired with the help of such expert advice which it was reasonable for him to obtain. By s 24A(6), "knowledge" for the purposes of s 24A(4) includes knowledge reasonably expected to be acquired. A firm belief held by the plaintiff that the damage was attributable to the acts or omission of the defendant, but in respect of which he thought it necessary to obtain reassurance or confirmation from experts, would not be regarded as knowledge until the result of his inquiries was known to him or, if he delayed in obtaining that confirmation, until the time when it was reasonable for him to have got it. If the plaintiff held a firm belief, which was of sufficient certainty to justify the taking of the preliminary steps for proceedings by obtaining advice about making a claim for compensation, then such belief would be knowledge and the limitation period would begin to run.

Mr Chan submitted that the plaintiff did not have the requisite knowledge at the time the Termination Certificate was issued or even after it was issued. Mr Chan submitted that although Sin had made known that it was challenging the validity of the Termination Certificate, the defendants were equally firm in holding to their view that the Termination Certificate was valid. Hence, Mr Chan argued that it was only when the arbitrator had found as a fact that the Termination Certificate was invalid that the plaintiff could be said to have "knowledge" within the meaning of s 24A(3)(b). He further submitted that the plaintiff "could not be certain at the time of the arbitration whether the challenges or issues raised by the contractor were valid." Mr Chan also seemed to be of the view that the fact that the defendants had consulted their own lawyers when they issued the Termination Certificate was important. It was not sufficiently argued, but it appears that the reason was that the fact that the defendants were legally advised at the material times fortified the plaintiff's position that he could not thus have the requisite knowledge that the Termination Certificate was invalid.

7 Mr Tan, counsel for the defendants, made two arguments. First, he submitted that the plaintiff could not rely on s 24A(3) of the Limitation Act because that provision only applied to cases of latent defects and not to pecuniary loss cases of which the present was one. Secondly, he submitted that even if s 24A(3) applied, the plaintiff had the requisite knowledge because he knew that the validity of his Notice of Termination as well as the defendants' Termination Certificate was challenged by Sin in the arbitration.

8 I agree with what was said in the passages from *Prosperland*, and would like to emphasize the wordings of sub-sections (a) and (b) of s 24A(3) before I continue:

(a) 6 years from the date on which the cause of action accrued; or

(b) 3 years from the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, if that period expires later than the period mentioned in paragraph (*a*).

A person has a right to sue in contract or in tort when a breach has occurred or a wrongful act has

been done. In the case of an action in tort, save for those causes that are actionable *per se*, damage is a requisite part of the cause of action. And when a cause of action accrues, that person to whom the cause accrued has to sue within the time limited under s 6 of the Limitation Act. In the present case, the moment Sin notified the plaintiff that it was challenging the Notice of Termination on the ground that the Termination Certificate was invalid, a cause of action accrued to the plaintiff against the defendants. The act of being sued by Sin on account of the Termination Certificate was a detriment that counted as damage to found a cause of action against the defendants. If, however, the arbitrator had found the Termination Certificate to be valid, then there would be no damage, although the act of issuing the Termination Certificate had brought about the arbitration. The point thus, is that from the facts, a cause of action had accrued to the plaintiff against the defendants when Sin commenced arbitration proceedings against him on account of the Termination Certificate. Time under s 6 of the Limitation Act begins to run from the accrual of that cause. Time under s 6 is not suspended until it is shown that the plaintiff was adjudicated to be liable to Sin. He has to join the defendants as parties to the arbitration or else sue in separate proceedings for a declaration for an indemnity. I will explain further.

9 Had this not been a matter involving arbitration, which is just a minor distraction in the contemplation of the legal issues involved presently, the plaintiff, who is alleged to have caused damage to Sin by reason of the defendants' invalid Termination Certificate that the plaintiff had relied on, will immediately have to exercise his judgment. Does he accept Sin's allegation or does he not? Typically, a party in the plaintiff's position would have taken the stand that he disputes the claim but, as a matter of precaution, he will join the defendants as third parties. If a party in the plaintiff's position cannot be certain that the contractor's claim was an unmeritorious one, he cannot afford to wait until the determination by the court before suing the defendants. He might be too late. From Mr Chan's submissions, the plaintiff's case here was precisely that – he was not certain whether the defendants' Termination Certificate was valid or not. He should therefore not have waited for the arbitrator's award. It was too late. This was, therefore, not a latent defects case at all. This was a case in which the plaintiff had knowledge that the defendants had put him at risk, and instead of taking the appropriate action to ensure that the defendants indemnify him in the event that he was found liable, the plaintiff had chosen to accept the defendants' assertion that their Termination Certificate was valid. He was not entitled to wait for the arbitrator to find the defendants' Termination Certificate to be invalid before commencing an action against the defendants.

10 Mr Chan's argument that this case was similar to *Prosperland* proceeded first with a lengthy reference to the law in the passages set out above at [6]. I agree with what Judith Prakash J had said in respect of the law, and I have no reason to say that she had not applied it correctly in that case. Judith Prakash J's decision that the plaintiff's claim in *Prosperland* was not time-barred was in fact affirmed by the Court of Appeal in *Chia Kok Leong and another v Prosperland Pte Ltd* [2005] 2 SLR 484. The argument by analogy has been a principal form of argument in judicial proceedings, especially in common law jurisdictions, and it is entwined with the doctrine of precedent because one case cannot affect another unless it can be shown that it is so similar that no distinction between them should be made for the application of the law. But argument by analogy can be in direct conflict with logic. It is neither necessary nor appropriate to have a major discourse on the merits and disadvantages of the different forms of legal arguments here, but I am obliged to point out the idle hope that *Prosperland* held out to the plaintiff here. The plaintiff had raised his hope from the clarity of the court's statement of the law, but he appeared to have misread Judith Prakash J's statement at [11], which states:

> If the plaintiff held a firm belief, which was of sufficient certainty to justify the taking of the preliminary steps for proceedings by obtaining advice about making a claim for compensation, then such belief would be knowledge and the limitation period would begin to run.

Mr Chan supposed that that passage did not apply here because the plaintiff here did not possess any firm belief that would have justified his taking preliminary steps for legal proceedings. Can it be said that this was right? In search of refinement by analogy we sometimes stand in danger of losing our common sense. Mr Chan's argument that a "firm belief" would only be gained from the arbitrator's award because the plaintiff would not know that he could sue the defendants, was in my view, not a correct application of *Prosperland*. A plaintiff who found a loose tile out of 100,000 others in his building without knowing why that tile came loose, might be entitled to wait for an expert opinion before suing the contractor. How many loose tiles are required to raise the alarm is not the kind of numerical problem that the plaintiff encountered here – the Court of Appeal in *Prosperland* thought that the tocsin ought to have sounded when a few more tiles became loose two years later. A plaintiff who has been told that his architect had allegedly issued an invalid Termination Certificate has no need to wait for an expert other than his solicitor. He need not wait long to decide whether to join the architect defendants in the same proceedings or institute separate proceedings against them for an indemnity.

11 For the reasons above, the plaintiff's claim is dismissed. Costs will follow the event and be taxed if not agreed.