Bank Austria Creditanstalt AG v Go Dante Yap
[2007] SGCA 44

Case Number : CA 72/2007, SUM 2765/2007

Decision Date : 12 September 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Christopher Anand Daniel, Tan Xeauwei and Ramesh Selvaraj (Allen & Gledhill LLP) for the appellant; Eddee Ng and Lim Hui Li Debby (Tan Kok Quan Partnership) for the respondent

Parties : Bank Austria Creditanstalt AG — Go Dante Yap

Civil Procedure – Admissions – Failure to object to documents in litigant's bundle of documents – Whether admission deemed – Court ordering otherwise – Order 27 r 4(1) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

Civil Procedure – Jurisdiction – Inherent – Court of Appeal unable to consider issue without hearing oral evidence – Whether appeal ought to be struck out and matter remitted back to court below for reconsideration

Words and Phrases – "Order" – Section 29A(1) Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed)

12 September 2007

Chan Sek Keong CJ (delivering the grounds of decision of the court):

1 This is an application by the respondent to strike out the appellant's notice of appeal on the ground that the appeal does not arise out of any order by the trial judge in Summons No 2109 of 2007 ("the Summons") and on two other grounds which are not relevant to the determination of this appeal.

2 At the conclusion of the hearing, we made the following orders:

> This is an application for the striking out of an interlocutory order made by the Judge. The appellant has alleged that it would be prejudiced if it could not call the relevant witnesses to testify to the authenticity of the relevant documents because of the delay of the respondent in clarifying its own position in relation to the documents. However, this court cannot hear this appeal without having to hear witnesses as to determine whether or not the appellant has suffered any prejudice. Furthermore, as this is an appeal against an interlocutory order made in the midst of a trial, we have decided to strike it out and remit the issue back to the Judge for further consideration. We accordingly order as follows
>
> (a) The appeal is struck out.
>
> (b) The issue raised in this appeal is remitted to the trial judge to review the exercise of his discretion in relation to O 27 r 4(1) of the Rules of Court on the basis of whether the [appellant] has been prejudiced by its alleged inability to call witnesses to testify as to the authenticity of the relevant documents resulting from the alleged delay by the [respondent] in clarifying its position on such documents, and if so, … whether this ought to have a bearing on the exercise of his discretion in relation to this issue.

(c) The costs of this application are reserved to the trial judge upon reviewing this issue.

We now give the full reasons for our decision.

The facts

3 The Summons was an application by the respondent to amend his statement of claim in Suit No 424 of 2003 ("the main suit") to include, *inter alia*, para 33A, which reads as follows:

> Insofar as the Defendants [the appellant] rely on any documents which purport to set out the Plaintiff's [the respondent's] instructions in relation to the unauthorized investments and the unauthorized loans as particularised in paragraphs 23 and 31 to 33, the Plaintiff disputes that such documents are authentic.

4 This application to amend was prompted by a dispute between the appellant and the respondent in relation to the authenticity of certain documents ("the disputed documents"). The disputed documents constituted the appellant's internal documents which purported to evidence instructions given by the respondent to the appellant for transactions which the respondent had alleged were unauthorised. Such allegedly unauthorised transactions formed the substantial bulk of the respondent's claims in the main suit.

5 The issue of the authenticity of the disputed documents was raised before the trial judge on 14 May 2007, the first day of the trial of the dispute. The appellant took the view that the respondent was deemed to have admitted to the authenticity of the disputed documents by virtue of O 27 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") as the respondent had not filed a notice of non-admission within the time stipulated in the rule. The respondent, on the other hand, argued that there was no deemed authenticity of the disputed documents because the respondent's pleading that the transactions were unauthorised would necessarily involve disputing the appellant's internal documents to the extent that they purported to show that instructions had been given.

6 The trial judge then suggested that the respondent amend his statement of claim so as to include a statement to expressly provide that the respondent disputed the authenticity of the disputed documents. Taking up the trial judge's suggestion, the respondent filed the Summons for leave to amend his statement of claim.

7 The Summons was heard in chambers before the trial judge on 15 and 16 May 2007. On 16 May 2007, the trial judge opined that it might not even be necessary to amend the statement of claim to dispute the authenticity of the relevant documents. He took the view that the respondent's pleading that the transactions were unauthorised would necessarily involve disputing the appellant's internal documents to the extent they purported to show that instructions had been given. As a result, the respondent withdrew his application for leave to amend. Thereafter, the trial judge made the following statements as reflected in the notes of argument:

> For the purposes of O 27 r 4(1), I hold that plaintiff is not deemed to have admitted the documents.
>
> My ability to so order is not dependent upon there having been pleadings disputing the documents. (Moreover, the documents were discovered late.)

8 On 22 May 2007, before the lapse of seven days from the last day of the hearing of the Summons (*ie*, 16 May 2007), counsel for the appellant, Mr Daniel, asked the trial judge in open court during the trial proceedings to certify that no further arguments were required for the order made during the hearing of the Summons. This was for the purpose of complying with s 34(1)(*c*) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") as an interlocutory order made in chambers is not appealable without such certification by the judge making the order. The trial judge did so certify and the appellant filed a notice of appeal by way of Civil Appeal No 72 of 2007 ("the Appeal") on 12 June 2007 against the whole of the trial judge's decision made on 16 May 2007. This was the notice of appeal which the present application had sought to strike out.

The parties' contentions

9 The respondent contended, *inter alia*, that the Appeal did not arise out of an order or a decision made by the trial judge in the Summons; no decision was made on the Summons as the respondent had eventually withdrawn his application to amend his statement of claim. From the terms of the notice of appeal, it was apparent that it was directed *solely* against the Summons on which no order was made as the Summons had been withdrawn. Thus the Appeal was against a non-existent decision of the trial judge and was plainly incompetent. The notice of appeal was consequently defective and should be struck out.

10 Further, the respondent also submitted that no prejudice would have been caused to the appellant by the order allegedly made by the trial judge on the issue of disputing the authenticity of the disputed documents. The only prejudice that could have been caused by the calling of further witnesses was a possible vacation of trial dates since time would have to be allotted to the appellant to procure its witnesses. Any difficulties in procuring such witnesses would have been present even if the notice of non-admission was filed in accordance with O 27 r 4 of the ROC, assuming it had been necessary to do so.

11 The appellant, on the other hand, argued that there was an order made by the trial judge on 16 May 2007; the trial judge was asked to certify that he did not need further arguments in respect of that order, expressly for the purposes of compliance with the SCJA, and there were no objections from the respondent to this request for certification. As such, there was an order made by the trial judge allowing the respondent to dispute the authenticity of the disputed documents, and the SCJA was complied with for the purposes of appealing against that interlocutory order. The respondent's application to strike out the notice of appeal should thus be dismissed.

12 In addition, Mr Daniel also submitted before us that the appellant might face some problems in contacting the necessary witnesses and getting them to testify to the authenticity of the disputed documents. He contended that it was not possible to determine, without a fair amount of speculation, if there would in effect be actual prejudice to the appellant caused by the alleged order made by the trial judge; at this point, one would not know if there was prejudice. He argued that when the trial judge exercised his discretion under O 27 r 4 of the ROC to deem the respondent not to have admitted the authenticity of the disputed documents, he had no basis on which to exercise his discretion since he did not inquire into the prejudice caused to the appellant resulting from the appellant's potential inability to contact the relevant witnesses, which might have been avoided if the notice of non-admission had been given earlier.

13 The application to strike out the notice of appeal required us to determine two broad issues: first, whether the trial judge had made an "order" or "orders"; and second, if so, whether this court should entertain appeals against orders of this nature, *ie*, interlocutory orders, at this stage of the proceedings.

Whether the trial judge had made an order

14 Section 29A(1) of the SCJA states:

> The civil jurisdiction of the Court of Appeal shall consist of appeals *from any judgment or order of the High Court* in any civil cause or matter whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this Act or any other written law regulating the terms and conditions upon which such appeals may be brought. [emphasis added]

Essentially, the main ground relied upon by the respondent in his application to strike out the appellant's notice of appeal is that the trial judge's decision – that the respondent was not deemed to admit the authenticity of the disputed documents – is not an "order" for the purposes of s 29A(1) of the SCJA since it was not made pursuant to any application by the respondent. In other words, could the trial judge have made an order without any application for it?

15 The word "order", as used in s 29A(1) of the SCJA, has not been defined in the SCJA or in the Interpretation Act (Cap 1, 2002 Rev Ed). It has, however, been considered by the English Court of Appeal in *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465 by Lord Esher MR who stated at 466:

> A "judgment," … is a decision obtained in an action, and every other decision is an order.

In a similar vein, in *A Dictionary of Law* (Elizabeth A Martin & Jonathan Law eds) (Oxford University Press, 6th Ed, 2006), the word "order" was explained, *inter alia*, to be:

> A decision of the court other than a judgment (which is the final decision of the court in relation to a claim).

16 In the *Cambridge International Dictionary of English* (Cambridge University Press, 1995), an "order" is described as an instruction telling someone to do something which *must* be done, or what can or cannot be done. Further, "order" is also expressed as a command or an authoritative direction of some kind by *The New Shorter Oxford English Dictionary* (Lesley Brown ed) (Clarendon Press, 1993).

17 In our view, the word "order" in s 29A(1) of the SCJA connotes a decision of some kind or other. The decision may require that something should be done or a party to the proceedings to do something, but it need not. A court may make a decision or ruling on a disputed point or issue without the need for any consequential action by any party. It may simply be a ruling that affects the legal rights (substantive or procedural) of a party. In our view, an order under s 29A(1) of the SCJA includes a decision or finding that a fact exists or does not exist, an event has occurred or has not occurred, or an act may be done or may not be done, which affects the legal rights of a party.

18 In the present case, what the trial judge did was effectively to decide or rule that (a) O 27 r 4(1) of the ROC was not applicable because the authenticity of the disputed documents had been denied in the respondent's pleadings; and (b) the respondent was deemed not to have admitted the authenticity of the disputed documents. These two decisions are consistent only if they are made in the alternative: If the first decision is correct in law, the second is unnecessary. In making both orders at the same time, the trial judge was telling the appellant that if his first decision was wrong, the second decision would take effect.

19 On the facts of the present application, the two decisions or rulings are clearly prejudicial to

the appellant to the extent that it would have to call witnesses to testify to deal with the issue of authenticity of the disputed documents at the trial of the main suit, which it would not otherwise have to do if its arguments on the meaning of O 27 r 4(1) had been upheld by the trial judge. In this connection, we do not think the withdrawal of the Summons by the respondent has any bearing on whether the decision of the trial judge is an order under s 29A(1) of the SCJA. In a normal situation, a court ordinarily makes an order pursuant to an application. In the present case, the trial judge decided as a matter of law (on legal and discretionary grounds) that the application was unnecessary. In our view, a decision of this nature, if it affects the legal rights of a party, is an order for the purposes of s 29A(1).

Why we decided not to hear the notice of appeal

20 Courts have generally been reluctant to entertain appeals, for practical reasons, against interlocutory orders made in the course of the trial. In *E McGarry (Electrical) Ltd v Burroughs Machines Ltd* (Court of Appeal, 14 April 1986) ("*E McGarry*"), the English Court of Appeal expressed its disapproval of such appeals. In dismissing an appeal against a judge's interlocutory order giving leave to re-amend a statement of claim, Dillon LJ remarked:

> I would add, however, that I greatly regret that the learned judge was persuaded to grant leave to appeal. *It is highly undesirable that there should be appeals in the course of the trial of actions. It is altogether better that matters of an interlocutory nature which crop up in the course of a trial should work themselves out in the course of the same trial without interlocutory recourse to this court before the facts have been completely determined and the trial has been concluded.* [emphasis added]

Lloyd LJ agreed with Dillon LJ and further commented:

> The Criminal Division of this court never hears appeals in the course of the trial. The Civil Division only does so in exceptional circumstances. The reason is not just that it interrupts the trial, although that is usually a sufficient reason. There is a further reason. If it became the practice to give leave to appeal in the course of a trial, this court would soon be overwhelmed with appeals, many of which would or might in the event prove academic.

2 1 *E McGarry* was a case concerned with leave to appeal. In the present case, no leave is necessary. Nevertheless, this court retains inherent jurisdiction to strike out appeals which are not appropriate for hearing before an appellate court. In the present case, although the two decisions of the trial judge (made in the alternative) are interlocutory orders in that they do not "finally dispose of the rights of the parties": see *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 at 548 (approved by this court in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR 525), they did dispose of an evidentiary issue which may prejudice the rights of the appellant if the decisions are not overruled. In ordinary circumstances, we should have heard and disposed of the appeal. The first issue as to whether the authenticity of the disputed documents had been denied in the pleadings, which would exempt the respondent from having to give notice of objection, was a pure question of law. However, the second question as to whether the judge had exercised his discretion properly involved the determination of the factual basis for his decision to deem the respondent not to "have admitted the documents". Unfortunately, the judge's notes of argument did not record any reason for the exercise of the discretion. We were informed by counsel for the appellant that the judge had not taken into account any possible prejudice the appellant might have suffered in its inability to contact the relevant witnesses by reason of the respondent's failure to give timely notice of objection. This would mean that we were not in a position to consider this particular issue without hearing oral evidence. And, in these circumstances, we also considered that it would

not be proper for us to hear any oral evidence on the issue without the benefit of the judge's views on such evidence. In our view, the second issue, which could only have been determined after hearing oral evidence as to whether the appellant would have suffered any prejudice as a result of the delay of the respondent in failing to give notice of objection, should have been determined in a trial within a trial. Accordingly, we considered that this would be an appropriate case for us to exercise our powers under O 57 r 13(3) of the ROC to remit the matter back to the judge for him to reconsider his two orders, after hearing the arguments of the appellant and the respondent on the issue of prejudice.

Conclusion

22 For the reasons given in [20] and [21] above we struck out the appellant's notice of appeal and made the orders set out at [2] above.