

Changhe International Investments Pte Ltd and Another v Dexia BIL Asia Singapore Ltd and
Others
[2005] SGHC 12

Case Number : Suit 63/2004, RA 297/2004
Decision Date : 26 January 2005
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Leslie Yeo Choon Hsien (Leslie Yeo and Associates) for the first plaintiff; Sarjit Singh SC (Shook Lin and Bok) for the first defendant
Parties : Changhe International Investments Pte Ltd; Yangyun — Dexia BIL Asia Singapore Ltd; Wong Sue Jean; Highgold Fortune Ltd

Civil Procedure – Striking out – First plaintiff's first action against first defendant dismissed for failure to comply with peremptory order – Plaintiffs subsequently commencing second action against defendants – Plaintiffs attempting to admit statement of claim from first action in second action – Whether second action should be struck out for abuse of process

26 January 2005

Tan Lee Meng J:

1 The first defendant, Dexia BIL Asia Singapore Limited ("Dexia"), formerly known as Banque International A Luxembourg BIL (Asia) Ltd ("Banque Luxembourg"), appealed against the dismissal of its application to strike out the Statement of Claim of the first plaintiff, Changhe International Investments Pte Ltd ("Changhe"), and the second plaintiff, Yangyun, on the grounds that it is an abuse of the process of the court and/or is scandalous, frivolous or vexatious and/or discloses no reasonable course of action. I allowed the appeal and now give the reasons for my decision.

Background

2 The starting point for any discussion of the appeal must be Suit No 1725 of 1999 ("the first suit"), which was commenced by Changhe against Banque Luxembourg in December 1999. In this suit, Changhe claimed the sum of US\$10m from the bank on the ground that this sum was transferred out of its account in breach of the mandate and express instructions that it gave to the bank. On 8 March 2000, that claim was dismissed with costs by Ms Thian Yee Sze, who was then an assistant registrar, because of a breach by Changhe of an "unless order" with respect to the filing of a list of documents by 2 March 2000.

3 Changhe's counsel did not appeal against the order dismissing the first suit. Subsequently, Changhe appointed new solicitors, who decided to apply to set aside the order dismissing the first suit. At the hearing of this application on 14 June 2000, Banque Luxembourg's counsel asserted that what Changhe was in fact trying to do was to have one assistant registrar overturn an order of another assistant registrar when the proper course of action would have been to appeal against the order dismissing the first suit. Ms Vivian Wong, the then assistant registrar who heard the application, agreed and dismissed Changhe's application without hearing the merits. Changhe appealed to a judge in chambers. Amarjeet Singh JC dismissed the appeal and said that Changhe "could not re-litigate the same matter save by way of appeal". Changhe's appeal against the judicial commissioner's decision was dismissed by the Court of Appeal on 18 January 2001.

4 Three years later, on 20 January 2004, after Banque Luxembourg had changed its name to

Dexia, Changhe issued a new Writ of Summons ("the second suit") against the bank. It is evident that the second suit concerns the same causes of action as those pleaded in the first suit. Essentially, what is different about the second suit is the inclusion of the second plaintiff and the second and third defendants. The inclusion of additional defendants is now academic because as far as they are concerned, Changhe allowed the new Writ to lapse.

5 Dexia's lawyers applied to strike out the second suit and when this failed, they lodged the present appeal.

The appeal

6 At the outset, it ought to be noted that although Changhe added two other defendants in the second suit, it took no concrete steps to advance its case against the second and third defendants, sought no substantial relief against them, and allowed the Writ to lapse as far as these two defendants were concerned.

7 At the hearing of the appeal, Changhe's counsel accepted that the second suit was identical to the first suit. In his written submissions, he stated:

It is not disputed by the Plaintiffs that apart from the inclusion of the 2nd Plaintiff, the 2nd and 3rd [Defendants] in this fresh suit, the Plaintiffs' claim is identical to the Suit No 1725 of 1999 commenced earlier and had been struck out pursuant to an "unless order" given by the Registrar at a Pre-trial conference on 24th February 2000.

8 In view of the admission by Changhe's counsel, the issue in this case is whether there was an abuse of process of the court when Changhe resurrected the dismissed first suit in the form of the second suit.

9 Whether or not the second suit should be struck out is at the discretion of the court. As the first suit was dismissed because of a failure to comply with a peremptory order, it is pertinent to note that in *Janov v Morris* [1981] 1 WLR 1389 at 1395, Dunn LJ, with whom Watkins LJ agreed, said as follows:

The court then has to consider whether, in the exercise of its discretion under R.S.C., Ord. 18, r. 19, that second action should be struck out. In my view, the court should be cautious in allowing the second action to continue and should have due regard to the necessity of maintaining the principle that orders are made to be complied with and not to be ignored.

10 Dunn LJ's approach rests on solid ground. After all, in *Samuels v Linzi Dresses Ltd* [1981] QB 115 at 126, Roskill LJ reiterated that orders "as to time, and in particular as to the time for delivery of pleadings and particulars are made not to be ignored but to be complied with". This cautious approach was endorsed by the Court of Appeal in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750.

11 As has been mentioned, Changhe did not appeal against the decision to dismiss its first suit and did not apply for an extension of time to file the requisite particulars required for the purpose of that suit. In *Janov v Morris*, Watkins LJ pointed out at 1395 that where an appeal has been lodged against the dismissal of an action and an application has been made for an extension of time to comply with a peremptory order, "[t]he outcome of such an appeal ... will to some extent depend upon the excuse for failure preferably set forth in affidavit form provided for the court's consideration". No lower standard can be expected if a litigant chooses not to appeal but to start a

fresh action several years down the road.

12 When considering whether the discretion of the court should be exercised in Changhe's favour, it cannot be overlooked that neither in the first suit nor in the present suit did Changhe offer any satisfactory explanation for the failure to comply with the peremptory order in the first suit. In the present proceedings, Changhe had sought an adjournment for the purpose of filing an affidavit to explain its actions in the first suit but it failed to file the said affidavit before 20 September 2004, the deadline fixed by an Order of Court dated 30 August 2004. On 21 September 2004, one day after the deadline in question, Dexia's solicitors, M/s Shook Lin & Bok, wrote to Changhe's solicitors as follows:

We refer to the above matter and to the Order of Court dated the 30th day of August 2004.

Pursuant to paragraph 1 of the said Order, your clients were required to file and serve their affidavit in reply by Monday 20 September 2004. The Order was made pursuant to your clients' express request for an extension of time within which to file their affidavit.

Your clients have failed and/or neglected to file their affidavit and [are] now in breach of the said Order.

By failing to comply with the said Order, your clients have again shown their scant regard for the authority of Orders made by the Court.

We are instructed to object to any attempt by your clients to rely on any affidavit that has been filed out of time.

[emphasis added]

13 In the light of its own request to adjourn proceedings in order to file an affidavit, Changhe's failure to do so before or after the deadline cannot be countenanced. After Changhe failed to file the promised affidavit, its counsel sought to rely on a previous affidavit filed on behalf of Changhe during proceedings relating to the first suit three years ago. That affidavit certainly did not offer any satisfactory explanation for non-compliance with the court order. One must be mindful of the fact that in *Janov v Morris*, Watkins LJ rightly pointed out at 1395 that:

If a litigant ... brings a fresh but precisely similar action to that ordered to be struck out without any explanation then or at any later time for a failure to obey the peremptory order, he should not be surprised that the commencement of the second action is found to be an abuse of the process of the court and for that reason it, too, is struck out.

14 Changhe's lack of diligence in complying with court orders in the first suit is equally evident in the second suit. After taking all circumstances into account, I had no doubt that to allow Changhe to proceed with the second suit would be to condone a blatant disregard of orders of court. As such, I allowed Dexia's appeal with costs.

Appeal allowed.

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