Ng Ah Lay v Dumoulin Leon (Dumoulin Charles Leopold Elisabeth) [2004] SGDC 262

Case Number : DC Suit 5367/2002, RA 209/2004, RAS 55/2004

Decision Date : 26 October 2004

Tribunal/Court : District Court

Coram : Valerie Thean Pik Yuen

Counsel Name(s) : Mr Peter Pang and Mr Lawrence Khoo (Guofu) for respondent / plaintiffs; Mr Rajinder Singh (Rajah and Tann) for appellant / defendants

Parties : Ng Ah Lay — Dumoulin Leon (Dumoulin Charles Leopold Elisabeth)

26 October 2004

District Judge Valerie Thean:

1. No step was taken in the present proceedings for more than 12 months. On 11 June 2004, it was deemed discontinued pursuant to Order 21, rule 2(6). Upon the plaintiff's application on 12 July 2004, reinstatement was granted by a deputy registrar. I dismissed the defendant's appeal, but disallowed the plaintiff interest and costs between 11 June 2004 and 30 September 2004. The defendant has now appealed against my decision.

Facts

2. On 19 December 2002, the plaintiff issued a writ against the defendant for loss and damages for personal injuries arising out of a road accident on 18 February 2000. On 30 May 2003, parties partially settled, agreeing to enter interlocutory judgment in the plaintiff's favour at 85% liability. Interlocutory judgment on those terms was entered on 11 June 2003, with damages to be assessed by the registrar. Thereafter, parties continued to negotiate the issue of damages. The plaintiff's wrist injury was a point of contention. Details of the quantum sought were sent to the defendant on 26 January 2004. On 29 January 2004 solicitors for the defendant queried the quantum sought for the plaintiff's wrist injury and loss of earning capacity arising from the wrist injury, and asked for tax returns to justify the plaintiff's solicitors' quantification of their client's claim on that head. On 2 March 2004, solicitors for the plaintiff informed solicitors for the defendant that they were still in the midst of taking instructions. In the meanwhile, 10 June 2004, the last date for the plaintiff to take a step in the action, passed.

3. On 16 June 2004 solicitors for the defendants wrote to solicitors for the plaintiffs, informing them that the action was deemed discontinued under O.21, r.2(6). On 22 June 2004, solicitors for the plaintiff reverted stating that they would be applying to reinstate the action. The application was subsequently filed on 12 July 2004. Solicitor for the plaintiff explained in his affidavit that he did not apply for an extension of the one year period owing to "inadvertence": he had overlooked the date of the expiry of the one year period.

The law on reinstatement

4. O.21, r.2(6) reads:

> Subject to paragraph (6A), if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.

5. O.21, r.2(6B) allows the court to extend the time under r.2(6) before the expiry of the one-year period. Where the one year period has expired, O.21, r.2(8) allows the court to reinstate the action in the following terms:

> Where an action, a cause or a matter has been discontinued under paragraph (5) or (6), the Court may, on application, reinstate the action, cause or matter, and allow it to proceed on such terms as it thinks just.

6. Thus O.21, r.2(6) provides the sanction of discontinuance as an incentive to plaintiffs to prosecute their claims with reasonable speed; it also automatically clears court lists of dormant suits. The object of O.21, r.2(8), then, must be to prevent injustice, but not to detract from the primary aims of O.21, r.2(6).

7. In England, the County Court rules contain a similar housekeeping provision. An action is automatically struck out if the plaintiff has not applied for a hearing date within the timetable set by the County Court rules. As the objectives of our O.22, r.2(6) and the English O.17, r.11 are the same, the principles applied by the English courts are relevant to the case at hand. In *Bannister v SGB plc* [1997] 4 All ER 129, the English Court of Appeal separated cases for reinstatement into two categories. The first applied wherever the second did not. The second category was where the failure to apply for a date for trial was caused by something that genuinely and reasonably misled the plaintiff or his advisors and is not applicable here. As for the first category, Saville LJ set out three guidelines, which the learned judge summarised as follows:

> (i) Has the plaintiff satisfied the court that (apart from his failure to request a date for trial) he is innocent of any significant failure to conduct the case with expedition between the trigger date and the guillotine date, having regard to the particular facts of the case? If he has not, then reinstatement should be refused.
>
> (ii) Has the plaintiff satisfied the court that in all the circumstances his failure to apply for a date is excusable, ie should be forgiven? If he has not, then again reinstatement should be refused.
>
> (iii) Has the plaintiff satisfied the court that the balance of justice indicates that the action should be reinstated? If not then once again reinstatement should be refused.

The Court of Appeal emphasised that each case depended on its own facts, and the matter was one for the discretion of the judge in each case

8. In *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR 429, Prakash J adapted the *Bannister* guidelines to formulate the following for local use:

> (i) Has the plaintiff satisfied the court that he is innocent of any significant failure to conduct the case with expedition prior to the trigger date having regard to the particular features of the case. If he has not, then reinstatement should be refused;

(ii) Has he satisfied the court that in all the circumstances his failure to take any step in the action since the trigger date (and this would include his failure to apply for an extension of time) is excusable, ie should be forgiven? If he has not, then again reinstatement should be refused;

(iii) Has the plaintiff satisfied the court that the balance of justice indicates that the action should be reinstated? If not once again reinstatement should be refused.

Arguments and analysis

Guideline (1): is the plaintiff innocent of any significant failure to conduct the case with expedition prior to 11 June 2003

9. Under the *Moguntia* guidelines, this question pertains to the period between 19 December 2002 and 11 June 2003. Within this period, the plaintiff did prosecute his case with reasonable diligence. After settlement at court dispute resolution, interlocutory judgment was entered on 11 June 2003. Counsel for the defendant conceded that his case against reinstatement rested upon the second and third guidelines.

Guideline (2): was the plaintiff's failure to take any step in the action after 11 June 2003 excusable?

10. In respect of this guideline, two tests were suggested by Saville LJ in *Bannister*. One was whether an extension of time would have been granted if requested. Another was whether the failure contributed in a significant way to delay getting the matter to a hearing. Any delay in application for reinstatement could be material. It would depend upon all the circumstances. This guideline examines the plaintiff's omission in the larger context of the whole case. In applying this guideline, I think it needs to be emphasised at the outset that we are not looking for a blameless plaintiff, but a plaintiff who, in the overall context of his case, should be forgiven an omission. This approach was explained by Lord Bingham in *Rastin v British Steel plc* [1994] 2 AER as follows, in a passage adopted by Prakash J in *Moguntia*:

> A retrospective application to extend time should not succeed unless the plaintiff (in which expression we include his advisers) is able to show that he has, save in his failure to comply with r11(3)(d) and (4), prosecuted his case with *at least reasonable diligence*. That does *not* mean that there is *no room to criticise* any aspect of his conduct of the case but that *overall he is innocent of any significant failure to conduct the case with expedition, having regard to the particular features of the case*. The plaintiff's failure to comply with the rule *can never be justifiable*, but he must in all the circumstances persuade the court that it is *excusable*. (emphasis added)

11. In the present case, parties were working to resolve the case from its commencement. On 3 March 2003, defendant's solicitors wrote to plaintiff's solicitors asking for details of the plaintiff's claim. After some negotiation and a letter from plaintiff's solicitors of 12 May, defendant's solicitors wrote confirming an agreement on interlocutory judgment on 23 May 2003. They asked, at the same time, some queries regarding the plaintiff's wrist injury. Interlocutory judgment was entered on 11 June 2003, but the defendant's queries remained outstanding. On 25 July 2003, the plaintiff's solicitors replied to the defendant's solicitors' reminder, saying that they wrote to A/P Lim on 20 June, and A/P Lim had referred the matter to another doctor, Dr Joseph Thambiah. On 26 September 2003, the plaintiff's solicitors reverted to defendant's solicitors with the clarifications. On 27 October 2003, defendant's solicitors asked the plaintiff solicitors to quantify their claim, "on the assumption that our clients accept that the laxity to the ligaments of your client's right wrist was caused by the accident". On 26 January 2004, the requested quantification was sent over. On 29 January, the defendant replied, stating that the plaintiff's solicitors' quantification for the wrist injury and the plaintiff's resulting loss of earning capacity was "exorbitant". They also asked for 6 years of tax returns. On 1 March 2004, solicitors for the defendant sent the plaintiff's solicitors a reminder. On 2 March 2004, solicitors for the plaintiff reverted, stating that they were in the midst of taking instructions on the plaintiff's

disability and how the disability affected his performance. There was no further correspondence until solicitors for the plaintiffs wrote to solicitors for the defendants on 16 June informing them that the claim was automatically discontinued, reserving their position on costs.

12. From the defendant's point of view, then, in contrast to his solicitors' proactive approach, the plaintiff appeared to be asleep from 29 January. After his reminder of 1 March 2004, and he did not hear from the plaintiff from 2 March 2004 to 22 June 2004, when, finally, solicitors for the plaintiffs replied to his ominous 16 June letter to say that they planned to apply for a reinstatement of the claim. Solicitors for the plaintiffs offered essentially two explanations for the silence. The first related to the 6 years of tax returns requested by the defendant solicitors on 29 January. After these were obtained, solicitors for the plaintiff were concerned that a fuller picture was needed in order to advance their client's claim. They sought to verify with him that he received bonus and gratuity every three years in lieu of CPF. Difficulties were compounded by the plaintiff's heavy travel and work schedule. In his affidavit, the plaintiff's solicitor explained that by the time he received proof of breakdown of the bonus from the plaintiff, the one year period had lapsed.

13. The second explanation was that the wrist injury had not stabilised, and the plaintiff's solicitor was reluctant to set a date for the assessment prematurely. This was important to the plaintiff's claim for loss of earning capacity, because as a senior researcher and engineer at the Singapore Institute of Manufacturing Technology, his work required the use of his hands at the workshop. Six medical and specialist reports and two clarification reports were obtained by his solicitors. Although the plaintiff's wrist was operated upon, his attending doctor, Assoc Professor Lim Beng Hai stated in his report of 1 May 2003 that there still existed the prospect of arthritis and residual disability. The long term consequences could not yet be commented upon. In a clarification report in September 2003, A/P Lim concluded that although surgery had delayed the development of arthritis, such development had not been eliminated. A future loss of 50% to 100% could result. In the plaintiff's solicitor's last affidavit, he adduced a letter from the National University Hospital, in response to his request for an "urgent and final" medical examination and specialist report by 24 August 2004, a notice that an examination was set for 16 December 2004, with the information that "an earlier appointment may not be appropriate as the patient was required to be fully recovered prior to a final completion of report".

14. It seems, then, that at the guillotine date, although solicitors for the plaintiffs were moving at a somewhat relaxed pace, they were not neglecting their client's case. His earnings were being investigated, and more time was needed to obtain a fuller picture of his injury, in order to advance his claims. If, on the eve of the guillotine date, solicitors had applied for an extension of time, that extension would likely have been given, albeit with costs. A test suggested in *Bannister* (based on earlier cases such as *Rastin v British Steel* [1994] 2 AER 641) was that if an extension of time would have been granted prospectively, it would weigh in balance in favour of the plaintiff. Saville LJ did caveat with the advice that the passing of such a test "would not necessarily or automatically entail that there is or is not an excusable failure". Each case depended upon its own facts. Of course, in each case, the failure to apply for an extension must be viewed with seriousness, as it is up to a plaintiff to progress his case, and to explain to the court in advance if he is unable to meet its timeframes. Nevertheless, it was not such an omission that would bar a reinstatement in all cases: if it were, the power under r.2(8) would not exist. The question is whether, in all the circumstances, that omission amounted to a significant failure. Viewing the case as a whole, I did not think that it did.

Guideline (3): does the balance of justice indicate that the action should be reinstated?

15. The last guideline deals with the interests of justice, the position of the parties and the balance of hardship between plaintiff and defendant.

16. Of relevance here was the fact that the limitation period has expired. Counsel for the defendant argued that the defendant suffered prejudice, as the plaintiff would be unable to file a fresh action if the present one was not reinstated. In *Moguntia*, the fact that the defendants possessed an accrued right to limitation was one of the reasons

that Prakash J dismissed the application for reinstatement. The learned judge did not, however, state that such a fact would bar all applications to reinstate.

17. In my judgment, whilst the expiry of a limitation period would be a relevant factor against reinstatement, it should not automatically disentitle the plaintiff from such relief. In *Bannister*, Saville LJ mentioned that it would be a factor in considering the balance of justice between parties. In the case of *Bannister* itself, the suit was started only a few days before the expiry of the limitation period. It must have expired by the time the action was automatically struck out. A distinction should be drawn between the court's exercise of its discretion under O.21, r.2(8), and the court's exercise of its discretion whether or not to renew a writ outside of the relevant limitation period. In the latter category of cases, where the plaintiff seeks to renew a writ after the expiry of the limitation period, the defendant has not been served with notice of the stale cause of action. The purpose of having a limitation period is to bring notice of actions to defendants within a specific period of time. To allow renewal of a writ without exceptional reason would defeat the very object of the rule. Thus the test must necessarily be a strict one. This rationale is not applicable where a cause of action is brought and served well within the limitation period. In such cases the more important issue is whether the suit has been prosecuted thereafter with reasonable diligence.

18. In deciding the balance of justice between the parties, and considering the prejudice caused to the defendant, the prejudice we are primarily concerned about is any prejudice that would have been avoided *if the case had proceeded within the year*. An example would be where a key witness dies after the guillotine date: if the case had proceeded within the year after the trigger date, the witness would have given evidence. In the present case, the defendant has suffered no fresh prejudice arising from the delay, but has been given the advantage of a limitation defence when the plaintiff allowed the case to lapse. Reinstatement deprives him of this advantage, and it is in this sense that we say he is prejudiced. Indeed, the argument that the defendant has an existing right which is prejudiced by reinstatement is a somewhat circuitous one: he only has a right if one presupposes that the court will not exercise its powers to reinstate.

19. In considering cases where there is prejudice of this sort, the time period between the guillotine date and the date of the application for reinstatement is relevant: once limitation has passed, it would be reasonable for the defendant to think he is free from the danger of litigation. If too long a period has passed, it would be inequitable for the plaintiff to attempt to reinstate the case, especially if crucial evidence has aged. In the present case, this period was slightly over one month. The defendant has not suffered much prejudice by this delay, and the delay has not affected the evidence regarding the issues in dispute. The hardship caused to the plaintiff, on the other hand, if this suit were not reinstated, would be substantial. Overall, the balance of justice lay with the plaintiff, not the defendant.

Conclusion

20. The object of O.21, r.2(6) is to provide the sanction of discontinuance as an incentive to plaintiffs to prosecute their claims with reasonable speed. It also serves a useful function of clearing dormant suits from court lists. The object of O.21, r.2(8), then, must be to prevent injustice in individual cases in a manner consonant with the primary aims of O.21, r.2(6). In such cases of exercise of judicial discretion, it must be a balancing exercise involving all the relevant factors. In my view, O.21, r.2(8) is also a power that should not be exercised in isolation. Due regard must be given to the purposes of procedural law and the principles underpinning analogous uses of judicial discretion. In *The "Melati"* [2004] SGCA 25, Chao Hick Tin JA stated at ¶37 that a plaintiff should, except for sufficient grounds, have his claim adjudicated upon by the court on its merits and not be defeated by non-compliance with procedural requirements. In the context of the exercise of judicial discretion to extend time upon default of unless orders, it has been said that the penalty imposed in each case must be proportionate to the default: see *Syed Mohammed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750, ¶ 15 or Parker LJ, *Re Jokai Tea Holdings Ltd* [1993] 1 AER 630, p641. This principle should be even more pertinent where - as here - there has not yet been contumelious conduct.

21. Having regard to all the circumstances of the case, I was of the view that the prejudice suffered by the defendant could be compensated by disallowing the plaintiff any interest and costs from 11 June to 30 September 2004, the date of my decision. The appeal was otherwise dismissed. Costs of appeal, fixed at $1,000, were awarded to the defendant.

BACK TO TOP

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