Sin Kean Boon Metal Industries Sdn. Bhd. v. Trikkon Construction Sdn. Bhd.
HIGH COURT MALAYA, Pulau Pinang
ABDUL HAMID MOHAMAD
HC CIVIL SUIT NO. 23-131-88
23 JULY 1991
[1991] 3 CLJ Rep 748; [1991] 3 CLJ 2946

***CIVIL PROCEDURE**: Application for summary judgment filed 5 weeks after appearance - Whether there was an inordinate delay - Explanation - Time within which affidavit in support of application must be served on defendant - More than 4 days before the return date - Triable issue - Rules of the High Court 1980 O. 14 r. 2.*

The plaintiff's claim was based on the certificates of payment issued by an architect that a sum of RM894,314.63 was due and payable to the plaintiff by the defendant. The defendant filed a defence and a counterclaim. The plaintiff proceeded by a summons in chambers to apply for summary judgment and also for the defendant's counterclaim to be struck out. The Senior Assistant Registrar granted the plaintiff's application for summary judgment and struck out the counterclaim of the defendant under O. 18 r. 19 Rules of the High Court 1980 (RHC).

This was the defendant's appeal against that decision, arguing that there was an inordinate delay on the part of the plaintiff in making the application for summary judgment and that no explanation had been given for it. It was further argued that the application did not comply with O. 14 r. 2as it was not accompanied by an affidavit.

Held:

[1] The application for summary judgment was filed about 5 weeks after appearance was entered - this was not an inordinate delay. However, since it was made after the defence was filed, an explanation must be given.

[2] The explanation by plaintiff's Counsel that the delay resulted because the plaintiff had to look for various documents ranging over a period of two years was accepted by the Court.

[3] Order 14 r. 2 does not state that the affidavit must be served on the defendant together with or at the same time as the summons. In this case, the affidavit was served more than 4 days before the return date. Therefore there was compliance with r. 2 of O. 14 of the RHC.

[4] The final certificate was a subject matter of arbitration, and could not be treated at this stage to be conclusive proof that works had been done and completed.

[5] Whether the 'shortfall' was for additional works completely outside the purview of the sub-contract for which the price had been agreed or not was a triable issue which could only

be ascertained after a full trial.

[**Editors note:** The plaintiff has appealed to the Supreme Court on 7 July 1991 *vide* S.C.C.A. No. 3-66-91.]

Case(s) referred to:

Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd. [1973] 3 All ER 195 ***(cit)***

Gunung Bayu Sdn. Bhd. V. Syarikat Pembinaan Perlis Sdn. Bhd. [1987] CLJ 120

Hsu Seng v. Chai Soi Fua [1989] 1 LNS 116; [1990] 1 MLJ 300 ***(cit)***

Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd. 1986 CLJ 170[1986] 2 MLJ 134 SC ***(cit)***

Legislation referred to:

Rules of the High Court 1980, O. 14 rr. 2, 2(1), (3),O. 18 r. 19,O. 88 r. 19

Counsel:

For the plaintiff/respondent- Gerard Chan; M/s. Lim Kean Siew & Co.

For the defendant/appellant - Mahinder Singh Dulku (Ismadi Zainal Abidin with him); M/s. Mahinder Singh Dulku & Co.

JUDGMENT

Abdul Hamid Mohamed JC:

This is an appeal from the decision of the Senior Assistant Registrar giving the plaintiff liberty to sign final judgment against the defendant for the sum of RM281,139.18 with interests and costs. There is no appeal against her decision striking out the counter-claim under O. 88 r. 19 of the Rules of the High Court 1980.

The plaintiff's claim was based on the certificates of payments issued by the architect that a sum of RM894,314.63 was due and payable to the plaintiff, less RM593,620.13 which had been paid by the defendant leaving the sum claimed unpaid.

The writ of the statement of claim were served on the defendant on 20 July 1988. The defendant entered appearance on 26 July 1988. Defence and set-off was filed on 18 August 1988.

By a summons-in-chambers filed on 1 September 1988, the plaintiff applied for summary judgment and also for the defendant's counterclaim to be struck out apparently under O. 18 r. 19 of the Rules of the High Court 1980. No affidavit was filed in support. However an affidavit was filed on 1 November 1988.

Before me, first, it was argued by Counsel for the defendant that there was an inordinate delay on the part of the plaintiff in making the application for summary judgment and no explanation was given for it.

It is to be noted that the application was made about two weeks after the defence and counterclaim was filed and about 5 weeks after appearance was entered. In the circumstances, I do not think there was an inordinate delay on the part of the plaintiff in making this application. However, since it was made after the defence was filed, an explanation must be given - see *Krishnamurthy & Anor. v. Malayan Finance Corporation Bhd. 1986 CLJ 170*[1986] 2 MLJ 134 SC. But where the facts pertaining to the delay are within the personal knowledge of Counsel, oral explanation for the same could be accepted by the Court - see *Hsu Seng v. Chai Soi Fua [1989] 1 LNS 116;*[1990] 1 MLJ 300.

Here Counsel explained that the reason was because his client, the plaintiff had to look for the various documents over a period of two years. As I have said there was actually no delay here but for the fact that the application was made two weeks after the defence was filed. I accept the explanation. This ground therefore fails.

However, there is another aspect of the objection. The summons-in-chambers which was filed on 1 September 1988 was not accompanied by an affidavit. The affidavit in support was only filed on 1 November 1988 which was two months later, but before the return date which was 30 November 1988. The question is whether that was in compliance with the provisions ofO. 14 r. 2.

It should be noted that O. 14 r. 2(1)says that an application under r. 1 must be made by a summons supported by an affidavit. Sub-rule (3) provides:

(3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day.

So while the rule requires that the summons must be supported by an affidavit, it does not say in so many words that the affidavit must be served on the defendant together with or at the same time as the summons. Of course it would not be in compliance with sub-rule (3) if the affidavit was served on the defendant less than four clear days before the return day.

In this case the affidavit, though not served on the defendant together with or at the same time as the summons, was served more than four days before the return date. I therefore hold that r. 2 was complied with.

Now let me revert to the application proper. The application was for summary judgment under O. 14 of the Rules of the High Court 1980.

The claim was based on the certificates of payments issued by the architect less payments made.

The plaintiff averred that it had completed all the works required under the sub-contract and the certificates of practical completion of the works was duly issued to the plaintiff by the architect as required by the sub-contract.

However, Counsel for the defendant pointed out that the contract was only for the sum of RM583,151.59 but the defendant had paid more than that amount, that is RM593.620.13. So, the claim actually was for additional works. It was further contended by him that the additional works were not variations as provided by Clause 7 of the sub-contract as nowhere in the statement of claim nor in the affidavit in support of the summons-in-chambers did the plaintiff say so. He therefore argued that the additional works arose outside the sub-contract for which the price had not been agreed. He also referred to me to two letters written by the defendant to the architect prior to the commencement of the action, that is letters dated 11 February 1987 and 17 November 1987. From the first letter it appears that there was a dispute whether the architect had power to issue instructions and variation orders direct to the defendant's sub-contractor. In the second, the defendant objected to the inclusion of " the amount for acoustic ceiling and protective fencing " in the plaintiff's instruction. There is also a letter from the defendant to the architect, written four days after the writ was filed disputing the " final account ".

It appears from *Gunung Bayu Sdn. Bhd. V. Syarikat Pembinaan Perlis Sdn. Bhd. [1987] CLJ 120*and *Gilbert-Ash (Northern) Ltd. v. Modern Engineering (Bristol) Ltd.* [1973] 3 All ER 195 HL that an architect's certificate may be challenged.

Counsel for the plaintiff stressed that the claim was not based on the final certificate but on the various certificates of payments issued by the architect. He however said that the final certificate was proof that work had been done and completed by the plaintiff. But, as far as the final certificate is concerned it should be noted that it is a subject matter of arbitration. So at this stage it cannot be treated as conclusive proof that work has been done and completed.

I am of the view that whether the " shortfall " is for additional works completely outside the sub-contract for which the price had been agreed or not, is a triable issue. Whether the sum claimed is due and payable to the plaintiff is in dispute. This could only be ascertained after a full trial.

In the circumstances, I am of the view that this is not a proper case for a summary judgment.

Appeal against the decision of the Senior Assistant Registrar giving the plaintiff leave to sign final judgment is allowed with costs.