The "Bonito"
[2001] SGCA 30

Case Number : CA 100/2000, 101/2000

Decision Date : 26 April 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA

Counsel Name(s) : Colin Seah and Kelly Yap (Rajah & Tann) for the appellants; Danny Chua, Mohd Goush Marikan and Tan Hui Hsing (Joseph Tan Jude Benny Anne Choo) for the respondents

Parties : —

Civil Procedure – Extension of time – Application for extension of time to file reference to registrar for assessment of damages -Considerable delay to apply for extension – Whether extension should be granted

Civil Procedure – Judgments and orders – "Unless order" – Parties settling on liability – Assistant registrar making "unless order" – Plaintiffs obtaining extensions of time to file reference to registrar for assessment of damages -Plaintiffs filing reference out of time – Defendants seeking to strike out reference – Whether cause for making "unless order" – Courts' approach to an "unless order" – Whether "unless order" incorporated in orders extending time – Whether action dismissed by plaintiffs' failure to file reference within time extended

(delivering the grounds of judgment of the court):

The facts

On 28 January 1992, there was a collision between the appellants` vessel Bonito and the respondents` vessel Ah Lam II. Immediately following the collision, the respondents commenced an admiralty action in rem No 69 of 1992 against the appellants in the High Court claiming damages for the loss occasioned and arrested the Bonito. The arrest was lifted after security was provided to the respondents.

On 12 September 1996, the appellants served on the respondents an offer to settle the respondents` claim in full. On 27 November 1996, the appellants confirmed that they had no claim against the respondents, and on 4 December 1996 the respondents gave notice of acceptance of the offer to the appellants. Under the terms of the settlement, the appellants would pay the respondents 50% of the respondents` claim as proved or as agreed, together with interest thereon at the rate of 6% p[thinsp]a from 28 January 1992 to the date of the offer and, unless the quantum of damages claimed was agreed, there was to be a reference to the registrar for damages to be assessed.

On 27 March 1997, there was a pre-trial conference on the action before the assistant registrar. At that time, no agreement had been reached on the quantum of damages. Counsel for the appellants informed the assistant registrar that liability had been settled and that the parties were likely to agree on the quantum, once the discovery of documents was completed, and counsel for the respondents said that the prospects of a settlement were good. Nevertheless, the assistant registrar made an `unless order` to the effect that the respondents were to file and serve a notice of discontinuance by 12 July 1997, failing which the respondents were to file by 19 July 1997 a notice for an appointment before the registrar for damages to be assessed, failing which the action was to stand dismissed with costs.

On 4 July 1997, the respondents` solicitors delivered to the appellants` solicitors a statement containing 32 heads of claim supported by 75 documents in 30 annexes or bundles. This was done no doubt with a view to reaching an agreement on the quantum. Not having heard further from the appellants` solicitors, the respondents on 15 July 1997 applied for an extension of the time to file and serve the notice of appointment for assessment of damages. At the hearing on 18 July 1997, counsel for the appellants said that the documents were only received on 4 July 1997 and that the parties were actively working on a settlement. There was no objection to the application, and an order was made extending to 19 October 1997 the time for filing and serving the notice of appointment before the registrar for assessment of damages, ie the reference to the registrar to assess damages.

On the same day of 18 July 1997, the appellants` solicitors requested further information and documents in respect of the respondents` claim. On 28 July 1997 the respondents filed an application for a further extension of time for filing the reference to the registrar for assessment of damages, but the application was only fixed for hearing on 3 September 1997. Meanwhile, on 19 August 1997, the respondents` solicitors provided further information in respect of part of the claim and they also filed and served on the appellants a list of documents and an affidavit verifying the list. On 27 August 1997 they complied with the appellants` request for further information and documents and also provided further claim documents. The list of documents and the affidavit verifying the list were presumably filed and served with a view to proceeding with the assessment of damages and in anticipation of directions being given.

When the respondents` application came on for hearing on 3 September 1997, it was not opposed by the appellants and an order was made extending the time to 30 November 1997 for filing and serving the reference to the registrar for assessment of damages. On 9 September 1997, less than a week after the time was extended, the appellants` solicitors again requested further information and documents in respect of a part of the claim. There was, however, no response from the respondents to this request.

About one and a half years later, on 11 March 1999, the appellants` solicitors informed the respondents` solicitors that the action had been dismissed. They referred to the orders of 27 March 1997, 18 July 1997 and 3 September 1997. The respondents` solicitors did not agree, and there was an exchange of correspondence as to the effect of these several orders.

On 20 March 2000, the respondents` solicitors submitted a revised breakdown of the claim and the supporting documents and requested the appellants` response within 14 days. On 22 March 2000, the appellants` solicitors repeated their assertion that the action had been dismissed. The respondents took no further action in respect of their claim until 13 April 2000, when they filed and served the reference to registrar for assessment of damages without having applied for, nor had they obtained, a further extension of time beyond 30 November 1997 to do so.

On 2 May 2000, the appellants applied for an order to strike out the reference to registrar and also an order for the return of the securities (the `striking out application`). On 10 May 2000, the assistant registrar heard and granted an order in terms of the striking out application, subject to a stay of execution (as regards the return of the securities) pending an application to be made by the respondents for an extension of time for filing the reference to the registrar to assess damages. On 17 May 2000, the respondents eventually filed an application for an extension of time to file and serve the reference to registrar (the `extension of time application`). This application was heard by the assistant registrar on 9 June 2000 and was dismissed.

The respondents appealed against the decisions of the assistant registrars on the striking out application and the extension of time application. Both the appeals were heard before Lim Teong

Qwee JC on 11 July 2000. He allowed both the appeals. He held that the order of 18 July 1997 was an order extending the time to 19 October 1997 for filing the reference to the registrar, and the order of 3 September 1997 was an order further extending the time to 30 November 1997, and that neither of them incorporated the same `unless order` made on 27 March 1997. Against his decision, the appellants brought these two appeals: one against his decision granting an extension of time for filing the reference to the registrar for assessment of damages, and the other against his decision dismissing the application to strike out the reference to the registrar filed on 13 April 2000. We dismissed the appeals and now give our reasons.

The appeal

Before us two issues were raised by the appellants: first, whether the action was dismissed by reason of the respondents failing to file by 30 November 1997 the reference to the registrar for assessment of damages; and second, whether the respondents should be given an extension of time beyond 30 November 1997 to file the reference to the registrar for assessment of damages. The first issue turned on the question whether the two orders made on 18 July 1997 and 3 September 1997 granting an extension of time to file the reference to the registrar for assessment of damages could be construed as having incorporated therein the `unless order` made on 27 March 1997 for a dismissal of the action. The second issue was one concerning the exercise of discretion by the judge.

Unless order

Before us, it was not disputed that the first and second orders granting the extension of time did not contain an `unless order`. In particular, the assistant registrar in allowing the extensions did not expressly make a default provision in either of the orders. But it was contended on behalf of the appellants that, when the respondents failed to file the reference to the registrar by the time extended by the orders, ie by 30 November 1997, the unless order made on 27 March 1997 came into operation and by reason thereof the action was dismissed. We were unable to agree.

At this stage, it would be helpful to look at the circumstances in which the `unless order` was made. It was made at the pre-trial conference on 27 March 1997. That was the first pre-trial conference called by the registrar. At that time, the parties had reached a settlement on the liability, and the only outstanding issue was the quantum of damages. The indications from counsel were that the parties were likely to agree on the quantum. In particular, according to counsel for the respondents, the prospects of a settlement were good. Neither the appellants nor the respondents had been or were in default in complying with any court order or direction. There was really no cause for making the ` unless order` that was made. It ought not to have been made. On this the judge observed at [para]12:

> *As noted above counsel for the defendants had said that the parties had agreed on liability and were likely to agree on damages and counsel for the plaintiffs had said that prospects of settlement were good. The plaintiffs were not in default. Under the terms of settlement a reference to the registrar to assess damages would only arise if and when damages could not be agreed and that event had not occurred yet. I think an "unless order" ought not to have been made at that stage but it was made and it would be too late now to take exception to it.*

We could not agree with him more.

Orders for extension of time

We now turn to the two orders made on 18 July 1997 and 3 September 1997 respectively extending the time for filing the reference to the registrar for assessment of damages. Each of the orders was made in terms of the application, and the application was for an order to the effect that the time for filing and serving the notice of appointment for assessment of damages before the registrar be extended. No other order was sought, and no other order was made on each of the two occasions. In particular, no default provision was made or referred to in either of the orders. If it was intended to apply the default provision as contained in the order of 27 March 1997 to the non-compliance with each of the orders, then the orders extending the time must say so clearly and unambiguously so that the party affected would know of it, because the consequence of non-compliance of such provision is extremely serious and far reaching.

In this regard, the decision of the English Court of Appeal in **Hitachi Sales (UK) v Mitsui Osk Lines** [1986] 2 Lloyd`s Rep 574 was of some assistance, though it was not directly in point. There, an order was made against the defendants requiring them to deliver further and better particulars within a certain time. They did not comply with the order and the plaintiffs gave notice that they would apply for a peremptory order for delivery of the particulars, and a summons was taken out. The defendants consented to the order and did not attend. In the result, the order was made and was in the following term:

> *Unless the Defendants do serve within 14 days the Further and Better Particulars of the Points of Defence ... the Points of Defence be struck out and that the Plaintiffs be at liberty to enter judgment against the Defendants for damages to be assessed ...*

The order was extracted and served a few days later on the defendants. The order for delivery of further and better particulars was not complied with and the plaintiffs entered judgment in default. An application was then taken out by the defendants to set it aside. It was held that the unless order was invalid in that it did not spell out the date from which the period of 14 days would run and in the result there was a non-compliance with the terms of RSC O 42 r 2. Accordingly, the judgment in default was invalid and was set aside. In considering the requirement that an unless order must state the date from which the time for doing a certain act would run, O`Connor LJ said at p 579:

> *[T]he basis must be that the party against whom it is made knows of its existence, the order must be unambiguous and specify the time limit from a starting time.*

That case showed all too clearly the very strict approach adopted by the courts in considering and dealing with an unless order.

We were of the opinion that it could not be seriously contended that the default provision in the order of 27 March 1997 was still alive and came into operation, when the respondents defaulted in filing the reference to the registrar for assessment of damages within the time provided in the order of 3 September 1997. It is true that the unless order had not been rescinded or abrogated by any order, but in view of the extensions of time granted by the two subsequent orders it could hardly be said that it still continued to have effect and remain in force. To all intents and purposes, the entire order

of 27 March 1997 had been replaced or varied by the two subsequent orders giving to the respondents the extensions of time sought by them in the applications. There was no default provision in these orders extending the time and the default provision in the order of 27 March could not be read into these orders; nor could the default provision be read as if the date of 30 November 1997 was substituted for the original date of 19 July 1997. The judge said at [para]16:

> *Having regard to the terms of the orders made and the circumstances surrounding the making of the orders and the grounds of the applications for extension of time it must be at least doubtful whether the order of 3 September 1997 extending time to 30 November 1997 read with the orders of 27 March 1997 and 18 July 1997 was an "unless order". I do not think that it was. I also do not think that the "unless order" of 27 March 1997 can be read as if the date 30 November 1997 was substituted for the original date 19 July 1997. When the plaintiffs applied on 9 June 2000 for a further extension of time the action had not been dismissed pursuant to the order of 27 March 1997 or to any other order and the application ought to have been heard on its merits.*

We were in complete agreement with the judge that the action was not dismissed as of 9 June 2000, when the respondents applied for an extension of time to file the reference to the registrar for assessment.

Judge`s discretion

We now turn to the second issue: whether the judge exercised his discretion properly in granting the extension of time. We agreed with the appellants that there had been some considerable delay on the part of the respondents to apply for the extension of time. The judge was aware of this. Nevertheless, he was of the view that if no extension of time was given, the respondents would be deprived of their entitlement to damages being assessed. He said at [para]19:

> *If the plaintiffs are denied an extension of time they will be deprived of their right to a reference to the registrar to assess damages. An offer to settle fully and finally as regards liability has been made by the defendants in accordance with the rules and the offer has been accepted and it would be quite extraordinary that the defendants should have been bound to pay but will not have to pay anything because the amount cannot be ascertained.*

We agreed with the judge.

In exercising his discretion the judge took into consideration the relevant matters. One of the matters he considered most carefully was the likelihood of prejudice to the appellants. He found that no prejudice would be caused to the appellants by granting the extension of time. He said at [para]23-25:

> *23 Having regard to all the circumstances I am satisfied that an extension of time as asked for by the plaintiffs will not cause any prejudice to the defendants for which they cannot be compensated by an award of costs. An extension of time in favour of one party in a sense causes an injustice to the other just as the refusal to grant an extension of time causes an injustice to the party out of time but here I think the balance of justice favours the making of an order to*

extend time. It remains to consider whether this is a special case or if there are any exceptional circumstances to refuse the extension of time asked for.

24 Under the terms of settlement there would only be a reference to the registrar to assess damages if the parties cannot reach an agreement. The plaintiffs submitted a claim under 32 heads and they provided information and documents in support of the claim. They later revised the claim under 34 heads but otherwise the revision did not result in a departure from the original claim. The defendants called for further information and documents. Quite clearly both parties were engaged in negotiations to reach an agreement as to damages. The defendants themselves said so.

25 After the order was last made for extension of time the defendants called for more information and documents. It has not been suggested that without these they were unable to consider the plaintiffs` claim but the plaintiffs could have provided the further information and documents last asked for or applied for more time to do so or they could have treated the negotiations as at an end and proceeded with the assessment of damages if they could not provide the information or documents. They could have taken one of these steps before 30 November 1997 to which day time was last extended or some time after that. To do so more than two years later is hardly justifiable but I do not think that this is so special a case or that the circumstances are so exceptional that it can be right to deny the plaintiffs an extension of time.

We were in complete agreement with the judge, and could not find any ground of complaint in the way he exercised his discretion.

In conclusion, it would be helpful to refer to **The Tokai Maru** [1998] 3 SLR 105 , where the defendants and the third parties were ordered to file and exchange their affidavits for the trial by a certain date. The third parties defaulted and filed and served their affidavits several months later. The defendants refused to exchange their affidavits. The third parties then applied for an extension of time for filing and exchange of affidavits and the defendants applied to strike out the defence of the third parties. Both the applications were heard together, and the judge at first instance dismissed the third parties` application and struck out the defence and made the consequential order for judgment and costs against the third parties. On appeal, this court allowed the appeal. The court, following the judgment of Sir Thomas Bingham, MR (as he was) in **Costellow v Somerset County Council** [1993] 1 All ER 952[1993] 1 WLR 256, said at [para]23:

23 We note that the instant case involves an application to extend time coupled with an application to strike out the defence ... we are of the view that similar principles should apply in both cases, and these principles are as follows:

(a) ...

(b) The rules of civil procedure guide the courts and litigants towards the just resolution of the case and should of course be adhered to. Nonetheless, a litigant should not be deprived of his opportunity to dispute the plaintiff`s claims and have a determination of the issues on the merits as a punishment for a breach of these rules unless the other party has been made to suffer prejudice

which cannot be compensated for by an appropriate order as to costs.

(c) Save in special cases or exceptional circumstances, it can rarely be appropriate then, on an overall assessment of what justice requires, to deny a defendant an extension of time where the denial would have the effect of depriving him of his defence because of a procedural default which, even if unjustified, has caused the plaintiff no prejudice for which he cannot be compensated by an award of costs.

See also this court`s recent decision in **Leong Mei Chuan v Chan Teck Hock David** [2001] 2 SLR 17 .

What was said in ***The Tokai Maru*** (supra) is equally applicable here. In our judgment, on an overall assessment of what justice requires, to deny the respondents the extension of time sought would have the effect of depriving them of their entitlement to damages (to be assessed by the registrar) because of a procedural default which, even if unjustified, has caused the appellants no prejudice for which they cannot be compensated by an award of costs.

Outcome:

Appeals dismissed.