S3 Building Services Pte Ltd v Sky Technology Pte Ltd
[2001] SGHC 87

Case Number	: Suit 1001/2000/R, RA 58/2001/S
Decision Date	: 05 May 2001
Tribunal/Court	: High Court
Coram	: Woo Bih Li JC
Counsel Name(s)	: Manjit Singh and Sree Govind Menon (Manjit & Partners) for the plaintiff/respondent; Lok Vi Ming, Ng Hwee Chong and Joanna Foong (Rodyk & Davidson) for the defendant/appellant
Parties	: S3 Building Services Pte Ltd — Sky Technology Pte Ltd

JUDGMENT:

Grounds of Decision

1. This was an appeal against the decision of the Registrar dismissing the application of the Defendant, Sky Technology Pte Ltd (Sky Technology) for an extension of time (EOT) to file affidavits of evidence-in-chief (AEICs). The Registrar also struck out the defence and dismissed the counterclaim of Sky Technology with costs.

2. After hearing arguments, I allowed the appeal but I ordered Sky Technology to pay costs of the appeal and of two applications below on a standard basis which I fixed at $14,000.

3. The Plaintiff S3 Building Services Pte Ltd (S3) has appealed against my decision.

BACKGROUND

4. In this action, S3 seeks to rescind an agreement it had with Sky Technology pursuant to which Sky Technology had assigned the patent rights of its invention to S3. S3 is alleging that Sky Technology had intentionally suppressed material information relating to the patent rights. I was not informed as to what Sky Technologys counterclaim was about.

5. On 25 November 2000, the Writ of Summons was filed.

6. On 5 December 2000, S3 served an application for summary judgment.

7. On 15 January 2001, Sky Technology was granted unconditional leave to defend by SAR James Leong.

8. On 30 January 2001, S3 served its Notice of Appeal to a judge in chambers. On 31 January 2001, Sky Technology served its Defence and Counterclaim.

9. On 13 February 2001, Lai Siu Chiu J dismissed the appeal of S3. On 14 February 2001, S3 served its Reply & Defence to Counterclaim.

10. On 27 February 2001, S3 wrote in for further arguments before Lai J.

11. On 28 February 2001, the parties Counsel appeared before the Registrar for further directions. By that time, the list of documents had been filed by Sky Technology, and presumably by S3 too, in compliance with earlier directions. Furthermore, Sky Technology had served an Amended Defence & Counterclaim and S3 had filed and served an Amended Statement of Claim.

12. At the hearing before the Registrar on 28 February 2001, various directions were given. The pertinent ones were:

> (a) The AEICs were to be exchanged by 30 March 2001 and objections thereto were to be taken by 6 April 2001.
>
> (b) Leave was granted to Sky Technology to adduce the evidence of the following witness orally at the trial of this action:
>
> (i) A representative from Allen & Gledhill,
>
> (ii) A representative from Chu Chan Gan & Ooi.
>
> (c) Trial be fixed for five days from 27 April 2001 to 4 May 2001 and to be set down by 9 April 2001.

13. Mr Lok said that as at 28 February 2001, he was not aware of S3s request for further arguments. After he was aware, Sky Technology submitted further written arguments to Lai J on 3 March 2001.

14. On 5 March 2001, the parties Counsel attended before Lai J for further arguments. The judge then ordered that Sky Technology be granted conditional leave to defend instead. The condition was that Sky Technology was to provide $600,000 security for S3s claim by 26 March 2001.

15. On 9 March 2001, Sky Technology wrote to request further arguments before Lai J. The judge declined to hear further arguments and the parties solicitors were informed of this in writing also on the same day.

16. On 16 March 2001, Sky Technology filed an appeal to the Court of Appeal, as well as an application for an expedited appeal.

17. The parties Counsel attended before Chao Hick Tin JA for this application to be heard at 3 pm of the same day.

18. The application was granted and directions were given. The appeal was subsequently heard on 22 March 2001.

19. The appeal to the Court of Appeal was unsuccessful. Sky Technology then orally sought and was granted an extension of time of two weeks by the Court of Appeal to provide the security of $600,000, ie two weeks from the original dead-line of 26 March 2001 under Lai Js decision. The new dead-line for provision of security was therefore 9 April 2001.

20. Thereafter Sky Technology and its solicitors attempted to prepare and finalise the AEICs by 30 March 2001 but they were unable to do so.

21. On 30 March 2001, S3s solicitors Manjit & Partners sent a fax to Sky Technologys solicitors Rodyk & Davidson to arrange a time for the exchange of the AEICs.

22. In response, Mr Lok Vi Ming of Rodyk & Davidson called Mr Govind Menon of Manjit & Partners to say that Rodyk & Davidson would need an extension of about two weeks to exchange the AEICs. The reason given was that Ms Winnie Tham of Allen & Gledhill was overseas. This implicitly meant that Rodyk & Davidson were trying to contact her to get her evidence but were unable to do so by 30 March 2001.

23. This request drew a riposte from Manjit & Partners who quickly sent a telefax to Rodyk & Davidson to state, inter alia, that:

> Our clients find this last minute adjustment totally astonishing and

unsatisfactory. No proper regard has been given to the learned Registrars Order or the proper administration of the Courts, not to say anything about the prejudice you are occasioning to our clients by our inability to prepare for trial without your affidavits.

24. Rodyk & Davidson replied the same day stating, inter alia:

> As explained, Ms Winnie Tham from Messrs Allen & Gledhill is one of the witnesses whom our clients had indicated they wish to call. She is currently overseas at a Conference and will only be back after 4 April 2001.
>
> We will be grateful for your kind indulgence in this matter.

25. Thereafter, Rodyk & Davidson filed a Notice for Further Directions also on 30 March 2001 for an EOT to file the AEICs by 14 April 2001 and consequential orders.

26. There was one supporting affidavit (the 2nd affidavit) from Lim Yeow Beng, the Intellectual Property and Contracts Director of Sky Technology. It said, inter alia:

> 2. This action involves an agreement ("the Agreement") pursuant to which the Defendant assigned the patent rights of their invention to the Plaintiff. The Plaintiff seeks to rescind the Agreement on the basis inter alia that the Defendant had intentionally suppressed material information relating to the patent rights.
>
> 3. At a hearing before the learned Registrar on 28 February 2001, the following directions, inter alia, were made:
>
> > a) That the Affidavit of evidence-in-chief be filed by 30 March 2001.
> >
> > b) That the objections to the Affidavits be made by 6 April 2001.
> >
> > c) That the action be set down for trial by 9 April 2001; for trial from 27 April 2001 to 4 May 2001.
>
> 4. The directions provided a short time frame for the preparation of the affidavits. Meanwhile, the Defendants efforts to prepare the affidavits expeditiously have been affected by the following circumstances:-
>
> > (a) The Plaintiff obtained leave, subsequent to the giving of the directions, to make further arguments before Justice Lai Siu Chiu in respect of her earlier dismissal of their appeal for summary judgment. The further arguments were heard on 5 March 2001 and, at the end of a lengthy hearing, the learned Judge gave conditional leave to defend.
> >
> > (b) The Defendant appealed to the Court of Appeal against the learned Judges order, and the appeal was heard on an expedited basis on 22 March 2001. The appeal was

unsuccessful. Much of the Defendants attention and effort were taken up by the hearing of the further arguments and the appeal.

(c) The Defendant had also previously indicated that they may call a lawyer from M/s Allen & Gledhill to testify. In this regard, Ms Winnie Tham of M/s Allen & Gledhill, who acted for the Defendant in the subject patent application, has been out of the country since 23rd March 2001 and is understood that she will only return to Singapore after 4 April 2001.

27. The application for EOT was served on 2 April 2001 at about 3.35 pm. By then, Manjit & Partners had filed S3s application on 2 April 2001 at 3.19 pm to strike out the Defence & Counterclaim with a supporting affidavit from Ho Kah Meng executed on 2 April 2001.

28. Sky Technologys application was fixed for hearing on 4 April 2001. S3s application was fixed for hearing on 6 April 2001 but was subsumed in the hearing on 4 April 2001.

29. As I have mentioned, the Registrar dismissed Sky Technologys application and ordered that its Defence be struck out and its Counterclaim be dismissed with costs.

30. On the same day, Rodyk & Davidson filed an appeal to the judge in chambers. This was fixed for hearing on 10 April 2001.

31. Mr Lok Vi Ming for Sky Technology informed me that, as it turned out, the AEICs of two principal witnesses ie Gordon and Loewe Goh were completed and signed in the evening of 4 April 2001, ie on the same day that the Registrar dismissed the application for an extension of time. On that very day he was at an arbitration hearing, a lawyer from his firm was presenting arguments before the Registrar and a third lawyer was attending to the witnesses. Mr Lok said the AEICs for Sky Technology were voluminous and one was in three volumes. A statement of intended evidence from Mr Gan Choon Beng of Chan Gan & Ooi had been prepared and a similar statement from Winnie Tham had also been prepared.

32. On 5 April 2001, another affidavit (the 3rd affidavit) of Lim Yeow Beng was filed for the appeal to the judge-in-chambers. S3 responded by filing the 3rd affidavit of Dr Yang Jian Ling on 9 April 2001.

33. In response, another affidavit, this time by Joanna Foong, a solicitor with Rodyk & Davidson, was served on Manjit & Partners on 9 April 2001 at 6.55 pm.

34. According to the 3rd affidavit of Mr Lim and/or the affidavit of Joanna Foong, Gordon and Loewe Goh were supposed to attend at Rodyk & Davidsons office in the week commencing 26 March 2001 to prepare the AEICs. They were however unable to attend on 26 March 2001 due to urgent business commitments.

35. On 27 March 2001, they attended at Rodyk & Davidsons office from the morning up to 8 pm with a lunch break in-between. On 28 and 29 March 2001, Joanna Foong and another lawyer were in the office until 1.30 am to complete the drafts. Drafts of the AEICs were going back and forth.

36. In the meantime, Ms Foong had contacted Winnie Thams office on 27 March 2001 and learned

that she was away in Melbourne at a patent seminar and would not be back until 4 April 2001.

37. The AEICs could not be completed by 30 March 2001 although, by then, substantive draft AEICs had been prepared.

THE LAW

38. Mr Manjit Singh for S3 repeatedly emphasized that the paramount consideration is the efficient administration of justice. According to him, a litigant who seeks any EOT is affecting the efficient administration of justice which would cause public prejudice. Such a litigant must show extenuating circumstances or that his is a special exception to justify an EOT.

39. Mr Singh also repeatedly submitted that there was no material before the Registrar to grant an EOT. He said that even the new affidavits filed for Sky Technology, after the Registrars decision and without leave of court, were not sufficient to persuade the court to allow the appeal for an EOT.

40. On the other hand, Mr Lok cited *The Tokai Maru* [1998] 3 SLR 105.

41. In that case, an order was made for AEICs to be exchanged by 11 October 1996.

42. The applicants filed their AEICs only on 1 July 1997, about nine months after the dead-line, and served a copy on the respondents solicitors who refused to serve their clients affidavits in exchange. The applicants applied for an EOT and the respondents applied to strike out their defence. Both applications were heard on 15 July 1997 by a judge who disallowed the application for an EOT and ordered the defence struck out and the applicants to pay the respondents whatever sum might be found due to them on their claim.

43. The applicants appealed to the Court of Appeal on both the decisions and both appeals were allowed.

44. The judge in *The Tokai Maru* case had adopted the principle from the judgment of Lord Guest in *Ratnam v Cumarasamy* [1965] 1 WLR 8 at p 12 that:

> The rules of court must prima facie be obeyed, and in order to justify a court extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a time table for the conduct of litigation.

45. However Tan Lee Meng J, delivering the judgment of the Court of Appeal in *The Tokai Maru,* pointed out that in *Ratnam v Cumarasamy*, Lord Guest had made a point which distinguished an application for an EOT to file a notice of appeal and other applications for EOT. Lord Guest said, at p 12:

> In the one case, the litigant has had no trial at all; in the other he has had a trial and lost.

46. The judgment of Tan Lee Meng J then went on to cite with approval the judgment of Sir Thomas Bingham MR in *Costellow v Somerset County Council* [1993] 1 All ER 952 at 959:

As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: O 19 r 1, O 24 r 16(1), O 25 r 1(4) and (5), O 28 r 10(1) and O 34 r 2(2) are examples. This principle is also reflected in the courts inherent jurisdiction to dismiss for want of prosecution.

The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by O 3 r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiffs default had caused prejudice to the defendant. But the courts practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by O 3 r 5, and would indeed involve a substantial rewriting of the rule.

The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate .

Cases involving procedural abuse (such as *Hytrac Conveyors Ltd v Conveyors International Ltd* [1982] 3 All ER 415, [1983] 1 WLR 44) or questionable tactics (such as *Revici v Prentice Hall Inc* [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiffs action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under O 19, O 24, O 25, O 28 and O 34. The approach to applications under O 3 r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the Defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under O 3 r 5 should ordinarily be granted where

the overall justice of the case requires that the action be allowed to proceed.

47. Tan Lee Meng J then stated the following principles:

> (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 plaintiffs 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.
>
> [Emphasis added.]

48. The distinction between an application to appeal out of time and other applications to extend time was reiterated in the judgment of Lai Kew Chai J for the Court of Appeal in *Lim Hwee Meng v Citadel Investment Pte Ltd* [1998] 3 SLR 601 which cited *The Tokai Maru* with approval.

49. Since then, the observations of Sir Thomas Bingham MR in *Costellow* have been cited again with approval in the judgment of L P Thean JA for the Court of Appeal in *Leong Mei Chuan v Chan Teck Hock David* [2001] 2 SLR 17.

50. It was therefore clear to me that the arguments of Mr Singh were departing from the principles as laid down by our Court of Appeal.

51. Mr Singh was bringing to the forefront the principle about the public interest in the efficient administration of justice while pushing back to the background the other competing principle that a litigant should not be denied an adjudication of his position on its merits because of procedural default.

52. Furthermore, Mr Singhs repeated emphasis on the public interest was really to advance the interest of his own clients.

53. After citing the legal principles, Tan Lee Meng J then considered the following questions:

> (a) Was the delay of nine months (in *The Tokai Maru*) justified?
>
> (b) Was prejudice caused to the respondents?
>
> (c) Were there exceptional circumstances to warrant dismissing the application for extension of time?

WAS THE DELAY BY SKY TECHNOLOGY JUSTIFIED?

54. Adopting a similar approach, the first question I considered was whether the delay by Sky

Technology was justified.

55. The first and only reason given by Mr Lok in the telephone conversation of 30 March 2001 with Mr Menon and in the written reply of Rodyk & Davidson (see para 24 above) was the absence of Winnie Tham of Allen & Gledhill. This was also one of the reasons stated in the 2nd affidavit of Lim Yeow Beng but it was not the only reason.

56. I noted that when the directions were given by the Registrar on 28 February 2001, leave had already been granted to Sky Technology to adduce the evidence of a representative from Allen & Gledhill orally.

57. Mr Lok said that, even so, the Registrar had directed that a statement of the intended evidence should be filed.

58. The draft Order of Court of 28 February 2001 which has been approved by both solicitors does not reflect this requirement, although it is a common requirement when leave is granted to adduce the evidence of a witness orally.

59. Besides, even if Mr Lok were correct, the AEICs of the two principal witnesses of Sky Technology, and the statement of intended evidence from Gan Choon Beng could and should still have been completed on time.

60. Had this been done, leaving only the statement of intended evidence from Winnie Tham to be done, Mr Singh might not have objected to an EOT for that statement to be furnished later. Even if Mr Singh were to object, Sky Technology would have had a much better chance of persuading the Registrar to grant an EOT for this sole outstanding item, although I saw no reason why the statement of intended evidence from Winnie Tham should await her return. The very reason why Sky Technology had to obtain leave to adduce her evidence orally was, presumably, because she might not co-operate. That should not stop Sky Technologys solicitors from filing a statement of the intended evidence that they were seeking from her. The statement would only identify the areas of fact on which her evidence was sought.

61. The truth of the matter was that Rodyk & Davidson and Sky Technology had used the absence of Winnie Tham to seek an EOT when the real reason was something else. To this extent, their conduct was unsatisfactory.

62. Unfortunately, theirs is not the only instance of such conduct.

63. Solicitors who have misjudged the amount of time required to carry out a task and/or who have been too busily engaged in other matters or who have overlooked a matter should have the courage to admit this in an application for EOT. I appreciate that some may fear that this will encourage their own clients to take action against them should the application for EOT fail, but, all things considered, I am of the view that it is preferable that they be candid with their opponents, the court and their clients.

64. The true reason for the delay was that Rodyk & Davidsons time and attention had been taken up and distracted by the hearings before Lai J and the Court of Appeal in respect of the application for summary judgment and conditional leave. They had misjudged the time required to prepare the AEICs.

65. Although I had some sympathy for the situation they found themselves to be in, the true reason was still not satisfactory. After all, S3s AEICs were ready by 30 March 2001.

66. Hence, the delay was unjustified.

WAS UNDUE PREJUDICE CAUSED TO S3?

67. The prejudice must be other than having to meet the case of Sky Technology if an EOT is granted. Otherwise, every application for an EOT will be doomed from the start.

68. I make this point because I am aware of submissions by counsel in other cases that an EOT should be denied simply because, if it were to be granted, their clients would have to meet a case which they would not otherwise have to meet if the extension were not granted.

69. I prefer to use the label undue prejudice to emphasize the point that an EOT will often prejudice the other side to some extent, but that, per se, is not sufficient to deny an EOT. It depends on the nature of the prejudice and this is encapsulated in the principle that the prejudice must be one that cannot be compensated by an appropriate order as to costs.

70. Mr Singh took exception to Mr Loks argument based on such a principle. He argued that to sanction such a principle would mean that the efficient administration of justice can be bought off or overreached by an award of costs.

71. I was of the view that Mr Singhs argument was an exaggerated one. The principle relied on by Mr Lok has been endorsed by the courts in England and Singapore. Furthermore, no one has suggested that costs can be a cure-all. Indeed, the *Costellow* and *The Tokai Maru* have cautioned that in special or exceptional circumstances, the payment of costs will not be sufficient to obtain an EOT.

72. As for prejudice, Mr Singh argued that there was prejudice to S3 because although Sky Technology was not asking for the trial dates to be vacated, S3 would be compelled to do so in view of Mr Singhs other commitments.

73. Mr Singh said that on 11 April 2001, he had another hearing. On 17 April 2001, he was due to see a Queens Counsel in London on an unrelated matter. He would be back in Singapore by 23 April 2001. That would leave him with 23 April 2001 to 26 April 2001 (four days) before the trial starting on 27 April 2001. He pointed out repeatedly that his was a small firm.

74. On the other hand, when Mr Singh was submitting that there was no valid reason for Sky Technology to fail to comply with the original dead-line for the exchange of AEICs, he had submitted that the case was simple. He also submitted that in the light of the proceedings for summary judgment, Sky Technology already knew what was the substance of the case before the court.

75. These very arguments of Mr Singh militated against his argument that he would not have sufficient time to prepare for trial if an EOT were granted to allow Sky Technology to exchange AEICs by 14 April 2001. Furthermore, as their AEICs, and statements of intended evidence, were ready by the time of the hearing before me, they could be exchanged with the AEICs of S3 immediately or the next day ie 11 April 2001. Mr Singh should have some time before he was to fly to meet Queens Counsel on 17 April 2001 and some time after his return by 23 April 2001.

76. It was clear to me that Mr Singh was blowing hot and cold.

77. Furthermore, although Mr Singhs firm is a small one, he is assisted by Mr Menon who appeared to have been involved with the case for some time already if not right from the beginning.

78. Mr Menon could continue to take the witnesses of S3 through the AEICs and statements of intended evidence for Sky Technology and prepare them for cross-examination when Mr Singh was away in London.

79. Besides, as S3 is the plaintiff, Mr Singh would not have to do any cross-examination on the first day of trial. Mr Lok would have to do that.

80. As 27 April 2001 would be a Friday, there would be a weekend for Mr Singh to do some more preparation, if that was necessary.

81. In the circumstances, the argument that S3 would be compelled to seek a vacating of the trial dates was without merit.

82. This is reinforced by another point.

83. On 10 April 2001, Mr Singh had two matters before me. One was the appeal of Sky Technology in the present action. The other was an appeal in another action ie Suit No 229 of 200 between Les Placements Germain Gautheir Inv c Hong Pian Tee (the Other Action). Mr Singh was representing the defendant in the Other Action.

84. The appeal in the Other Action was listed for hearing before the hearing of Sky Technologys appeal. However it was adjourned to a special date to be fixed.

85. When I was considering the directions I should make about that special date, Mr Singh requested that I direct that the appeal (in the Other Action) be fixed for hearing on a date after the trial dates of the S3 action against Sky Technology. He explained that if Sky Technologys appeal was successful, he would then be engaged in the trial of S3s action.

86. In the light of Mr Singhs request, I directed accordingly. Yet he was arguing emphatically before me in Sky Technologys appeal as to how S3 would have to seek a vacating of the trial dates because of his tight schedule if an EOT was granted to Sky Technology.

87. I stress that even if Mr Singh had not made the request I have mentioned, my conclusion about the lack of merits in his argument about the vacating of the trail dates would have been the same.

88. In the circumstances, the cases cited by Mr Singh, ie the unreported decision of Chan Seng Onn JC in Suit No 320 of 1997 and *Chan Kern Miang v Kea Resources Pte Ltd* [1999] 1 SLR 145 were not applicable because these were cases in which a party was applying for the trial dates to be vacated.

89. I was of the view that there was no undue prejudice to S3 if EOT was granted to Sky Technology to exchange the AEICs by 11 April 2001 ie one day after the hearing before me.

WHETHER THERE WERE EXCEPTIONAL CIRCUMSTANCES TO WARRANT DISMISSING THE APPLICATION FOR EXTENSION OF TIME

90. The affidavits filed for S3, the written submissions and Mr Singhs oral submissions advanced numerous arguments about the conduct of Sky Technology and/or their solicitors.

First Argument

91. First, Mr Singh argued that the excuse about Winnie Tham was not a true one. I have already dealt with that and need say no more on it, except to add that while I found the attempt to rely on the Winnie Tham excuse unsatisfactory, I would stop short of calling it deplorable.

Second Argument

92. (a) Mr Singh stressed that Rodyk & Davidson should have informed his firm much earlier that they were unable to complete the AEICs in time. He even pointed out that at the hearing before the

Court of Appeal on 22 April 2001, Rodyk & Davidson had asked for an EOT to provide the $600,000 security but did not do so for the AEICs.

(b) However, as Mr Lok put it, Rodyk & Davidson did not have prior knowledge that they would be unable to meet the dead-line for the AEICs. They were trying their best to meet the dead-line but were unable to do so.

(c) The fact that they informed Manjit & Partners on the very last day and only after they had received a fax from Manjit & Partners is immaterial. I have no doubt that if they had informed Manjit & Partners just the day before about their predicament, he would still have objected to an EOT.

Third Argument

93. (a) Mr Singh argued that if Sky Technology was granted an EOT, this would mean that it would have had more time to prepare its AEICs than S3. I was of the view that while this is true as a fact, it was not a valid argument. If S3s AEICs had not been ready by the dead-line, S3 would be in no position to object to the application for an EOT by Sky Technology.

(b) While it is to the credit of S3 and their solicitors that they have met the dead-line, notwithstanding all the distractions in-between, this did not in turn mean that the application of Sky Technology for an EOT should be rejected. It is in the very nature of an objection to such an application that the party who is objecting has met the dead-line whereas the other has not.

(c) Besides, Mr Singh was not suggesting that if an EOT was to be granted to Sky Technology, then S3 should have the same EOT to file supplementary AEICs if S3 thought fit to do so.

Fourth Argument

94. (a) Mr Singh argued that he was not informed that the AEICs of the principal witnesses had been signed by the evening of 4 April 2001. He only learned about it at the hearing before me. He went on to say that had he been informed, the AEICs could have been exchanged before the hearing of the appeal on 10 April 2001. While he was implying that he would have agreed to such an exchange then, he stopped short of actually saying so.

(b) However, I note that in para 6 of the 3rd affidavit of Mr Lim executed on 4 April 2001, and filed on 5 April 2001, Mr Lim had said that Sky Technology was in a position now to file and serve the affidavits of Gordon Goh and Loewe Goh. This 3rd affidavit was served on Manjit & Partners on 5 April 2001 at 4.30 pm whereupon they prepared and eventually filed an affidavit, ie the 3rd affidavit of Dr Yang Jian Ling, in response on 9 April 2001. Manjit & Partners were therefore aware some time before the hearing on 10 April 2001 that the AEICs for Sky Technology had been completed on 4 April 2001. Yet they did not suggest that the AEICs be exchanged before 10 April 2001.

Fifth Argument

95. (a) An argument was also raised that Sky Technologys representatives were more interested in

crucial business negotiations than in meeting the courts dead-line.

(b) This argument was raised because Sky Technology had sought to explain why Gordon and Loewe Goh were unable to attend at Rodyk & Davidsons office for the preparation of their AEICs on 26 April 2001.

(c) I was of the view that Sky Technology was trying to be candid but S3 sought to turn this explanation against it by the argument I have mentioned. S3 even labelled the non-attendance, for one day, as disgraceful.

(d) I was of the view that this was an exaggeration by S3.

Sixth Argument

96. (a) Mr Singh complained that his firm was not even informed on 30 March 2001 that Rodyk & Davidson were filing an application for an EOT. He knew about it only when it was served on 2 April 2001 at 3.35 pm but by then his firm had already filed S3s application against Sky Technology for its failure to meet the dead-line.

(b) While Rodyk & Davidson should have informed Manjit & Partners that they were filing an application for extension, I did not read as much into it as Mr Singh wanted me to. Obviously Rodyk & Davidson were themselves hard-pressed and inadvertently omitted to give Manjit & Partners advance notice of their intention.

(c) Besides, their omission was immaterial.

Seventh Argument

97. (a) After Lim Yeow Bengs 2nd affidavit was filed for Sky Technologys application for EOT, and a 3rd one was filed thereafter for the appeal before me, Mr Singh complained that the Gohs should have executed these affidavits and not Mr Lim who had no knowledge about the dispute.

(b) I was of the view that this complaint was not a valid one. Mr Lim is the Intellectual Property & Contracts Director of Sky Technology. There was no material to suggest that only the Gohs can sign affidavits for an application for EOT. Such affidavits were not the AEICs.

Eighth Argument

98. (a) Mr Singh drew my attention to paragraph 4 of the 2nd affidavit of Mr Lim which began with this sentence:

> The directions provided a short time frame for the preparation of the affidavits.

Mr Singh said that this was an implied criticism of the courts.

(b) In Mr Lims 3rd affidavit, he said that no disrespect was intended to the court by the sentence I have mentioned. However, this did not satisfy Mr Singh. He stressed that there was no retraction of the offending sentence and no apology to the court.

(c) As the parties had been given slightly over a month to prepare the AEICs, I was of the view that Mr Lims sentence should have been more carefully worded. However, I was also of the view that in the light of his 3rd affidavit, nothing more should turn on it. Also, even if his 3rd affidavit had not been filed, I was of the view that offence should not be taken too quickly as his 2nd affidavit was obviously prepared in a rush and should be read in the context of the other matters that occupied the time and attention of Rodyk & Davidson.

(d) I was also of the view that it was not for Mr Singh to take umbrage on behalf of the court.

Ninth Argument

99. (a) Mr Singh also submitted that the two new affidavits by Mr Lim and Joanna Foong should have been brought to the attention of the Registrar in the context of further arguments so that the Registrar could deal with the new material in these affidavits. He said it was unfair for Sky Technology to require me to reverse the Registrars decision not on material placed before the Registrar but on new material consciously not pleaded before the Registrar.

(b) I did not accept this argument. In the first place, the two affidavits were primarily to elaborate on points already taken in Mr Lims 3rd affidavit.

(c) Moreover, Sky Technology was not consciously withholding the material in the two new affidavits. They had filed Mr Lims 2nd affidavit on an urgent basis to support its application for EOT. When this application failed, the only natural step was to file a Notice of Appeal to the judge on an urgent basis if the trial dates were not to be jeopardised. Pending the hearing of the appeal, the two new affidavits were filed.

(d) Furthermore, if Sky Technology had sought further arguments before the Registrar and was unsuccessful again, precious time would have been wasted and the appeal to the judge would have been heard even later.

(e) Indeed, if Sky Technology had sought further arguments before the Registrar and was unsuccessful, I would not have been surprised if Mr Singh was then to argue that Sky Technology should not have sought further arguments and should have appealed immediately to the judge.

Tenth Argument

100. (a) Mr Singh argued that when Sky Technology chose to move quickly, it could do so. Hence, the application for EOT was filed on the same day when Rodyk & Davidson had informed his firm that they were unable to exchange the AEICs on time.

(b) I was of the view that this too was not a valid argument. On that day, Rodyk & Davidson knew that they were unable to complete the AEICs on time and also knew that they were not going to get

any quarter from Manjit & Partners in view of their strong objection. The application for EOT had to be filed immediately.

(c) Besides, I did not agree that Sky Technology and Rodyk & Davidson had in the past been dragging their feet as Mr Singhs argument was suggesting.

Eleventh Argument

101. (a) Mr Singh also pointed out that when Rodyk & Davidson were seeking an urgent date for the hearing of the appeal to the judge, they did not give the right reason to the Duty Registrar and instead gave some unconnected reason.

(b) I was of the view that while that was true, it was neither here nor there since Mr Singh was not suggesting that there was any attempt to deceive the Duty Registrar.

Twelfth Argument

102. (a) Mr Singh said that when the hearing date of 10 April 2001 was obtained for the appeal before me, Rodyk & Davidson did not check whether that date was suitable for him. He complained that they were only acting to suit themselves.

(b) I did not agree. Rodyk & Davidson themselves had no advance knowledge what date would be given for the appeal. Besides, developments were occurring quickly and they had to move even more quickly. They did not have the luxury of contemplating whether to keep Manjit & Partners informed of each and every development. Also, they were not legally obliged to keep Manjit & Partners so informed.

(c) Mr Singh also said that previously as regards Sky Technologys application for an expedited appeal to the Court of Appeal against Lai Js decision, he was given less than two hours notice to appear before Chao JA and he was being required to work to the timetable of Sky Technology.

(d) Again I did not agree. It was the Duty Registrar who had fixed the appointment before Chao JA in view of the intention to have an expedited appeal. The Duty Registrar was being helpful and solicitors from both sides had to work on an urgent basis. This was not a situation of Mr Singh having to work to the timetable of Sky Technology.

Thirteenth Argument

103. (a) Mr Singh argued that the Notice of Appeal against the Registrars decision on EOT still sought a fourteen day extension in defiance of the Registrar.

(b) I was of the view that this was not a valid argument. Sky Technology had originally sought a fourteen day extension and the Notice of Appeal had sought the same extension. There was no question of defying the Registrar as Sky Technology was exercising its right to appeal.

Fourteenth Argument

104. (a) Paragraph 4 of the affidavit of Ho Kah Meng for S3 to resist the initial application for EOT accused Sky Technology of unilaterally deciding to vary the directions of the Registrar given on 28 February 2001.

(b) Again, this was not a valid argument. Sky Technology had not unilaterally decided to do anything. It was unable to meet a dead-line and had to apply for EOT.

Fifteenth Argument

105. (a) Mr Singh stressed repeatedly that Rodyk & Davidson still had not listed the names of their witnesses notwithstanding his requests to them to do so as a result of which he could not extract the order of 28 February 2001.

(b) However, I did not think this was deliberate on the part of Rodyk & Davidson. So many things were happening, the most important of which was the appeal to the Court of Appeal and, on the conditional leave, the provision of the security thereafter and the preparation of the AEICs. The action was only required to be set down by 9 April 2001. If the AEICs (for Sky Technology) could have been completed on time, Rodyk & Davidson would no doubt have provided the list of their witnesses upon being reminded that it was still outstanding.

Sixteenth Argument

106. (a) The submissions of S3 also pointed out another instance of alleged delaying tactic on the part of Sky Technology. Apparently, on or about 14 March 2001, Manjit & Partners had sought copies of correspondence for preparation of AEICs for S3 and these copies were not provided promptly.

(b) The letter dated 14 March 2001 was not produced to me.

(c) In any event, as a general rule, an instance of delay in responding to a request cannot be categorised as deplorable conduct and there is no evidence before me that the delay was deliberately intended to hinder the preparation of the AEICs for S3.

Summary

107. Ultimately, I was of the view that S3 and Mr Singh were just trying to find fault with every act or omission of Sky Technology and of Rodyk & Davidson so that they would be punished by a denial of EOT.

108. S3 and Mr Singh also used a plethora of words like deplorable, disgraceful, cavalier, lackadaisical, no apology, no retraction, offensive, consciously, in defiance and unilaterally deciding for their mission. However, I was unmoved.

109. Their arguments were not valid and the use of such language did not advance their position

any further.

Order 25 Rule 3(2) Rules of Court

110. Mr Singh pointed out that the Singapore Rules of Court O 25 r 3(2) states:

> Where any party fails to comply with the Courts directions for the filing and exchange of affidavits, an application may be made by summons at any time after the default for an order to enter judgment or to dismiss the action, as the case may be, or for such other order as to costs or otherwise that the Court thinks just in the circumstances.

111. He stressed that this provision was peculiar to Singapore. He was suggesting that a failure to exchange AEICs on time would lead to more drastic consequences than a failure to comply with any other provision in the Rules of Court in time.

112. I did not agree. *The Tokai Maru* also involved a case of the late filing or exchange of AEICs. Indeed the length of the delay there was much longer and the reason for delay there was even less justifiable. I presumed that the Court of Appeal in *The Tokai Maru* was aware of O 25 r 3(2).

113. In any event, in the absence of any express provision to the contrary, I was not prepared to treat the failure to exchange AEICs in time as an exception to the principles laid down in *The Tokai Maru*.

114. In the circumstances, there was no exceptional reason to warrant the dismissal of the application for EOT.

115. Indeed, as Mr Lok submitted, this was not a situation where Sky Technology was in the habit of allowing dead-lines imposed by the court to pass without doing anything.

116. Furthermore, the parties had gone through an application for summary judgment before a registrar, an appeal to a judge in chambers, further arguments thereon, an expedited appeal to the Court of Appeal and Sky Technology had provided the security of $600,000. It was also ready with its AEICs before the appeal to me was heard.

117. I would add that my decision would have been the same even if the two fresh affidavits (ie Mr Lims 3rd affidavit and Joanna Foongs affidavit) were not filed after the Registrars decision on 4 April 2001. I allowed arguments thereon because they contained primarily elaboration. Furthermore, S3 had filed an affidavit of Dr Yang Jian Ling in response to Mr Lims 3rd affidavit and Mr Singh was, to his credit, in a position to advance arguments in response to Joanna Foongs affidavit.

Interference with the Registrar decision

118. Mr Singh cited the case of *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1992] 2 SLR 710 for the principle that in the absence of clear error of law or principle, an appellate court should not interfere.

119. I noted that that principle was said in the context of an appeal to the Court of Appeal and not

an appeal from a registrar to a judge.

120. Mr Singh further submitted that the Registrar had acted on established principles, meaning the principle he was advocating.

121. However, he stopped short of saying that the Registrar had acted on the principles laid down in *The Tokai Maru* and the subsequent decisions of the Court of Appeal that I have mentioned.

122. I was of the view that the principles laid down in those decisions lead to the inevitable conclusion that an EOT should be granted to Sky Technology.

123. As the hearing of the appeal concluded at about 6.30 pm, I granted an EOT for the AEICs of both sides to be exchanged by the next day with consequential orders for the date for objection to be taken and for setting down to be extended.

COSTS

124. In Mr Singhs request for further arguments, he said, inter alia, that S3 could not appreciate why it was not awarded costs (of its application before the Registrar, Sky Technologys application before the Registrar and Sky Technologys appeal before me) on an indemnity basis. I rejected the request for further arguments.

125. I was of the view that the argument that S3 could not appreciate my decision on costs was an emotional argument and, hence, irrelevant. A partys argument is not augmented by its failure to appreciate the courts view or decision.

126. The usual rule is that costs are granted on a standard basis, in the absence of a contractual provision to the contrary.

127. Hence, even if a defendant is dragged to court through no fault of his own, he is still awarded costs on a standard basis.

128. Another illustration is where one party seeks to amend his pleading. The costs of that application and any costs consequential on the amendment are, again, usually awarded to the other side on a standard basis even though the amendment arises through no fault of the other side.

129. As for applications for EOT, these are not uncommon and are usually again met with an order for costs on a standard basis. The nature of such applications and the legal principles are not novel or complex.

130. The facts of the application of Sky Technology for EOT were also not complex.

131. I also did not think that the conduct of Sky Technology and/or Rodyk & Davidson was so bad that it warranted an order for costs on an indemnity basis.

132. It is true that there was considerable urgency, but that did not warrant an order for costs on an indemnity basis. Besides, I took into account the element of urgency before I fixed the quantum of the costs.

133. As for the length of the hearing before the Registrar, there was no suggestion that it was

particularly long.

134. As for the hearing before me, this took about three hours. This was mainly because of the numerous, but invalid, arguments advanced by Mr Singh and also because he repeated some of his arguments from time to time. In view of that I had contemplated whether S3 should even be awarded full costs on a standard basis.

135. However, as Mr Lok did not dispute that S3 should be entitled to full costs on such a basis, I awarded S3 its full costs on a standard basis and fixed it at $14,000.

Woo Bih Li

Judicial Commissioner