SBS Transit Ltd (formerly known as Singapore Bus Services Limited) v Koh Swee Ann [2004] SGCA 26

Case Number : CA 135/2003

Decision Date : 28 June 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Judith Prakash J; Yong Pung How CJ

Counsel Name(s) : Cindy Sim (Tan JinHwee, Eunice and Lim ChooEng) for appellant; Subbiah Pillai (Pillai and Pillai) for respondent

Parties : SBS Transit Ltd (formerly known as Singapore Bus Services Limited) — Koh Swee Ann

Civil Procedure – Appeals – Leave – Final and conclusive nature of refusal of leave to appeal

Civil Procedure – Offer to settle – Whether Calderbank letter amounts to statutory offer to settle – Whether successive statutory offers to settle supersede earlier statutory offers to settle – Order 22A Rules of Court (Cap 322, R 5, 1997 Rev Ed)

24 June 2004

Judith Prakash J (delivering the judgment of the court):

1 It has long been a rule of the common law that wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given: *In re Housing of the Working Classes Act, 1890*, *Ex parte Stevenson* [1892] 1 QB 609. The appellant in this case thought that this rule did not apply to an order of the High Court made pursuant to an originating summons asking for leave to appeal from a decision of a Magistrate's Court. The appellant was wrong and the appeal had to be dismissed on the basis of the preliminary objection put up by the respondent that the Court of Appeal had no jurisdiction to hear the appeal. While the rule in question is over 100 years old, it appears to us that it is opportune to remind members of the legal community of its existence so as to avoid further hopeless appeals.

Background

2 The original action in the Magistrate's Court arose out of a traffic accident between a bus driven by an employee of the appellant, SBS Transit Ltd, and the respondent's car in July 2000. Three months later, the respondent demanded some $9,000 in damages from the appellant. On 26 December 2000, the appellant, in a letter marked "Without Prejudice Save as to Costs", offered to settle the respondent's claim for "a global sum of $6,322 [subject to proof of receipts for the rental charges and General Insurance Association of Singapore fees paid] in full and final settlement of all claims pertaining to the accident". This letter qualified as a "Calderbank letter" of the type identified by *Calderbank v Calderbank* [1976] Fam 93.

3 The respondent rejected the Calderbank letter in May 2001. In April 2002, she started the original action against the appellant and claimed damages of $8,490.18. On 26 June 2002, the appellant served on the respondent a formal offer to settle ("OTS") pursuant to O 22A r 1 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the Rules"). By it, the appellant offered the respondent the same sum of $6,322 in settlement. On 13 July 2002, the appellant withdrew this OTS. Two days later, it served another OTS on the respondent. The second OTS was for $3,161. The respondent did not accept the second OTS and the matter went to trial.

4 At the conclusion of the trial on 10 June 2003, the district judge who heard the case (sitting as a magistrate) apportioned the liability for the accident between the appellant and the respondent. The appellant was found 80% liable. The appellant was ordered to pay the respondent $6,065.85 as damages and costs of $3,500 plus reasonable disbursements.

5 Section 21(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("the Act") provides that an appeal lies to the High Court from a decision of a Magistrate's Court in any suit where the value of the subject matter exceeds $50,000 or, where the value is less, leave to appeal has been given by a District Court, a Magistrate's Court or the High Court. Under O 55D r 4 of the Rules, a party applying for leave to appeal against an order made by a Magistrate's Court must first file his application to that court. In the event leave is refused by that court, he may, within seven days of such refusal, apply to the High Court for leave. On 20 June 2003, the appellant applied to the Magistrate's Court for leave to appeal against the costs order. The appellant contended that the respondent had not been entitled to costs given that the judgment sum awarded in her favour was lower than the amount that it had offered her in the Calderbank letter. It submitted that there was a question of public importance such that leave to appeal should be granted, *ie*, whether for the purposes of an order for costs a formal OTS would supersede a pre-writ Calderbank letter. The district judge refused to grant leave to appeal.

6 The appellant did not let the matter lie. It decided to take a second bite of the cherry by filing an originating summons in the High Court for leave to appeal against the costs order made by the Magistrate's Court. This originating summons was heard and dismissed by Lai Kew Chai J on 13 August 2003.

7 The appellant did not realise that it had come to the end of the road. It wanted to appeal to this court but thought that it needed leave to do so as s 34(2)(b) of the Act provides that, except with the leave of the Court of Appeal or a Judge, no appeal shall be brought to the Court of Appeal where the only issue in the appeal relates to costs or fees for hearing dates. The appellant therefore filed a summons in chambers in the originating summons asking for leave to appeal against Lai J's order. This summons in chambers was heard in September and November 2003 and the appellant was able to persuade the judge to grant it the leave sought. So the matter came before us as an appeal against Lai J's refusal to grant leave to appeal against the district judge's decision on costs.

The applicable legal principle and its rationale

8 The first case to establish the principle that where a legal decision cannot be appealed against except with express permission from a named authority, the decision of that authority whether or not to grant leave is final, was *Lane v Esdaile* [1891] AC 210. In that case, the appellants had been refused leave to appeal to the House of Lords by the Court of Appeal. They proceeded to appeal against that refusal but were met with the preliminary objection that no appeal lay to the House of Lords from such a refusal. Upholding the preliminary objection, Lord Halsbury LC gave the rationale for such a restricted approach (at 212–213):

> [I]t seems to me that to give an appeal in this case would defeat the whole object and purview of the order or rule itself, because it is obvious that what was there intended by the Legislature was that there should be in some form or other a power to stop an appeal – that there should not be an appeal unless some particular body pointed out by the statute (I will see in a moment what that body is), should permit that an appeal should be given. Now just let us consider what that means, that an appeal shall not be given unless some particular body consents to its being given. Surely if that is intended as a check to unnecessary or frivolous appeals it becomes absolutely illusory if you can appeal from that decision or leave, or whatever it is to be called

itself. How could any Court of Review determine whether leave ought to be given or not without hearing and determining upon the hearing whether it was a fit case for an appeal? And if the intermediate Court could enter and must enter into that question, then the Court which is the ultimate Court of Appeal must do so also. The result of that would be that in construing this order, which as I have said is obviously intended to prevent frivolous and unnecessary appeals, you might in truth have two appeals in every case in which, following the ordinary course of things, there would be only one; because if there is a power to appeal when the order has been refused, it would seem to follow as a necessary consequence that you must have a right to appeal when leave has been granted, the result of which is that the person against whom the leave has been granted might appeal from that, and inasmuch as this is no stay of proceeding the Court of Appeal might be entertaining an appeal upon the very same question when this House was entertaining the question whether the Court of Appeal ought ever to have granted the appeal. My Lords, it seems to me that that would reduce the provision to such an absurdity that even if the language were more clear than is contended on the other side one really ought to give it a reasonable construction.

9 *Lane v Esdaile* was followed by *Ex parte Stevenson* ([1] *supra*) in 1892. Ninety years later, in *Bland v Chief Supplementary Benefit Officer* [1983] 1 WLR 262, Sir John Donaldson MR applied the principle as stated in *Ex parte Stevenson* to the case of a refusal by the social security commissioner to grant leave to an applicant to appeal to the Court of Appeal against a decision of a benefit appeal tribunal. Lord Bingham affirmed this position even more recently in the case of *R v Secretary of State for Trade and Industry, ex parte Eastaway* [2000] 1 WLR 2222 where he accepted that case law recognised it was obviously absurd to allow an appeal against the decision under a provision designed to limit the right of appeal. Lord Hoffmann, in another recent decision, *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1 at 13, said that this absurdity is greatest in a case in which the appeal is brought to the very tribunal to which it is desired to appeal on the merits. This is because an appeal against the refusal of leave would involve the higher court doing the very thing that the provision was designed to prevent, namely, having to examine the merits of the decision appealed against.

10 The appellant submitted that the English decisions on the point should only reflect the English position as the English courts were interpreting English statutes which may be different from the applicable Singapore laws, namely, the Act and the Rules. It said that there was no bar in this legislation to the appeal that it had launched provided it had obtained the necessary leave to appeal.

11 Whilst the English authorities did deal with English statutes, what was in issue in those cases was not the substantive subject matter of those statutes but only the requirement that for an appeal to lie, leave had to be granted. The cases therefore discussed the principle to be applied when an appeal against a decision could only be made with the leave of a particular authority, whether that authority was a court having appellate jurisdiction or a person holding a particular office like the commissioner in the *Bland* case. The English courts have consistently held that in such a situation the decision of the appointed authority is final and no further appeal may be brought against that decision. That common law principle applies in Singapore as it does in England. Thus, since s 21(1) of the Act read with O 55D r 4(3) of the Rules has appointed the High Court as the authority with the final jurisdiction to grant or refuse leave to appeal against a magistrate's decision, there can be no further recourse after the High Court has adjudicated on the matter.

12 The judge, therefore, did not have jurisdiction to give the appellant leave to appeal against his refusal to grant it leave to appeal against the district judge's decision. The fact that the appellant made an application for such leave under s 34(2) of the Act did not confer such jurisdiction on the judge. Nor did the Court of Appeal have the jurisdiction to hear the application. Section 29A(1) of the

Act provides that the civil jurisdiction of the Court of Appeal consists of appeals from any High Court judgment or order in any civil cause or matter subject to the other provisions of the Act. The width of this section which would allow any judgment or order to be appealed against is considerably narrowed by s 34. Section 34(1) sets out in sub-paras (a) to (e) the categories of cases in which no appeal at all can be brought to the Court of Appeal. This is followed by s 34(2) which sets out in sub-paras (a) to (d) the four categories of cases in which an appeal can only be brought with the leave of court. Thus, s 34 was designed to restrict appeals to the Court of Appeal. It would be inconsistent with the object of this statutory provision as a mechanism restricting appeals to allow it to detract from the operation of s 21(1) which is another mechanism restricting appeals. Section 34(2) therefore cannot be used as a mechanism to override the common law principle and thereby obtain leave to appeal in a situation in which otherwise no appeal would be possible. If s 34(2) could be used in this way, the *Lane v Esdaile* line of authorities would be deprived of all effect.

13 Whilst in *Lane v Esdaile* Lord Halsbury LC held (at 212) that there should not be an appeal against a decision to refuse leave "unless some particular body pointed out by the statute should permit that an appeal should be given", that statement does not permit reliance on s 34(2). As pointed out above, s 34(2) was not designed as an enabling provision to permit appeals that could not otherwise be maintained. As such, the "particular body pointed out by the statute" that Lord Halsbury referred to must be read restrictively to mean the particular statute requiring leave to appeal. In this case that is s 21(1) of the Act read with O 55D r 4(3). Those provisions only permit an application for leave to appeal to reach a High Court judge in the event that leave is refused by the Magistrate's Court (effectively giving an appeal against the magistrate's decision to refuse leave). They do not provide for any further avenues of appeal. The appellant was given two bites at the cherry by those provisions. It took both those bites. Nothing further was or should have been allowed.

14 The respondent's preliminary objection was well founded and the appeal had to be dismissed with costs.

The substantive point

15 In the cases filed by both parties, the substantive point of the appeal was explored in some detail. Whilst, strictly, it is not necessary for us to go into this, we thought it might be helpful to offer some observations on the main point at issue.

16 As is well known, a Calderbank letter is a letter marked "without prejudice save as to costs" from one party involved in a claim to another setting out the terms of an offer to settle that claim. In the case of the same name, it was held that where a pre-writ Calderbank offer had been made which was higher than the quantum eventually obtained at trial, the plaintiff could be denied his costs. In 1996, this court in *Shi Fang v Koh Pee Huat* [1996] 2 SLR 221 recognised the relevance of the Calderbank letter in relation to orders on costs. Order 22A was, however, introduced thereafter to "spur the parties to bring litigation to an expeditious end without judgment and thus to save costs and judicial time" (*per* Chao Hick Tin JA in the Court of Appeal decision in *Singapore Airlines v Tan Shwu Leng* [2001] 4 SLR 593 at 602, [37]). Whilst a Calderbank letter can be issued before litigation starts, an OTS under O 22A can only be made after proceedings start. There is, therefore, still a place for the Calderbank letter before the issue of the writ but the question which has vexed litigants is whether such a letter has the same effect on costs as an OTS.

17 The position taken by the appellant in its case was that the pre-writ offer made in its solicitors' Calderbank letter, which did not contain a deadline for acceptance, remained open for acceptance by the respondent until withdrawn by the appellant. The appellant did not formally

withdraw the offer in the Calderbank letter even though it did avail itself of the O 22A procedure on two occasions. The appellant pointed out that the Rules prescribed that where an OTS did not specify a time for acceptance it was deemed not to expire. In order for an OTS to be withdrawn, notice had to be given of the intention to withdraw. Thus, even if more than one OTS was made by a party, the second and subsequent offers could never have the effect of superseding the first or earlier offers as long as the same did not specify a time for acceptance. It submitted that the Calderbank letter here similarly had to be considered as having remained open for acceptance right up to judgment notwithstanding the various offers to settle made after proceedings commenced. Before the district judge, the appellant had submitted that as the pre-writ offer was more favourable than the judgment sum, the respondent should not be entitled to costs and that instead she should pay the appellant its costs for bringing it into proceedings which had been unnecessarily commenced. In its case for this appeal, the appellant did not go so far but submitted that the Calderbank offer had to be considered by the magistrate or the district judge when exercising his or her discretion to decide on the parties' entitlements to costs and disbursements.

18 In his decision to grant the appellant leave to appeal against his earlier decision to refuse leave, Lai J stated:

> I refused leave to the plaintiffs to appeal to the High Court because the district judge has exercised his discretion under O 22A and therefore there was no ruling whether the pre-writ Calderbank offer was superseded by the later OTS on which the matter could be resolved by a higher tribunal. I would venture my personal opinion: if in fact the district judge had ruled that the Calderbank offer was superseded by the later OTS, that decision would have been wrong as it would not have given effect to the requirement under O 22A r 3 of one day's prior notice in writing in conformity with Form 38B. I am proceeding on the basis that the Calderbank offer is an OTS within the meaning of O 22A r 4: see explanation in para 22A/4/1 [of *Singapore Civil Procedure 2003*].
>
> I am now shown the notes of evidence and arguments: those notes may well be sufficient to infer that the district judge had awarded costs of $3,500.00 against the plaintiffs on the basis that the Calderbank offer was superseded by a later OTS, contrary to the passage in Singapore White Book para 22A/3/4. The matter is of public importance … I therefore grant leave to appeal to the Court of Appeal.

19 The judge's opinion that the Calderbank offer was a valid OTS within the framework of O 22A was, as he stated, based on para 22A/3/4 of *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003). That paragraph reads:

> It would follow from this procedure that it would not be possible to withdraw the offer by implication by way of a second offer for a lesser or larger sum … It may be withdrawn only if done in accordance with this rule: see *York North Condominium v Van Horne* (1989) 70 OR (2d) 317, where the court held that the common law principles of contract of law relating to offer and acceptance have no application to r49, and the Canadian equivalent to r6(2) of O22A replaces the usual common law provision that rejection of an offer or the making of a counter-offer forecloses a later acceptance of the original offer.

It should be noted that O 22A r 6(2) provides that where a party to whom an offer to settle is made rejects that offer he may nevertheless later accept the original offer unless it has been withdrawn. This rule therefore underlines the importance of following the formal mechanism set out in O 22A r 3 for withdrawal of an offer if the offeror wishes to make an effective withdrawal. A mere rejection by the offeree is not sufficient to extinguish the offer.

20 The alleged error made by the district judge (who did not consider that the existence of the Calderbank letter obliged him to award costs to the appellant) and the concomitant question of importance (such that leave to appeal was warranted) perceived by the judge below hinged entirely on the assumption that the Calderbank letter containing the offer to settle was a valid OTS within the framework of O 22A. If the Calderbank letter was an OTS, then it could only be withdrawn by following the procedure in O 22A r 3, *ie*, by giving at least one day's prior notice of the intention to withdraw the offer and thereafter serving a notice of withdrawal in Form 38B. An OTS that is not withdrawn cannot be superseded by a second or subsequent OTS. On the other hand, if the Calderbank letter did not amount to an OTS, then the normal contractual principles of offer and acceptance would apply. That would mean that the respondent's rejection of the offer in that letter on 21 May 2001 was an effective termination of that offer so that it could not be accepted thereafter unless renewed.

21 It is our view that a Calderbank letter issued before proceedings are started is not a valid OTS within the statutory offer to settle scheme established by O 22A. True it is that Calderbank letters are recognised in Singapore and that they may influence the exercise of a court's discretion as to costs. A Calderbank letter does not, however, govern the court's discretion in respect of costs in the same way as a valid OTS does. We endorse in this regard the statement of District Judge Valerie Thean in *Teng Lien Yen v SBS Transit Ltd* [2003] SGMC 10 at [10] that:

> even in circumstances where Calderbank letters may be relevant, the court retains its discretion. The existence of a Calderbank letter influences but does not govern the exercise of a court's discretion: *McDonnell v McDonnell* [1977] 1 All ER 766. English [Court of Appeal]. The discretion of the court as to costs, and as to what weight is to be given to a Calderbank letter, cannot be usurped.

22 Order 22A r 1 is precise on the form that an OTS must take. It specifies that an OTS "shall be in Form 38A". Commentators have recognised that the use of the prescribed form is obligatory and that therefore cases from other jurisdictions on offers to settle contained in letters and the effect of the same on the court's discretion are distinguishable on the basis that the procedure in those jurisdictions is more flexible as they do not mandate the use of a specified form. See *Singapore Court Practice 2003* (LexisNexis, 2003) by Jeffrey Pinsler at 656 para 22A/1/4.

23 In this case, the Calderbank letter was not in Form 38A. A valid OTS in Form 38A dated 26 June 2002 was subsequently sent by the appellant to the respondent offering her the exact same amount in settlement as the Calderbank letter had. This OTS was formally withdrawn by the appellant in early July 2002. The second properly-constituted OTS served on the respondent on 15 July 2002 was for a smaller sum. The appellant's submission that the district judge had wrongly found the Calderbank letter to have been superseded by an OTS was made with respect to this second OTS. Since, however, the Calderbank letter was not an OTS, it had been terminated by the respondent's rejection of it and there was no question of it being superseded by the OTS of July 2002. There was also nothing in the notes of evidence at trial to suggest that the district judge had regarded the Calderbank letter as a valid OTS and that he had therefore (wrongly) taken the view that it had been superseded by the July OTS such that he was entitled to disregard it when making an order on costs.

24 Lai J referred to the explanation contained at para 22A/4/1 of *Singapore Court Procedure 2003* in concluding that the Calderbank letter here qualified as an OTS. That paragraph states that O 22A r 4 "imports the *Calderbank* letter mechanism which allows a party to *only* disclose the letters though marked 'without prejudice save as to costs' to the court to a limited extent in respect of the issue of costs, but in all other cases, the offers are privileged" [emphasis in original]. In our view, all this means is that an OTS under O 22A is a statutory form of a Calderbank letter. With due respect,

this paragraph does not mean that all Calderbank letters are, as such, valid offers to settle for the purposes of O 22A. That being the case, whilst the district judge could have had regard to the Calderbank letter when deciding the issue of costs, he was not obliged to do so. There was no fetter on the exercise of his discretion on costs. He was entitled to weigh up the circumstances and make such costs order as seemed appropriate to him in those circumstances. We are not saying here that a pre-writ Calderbank letter should never have an effect on costs. We do not want to discourage the practice of issuing such letters as they are a useful tool in the disposal of contentious matters. Our view is that if, despite the issue of such a letter, the matter nevertheless goes to litigation and the result is less favourable to the litigant than the Calderbank offer, that fact should be one of the factors taken into account in the exercise of the judge's discretion on costs. It need not, however, be the dominant factor. It will all depend on the circumstances of the particular case.

Appeal dismissed.