

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 163

HC/Suit No 1236 of 2015
(HC/Registrar's Appeal No 221 of 2016)

Between

Lim Seng Choon David

...Plaintiff/Appellant

And

1. Global Maritime Holdings Ltd
2. Global Maritime Consultancy Pte Ltd

...Defendants/Respondents

JUDGMENT

[Civil Procedure] – [Striking out]

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Lim Seng Choon David
v
Global Maritime Holdings Ltd and another

[2016] SGHC 163

High Court — Suit No 1236 of 2015 (Registrar's Appeal No 221 of 2016)
Choo Han Teck J
27 July 2016

22 August 2016

Judgment reserved

Choo Han Teck J:

1 This is an appeal by the plaintiff against the orders of the assistant registrar striking out his claim in Suit No 1236 of 2015 (“the present suit”). The first defendant is a company incorporated in the United Kingdom. The second defendant is a wholly owned subsidiary of the first defendant and is in the business of providing marine, offshore and engineering consultancy as well as maritime software consultancy. The plaintiff employed by the first defendant from 10 May 2004 to 24 November 2014 pursuant to an employment contract dated 15 March 2004. He worked mainly as the General Manager of the second defendant.

2 The plaintiff's claim in the present suit is for damages arising from the breach of an oral agreement made between the plaintiff and the defendants on 24 November 2014. According to the plaintiff, it was orally agreed between the plaintiff and Mr Gary Anthony Hogg, a director of the defendants that the

plaintiff would take an early retirement on agreed terms (“the oral agreement”). The plaintiff avers that it was due to the oral agreement that he accepted early retirement and voluntarily terminated his employment with the defendants on 24 November 2014. The plaintiff claims that the defendants have to-date failed, neglected and/or refused to perform their obligations under the oral agreement.

3 The present suit is the second suit brought by the plaintiff against the defendants. The plaintiff previously brought a claim against the defendants in Suit No 239 of 2015 (“the previous suit”) for breach of the employment contract. The previous suit was struck out by the assistant registrar on the basis that there was a defect in the pleadings. The assistant registrar held that the pleadings in the previous suit did not make out a case for the plaintiff because the oral agreement which the plaintiff was relying on had not been expressly pleaded notwithstanding an opportunity to do so. The assistant registrar also stated that even if the oral agreement had been pleaded, it was not possible for the plaintiff to plead both the oral agreement and the employment contract at the same time. Finally, the assistant registrar found that based on the evidence before her, no agreement had been reached. After the claim was struck out, the plaintiff filed for an extension of time to file the Notice of Appeal but this was withdrawn subsequently and the present suit was filed. There was hence no appeal against the assistant registrar’s decision to strike out the previous suit. The assistant registrar who struck out the previous suit heard and granted the defendants’ application for striking out in the present suit and was familiar with the plaintiff’s claim.

4 In the present suit, the defendants argued that the matters pleaded in the present suit were *res judicata* in the light of the previous suit. They argued that it was an abuse of process to allow the plaintiff to proceed in the present suit as it was a direct attack on the decision of the previous suit in which the assistant registrar found that there was no oral agreement reached between the parties as the plaintiff alleged. The defendants also argued that the plaintiff had the opportunity to amend his statement of claim and to appeal against the decision of the assistant registrar in the previous suit but he had opted not to do so. Finally, the defendants submitted that the plaintiff's claim was factually unsustainable. The plaintiff responded that issue estoppel did not arise as the present suit and the previous suit were different. He argued that the present suit was based on a breach of the oral agreement, which he claimed had not been pleaded in the previous suit as the previous suit was premised on a breach of the employment contract. To show this, the plaintiff relied on the finding of the assistant registrar in the previous suit that "an oral agreement was not expressly pleaded notwithstanding that the opportunity was given to amend". As a result of the lack of pleading, the plaintiff argued that the oral agreement was not an issue in the previous suit and consequently, issue estoppel did not apply even though it had been canvassed in submissions and considered in *obiter dicta* to some extent by the assistant registrar. He also argued that there was no abuse of process and his claim was factually sustainable in the light of what had been pleaded in the present suit.

5 The assistant registrar accepted the submissions of the defendants' counsel and struck out the present suit on the ground, generally, that it was factually, the same claim that the plaintiff brought in the previous suit against the same defendants. First, the assistant registrar held that issue estoppel

operated to prevent the plaintiff from pursuing the present suit. The assistant registrar held that the plaintiff's argument was overly technical and inconsistent with authorities such as *Lee Tat Development Pte Ltd v MCST Plan No 301* [2005] SLR(R) 157 ("Lee Tat") and *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 ("Nellie Goh"). Secondly, the assistant registrar held that the present suit was an abuse of process because the plaintiff had the ample opportunity to amend his pleadings in the previous suit while facing the striking out application but did not. Moreover, the assistant registrar found that the plaintiff ought to have appealed the decision to strike out the previous suit if he was dissatisfied with it but had elected not to do so.

6 On appeal before me, the plaintiff argued that:

- (a) Issue estoppel does not apply as the findings of the assistant registrar in relation to the oral agreement were collateral and not fundamental to the decision in the previous suit;
- (b) The plaintiff's decision to commence the present suit is not an abuse of process; and
- (c) The defendants have failed to satisfy the test for striking out.

7 In response, the defendants rely on the same arguments it raised before the assistant registrar. First, counsel submitted that the claim in the present suit is also based on the same alleged oral agreement averred to (but not pleaded) in the striking out proceedings in the previous suit. The matters in the present suit are therefore *res judicata*. Secondly, counsel also submitted that the present suit is an abuse of process and finally, that the plaintiff's claim on the oral agreement is factually unsustainable.

8 The four requirements for establishing an issue estoppel as set out by the Court of Appeal in *Lee Tat* at [14] – [15] are:

- (a) There needs to be a final and conclusive judgment on the merits;
- (b) The judgment has to be by a court of competent jurisdiction;
- (c) There has to be identity between the parties to the two actions that are being compared; and
- (d) There must be an identity of the subject matter in the two proceedings.

The plaintiff accepts that the first three requirements in *Lee Tat* are fulfilled in the present case but his counsel submitted that there is a lack of identity of subject matter between the previous suit and the present suit.

9 As stated in *Lee Tat*, the approach in determining if there is identity in the two proceedings is to first, ask what had been litigated and, secondly, what had been decided. For issue estoppel to arise, the decision on the issue must have been a “necessary step” to the decision or “a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision” (see *Lee Tat* at [15]). This requirement of identity of subject matter is further expounded on by Sundaresh Menon JC (as he then was) in *Nellie Goh* at [34] to [39] where he states that:

- (a) The prior decision must traverse the same ground as the subsequent proceeding and the facts and circumstances giving rise to

the earlier decision must not have changed or should be incapable of change

(b) The previous determination in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination; and

(c) The issue in question should be shown in fact to have been raised and argued.

10 What seems clear to me is that the pleadings in the previous suit were struck out because the oral agreement that the plaintiff relied on (to found his action) was not pleaded in the statement of claim. The assistant registrar's decision to strike out the claim stands independently on this basis and further comments by the assistant registrar with respect to the oral agreement is *obiter dicta* because they were contingent on a "generous reading" of the pleadings. While the plaintiff could have applied to amend his statement of claim, he did not. The finding that the plaintiff had not pleaded the oral agreement is not the same as a finding of fact that there was no oral agreement. Given that there was neither a trial nor a comprehensive hearing of the arguments relating to the oral agreement before the assistant registrar, the plaintiff is free to commence another action provided he is not time barred. It was not disputed before me that this present action was brought within the time limitation. I am therefore of the view that issue estoppel does not apply to the present suit.

11 The defence of abuse of process allows the court to prevent an action from proceeding even if the issues raised were never litigated or decided on before, but ought to have been raised in previous litigation. The basis for this

is the public interest in protecting the court's processes from abuse and protecting defendants from oppression (see *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 at [101] and *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 ("*Ching Mun Fong*") at [23]). This "power is to be exercised with caution before striking out or dismissing any proceedings on the ground of abuse of process" because it is a "drastic step": (see *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR(R) 644 ("*Kwa Ban Cheong*") at [29]). In applying the defence, a broad and non-formalistic approach has been adopted by the Singapore courts where the court looks at circumstances such as whether there is fresh evidence that might warrant re-litigation or whether there are *bona fide* reasons why a matter was not raised in the earlier proceedings.

12 In finding that there was an abuse of process, the assistant registrar took the view that any disagreement with her decision in the previous suit ought to have been a subject of an appeal. The plaintiff's failure to appeal made the bringing of the present suit an abuse of process. That is a little harsh in the circumstances. The *ratio* of the striking out in the previous suit was that the oral agreement had not been pleaded (see [11] above). Given that the plaintiff's case in the present suit was premised on the oral agreement, it is reasonable for the plaintiff to choose not to appeal the striking out of the previous suit. This is because such an appeal, on its own, without an application to amend his pleadings to expressly plead the oral agreement would not have enabled the plaintiff to overturn the striking out. Thus, the

plaintiff would have had to first successfully apply for an amendment of pleadings, to include the oral agreement, before the appeal could have been brought. On that basis, it was not incumbent on the plaintiff to appeal if he was dissatisfied with the decision and he is entitled to bring the present suit, *ie*, a fresh suit with proper pleadings. Lastly, while the present suit and the previous suit are premised on the same grounds, I find that there are some differences in the particulars of the pleadings in the present suit vis-à-vis the previous suit. Accordingly, I decline to find an abuse of process.

13 The final issue to deal with is the alternative ground that the defendants rely on for a striking out, *ie*, that the plaintiff's claim in respect of the present suit is factually unsustainable because the pleaded fact of the oral agreement is contradicted by the documents before the court. The defendants argue that:

- (a) The totality of contemporaneous emails between the parties show that no agreement had been reached;
- (b) The pleadings show no agreement reached; and
- (c) There was a concession by the plaintiff's former counsel that no agreement had been reached before the assistant registrar in the previous suit.

14 Counsel for plaintiff submitted that the defendants failed to satisfy the test for striking out. Counsel submitted that he had (a) pleaded every essential element of a known cause of action, (b) furnished sufficient particulars for the defendant to have reasonable notice of the case he has to meet and not thereby be embarrassed at trial and (c) pointed to proof for each element of his cause of action.

15 The threshold for striking out a claim on this basis is a high one and as long as the plaintiff has pleaded a reasonable cause of action, it should not be struck out. A reasonable cause of action means a cause of action with some chance of success when the allegations in the pleadings are considered. So long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The plaintiff's case here is based on the enforcement of the oral agreement. Although I accept that the email correspondence put forth by the defendants in their submission may suggest that an oral agreement in the totality of what the plaintiff claims may not be as easily proved, it is still possible for the plaintiff to succeed in showing that there was an oral agreement formed between the plaintiff and the defendants on 24 November 2014. Further, the details which the defendant claims are lacking from the pleadings may be pursued with an application for further and better particulars. Striking out the suit in its entirety is an inappropriate measure in response. Lastly, the plaintiff's counsel's concession, if any, would only be limited to the non-compete clause and does not extend to the oral agreement as a whole. I therefore do not think that the plaintiff's claim is factually unsustainable whether it will ultimately succeed is for the trial judge to determine.

16 In conclusion, neither issue estoppel nor abuse of process is relevant in this present application. It is a fresh action in which the claim is based on an oral agreement now pleaded where it previously was not. There is now a cause of action where previously there was none. The plaintiff could have appealed previously and amend his statement of claim, which might likely succeed, but he chose to let the bad pleadings be struck out and commenced anew. I think

he has a right to do so. Further, I do not find the plaintiff's claim to be factually unsustainable. For these reasons I allow the appeal with costs here and below to be costs in the cause.

- Sgd -
Choo Han Teck
Judge

Twang Kern Zern and Jamie Tan (Central Chambers Law Corporation) for the plaintiff/appellant;
Audrey Chiang and Nerissa Tan (Dentons Rodyk & Davidson LLP) for the defendants/respondents.
