

IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 9 OF 1999

BETWEEN

HANS BROCHIER GMBH & COMPANY

Appellant

AND

FATIMAHJAYA HOLDINGS SDN BHD

1st Respondent

FATIMAHJAYA CHEMICAL INDUSTRIES
CO.SDN.BHD.

2nd Respondent

Before : FUAD, P.; HUGGINS, J .A. AND SILKE, J.A..

Date of Hearing : 2 NOVEMBER, 1999.

Date of Reasons for Judgment : 4 NOVEMBER, 1999.

J U D G M E N T

FUAD, P.:

On 21 August 1999, Mr Commissioner Penlington, by a reserved judgment, made an order discharging an ex-parte injunction in favour of the plaintiff company which had restrained the two defendants from calling upon a Performance Bond issued by a German bank and an Advance Payment Guarantee issued by another German bank. The Commissioner declined to stay the effect of his decision pending appeal.

Before Mr Sawan opened his appeal, we indicated that it seemed to us that the Commissioner's order was an interlocutory one which required leave to appeal from the High Court, or from the Court of Appeal, by virtue of section 20(2)(f) of the Supreme

Court Act. Mr Sawan confirmed that no leave to appeal had been sought or given before the Notice of Appeal was filed on 21 September 1999, followed by a Petition of Appeal filed 4 days later but submitted that the Commissioner's order was not interlocutory because it was heard on an application inter partes. He went on to contend that even if the order was interlocutory, he could rely on O.56, r.2(1) of the Rules of Court which did not mention leave. The Rule is as follows:

“2(1) An appeal shall lie to the Court of Appeal from my judgment, order or decision by a judge.”

We have no doubt whatever that the order Mr Sawan seeks to challenge was interlocutory and that therefore leave to appeal was necessary. If there is any inconsistency between the requirements of section 20(2)(f) of the Supreme Court Act and O.56 r.2(1) of the Rules of Court then, in accordance with well settled authority, the statutory provisions will prevail.

Mr Sawan also relied on the fact that the question of the absence of leave to appeal (if such were necessary) had not been raised by the respondents. The failure to obtain necessary leave is not a mere matter of procedure which can be waived by the parties, or overlooked by the Court: it goes to the Court's jurisdiction. The Court is therefore bound to raise the question of its own motion (see para. 59/1/139 of the Supreme Court Practice, 1999). A valid Notice of Appeal cannot be served until leave to appeal has been granted (see para. 59/14/7 of the Supreme Court Practice). Therefore there is no properly constituted appeal before us that we can entertain.

Mr Sawan asked for an adjournment to enable him to file a Notice of Motion for leave to apply for leave to appeal out of time.

The principal issue in the proposed appeal was whether the Commissioner had erred in discharging the injunction granted ex parte by the Chief Justice. It seems to us that events which occurred after his Order have rendered the appeal on this issue academic. We are told that 2 days after the order was made, demands which until then

had been restrained by injunction, were made on both the Bond and the Guarantee. There was nothing improper in this because the Commissioner had declined to continue the injunction pending appeal. Even though the matters sought to be argued might be of great importance to the parties or generally, the Court will not entertain appeals which are academic (see for example Sun Life Assurance Co. of Canada v Jervis [1944] AC III Ainsbury v. Millington [1987] 1 WLR 376.)

Whatever remedies the plaintiff company may have against the defendants or anyone else, they can no longer pursue the remedy they sought before the Commissioner. The demands sought to be enjoined at the inter partes hearing having been made, the clock cannot be put back. Mr Sawan submitted that if this were so, he would ask for a declaration that the demands were wrongfully made. No such remedy was sought before the Commissioner and such an issue cannot be raised in these appellate proceedings.

Mr Sawan pointed to another matter raised by his Petition of Appeal which, he submitted, could not be said to be academic. The Petition averred that the Commissioner had erred in awarding the defendants consequential damages on the basis of 6.9 per cent interest on the amount they had had to borrow from a bank for the period the Chief Justice's injunction was in force.

The foundation for this challenge to the Commissioner's order appears to be that there was no evidence to justify a conclusion that the loan should "be treated as matters forming part of the parties' mutual obligations under the relevant contract and agreements"; the plaintiff bank had not been a party to the loan nor had they knowledge of it.

When considering whether or not to grant an adjournment in these circumstances, the Court will look at the possible merits of the proposed appeal. It seems clear to us that the basis of this ground of appeal is misconceived. The Commissioner's assessment of damages did not depend in any way on the points Mr Sawan seeks an opportunity to raise on behalf of the plaintiff company. The Commissioner was determining what would be a

fair recompense for the defendants for the damages they had suffered by the injunction to which the plaintiffs were not entitled. We decided that we should not grant the plaintiffs an adjournment to pursue a ground of appeal which had such little prospect of success.

It was for these reasons that we refused an adjournment and struck out the appeal as being incompetent, with costs to the defendants.

DATO SERI PADUKA KUTLU TEKIN FUAD
President, Court of Appeal

SIR ALAN HUGGINS
Judge, Court of Appeal

WILLIAM JAMES SILKE
Judge, Court of Appeal

Mr Christopher Sawan

for the Appellant

Miss Sue Ong and
Mr Damien Hale

for the Respondent