

CHIN WUI HENG

... **Appellant**

AND

YONG SOK GENERAL

... **Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 3 of 2015)**

Before: Mortimer P, Leonard and Burrell JJ A.
10th and 17th November 2015

Headnote: Appeal purely on fact – trite law that in order to succeed the appellant must demonstrate that the judge’s decision was plainly wrong. In this he failed and appeal dismissed. Cross appeal allowed for interest before judgment on the sum awarded.

Appellant in person

Ms. Geetha a/p V Janardhanan (M/S Abrahams, Davidson & Co) for the Respondent

Mortimer. P:

On 4 April 2015 Findlay J awarded the plaintiff/respondent (Yong Sok) \$259,458 and costs for the rental and repair of 2 bulldozers against the defendant/appellant (Chin) who now challenges that judgment by appealing to this court.

In his pleaded case Yong Sok claimed interest on the damages at the rate of 6%. The judgment is silent on this issue and Yong Sok cross appeals asking for an award of interest to which it says it is entitled.

The Appeal

The appeal is on fact alone and in order to succeed Chin must demonstrate that the judge’s findings of fact were plainly wrong on the evidence. Usually it must be shown that in reaching his decision the judge overlooked or ignored a material part of the evidence, or made findings in the absence of relevant evidence. This is trite law applied in numerous decisions of this court. When making findings of fact the judge below who sees and hears the witnesses and is able to consider the relevant documents and arguments in the light of this evidence has a massive advantage over an appellate court which simply examines the written record.

The Central Issue

The central issue before the judge was whether Yong Sok established on the evidence that it had sold and delivered the 2 bulldozers to Chin in July 2006. In his defence Chin contended that he did not purchase the bulldozers but that he arranged the sale of the bulldozers to Shrikanokporn Construction Company (the Thai company) on behalf of Yong Sok and throughout he dealt with the Thai company only on behalf of Yong Sok and not himself.

The conflicting accounts

The account given by each party of the transactions is complicated and it is necessary to set both out. The important background to these transactions is that Chin and the general manager of Yong Sok (Yong) were at the time close friends and had been since childhood. At the relevant time they trusted one another and were prepared to help one another in their business transactions which for this reason may have lacked formality.

Yong Sok's case was that the Thai company was Chin's customer and that Chin supplied a considerable amount of heavy equipment to the Thai company. The Thai company wanted bulldozers which Chin did not have but Yong Sok had 2 in stock. Chin brought the representative of the Thai company to Yong Sok's premises and in due course bought the bulldozers from Yong Sok and arranged the sale of them to the Thai company. On Chin's instructions the bulldozers were delivered by Yong Sok to the Thai company in July 2006. Chin invoiced the Thai company for the bulldozers together with other expensive equipment which he had supplied but the Thai company failed to pay.

In the circumstances Chin agreed with the Thai company to repossess the bulldozers but to charge rental for the time they used the bulldozers together with the cost of certain repairs which had been carried out by Yong Sok. Consequently the bulldozers were repossessed on the 3 March 2007 using transport provided by Yong Sok. Yong Sok agreed with Chin that Chin should repossess the bulldozers from the Thai company and return them to Yong Sok. Chin would charge the Thai company rental for the time they had used the equipment and Yong Sok would charge Chin a similar rental. In the action therefore Yong Sok claimed rental from Chin and additionally the cost of the repairs. Yong Sok gave Chin credit of \$9000 due for the hire of an excavator.

Yong's evidence was that he declined to deal with the Thai company because he had not dealt with it before and knew nothing about it whereas he trusted his then friend Chin.

Chin's case was that he did not purchase the bulldozers from Yong Sok but that the Thai company purchased them directly from Yong Sok and that throughout in his dealings with the Thai company concerning the 2 bulldozers he acted entirely on behalf of Yong Sok. The consequence was that Chin arranged the delivery of the bulldozers to the Thai company, he invoiced them as his own goods by agreement with Yong Sok and the representative of the Thai company. When the Thai company failed to pay he agreed to repossess and charge rental on behalf of Yong Sok.

The Judge's Findings

The judge had before him both oral and affidavit evidence from Chin, Kampon Rooppradit (Kampon) the local representative of the Thai company and Yong. Chin and Yong gave evidence in accordance with their contentions to which we have referred. Kampon gave evidence supporting Chin. The judge however was unable to determine the fundamental issue of fact between the parties from the oral evidence and he found it necessary to turn to the documents. The important documents were either contemporary with the transactions or came into existence before the dispute between these 2 parties.

Significantly the judge noted that there were no documents originating from Yong Sok or Chin which either evidenced or supported the sale of the 2 bulldozers by Yong Sok to Chin. There was no purchase order and no invoice. Similarly, there are no documents to support the sale of the bulldozers by Yong Sok to the Thai company. The judge had the absence of documentary evidence to support either sale well in mind.

The judge carefully considered the documents which support and evidence the sale of the 2 bulldozers by Chin to the Thai company. From Chin there is a pro forma invoice to the Thai company for 8 items of heavy equipment including the 2 bulldozers for the total sum of \$1,151,390 and a purchase order from the Thai company to Chin for the same items specifying the same price. It is to be noted in passing that Chin's evidence was that the bulldozers being sold by Yong Sok were included in this pro forma invoice and the purchase order at the request of the Thai company and with the agreement of Yong Sok so that the Thai company could issue just one letter of credit for all the items. The judge did not accept this explanation.

The judge had evidence that on 14 October 2006 the Thai company wrote to Chin saying that the 20% deposit specified in both the pro forma invoice and the purchase order would not be paid on time. Significantly this letter was not copied to Yong Sok the alleged vendor.

No payment was forthcoming and on 18 December 2006 Chin wrote to the Thai company saying that inter-alia the bulldozers would be repossessed and a rental charged at the same rate as was eventually claimed by Yong Sok in this action. There is little dispute that at this stage the Thai company, Yong Sok and Chin each agreed that the bulldozers should be repossessed, that they should be returned to Yong Sok and that rental should be charged. Consequently on 11 January 2007 the Thai company wrote to Chin cancelling the original purchase order of the 9 June 2006 again without any copy to Yong Sok the alleged vendor.

On 2 March 2007 Chin wrote to the Thai company informing it that the 2 bulldozers would be repossessed on 3 March. The claim for rental of the equipment was repeated and legal action threatened if payment was not made within one week.

On 3 March Yong Sok wrote to Chin charging Chin rental for the 2 bulldozers at the same rate together with a claim for the cost of repairs carried out by Yong Sok to the bulldozers at Chin's request when the bulldozers were in the possession of the Thai company.

On the 23 March 2007 Yong Sok wrote to Chin claiming the costs for the repairs of the bulldozers during the time that they were in the possession of the Thai company and on 26 March Yong Sok wrote again demanding the settlement of its demand for the rental and the cost of repairs amounting to \$259,458.00; the sum claimed in this action.

Although on 20 March Chin had invoiced Yong Sok for \$9000 for the hire of the excavator at no stage did he challenge the validity of Yong Sok's claims in the letters of the 3rd and 26th March which are the claims made in this action. Further, having not challenged the validity of Yong Sok's claims in June 2007 Chin then commenced and paid for an action against the Thai company for similar rental of the 2 bulldozers together with several smaller claims which even on his evidence must have been claims on his own behalf.

Nowhere in the pleadings of Chin's action against the Thai company is there any suggestion that the Thai company had purchased the bulldozers from Yong Sok. Indeed in paragraph 4

of the Thai company's defence it claims that it purchased the bulldozers from Chin and in paragraph 4 of Chin's reply he alleges that he agreed to sell and supply the Thai company with the 2 bulldozers for the price of \$374,420. These pleadings were in evidence before the judge although he made no reference to them in his judgment.

The judge carefully considered the powerful documentary support for Yong Sok's evidence that Chin sold the bulldozers to the Thai company and held that Chin had sold the bulldozers to the Thai company. Having satisfied himself that Chin had sold the goods to the Thai company he held that the only possible inference was that Chin had purchased them from Yong Sok.

On these grounds the judge held in favour of Yong Sok.

Chin's Case on Appeal

Chin appeared in person on this appeal but had the advantage of excellent and helpful written submissions which he tendered for our consideration.

In seeking to demonstrate that the judge's decision was plainly wrong on the evidence he contends that the judge overlooked some important features and failed to give sufficient weight to others. In particular he says that the judge did not give sufficient weight to the complete absence of any documentary evidence of a sale of the bulldozers by Yong Sok to himself. With this in mind he invites the court to consider the following:

1. The evidence of Kampon who at the time was the Thai company's local representative and apparently an independent witness who testified that Chin was only acting as a facilitator or agent in a sale of the bulldozers by Yong Sok. It is submitted that judge failed to give proper weight to his evidence
2. That Chin made no profit on the bulldozers. If he were selling these on his own behalf it was submitted that this would not make commercial sense and this indicates that he was acting for Yong Sok only.
3. The absence of any documentary support for a sale by Yong Sok to Chin
4. That Yong Sok only brought this action against Chin when it was known that Chin could not recover from the Thai company without taking proceedings.

Chin contends that the judge failed to fully consider and give weight to the above matters and that a consideration of them demonstrates that the judge's decision was plainly wrong and he ought to have held in Chin's favour.

Discussion

In reaching his conclusion the judge had well in mind that there was no documentary support for any sale by Yong Sok to Chin as well as an absence of such support for any sale by Yong Sok to the Thai company. He had in mind also that the absence of the usual documents was not fully explained by Yong's friendship with Chin as they were available in other transactions between them.

Similarly, the judge was only too well aware of Kampon's evidence both on affidavit and orally supporting Chin's case. No doubt the concern the judge had with this evidence is that although Kampon was the Thai company's representative in Brunei when Chin sued the

Thai company it conceded in the pleadings that initially it had purchased the bulldozers from Chin. Chin also claimed in his pleadings that he had sold the bulldozers to the Thai company.

We are not able to accept that Chin's appeal is assisted by the fact that Yong Sok did not sue him until it was known that he was driven to take action against the Thai company. If the dealings were as the judge accepted there would have been no reason for Yong Sok to assume that if Chin recovered from the Thai company Chin would not then pay Yong Sok without the necessity of proceedings.

The most significant point made by Chin on the appeal is that the judge failed to take account of the fact that if Chin purchased the goods from Yong Sok and then sold them on to the Thai company at the same price and that this made no commercial sense. This tended to support Chin's case that the goods were sold by Yong Sok to the Thai company and that throughout Chin was only acting on Yong Sok's behalf.

On the other hand it can be said that for Chin to act throughout in the way he did on Yong Sok's behalf even paying for and conducting an action on its behalf against the Thai company, this made no commercial sense either.

This latter point if made at all in front of the judge was made in a very subdued manner and no reference is made to it in the judgment.

The question for us however is that taking all these matters carefully into consideration whether they demonstrate that the judge's decision on the whole of the evidence was plainly wrong. When these matters are weighed against the consistent, clear and powerful support in the documents for a sale of the bulldozers by Chin to the Thai company they are not significant. Most of these matters the judge had well in mind and the point about the sale not making commercial sense is two edged.

Conclusion

Although the judge did not make reference to every document supporting his conclusion they were all before him and it was not necessary for him to do so. He was satisfied from the documents and other evidence that on a balance of probability Yong Sok's case was established. The documents demonstrate with powerful and persuasive consistency that Chin sold the bulldozers to the Thai company. He could only do this if first he purchased them from Yong Sok. There is no hint in any document that passed between Chin and the Thai company that the purchase had been from Yong Sok. On the contrary, the documents demonstrate that the bulldozers were sold by Chin. Also, when Yong Sok made claims for rental of the 2 bulldozers from Chin in March 2007 he remained silent and did not challenge the claims. For this he had no satisfactory explanation. Indeed his reaction was to commence proceedings against the Thai company for the rental and contend in his pleadings that he had sold the bulldozers to it; a contention with which the Thai company agreed in its pleadings.

Giving proper weight and consideration to Chin's contentions on the evidence they do not come near to establishing that the judge's decision on the facts was plainly wrong. In these circumstances this appeal must fail.

The cross-appeal

In its pleadings Yong Sok claimed interest on any damages it was awarded at the rate of 6% per annum. The judge made no reference to this claim in his judgment. He must have overlooked this claim because save in exceptional circumstances and for good reason a successful plaintiff is entitled to interest on money for the time he has been deprived of it.

Chin contends that interest on the damages should not be awarded prior to judgment because Yong Sok failed to pursue its claim in a timely manner. It was five and a half years between writ and judgment.

Interest is normally awarded to a successful plaintiff to compensate him for being kept out of his money for such period as he can justify before obtaining judgment. He is therefore normally entitled to interest at such a rate as would normally be available to him over the period and for such period as he can justify.

Here the plaintiff issued the writ on 6 October 2009 and the pleadings were complete by 7 December 2009. Thereafter the action was not heard until April 2015. We are aware that cases often are not heard in a timely manner in this jurisdiction but a plaintiff is generally able to control the progress of an action and five and a half years between writ and hearing is excessive.

We have no evidence of the rates of interest available in Brunei over this period but we are able to take judicial notice that worldwide the cost of money has been very low over this period.

In the circumstances we award interest at the rate of 3% on the judgment sum for the period of 3 years prior to judgment on the 4 April 2015. The resulting sum to be agreed between the parties and provided in the order of the court.

Order

1. Appeal dismissed with an order nisi for costs to be taxed if not agreed.
2. Cross-appeal allowed with an order nisi for costs to be taxed if not agreed.
3. The orders nisi for costs to be made absolute unless application is made to the court with notice to the other party on or before 4.00 pm Tuesday 24 November 2015.
4. Interest on the judgment sum at the rate of 3% per annum for 3 years prior to 4 April 2015 the date of the judgment.

Mortimer, P.

Leonard, J.A.

Burrell, J.A