

PONNUSAMY RAJAPANDIAN ... **Appellant**

AND

HAJI AWG MOHD HUSSAINI BIN PP HJ AWG AHMAD ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(ICCS No. 43 of 2015)

HAJI AWG MOHD HUSSAINI BIN PP HJ AWG AHMAD ... **Appellant**

AND

PONNUSAMY RAJAPANDIAN ... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 6 of 2015)

Before: Mortimer P, Leonard and Burrell JJ A.
21st November 2015

*Headnote: application for leave to appeal against refusal to order security for costs refused.
Interlocutory application – Satellite litigation – Reluctance of Court of Appeal to grant
leave in satellite litigation – Reasons considered.*

ICCS No. 43 of 2015

Ms. Wong Mew Sum (M/S Abrahams, Davidson & Co) for Appellant
Mr. Biji Kumar a/I Nadasan (M/S Zuls Partners Law Office) for Respondent

Civil Appeal No. 6 of 2015

Mr. Biji Kumar a/I Nadasan (M/S Zuls Partners Law Office) for Appellant
Ms. Wong Mew Sum (M/S Abrahams, Davidson & Co) for Respondent

Cases referred:

*Ak Abdul Rahman Rahimin bin Pg Mahali and another v Rizan bin Hj Hamid
[2008] BLR 198 at 200*

Morsima Sdn Bhd and Wong Yep Ming v Perbadanan Tabung Amanah Islam Brunei [2008] BLR 190 at 193 E
Birkett v James [1978] AC 297 at 317D – G per Lord Diplock

Mortimer. P:

Application for Leave to Appeal

On 17 November 2015 we refused the defendant’s application for leave to appeal against Intermediate Judge Abdullah Soefri’s refusal to order security for costs against the plaintiff and struck out the notice of appeal. We now give our reasons.

This is a personal injuries action. The plaintiff was employed by the defendant and claims for personal injuries sustained on the 23 March 2009 by writ and statement of claim dated 8 March 2012. The defence was filed on 7 February 2013. The plaintiff claims that he was injured when attempting to start his employer’s outboard motor boat engine. There are issues to be resolved at trial concerning whether the plaintiff was acting within the scope of his employment and relating to the facts of the accident itself.

The action was fixed for trial in July 2014 but was adjourned until December when the defendant’s then solicitors could no longer act. In December the action was further adjourned as the defendant’s new solicitor discharged himself. The defendant’s present solicitors were then instructed in January 2015 and immediately applied for an order for security for costs against the plaintiff for \$35,000. This application was dismissed by the registrar in April. The defendant appealed to the intermediate judge who again dismissed the application on 23 June 2015.

The defendant sought leave to appeal to this court.

An interlocutory application requiring leave to appeal

Ms Wong, who appears for the defendant, readily accepts that an application for security for costs is an interlocutory application and that no appeal lies to this court without leave to appeal granted by the court below or the Court of Appeal. See *Section 20 Supreme Court Act (Cap.5)*

The principles and approach to the granting of leave

Appeals in interlocutory matters are satellite litigation. In other words they are proceedings which do not dispose of the rights of the parties in the action. These proceedings may be necessary but nearly always delay the final hearing and resolution of the case. Unless there is good reason therefore the Court of Appeal is reluctant to give leave which may cause further delay. We considered this in *Ak Abdul Rahman Rahimin bin Pg Mahali and another v Rizan bin Hj Hamid [2008] BLR 198 at 200* when we said:

“Interlocutory applications and appeals are rightly described as “satellite” litigation. In other words, the hearing is not designed to decide the real issues between the parties,

only subsidiary ones. Whether justified or not, they cause delay in the final resolution of the dispute. Judges are recognised as being better, more experienced and more practical tribunals for dealing with appeals on ordinary interlocutory applications. Additional delay in an appeal to this court on such matters ought not to be entertained save where there is a serious point of principle involved or where a decision on the point would be of general advantage, not usually otherwise. There must always be some good reasons."

Later the same year in *Morsima Sdn Bhd and Wong Yep Ming v Perbadanan Tabung Amanah Islam Brunei [2008] BLR 190 at 193 E* we considered what are good reasons:

"In Lee Kuan Yew v Tang Liang Hong and Another [1997] 3 SLR 489 the Chief Justice of Singapore speaking for the Court of Appeal, said, after referring to some earlier Singapore decisions:

"Hence, from the cases, it is apparent that there are at least 3 limbs which can be relied upon when leave to appeal is sought: (1) prima facie case of error; (2) question of general principle decided for the first time: and (3) question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage."

Somewhat similarly, in Australia ordinarily 2 cumulative tests are applied. The first is whether the decision below is plainly wrong or, at least, attended with sufficient doubt as to warrant being reconsidered. And the second is whether, if that is so, substantial injustice would result if leave were refused. See, for example Niemann v Electronic Industries Ltd [1978] VR 431. However, the degree of doubt required for the first consideration may be less where the questioning involved is one of general importance; or where, unless leave were granted the decision of the court below would, in a practical sense, finally determine substantive rights. See, for example, ex parte Bucknell [1936] 56 CLR 221."

In summary, it is neither practical nor desirable to further define 'good reasons' as circumstances vary so greatly but leave will not normally be granted to appeal to this court in satellite litigation unless substantial injustice will result from refusing leave, or if the public interest will be served by having the matter decided by this court.

There is one further matter. When a judge below has properly exercised his discretion this court will not substitute its own discretion for that of the judge merely because this court may regard the balance as tipped against the way in which he decided the matter. See *Birkett v James [1978] AC 297 at 317D – G* per Lord Diplock.

The Application for Leave

As the plaintiff is ordinarily resident abroad the judge below correctly decided that he had jurisdiction to grant the defendant security for costs under Order 23 rule 1 (1) (a) of the RSC and that it was necessary for him to exercise his discretion whether, in all the circumstances of the case, it would be just so to do.

In the exercise of his discretion he refused to grant security on the grounds that an order would stifle the plaintiff's claim, that there is merit in the claim, that there are proper issues

to be decided at trial and finally that had been unwarranted delay in the defendant making this application.

Ms Wong Mew Sum, who appears for the defendant, contends that the judgment below was plainly erroneous and that justice requires the making of the order as the merits are with the defendant and if he succeeds he will not be able to recover his costs.

As to the merits of the claim Ms Wong sought to argue that at the time of his accident the plaintiff was acting outside the scope of his employment. The judge rightly held that this was an issue to be resolved at trial and not on this interlocutory application. Additionally, Ms Wong points out that the judge was in error when he said that the plaintiff had left the employment of the defendant at the end of his contract whereas he had left before the end of his contract. No doubt this submission is factually correct but it is quite irrelevant to the exercise of the judge's discretion and his decision.

The delay in making the application is obvious. The action was begun in March 2012 and the application was first made by letter in January 2015 after the trial of the action had been adjourned twice and the plaintiff had made full preparations for trial. Ms Wong asks the court to note that the application was made as soon as she received instructions but this does not in any way justify the delay it only shows that Ms Wong was not responsible for it.

Ms Wong also suggested that the order would not necessarily stifle the claim as the plaintiff could possibly raise funds to proceed in any event. She did not seek to challenge the judge's clear view that the plaintiff is impecunious. This was a matter the judge had well in mind in balancing the circumstances when exercising his discretion.

Finally Ms Wong contends that there is a general public interest in having this matter decided by the Court of Appeal in order to clarify on what principles judges ought to exercise their discretion. Again were quite unable to accept this submission. The general principles are clear. There is no issue of general public interest involved.

No valid adverse criticism can be made of the judge's decision which he reached having properly exercised his discretion.

For these reasons we dismissed the application and struck out the notice of appeal with costs.

Orders made:

1. Application for leave to appeal dismissed with costs to be taxed if not agreed.
2. Notice of appeal struck out.

Mortimer, P.

Leonard, J.A.

Burrell, J.A.