

Danny Chong Meng Chiang

... **Appellant**

AND

Encore Sdn Bhd

... **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 18 of 2007)

Power, P; Mortimer and Davies, JJ.A.

20th November, 2008.

Intervention by Court of Appeal in order to resolve difficulties arising out of a refusal to order stay of a judgment which, if executed, would have involved payment of moneys in about the same amount as is involved in the counterclaim.

Mr. David Teo Kiang Khong of Messrs. Ibrahim Chee Teo & Ho for the Appellant.

Mr. Sajeed Shah bin Abdullah @ Sarjeet Singh of Messrs. Sarjeet & Co. for the Respondent.

Power, P.:

This appeal seeks to challenge a decision of Madam Justice Hayati. The appellant, Mr Chong, (the defendant at trial) appealed to the judge against a decision of Senior Registrar Ramzidah granting a declaration and orders sought under an Originating Summons. Mr Chong held certain properties on trust for the benefit of the respondent, Encore, (the plaintiff at trial). The dispute arose out of Encore's dismissal of Mr Chong as a director in 2004. Encore by way of an Originating Summons sought orders for, inter alia, transfer of the trust properties to itself or an appointed nominee and an account of all money received by Mr Chong by way of rent and other monies derived from the properties. This summons was heard by the Senior Registrar and on 13th March 2006 she granted the orders sought. There has never been any contention that Mr Chong was not trustee of the property. Indeed by the time the matter came before this court the properties had been, or were in the process of being, transferred to the Encore. There was, as the judge found, never any dispute in this regard. Mr Chong, however, argued before Hayati J that the properties should not be transferred until a new trustee was named and the appointment of that trustee was sanctioned by the court. Hayati J in her judgment delivered on 25th October 2007 was satisfied that this submission presented no barrier to the making of the order sought.

She held, rightly in our view:

“I agree with the defendant that any order for the transfer to the plaintiff or any new trustee must be sanctioned by the company and the court. Indeed, the Land Code provides the procedures for rectification of the land register and the plaintiff will no doubt be asked to comply with whatever procedures necessary such as a court order. Otherwise, I see no valid reason not to grant such declaration and orders sought by the plaintiff subject to plaintiff’s compliance with the necessary requirements by the competent authorities, in particular, the Land Department.”

Mr Chong, however, further argued there were “many disputes” which would be raised in his counter-claim involving fees and payment for work he had done for the Encore and damages for unlawful removal as a director and trustee. He claimed that he was owed more than \$200,000 which Encore was refusing to pay him.

Hayati J was satisfied:

“The issues raised in the counter-claim may arguably be relevant for any claim that the defendant may take separately against the plaintiff. The defendant surely deserve something. But, they bear no relevance to the declaration and orders sought by the plaintiff pursuant to the defendant’s duties as trustee. There is absolutely no defence as far as the reliefs sought by the plaintiff in this OS are concerned. O15 r2(1) cited by the defendant has no relevance here. The issue in an application by way of OS are the type of reliefs sought and whether the alleged ‘disputes of fact’ is relevant to the relief sought by the plaintiff. I do not think they are. In fact I find it very necessary that these declaration and orders should be made, such as for a proper account by the defendant as trustee, in order to clear the respective position of both parties and hopefully lead to an amicable solution to the other separate issues of disputes which had been sadly allowed to linger over many years.”

Again we are satisfied that she was clearly right in so holding. She ordered, inter-alia:

“iii) An Order that the Defendant do render a full and proper account of all rental income and monies derived from the said lands and received by the Defendant on behalf of and in trust for the Plaintiffs as the Beneficiaries thereof.”

It seems that, pursuant to the order of Hayati J on 14th August 2008 Encore went before Hairolarni J seeking an order that Mr Chong be committed for failure to comply with that order.

On 22nd August 2008 the appellant applied to Hairolarni J for a stay of execution of the order of Hayati J. pending this appeal. Somewhat surprisingly, given the indication by Hayati J that “the defendant surely deserve something” that application was refused.

On 28th October 2008 the parties again appeared in front of Hairolarni J who was told that the transfer of the properties was proceeding and that the accounts were being drawn up. Hairolarni J ordered that the accounts be drawn up within one week and adjourned the matter to 6th November. On that day the court was informed that Mr Chong's taking of accounts was completed and that he admitted to the sum of \$223,406.95.

The record of hearing shows the following exchange:

Mr Sarjeet : "Apply for judgment subject to verification and adjustment"

Court : "Order in term and to pay forthwith."

The matter was adjourned to 25th November 2008.

The matter first came before this Court on Wednesday 12th November. It was then adjourned to allow the parties to obtain the order made on 6th November.

On 13th November the decision of the Hairolarni J was embodied in an order issued under the hand of the Chief Registrar which stated that pursuant to the order of Hayati J made of 11th February 2008 Mr Chong was ordered to pay Encore \$223,406.93. It also gave liberty to apply in the event that further or additional amounts of accrued rentals were found due and payable to Encore. This does not correctly set out the order of the judge as it does not implement the application of Mr Sarjeet which the judge ordered in terms.

However that may be the hearing before this Court resumed on 17th November.

After further argument from Mr Teo the Court was satisfied that there was no merit in his appeal, that the order of Hayati J was properly granted on the facts before her and, further, that the judgment had, as far as the appellant was concerned, been fully executed.

The Court was satisfied, also, that the real issue left was the appellant's counterclaim and invited Mr Teo to make an application to stay execution of the judgment of Hairolarni J pending determination of the counterclaim. In due course he agreed to make that application.

The Court then asked Mr Sarjeet what he would have to say if the Court was prepared to abridge times as necessary and allow the application. When so doing the Court indicated that if any stay was granted it would be on stringent terms as to the diligent pursuit of the counterclaim and would be granted in the first instance only until the first day of the May hearings of this Court when the progress of the counterclaim would be reviewed and the Court would rule whether the stay should remain in force. The Court indicated further that it would direct the Chief Registrar that the matter should be given an early date of hearing.

Mr Sarjeet resisted the application citing a failure to comply with O.57 r.16(4) which states that except in special circumstances an application shall not be made in the first

instance to the Court of Appeal. He submitted that there was no special circumstance and that the application should be refused. He submitted further that O.57 r.16(1) requires that every application to the Court of Appeal must be by way of motion and that there had also been a failure to comply with this rule.

We are satisfied that the disarray in which this matter presently stands together with the fact that it is now before this court do constitute a special circumstance and that a just resolution of the differences between the parties makes it proper for us to waive non-compliance with the rules and to abridge times as necessary.

We grant the application for a stay of the order of Hairolarni J on condition the appellant diligently pursue his counterclaim. The stay will be in force until the first day of hearing of this Court in the May Session 2009. The Chief Registrar is directed to give this matter an early date of hearing.

We order that the appellant file a writ and statement of claim within 14 days of 30 November 2008. The respondent is to file his defence thereto within 14 days thereafter. Any reply thereto is to be filed within 14 days. At the expiration of 14 days, thereafter, the appellant is to fix an appointment for the parties to appear before Registrar Hazarena or such other Registrar as she may direct. The Registrar at that hearing is to deal with any consequential application and to set the matter down for hearing on the earliest available date on the court calendar.

We order that all cost in this matter be reserved to this Court.

Power, P

Mortimer, J.A.

Davies, J.A.