Hjh Sauyah Bte Hj Kamis … **Appellant**

AND

Maimunah Bte Abdul Ghani … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 7 of 2008)

Power, P; Mortimer and Davies, JJ.A.
13th November, 2008.

Failure by defence to make disclosure of videotape evidence until well into trial. Ambush tactics. Costs to be borne by defendant.

Mrs. Naz Parveen Rashid of Messrs. Sandhu & Co. for the Appellant.
Ms. Susanna Lim of Messrs. Susanna Lim Partnership for the Respondent.

Cases cited in the Judgment:

Guiness v Kellog Co. [1988] 1 WLR 913.
Khan (Avrangzeb) v Armaguard Ltd [1994] WLR 1204.
Rizan v Rahman Rahini Civil Suit No. 17 of 2005.
Scherer v Counting Instruments Ltd [1986] 2 AIIER 529 at 532.

Power, P.:

The appellant in this matter was the plaintiff in a claim for damages arising out of a road accident which occurred on 19th September 2000. The Notice of Assessment of Damages was fixed for hearing before the Registrar Norismayanti on 14th to 17th November 2005 liability having been admitted. The hearing proceeded on 3 days, 14th, 15th and 16th November, during which time the appellant called 9 witnesses including expert medical witnesses one of when was from overseas.

On 17th November the respondent was given permission to interpose her medical expert while the appellant's case was ongoing. At this point the respondent also sought to introduce video evidence which had been filmed using a hidden camera by 2 of the respondent's insurers posing as customers. This was the first time the appellant had been made aware of this evidence which had been in the possession of the respondent for more than 10 months prior to the hearing. Astonishingly, none of the appellant's witnesses,

including the medical ones, had been cross-examined on it. It was an attempted ‘ambush’ of the worst hind.

The appellant, taken by surprise, objected to the admission of the evidence and submitted that if leave was given to adduce it the appellant should be allowed to recall her expert witnesses. The respondent now had to seek the court’s indulgence to introduce the video evidence. She conceded that if leave was given allowing it to be tendered the appellant should be given leave to recall her expert witnesses. After a hearing (“the interlocutory application”) that extended over several days on 4th January 2006 the Registrar allowed the video evidence and gave leave to the appellant to recall her medical experts.

The hearing of the assessment took 19 days over a period of one year. On 26th April 2007 the Registrar gave judgment, with costs, to the appellant allowing all of the appellant’s claims and rejecting the respondent’s contention of exaggeration which was based on the video evidence.

The hearing on the costs of the interlocutory application was adjourned to 26th May 2007. This hearing took 3½ days and on 12 June 2007 the appellant was ordered to pay the respondent’s costs of the application.

This order was the subject of an appeal to Commissioner Barnett who on 28th February 2008 ruled:

> *“In my judgment, this was not a matter to be decided upon technical points of pleading or discovery even if these had been available to the plaintiff which they were not. The video evidence was just that, evidence, and it is trite that you do not plead evidence. Discovery is not available in cases involving accidents on land. It was necessary for the registrar to look at the bigger picture and determine whether, in all the circumstances of the case, the evidence should be admitted. The registrar rejected the plaintiff’s objection. It was then for the registrar to determine whether the circumstances, including the defendant’s conduct, required a departure from the usual order that costs should follow the event so that the defendant should pay the costs of the failed objection.*
>
> *The defendant’s conduct undoubtedly brought about the unhappy situation which arose. The defendant has rightly had to bear the costs of the consequences thereof. However, having heard Ms Lim’s explanation for the way in which the case was conducted, I am unable to characterize that as such misconduct that, taken with all the other circumstances, the defendant deserved to pay the costs.*
>
> *Accordingly I dismiss the plaintiff’s appeal. I make an order nisi that the defendant should have the costs of the appeal, those costs to be taxed if not agreed.”*

Throughout Mrs Naz Parveen has appeared for the appellant and Ms Susanna Lim has appeared for the respondent.

In his reasons Commissioner Barnett stated

> *"For the defendant, Ms Lim explained that there had been no ulterior motive behind the late disclosure. She said that she had been uncertain as to how to deal with the video evidence so she had researched Brunei Law but found no authority on the topic. She admitted that she had not researched cases in England or other jurisdictions. She conceded that there had been authority that video evidence should normally be disclosed at the earliest opportunity, either because it can have the effect of considerably shortening the proceedings; or because it affords the plaintiff an opportunity to deal with it. She also pointed out that in some cases, for example, where the plaintiff's conduct borders on the fraudulent, it is not inappropriate to produce the evidence only at trial."*

The Commissioner pointed out that on 19th December 2007, 6 months after the hearing in the present case, Hayati J. when dealing with a similar failure to disclose video evidence which she described as an "ambush tactic" firmly and quite properly ruled that: *"The video recordings, however, should have been disclosed to the other side, at the earliest possible stage."* (*Rizan v Rahman Rahini* Civil Suit No. 17 of 2005).

Although she did not refer thereto her ruling is fully supported by the decisions in *Guiness v Kellog Co.* [1988] 1 WLR 913 and *Khan (Avrangzeb) v Armaguard Ltd* [1994] WLR 1204.

We can dispose at the outset Ms. Lim's reliance upon O.24 r 2(2) which states:

> *"(2) Unless the Court otherwise orders, a defendant to an action arising out of an accident on lad due to a collision or apprehended collision involving a vehicle shall not make discovery of any documents to the plaintiff under paragraph (1)."*

This rule in so way relieves a party from the duty to make full disclosure before trial of the evidence upon which he seeks to rely. He can, if it is a videotape, comply with the requirement that he discover his evidence either by sending a copy of the tape to the other side or by alerting the other side to its existence so that an application can be made to the court under O. 24 r. 2(2) for it to decide whether the tape should be released. Ms. Lim was plainly wrong to interpret that order as she did and there is no merit in her plea that there was no authority on this situation in Brunei. There was clearly ample authority in other jurisdictions. Further it is no more than commonsense that both fairness and the due process of litigation require full disclosure.

We are further not persuaded by Ms Lim's argument that the appellant was wrongly challenging the admission of the videotape on the basis that it was irrelevant and not upon the correct basis that it would be unfair to allow the videotape to be used at that stage of the trial. We see no merit in this argument. Mrs Parveen was clearly contending that it would be unfair to allow the videotape to be used. This was a perfectly proper stance to take.

It is true that from the outset Ms. Lim conceded that if she was allowed to use the videotape the plaintiff should be given leave to recall his witnesses. This, however, in so way detracts from the strong case which the appellant had for asking that the videotape be excluded.

We turn now to the decision of Commissioner Barnett. He awarded the respondents the costs of the interlocutory application because *"having heard Ms Lim's explanation for the way in which the case was conducted, I am unable to characterize that as such misconduct that, taken with all the other circumstances, the defendant deserved to pay the costs."*

We can only interfere with the Commissioner's order *"if on a true view of the facts the judge has either not exercised his discretion at all or has exercised it otherwise than judicially"* (Buckly J in *Scherer v Counting Instruments Ltd* [1986] 2 ALLER 529 at 532).

The Commissioner had the following two matters to consider:
(1) The conduct of Ms Lim
(2) The effect of the conduct on the trial.

As to (1) the Commissioner appeared to take the view that the award of costs rested upon the subjective, indeed, almost sympathetic, view which he took of Ms Lim's conduct: This approach was wholly misconceived. The correct approach, we are satisfied, would have been to judge Ms Lim's conduct objectively in accordance with the standards expected of a legal practitioner in the conduct of a trial. It is no excuse for a practitioner to say, as Ms Lim did, that she misread the rules and that she carried out inadequate research.

Properly assessed such conduct tell, we are satisfied, far short of the standard expected of a legal practitioner.

As to (2) it is true that the Commissioner said it was necessary *"to look at the bigger picture and to determine whether in all the circumstances of the case the evidence should be admitted."* He then went on to say, *"The defendant's (Ms Lim's) conduct undoubtedly brought about the situation which arose."* He went on to say that *"I am unable to characterize that as such misconduct that, taken with all the other circumstances, the defendant deserved to pay the costs."* Had the Commissioner correctly characterized the conduct under (1) above he could not have come to that conclusion. Ms Lim's conduct derailed the trial forcing her to seek the indulgence of the Court. The trial was derailed not by Mrs Parveen's quite proper objection but by the ambush tactics of Ms Lim. It was we are satisfied clearly misconduct that warranted an order that the defendant pay the costs of the interlocutory application.

The Commissioner failed to exercise his discretion judicially. The appeal must be allowed. The respondent is order to pay the costs of the interlocutory application to be

taxed if not agreed. We make an order nisi that the respondent pay the costs of this appeal to be made absolute at 10 a.m. on Thursday 20th November unless application be made.

Power, P

Mortimer, J.A. **Davies, J.A.**