

SHEIKH ABUL

AND

**KWANSOO (B) SDN BHD
DAELIM INDUSTRIAL CO. LTD**

**(Intermediate Court of Brunei Darussalam)
(Civil Suit No.19 of 2020)**

Appeal against Registrar's Order

Dk Hjh Norismayanti binti Pg Hj Ismail, Judge.

10th April 2023

Civil Law – Appeal - Discontinuance under Order 21 rule 2(6) of the Supreme Court Rules – Dismissal of Plaintiff's application for reinstatement – Order 21 rule 2(10) of the Supreme Court Rules - exceptional circumstances for reinstatement – effect of Covid-19.

Robin Cheok and Iman Hanisah binti Dato Hisham (M/S Cheok) for Plaintiff/Appellant.
Wafa Hamizah binti Mohamad (M/S Ridzlan & Co.) for 2nd Defendant/Respondent.

Cases cited in Judgment:

Bannister v SGB pls [1997] 4 All ER 129

Moguntia-EST Epices S.A v Sea-Hawk Freight Pte Ltd [2003] SGHC 231

Malayan Banking Berhad v Maxwell Co Sdn Bhd & anor (HCCS No.107 of 2005)

Suparni v Metrobina & Sekuntum Zahrah Sdn Bhd & Tiong Yin Kay (HCCS No.23 of 2018)

Tan Kim Seng v Ibrahim Victor Adam [2003] SGCA 49

JUDGMENT

Dk Hajah Norismayanti, Judge:

1. This is the Plaintiff's appeal against the decision of the learned Registrar's on the 3rd September 2022 in allowing the 2nd Defendant's application for the Plaintiff's action to be deemed discontinued, and dismissing the Plaintiff's application for reinstatement.

Outline of the cause of action

2. This is a personal injury suit initiated by the Plaintiff who was a common labourer working for and under the instructions of the 1st Defendant. The Plaintiff sustained physical injuries and suffering as a result of a work site accident on the 23rd September 2018 during the course of doing work at CC3 Temburong Bridge, a project that was awarded to the 2nd Defendant.
3. The Plaintiff filed the suit on the 19th February 2020 and the 1st and 2nd Defendant both entered appearances on the 13th August 2020 and 3rd September 2020 respectively. This

was then followed by the 1st Defendant's Defence filed on the 10th September 2020 and the 2nd Defendant's Defence filed on the 23rd September 2020. Thereafter parties went through the process of automatic discovery.

Application before the Registrar

4. The 2nd Defendant filed a summons in chamber (no.20 of 2022) on the 18th February 2022 seeking the court's order for this suit to be deemed discontinued under Order 21 rule 2(6) of the Supreme Court Rules and the Plaintiff filed a summons in chamber (no.43 of 2022) for leave to reinstate the Plaintiff's action under Order 21 rule 2(10) of the Supreme Court Rules if deemed auto discontinued. The court reiterates that the Registrar hearing the applications granted the 2nd Defendant's application and dismissed the Plaintiff's application for reinstatement of the cause of action.

Relevant rules on discontinuance

5. The pertinent rules on discontinuance and reinstatement of an action before the court is found under the Supreme Court (Amendment) Rules 2017 which amended Order 21 of the Rules of the Supreme Court (RSC) by adding 6 more paragraphs to rule 2. For the purposes of the appeal, the court refers to the following rules under Order 21:

Rule 2(6): *"Subject to paragraph (7), if no party to an action or cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (8)), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have discontinued."*

Rule 2(10): *"Where an action, cause or matter has been discontinued under paragraph (5) or (6), the Court may, on application, reinstate the action, cause or matter and allow it to proceed on such terms as it thinks just."*

Appeal against the Registrar's order granting the 2nd Defendant's application for the Plaintiff's action to be deemed discontinued.

6. Summons no.20 of 2022 was filed by the 2nd Defendant seeking the court's order for the matter ICCS No.19 of 2020 be deemed discontinued under Order 21 rule 2(6) of the RSC. Upon rehearing of this application on appeal, Mr Cheok acknowledges that there was automatic discontinuance on the basis that there were no steps taken in the court's record over a period of 12 months and acknowledges their failure to apply for an extension of time. Based on the facts before the court concerning the inactivity or absence of steps taken by the Plaintiff in this action from the 17th December 2020 to 16th December 2021 as well as the provision under Order 21 rule 2(6) [referred above], this court upholds the Registrar's decision for this action to be deemed discontinued.

Appeal against the Registrar's Order refusing to grant the Plaintiff's application for reinstatement of the cause of action.

7. Summons no.43 of 2022 deals with the Plaintiff's application to reinstate the action under Order 21 rule 2(10) of the Supreme Court Rules if deemed discontinued. In addressing this appeal, the court refers to established principles and guidelines on cases involving discontinuance and reinstatement and they are briefly summarized as follows:

Principles and guidelines – case authorities

a) *Bannister v SGB pls* [1997] 4 All ER 129

In Saville LJ's judgment in the *Bannister* case, his lordship set out guidelines to be taken into consideration by the court on the proper method of dealing with the consequences of automatic discontinuance and automatic directions. The summary of the guidelines are as follows:

- (i) *has the Plaintiff satisfied the court that (apart from his failure to request a date for the trial) he is innocent of any significant failure to conduct the case with expedition between the trigger date and the guillotine date, having regards to the particular features of the case? If he has not, then the reinstatement should be refused;*
- (ii) *has the Plaintiff satisfied the court that in all circumstances his failure to apply for a date is excusable, ie should be forgiven? If he has not, then again reinstatement should be refused;*
- (iii) *has the Plaintiff satisfied the court that the balance of justice indicates that the action should be reinstated? If not then once again reinstatement should be refused.*

b) *Moguntia-EST Epices S.A v Sea-Hawk Freight Pte Ltd* [2003] SGHC 231

In the *Moguntia* case, Judith Prakash J was of the view that the guidelines set out in the *Bannister* case above can be applied in an application for reinstatement under Order 21 except that the first requirement must be modified. The modification relates to the court's consideration of the trigger date and guillotine date. Prakash J held that the trigger date is "*the date of the last step taken in the action as it appears in the court records (and this may be a step taken by the Plaintiff or Defendant) and the guillotine date is the day before the anniversary of trigger date.*" As such, there is no way for the Plaintiff to satisfy the court that he is innocent of any significant failure to conduct the case with expedition between the trigger date and the guillotine date as required under the first guideline set out in the *Bannister* case. Prakash J then reformulated the guidelines as follows:

- (i) *Has the Plaintiff satisfied the court that he is innocent of any significant failure to conduct the case with expedition prior to the trigger date having regard to the particulars of the case? If he has not, then the reinstatement should be refused;*
- (ii) *Has he satisfied the court that in all circumstances his failure to apply to take any step in the action since the trigger date (and this would include his failure to apply*

- for an extension of time) is excusable, ie should be forgiven? If he has not, then again reinstatement should be refused;*
- (iii) *Has the Plaintiff satisfied the court that the balance of justice indicates that the action should be reinstated? If not once again reinstatement should be refused.*

c) *Malayan Banking Berhad v Maxwell Co Sdn Bhd & Tank Kok Voon @ Chen Yu Soo*
(HCCS No.107 of 2005)

The court is also referred to the case *Malayan Banking Berhad* where Judicial Commissioner Kannan Ramesh heard an appeal against a Senior Registrar's decision to dismiss the Defendant's application to reinstate the 1st Defendant's counterclaim and to set aside the order granting the Plaintiff leave to issue execution proceedings. In addressing the issues for determination, Ramesh JC referred to the guidelines set out in the *Moguntia* case (referred above) which remains the operative guideline and test used in Singapore for cases involving auto discontinuance. In short, the case held that the said test is applicable in Brunei despite noting that there is a difference in the law where Singapore does not have an equivalent provision of Brunei's Order 21 rule 2(11) of the Rules of Supreme Court (RSC) which prohibits the filing of new court proceedings for an action, cause or matter which have been discontinued under Order 21 rule 2 (5) and (6) of the RSC.

8. The court will now proceed to consider the present appeal following the test to be applied as set out in the *Moguntia* case and applied in the Brunei's *Malayan Banking* case (referred above):

- (i) *Has the Plaintiff satisfied the court that he is innocent of any significant failure to conduct the case with expedition prior to the trigger date having regard to the particulars of the case?*

Based on the court's record, the date of the last step taken in the action relevant to this appeal would be the 17th December 2020 (filing of the 2nd Defendant's Bundle of Documents and thereafter there is no record of any steps taken until the 16th February 2022 when the Plaintiff's Bundle of Documents and setting down documents were filed). In respect of this part of the requirement, the court will look into the Plaintiff's conduct of the case prior to the 17th December 2020.

The Plaintiff's Writ and Statement of Claim was filed on the 27th February 2020. Between the filing of the Writ and the trigger date mentioned above, a period short of 10 months had passed. Within the said period of 10 months, the court is satisfied that by virtue of the explanation given in Mr Cheok's affidavit affirmed on the 20th April 2022, the Plaintiff is innocent of any significant failure to conduct the case expedition prior to the trigger date. Pleadings were closed upon filing of the 2nd Defendant's Defense on the 23rd September 2020. Thereafter, parties were subject to automatic directions under Order 25 rule 8 of the RSC.

During this period, Mr Cheok affirmed that there were ongoing correspondences with the 1st Defendant to settle the matter. The court refers to the case of *Tan Kim Seng v Ibrahim Victor Adam* [2003] SGCA 49 where Chao Hick Tin JA stated at paragraph 20 of the judgment “*The rationale behind O 21 is the maintenance of an efficient judicial system which requires less policing, with the imposition of drastic consequences for tardy litigants.*” In the present case, the court does not find that the Plaintiff is a tardy litigant as there were active negotiations taking place with the 1st Defendant even though the 2nd Defendant chose not to engage in the discussions. The court therefore finds that there is no significant failure by the Plaintiff to conduct the case with expedition and therefore succeeds under the first test.

(ii) *Has he satisfied the court that in all circumstances his failure to apply to take any step in the action since the trigger date (and this would include his failure to apply for an extension of time) is excusable, i.e. should be forgiven?*

Under the 2nd test, the period relevant to the court for consideration is from the 17th December 2020 (trigger date) to the 15th February 2022 (a day before the Plaintiff filed the List of Documents, about two months after the guillotine date). The main reason advanced by Mr Cheok in his supplementary affidavit dated 22nd November 2022 concerns Mr Cheok’s law firm which faced severe adverse impacts resulting from Covid-19 pandemic. The counsel contends that the pandemic badly affected the operations of their firm as there were too many “*things to juggle*” with insufficient staff manning the office at the time. It is further asserted that his law firm had no issues with automatic discontinuance prior to the pandemic and it was only after the Covid-19 pandemic hit Brunei that his law firm had a total of 12 files that were affected by automatic discontinuance.

Further to the above, the Plaintiff counsel refers to Judith Prakash J’s view in the *Moguntia* case that applications for reinstatement of a cause of action deemed to have been discontinued should be “*an exception rather than the rule*”. It is the Plaintiff’s position that the Senior Registrar erred in not finding that Covid-19 as an exceptional circumstance where the resulting delay from the circumstances is excusable under this heading.

With regards to the contention on Covid-19 being the main factor causing the delay or the Plaintiff’s failure to apply for an extension, the court is referred to the case of *Suparni v Metrobina & Sekuntum Zahrah Sdn Bhd & Tiong Yin Kay* (HCCS No.23 of 2018) which is an appeal against a Senior Registrar’s decision who dismissed the Third Party’s application to reinstate the action against the Fourth Party where the action had been deemed discontinued. The Third Party was also represented by M/S Cheok Advocates & Solicitors and the arguments raised in the *Suparni* case on the effects of Covid-19 is similarly submitted in the present case. Mr Cheok emphasized how the pandemic affected the lives of his office staff who were worried not just for themselves but also their family and not forgetting that the situation became more serious when the second wave of the pandemic hit Brunei sometime in August 2021 which is within the 12-month period of

inaction by the Plaintiff in the present case under Order 21 rule 2(6). Because of the situation then, it is claimed that the firm was unable to monitor all matters handled by them efficiently leading to a number of cases being overlooked and be deemed automatically discontinued.

The Plaintiff also refers to Media Statements (MS) released by the Ministry of Health issued a few months before the guillotine date to reflect the start of the 2nd wave of the pandemic. The MS released on the 7th August 2021 reported 5 new Covid-19 cases which made the total for Brunei cases to 347. The MS released on the 1st September 2021 reported a total of 146 new cases bringing the country's total to 2,858. On the 1st October 2021, the MS reported 210 new cases making a total of 7,326. By November and December 2021, the number of total cases recorded in Brunei increased to 14,514 and 15,372 respectively. Although the increase in the number of infections is not significantly high in comparison to other countries but it nevertheless does not lessen the seriousness of the pandemic in Brunei itself. To ensure that the spread of the virus is controlled, the Prime Minister's Office set in place movement control measures as well as directions to activate Business Continuity Plans for both the government and private sector. Based on these media releases, it is evident that towards the last quarter of the 12 months of inactivity by the Plaintiff, Brunei was experiencing an influx of Covid-19 cases and the court understands how the changes especially on the effects to the running of the workplace with some staff working from office and some working from home would affect the running of an office such as M/S Cheok.

In addition, to further support the effect of Covid-19 to be considered as an exceptional circumstance and any delay should be excusable, reference is made to a Practice Direction issued by the Chief Justice of Malaysia as well as in exceptions made in Canada in respect of delay in criminal proceedings. The same submission was also made to the Honourable Edward Timothy Starbuck Woolley JC in the case of *Suparni* (referred above) which also dealt with an appeal against a Senior Registrar's decision to dismiss the Third Party's application to reinstate the Fourth Party action. Justice Woolley gave the following views at paragraph 13 of his judgment:

"Other jurisdictions have recognized the effect of the Covid pandemic on legal proceeding, and Mr Cheok has drawn my attention to a ruling in Canada which held that a delay in criminal proceedings due to the pandemic was unforeseen and unavoidable and should be disregarded. In Malaysia a moratorium was given in judicial proceedings. In the same way I do not believe that it can be ignored here and some leeway must be given to parties whose cases before the courts are affected by it."

This court forms the same view as the Honourable Woolley, JC. The court cannot dismiss the fact that Covid-19 did have a substantial effect on the lives of Bruneians not just at home but also at large and in the workplace either in the government or private sector particularly during the second wave of the pandemic which saw a significant rise in the number of infections within a short period of time. This led to the government taking steps to prevent and reduce the spread of the virus. The impact of Covid-19 is no different

to the running of law firms. The court believes that some flexibility should be given to M/S Cheok which due to lack of manpower in the office to properly monitor cases on a full-time basis had overlooked several matters resulting in cases to be deemed discontinued, 12 personal injury cases in total.

Despite the lack of monitoring of cases, Mr Cheok affirms that there were ongoing settlement negotiations with the 1st Defendant and therefore the Plaintiff's case was still active at the time concerned despite not taking any steps in the court's record. Ms Iman for the 2nd Defendant contends that any negotiations that took place was only between the Plaintiff and the 1st Defendant and that the action against the 2nd Defendant should be deemed discontinued and not be reinstated. On the other hand, Mr Cheok affirms that it was the 2nd Defendant that refused to engage in negotiations but it did not however halt the Plaintiff's negotiations and narrowing of issues with the 1st Defendant.

Based on what the firm experienced during the period of inactivity in court including the 2 months delay after the guillotine date before taking a step in the proceedings, the court accepts the impact of Covid-19 during the said period as an exceptional circumstance and any delay caused as a result of it is excusable in the present case. The 2nd test is therefore satisfied.

(iii) *Has the Plaintiff satisfied the court that the balance of justice indicates that the action should be reinstated? If not, once again reinstatement should be refused.*

Having found that the predicament faced by the firm was only faced by the firm during the pandemic and is not a typical occurrence in the firm, the court finds that on the balance of justice, the action should be reinstated. The court also cannot disregard the number of times the Plaintiff and the 1st Defendant tried to settle the matter which is evident through the correspondences between the said parties as well as a meeting between Mr Cheok and Ms Wong Mew Sum on the 5th May 2021 to try a resolve personal injury matters handled by both firms. This supports the fact that the present case was an active matter between parties other than the 2nd Defendant. At the said meeting, Mr Cheok informed Ms Wong that the firm was still waiting for a medical report on the Plaintiff's muscle grip which as it turns out was not an easy feat.

The Plaintiff himself in Dhaka, Bangladesh and the situation in Dhaka is no less serious in respect of the Covid-19 pandemic occurring there. The court was referred to newspaper articles on lockdowns as well as restrictions in operational capacity in Bangladesh at the time and this hindered the Plaintiff from getting his x-rays done. Despite the ongoing negotiations with the 1st Defendant, the Plaintiff set the matter down for trial in February 2022. Eventually the firm received the x-rays in April 2022. The court finds that there was a genuine attempt to resolve the matter and due to the exceptional circumstances faced by the firm, the provisions on automatic discontinuance under Order 21 rule 2 of the amended rules were overlooked. The court reiterates that the balance of justice indicates that the action should be reinstated. Any prejudice caused to the 2nd Defendant resulting from the reinstatement will be addressed by discounting any accruing interest on potential damages.

Judgment

9. Having succeeded on all 3 tests mentioned above, the court will allow the Plaintiff's appeal against the Registrar's decision and order that the Plaintiff's action be reinstated under Order 21 rule 2(10) of the RSC and for the validity of the Plaintiff's action be extended for a period of 12 months from the date of this order. Cost of the appeal and the application below is to be paid to the Plaintiff, to be taxed if not agreed.
10. The court further orders that any interest applicable for damages for the duration of 2 months and 1 day from the 16th December 2021 to 16th February 2022 be discounted.

DK HJH NORISMAYANTI PG HJ ISMAIL
Judge, Intermediate Court