KERAJAAN NEGERI SELANGOR v. SYARIKAT BEKALAN AIR SELANGOR SDN BHD; KERAJAAN MALAYSIA (THIRD PARTY)

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
LIM YEE LAN JCA
ROHANA YUSUF J
[CIVIL APPEAL NO: W-01(IM)(NCC)-284-06-2012]
8 OCTOBER 2012

CIVIL PROCEDURE: *Amendment - Statement of claim - Whether amendment should be allowed - Whether amendment changes character of suit - Application to amend statement of claim close to trial date - Whether prejudicial*

CONTRACT: *Construction - Construction of terms of contract - Intention of parties - Agreed tariff in contract - Whether amendment of tariff in statement of claim contradicted agreed tariff in contract - Whether duty of court to re-write agreement to interpret intention of parties*

Held:

Allowing appellant's appeal with costs RM10,000.

Annotation:

(1) The first respondent's application to amend the statement of claim should not have been allowed. The amendment would change the character and scope of the first respondent's claim. In the proposed amendment the first respondent is seeking for declaration that the agreed tariff was RM1.89/m3. This ran counter to the position taken that it was entitled under cl. 11.3(4) of the concession agreement for the sum originally claimed by reason of the application of the prescribed formula. Without an agreed tariff, the compensation could not be said to be due. The agreed tariff (as the name suggests) must be determined by agreement of the parties to the concession agreement, and to ask for a declaration of the court to that effect (without an agreement of the parties) is actually

changing the scope and character of the claim in the statement of claim.

Legislation referred to:

Rules of the High Court 1980, O. 20 r. 5

For the appellant - Malik Imtiaz Sarwar (Fahda Nur Ahmad Kamar & Ain Farhana Mohd Hamid with him); M/s Fahda Nur & Yusmadi

For the 1st respondent - Dato Harpal Singh Grewal (Lua Ai Siew & Fadzilah Pilus with him); M/s Soo Thien Ming & Nashrah

For the 2nd respondent - Radhi Abas (Habibah Harun with him); SFC

[Editor's note: For the High Court judgment, please see Syarikat Bekalan Air Selangor Sdn Bhd v. Kerajaan Negeri Selangor [2013] 1 LNS 962]

JUDGMENT

Ramly Ali JCA:

[1] The present appeal is against the decision of the learned High Court Judge dated 29 May 2012 allowing the first respondent's application to amend its statement of claim.

Factual Background

[2] The first respondent (the plaintiff at the court below) filed an action against the appellant (the defendant at the court below) on 7 September 2011 for compensation pursuant to cl. 11.3(4) of a tri-partite concession agreement between the first respondent, the Federal Government (the third party) and the appellant.

[3] Originally, the prayers in the first respondent's statement of claim were as follows:

(i) a declaration that upon a true construction of the concession agreement dated 15 December 2004, there is a sum of RM1,054,208,382 due and owing from the

defendant to the plaintiff for the period from 1 January 2009 to 31 March 2011;

(ii) that the defendant to pay the said sum of RM1,054,208,382 to the plaintiff forthwith upon making of this order;

(iii) costs of this action be paid by the defendant to the plaintiff in any event; and

(iv) such further or other relief or remedy as this Honourable Court shall deem just.

[4] The claim for the first respondent's compensation was made pursuant to cl. 11.3(4) of the concession agreement. It is a specific provision relating to the process of tariff adjustment that is to be undertaken in relation to compensation to be paid to the first respondent in the event of a failure on the part of the appellant and/or the Federal Government to take steps prescribed under cl. 11.3.

[5] The sum claimed by the first respondent in its original statement of claim is based on the agreed tariff of RM1.89/m3, based on the review documents submitted by the first respondent to the appellant and the Federal Government (the third party) dated 31 March 2008. The appellant takes the position that there was no agreed tariff (agreed by the parties).

[6] The third party, for the purpose of tariff adjustment had issued the auditor general certificate for the first respondent's adjustment of water tariff to RM1.82/m3; and the third party by a letter dated 21 May 2009 had recommended to the appellant an increase of water tariff to RM1.80/m3.

[7] In view of the above, the first respondent filed an application dated 14 May 2012 under O. 20 r. 5 of the Rules of the High Court 1980 to amend the statement of claim as follows:

WHEREFORE, the 1st Respondent prays for the following Order:

(i) a declaration that upon a true construction of the Concession Agreement dated 15 December 2004, there is a sum of RM1,054,208,382.00 due and owing from the Defendant to the Plaintiff for the period from 1 January 2009 to 31 March 2011;

(ii) that the Defendant do pay the said sum of RM1,054,208,382.00 to the Plaintiff forthwith upon making of this Order;

(iii) costs of this action be paid by the Defendant to the Plaintiff in any event; and

(iv) such further or other relief or remedy as this Honourable Court shall deem just.

[8] The proposed amendment which was allowed by the High Court was only to para. 29 of the statement of claim, the paragraph setting out the prayers. There was no amendment sought to the body of the pleading in the statement of claim. In its proposed amendment, the first respondent sought for a declaration that the agreed tariff was RM1.89/m3. It further sought an alternative prayer for the agreed tariff under the concession agreement for the period 1 January 2009 to 31 March 2011 be determined by the court and judgment be entered for the first respondent against the appellant for the sum assessed by the court based on the agreed tariff so determined by the court. The first respondent also incorporated a new prayer for interest at the rate of 4% per annum on the sum so determined.

[9] The appellant opposed the application. Among other things the appellant contended that the proposed amendment would change the character of the suit - from one squarely based on cl. 11.3(4) and the review documents submitted by the first respondent to one of a more general and ambiguous nature in which the court would be called on to establish the amount due to the first respondent. Thus, it would involve the court in a process not contemplated by the parties under cl. 11.3(4) of the concession agreement.

Our Findings

[10] We agree with the appellant on this issue. The amendment would change the character and scope of the first respondent's claim. In the proposed amendment the first respondent is seeking for declaration that the agreed tariff was RM1.89/m3. This ran counter to the position taken that it was entitled under cl. 11.3(4) of the concession agreement for the sum originally claimed by reason of the application of the prescribed formula. Without an agreed tariff, the compensation could not be said to be due. The agreed tariff (as the name suggests) must be determined by agreement of the parties to the concession agreement, and to ask for a declaration of the court to that effect (without an agreement of the parties) is actually changing the scope and character of the claim in the statement of claim.

[11] The alternative prayer to request the court to determine the agreed tariff under the concession agreement for the period 1 January 2009 to 31 March 2011 is totally a new scope and character to be incorporated in the statement of claim. This was a departure from its pleaded case in which the first respondent contended that it was entitled to a specific sum by reason of the agreed formula. This prayer now introduces a new dimension either of general damages or *quantum meruit*.

[12] The intention of the parties in the concession agreement (particularly in cl. 11) is very clear and unambiguous, ie, that the adjustment of water tariff must be mutually agreed between the appellant and the first respondent. On that understanding it is referred to as "agreed tariff" throughout the agreement. To get the court to decide and determine the said "agreed tariff" (when there is no agreed tariff actually agreed by the parties) is totally inappropriate in the circumstances of the case. It is as if the court is being asked to rewrite the agreement for the parties. That should not be the task of the court in the construing of any agreement between parties.

[13] The proposed amendment was only to para. 29 of the statement of claim, ie, the paragraph setting out the prayers in the statement of claim. No amendment was sought to the main body of the pleading. The appellant is clearly prejudiced. The appellant is now compelled to meet a case radically different from the one it was

first called upon to meet. As such the pleaded case of the first respondent went in one direction (based on the specific provisions of cl. 11.3) whereas the prayers invited the court for a determination of facts in a different direction. This will pose difficulties in the preparation for trial by the appellant - particularly in preparing for its defence if the amendment is allowed by the court. This is a case where the respondent has been granted leave to pursue remedies which stand on a very different footing. The claim was originally one confined to a narrow premise; its scope has now been extensively widened by the amendment. The nature of the proposed amendments and the impact it has on the issues at trial cannot be ignored.

[14] Prior to the present suit, the first respondent had filed an originating summons (D-24-NCC-388-2010) for the same subject matter against the appellant on 10 November 2010. Then the appellant applied successfully to have the OS converted into a writ on 28 February 2011. The case was then managed and later the first respondent withdrew the said case, on or about 28 June 2011. The first respondent then filed the current suit on 8 September 2011. The trial was scheduled for 29 May 2012 and on 14 May 2012. The first respondent filed the present application for the amendment of the statement of claim, at the time when the parties were finalising their documents, agreed facts and issues to be tried. The first respondent sought to justify the application on the basis that the third party (the Federal Government) had by a letter dated 21 May 2009 recommended to the appellant an increase of the water tariff to RM1.80/m3.

[15] The timeline shows that the said letter dated 21 May 2009 from the Federal Government was already available long before the present suit was filed. It was available even before the earlier suit was filed (which was later withdrawn by the first respondent). The first respondent was aware of the said letter during the currency of the earlier OS. The first respondent had been put on notice of the matters it relied on to justify the amendment even prior to the filing of the suit. However, it elected to cast its claim on the basis it did in the original unamended statement of claim. Apparently the first respondent was not even sure of what to do and what to claim from

the appellant. It was not certain as to the nature and scope of its claim against the appellant.

Conclusion

[16] On the above considerations, we are of the view that the first respondent's application to amend the statement of claim, as in the present case, should not have been allowed by the learned High Court Judge. It has a prejudicial effect on the appellant, particularly when it was made so close to the trial date. We therefore allow the appeal with costs of RM10,000 to the appellant (to be paid by respondent – Syarikat Bekalan Air Selangor Sdn Bhd). Decision of the learned High Court Judge is set aside. We also make an order that the deposit be refunded to the appellant.