Jumabhoy Rafiq v Scotts Investments (Singapore) Pte Ltd
[2004] SGCA 48

Case Number : CA 15/2004

Decision Date : 06 October 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Lai Siu Chiu J; Yong Pung How CJ

Counsel Name(s) : Tan Bar Tien and Winston Quek Seng Soon (B T Tan and Co) for appellant; Harish Kumar and Linda Ong (Engelin Teh Practice LLC) for respondent

Parties : Jumabhoy Rafiq — Scotts Investments (Singapore) Pte Ltd

Civil Procedure – Costs – Appellant director of respondent company – Respondent conceding liability for expenses properly incurred by appellant – Trial judge ordering Registrar to conduct inquiry as to expenses incurred by appellant – Whether trial judge correct in awarding costs of proceedings to respondent

Companies – Directors – Remuneration – Appellant director of respondent company – Respondent passing resolutions and issuing indemnities purporting to indemnify appellant for costs and expenses incurred – Whether such agreements amounting to undertaking to remunerate appellant on time-costs basis

Contract – Implied contracts – Quantum meruit – Appellant director of respondent company – Respondent's articles of association specifically providing for appellant's remuneration – Whether appellant nevertheless entitled to remuneration on quantum meruit basis

Words and Phrases – Meaning of "indemnify for ... costs and expenses" – Whether covering appellant's remuneration

6 October 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal by a director of a company against a decision of the High Court refusing his claim for remuneration: see *Scotts Investments (Singapore) Pte Ltd v Jumabhoy Ameerali* [2004] SGHC 20. We heard the appeal on 25 August 2004 and dismissed it with costs. We now give our reasons.

The background

2 The respondent, Scotts Investment (Singapore) Pte Ltd ("SIS"), a company then under compulsory liquidation, instituted Suit No 736 of 2002, against, *inter alia*, the appellant, Rafiq Jumabhoy ("RJ"), for breaches of duty as a director of SIS. The other two defendants to the action were Ameerali R Jumabhoy, the father of RJ, and Iqbal Jumabhoy, the brother of RJ. In turn, RJ counterclaimed for remuneration amounting to some $916,275 allegedly due to him from SIS, as well as for the reimbursement of expenses totalling $164,034.68, which RJ asserted that he had incurred on account of SIS. Eventually, the claim of SIS against RJ and the other two defendants was discontinued. What remained was the counterclaim of RJ.

3 The counterclaim was in respect of work done and services rendered by RJ to SIS as well as expenses incurred by him on account of SIS pursuant to three resolutions passed by the board of SIS, *ie,* the resolutions of 27 July 1996, 6 August 1996 and 18 June 1997, and the written indemnities dated 30 June 1997 and 9 October 1997 given by SIS to RJ.

4 SIS was incorporated in May 1991 to hold the Jumabhoy family's stake in Scotts Holding Ltd, a public listed company. One of SIS's main subsidiaries was Lion City Holdings Pte Ltd ("LCH"). Besides the persons already mentioned above, the other members of the Jumabhoy family which we ought to identify for this case are Yusuf Jumabhoy ("YJ") and Mustafa Jumabhoy ("MJ"), who are the brothers of ARJ and uncles of RJ; and Assad Jumabhoy ("AJ"), a brother of RJ.

5 By the mid-1990s, the members of the Jumabhoy family, including grandfather Rajabali Jumabhoy, were involved in protracted legal proceedings brought about by a certain financial crisis in SIS. Banks which had granted facilities to SIS became alarmed. The members of the Jumabhoy family were concerned that the banks might act against SIS.

6 It was during that period that the resolutions were passed by the board of SIS empowering YJ and RJ to carry out certain acts on behalf of the company. YJ and RJ were expected to deal with the banks, which RJ did. We would observe that in undertaking the tasks, RJ would also be protecting his own interest in SIS. As the counterclaim of RJ rested entirely on the resolutions passed and the indemnities given, it is necessary that we set out the material parts of those documents in extenso:

27 July 1996 resolution

IT WAS RESOLVED THAT without prejudice to their respective rights and the right of the other plaintiffs and/or defendants [*sic*] under the various suits which have been filed and further reserving the rights of some of the Company directors challenging the legality of the investment in LCH and the guarantees provided to LCH by the Company pursuant to Article 112 of the Articles of Association of the Company Mr Yusuf Jumabhoy and Mr Rafiq Jumabhoy be appointed from among the directors of the Company *to review the Company's investment in LCH to determine the steps (if any) to be taken by the Company to safeguard the Company's investment in LCH and all amounts owing to the Company or guaranteed by Company for the debts of LCH* and to exercise all the powers of the Board in connection therewith and all things incidental thereto including without limitation:

(a) deciding all questions, taking all steps required and approving all matters to give effect to such steps as they may agree to take vis-à-vis LCH pursuant to their review;

(b) obtaining such reports or other data as they may deem necessary to assist them in their review and in determining the steps to be taken vis-à-vis LCH;

(c) *instructing M/s Rajah & Tann as solicitors for the Company,* and any other professional advisers (including auditors) or any third party on all matters relating to LCH and to settle the terms of their appointment; and

(d) exercising all discretion and doing all acts and things necessary or expedient to give effect to all matters referred to in this resolution.

and the Company shall *indemnify* Mr Yusuf Jumabhoy and Mr Rafiq Jumabhoy *for all costs and expenses* incurred by them (or each of them) personally in respect of their appointment.

That M/s Rajah & Tann be appointed as the Company's solicitors to act for the Company in relation to all matters regarding LCH …

[emphasis added]

[The 6 August 1996 resolution was in all material respects similar to that dated 27 July 1996 except that this related to SIS's investment in SHL.]

18 June 1997 resolution

IT WAS RESOLVED that in consideration for *his taking action for the recovery of the assets of the company*, Mr Rafiq Jumabhoy *be fully indemnified for all costs and expenses incurred and against all legal liability* as far as permitted by law with regards to LCH, *its subsidiaries and associates* and in the pursuit of any action to be taken on behalf of SIS/LCH *as advised by the company's solicitors*. [emphasis added]

30 June 1997 indemnity

In consideration of your agreeing to reasonably assist (at the cost and expense of the relevant company and/or ourselves) (1) in the recovery of the assets of SIS, Lion City Holdings Pte Ltd (LCH) and/or its subsidiaries and associated companies, and including, without limitation, Scotts Weitnauer Retailing Pte Ltd, Cost Plus Pte Ltd, Connoisseurs (Private) Limited, Landberg Holdings Pte Ltd and Richberg Holdings Pte Ltd ("LCH Group") (2) the prosecution of any claim which any company of the LCH Group may have and/or (3) any reasonable action in connection with the affairs of any company of the LCH Group *as may be advised by the company's solicitors, we agree to indemnify you and keep you indemnified at all times,* to the extent permitted by law, out of our assets against all costs and expenses and liabilities incurred or suffered by you in connection with any of the foregoing, until such time as this indemnity is revoked in writing. [emphasis added]

9 October 1997 indemnity

In consideration of having agreed to our request to undertake such duties as Nominee Director of *Rosebury Holdings Limited*, a New Zealand incorporated Company, we … will *indemnify* you, and keep you indemnified against all claims, demands, and payments for which you may in the course of or arising out of such service render yourself liable and against all actions, suits, proceedings, claims, demands, costs, expenses and all other liabilities whatsoever, which may be taken or made against you in the course of arising out of such service. [emphasis added]

7 We would add that the appellant also relied on some prior correspondence with YJ to show the setting in which the resolutions were adopted. Apparently, being concerned that he would have to spend some time on the affairs of SIS, on 14 May 1996, while he was in South America, RJ wrote to YJ and raised the question of his remuneration. In this letter, RJ offered his services to SIS and asked for a fixed monthly pay of $25,000. YJ did not reply. RJ claimed that YJ agreed to the proposal contained in the letter. RJ said that YJ had assured him that YJ would procure SIS board resolutions to ensure that RJ would obtain payment for his time spent and expenses incurred. However, this was refuted by YJ who told the court that the proposal in the letter was, to quote him, "nonsense". In this regard we should perhaps mention that a letter dated 18 May 1996 from RJ to YJ was also produced to court wherein RJ referred to a conversation he had with Mr Andrew Smith, an investment consultant of SIS, where he told Mr Smith that he (RJ) was still awaiting a reply to his letter of 14 May 1996.

The decision below

8 It would be noted that the basis of RJ's claim was not for a fixed monthly sum, as claimed in the letter of 14 May 1996, but on a time-costs basis. While the judge was clearly aware that the

dictionary meaning of "costs" could cover time costs in a "wide, literary and even economic sense", he found that the words "costs and expenses" in the first two resolutions meant that the directors would be covered for all out-of-pocket expenses, but not a director's remuneration which had to be specifically approved by the board. Neither was a director entitled to remuneration based on *quantum meruit*. In this regard, he relied on the case of *In re Richmond Gate Property Co Ltd* [1965] 1 WLR 335 ("*Re Richmond Gate*").

9 The trial judge accepted YJ's evidence that YJ did not agree to RJ's proposal in the letter of 14 May 1996. Neither did the judge accept RJ's arguments that the board had, by virtue of the resolutions, agreed to pay RJ a remuneration for his time spent in the affairs of SIS. The judge also held that as the appellant had contended that the words "costs and expenses" were intended by members of the board to cover remuneration as well, then the appellant should have adduced evidence from the directors who partook in the deliberations on the resolutions to substantiate the appellant's claim that those words were intended to have a wider sense. No such evidence was forthcoming.

The arguments of the appellant

10 Before us the main argument advanced by RJ was the same as that canvassed in the court below, namely, that the company by its resolutions agreeing to indemnify "Mr Yusuf Jumabhoy and Mr Rafiq Jumabhoy for all costs and expenses incurred by them (or each of them) personally in respect of their appointment", had thereby agreed to pay RJ for his time costs. The time costs were no less costs incurred by RJ and they should be reimbursed by the company.

11 RJ maintained that the resolutions be viewed against the backdrop that, on 14 May 1996, RJ had written to YJ asking for a fixed sum remuneration and there had been no response thereto. He submitted that the resolutions were thus the collective response of the board to his request for remuneration in respect of the time which he would spend in relation to the affairs of the company.

12 Counsel for RJ also pointed out that the judge was wrong to have thought that because SIS was in financial difficulties the company could not have agreed to pay a director for the time he had so spent. Neither did it matter that the board of SIS did not discuss a great deal over the resolutions.

Our views

13 We agreed with the submission of RJ's counsel that the crucial question was whether one could say, looking at the resolutions and the indemnities, that there was an agreement to pay RJ for the time he spent in the affairs of the company, *ie*, his time costs. We also agreed with the words of his counsel that "if there is an agreement, there is an agreement" even though the company might be in financial difficulties or, in passing the resolutions, there did not appear to be a great deal of discussions on them.

14 It is trite law that in construing the meaning or scope of a document the subjective intention of the individual party is irrelevant. As the learned authors of *Chitty on Contracts* (Sweet & Maxwell, 29th Ed, 2004), state at para 12-043:

> The task of ascertaining the intention of the parties must be approached objectively: the question is not what one or other of the parties meant or understood by the words used, but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" [*Investors Compensation Scheme Ltd v West*

Bromwich Building Society [1998] 1 WLR 896 at 912]. The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought *in the document itself*. "One must consider the meaning of the words used, not what one may guess to be the intention of the parties" [*Smith v Lucas* (1881) 18 Ch D 531 at 542]. However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. In the modern law, the courts will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man. [emphasis in original]

15 The words that lay at the centre of this dispute were "indemnify for … costs and expenses". It seemed to us clear and, here we agreed with the judge, that in the context of the resolutions, "costs and expenses" could not cover the remuneration of the two directors whom the board had authorised to act on behalf of the company. That expression should be limited to liabilities and expenses that would be incurred by the two directors in carrying out the tasks assigned to them, whether already paid by them or yet to be paid.

16 In several places in the Appellant's Case, the point was made that the burden of disproving RJ's case lay on SIS. This would be correct only if RJ had shown that he was *prima facie*, on the basis of the resolutions, entitled to remuneration for the time he spent on the affairs of the company. This was where the appellant failed. As the judge astutely observed, [1] *supra*, at [6]:

> Dictionary meanings of common words are always helpful, but when a document is being challenged in court as to what the words in it mean, the general and wide ambit of dictionary meanings can be misleading, instead of enlightening.

17 Clearly, it would not be good enough to point out that one of the meanings of a word is either this or that. Very often, a word will, according to the dictionary, have a spectrum of meanings. It is the context which will determine what is the correct meaning to give to a word in a document. Here, we thought the following observations of P O Lawrence J in *Mills v Cannon Brewery Co, Ltd* [1920] 2 Ch 38 at 44–45 were directly on point:

> One of the main objects of every dictionary of the English language is to give an adequate and comprehensive definition of every word contained in it, which involves setting forth all the different meanings which can properly be given to the particular word. The Court, on the other hand, in determining what is the true meaning of a particular word used in an instrument which it has to construe, has to ascertain in what sense the parties to that instrument have used the word: all the help the Court can derive from dictionaries in such a case is, in case of doubt, to ascertain that the meaning which it comes to the conclusion ought to be attributed to the word is one which may properly be given to it.

18 Another equally poignant remark was made by Lord Hoffmann in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 775:

> The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning but also … to understand a speaker's meaning, often without ambiguity, when he has used the wrong words.

19 Thus, the context or the background against which certain words are used are germane to determining their meaning. It seemed to us that it was in this regard that the judge below referred to the financial position of the company, as well as the lack of discussion, to show that the members of the board could not have intended to adopt the broadest literal sense of the word "costs" and to give RJ a blank cheque to fix his own time rate. Be that as it may, we would emphasise here that the words "all costs and expenses" were preceded by the word "indemnify". Thus, the word "costs" could only mean an item or items of debt which the two directors were liable to pay to others and which costs they had incurred in carrying out the tasks assigned to them. To label a claim for remuneration by a director as a "cost" incurred by him, was, in our view, contrived.

20 Moreover, we think we were fortified in this view that the word "costs" could not be construed to cover remuneration of a director as that construction would be inconsistent with the articles of association of the company. For this purpose, two articles were most germane:

> **Article 77**
>
> The Directors other than a Managing Director shall be paid out of the funds of the Company remuneration for their services *at such rate as the Company in General Meeting may* from time to time *determine* and such remuneration shall be divided among them in such proportions and manner as the Directors may determine and in default of such determination within the year equally. [emphasis added]
>
> **Article 80**
>
> Each Director shall be paid all his travelling, hotel and other expenses properly incurred by him … and *if any Director being willing shall be called upon to perform extra services* … for any of the purposes of the Company *the Company shall remunerate the Director so doing by a fixed sum of money to be determined by the Directors* and such remuneration may be either in addition to or in substitution for his or their share in the remuneration above provided. [emphasis added]

21 From Art 77, it will be noted that the rate of remuneration to be paid to a director, other than a managing director, required the approval of a general meeting. As for Art 80, which seemed to complement Art 77, it provided that where a director was willing to perform extra services, the board would fix the sum which the company would pay the directors for the extra services. The claim of RJ satisfied neither of these requirements. It was not for a fixed sum and neither was the time rate which he claimed approved by a general meeting. In fact, he did not aver that he had indicated any time rate to the board.

22 For the above reasons, the claim for remuneration on the basis of the resolutions and the indemnities must fail.

Quantum Meruit

23 We now turn to consider RJ's claim for remuneration based on *quantum meruit*. In the light of the contents of the resolutions, there could be no doubt that the board of SIS had requested RJ to undertake the tasks.

24 In *Re Richmond Gate* ([8] *supra*), a case relied on by the judge, Plowman J held that where there were express terms in the articles of association for the payment of remuneration to a managing director, there was no room for a claim in *quantum meruit*.

25 The ruling in *Re Richmond Gate* was upheld in the later case of *Guinness Plc v Saunders* [1990] 2 AC 663, where the appellant had received money from the respondent company in return for work on a take-over bid whilst he was a director of a company. The House of Lords ordered the appellant to return the money because no resolution had been passed authorising the payment as required by the articles of association. The House also rejected the appellant's claim in *quantum meruit* because such payment to directors had to be in accordance with the articles. Lord Templeman explained the position at 689 and 692:

> … [T]he short answer to a quantum meruit claim based on an implied contract by Guinness to pay reasonable remuneration for services rendered is that there can be no contract by Guinness to pay special remuneration for the services of a director unless that contract is entered into by the board pursuant to article 91. The short answer to the claim for an equitable allowance is theequitable principle which forbids a trustee to make a profit out of his trust unless the trust instrument, in this case the articles of association of Guinness, so provides. The law cannot and equity will not amend the articles of Guinness. The court is not entitled to usurp the functions conferred on the board by the articles.
>
> …
>
> Equity forbids a trustee to make a profit out of his trust. The articles of association of Guinness relax the strict rule of equity to the extent of enabling a director to make a profit provided that the board of directors contracts on behalf of Guinness for the payment of special remuneration or decides to award special remuneration. Mr Ward did not obtain a contract or a grant from the board of directors. Equity has no power to relax its own strict rule further than and inconsistently with the express relaxation contained in the articles of association. A shareholder is entitled to compliance with the articles. A director accepts office subject to and with the benefit of the provisions of the articles relating to directors.

26 However, Lord Goff of Chieveley (with whose views Lord Griffiths agreed) seemed to envisage the possibility that a director could, in appropriate circumstances, be paid an equitable allowance for work done. He rationalised as follows, at 700–701:

> The leading authorities on the doctrine have been rehearsed in the opinion of my noble and learned friend, Lord Templeman. These indeed demonstrate that thedirectors of a company, like other fiduciaries, must not put themselves in a position where there is a conflict between their personal interestsand their duties as fiduciaries, and are for that reason precluded from contracting with the company for their services except in circumstances authorised by the articles of association. Similarly, just as trustees are not entitled, in the absence of an appropriate provision in the trust deed, to remuneration for their services as trustees, so directors are not entitled to remuneration for their services as directors except as provided by the articles of association.
>
> *Plainly, it would be inconsistent with this long-established principle to award remuneration in such circumstances as of right on the basis of a quantum meruit claim. But the principle does not altogether exclude the possibility that an equitable allowance might be made in respect of services rendered.* That such an allowance may be made to a trustee for work performed by him for the benefit of the trust, even though he was not in the circumstances entitled to remuneration under the terms of the trust deed, is now well established. In *Phipps v Boardman* [1964] 1 WLR 993, the solicitor to a trust and one of the beneficiaries were held accountable to another beneficiary for a proportion of the profits made by them from the sale of shares bought by them with the aid of information gained by the solicitor when acting for the trust.

Wilberforce J directed that, when accounting for such profits, not merely should a deduction be made for expenditure which was necessary to enable the profit to be realised, but also a liberal allowance or credit should be made for their work and skill. …

Wilberforce J's decision, including his decision to make such an allowance, was later to be affirmed by the House of Lords: *sub nom Boardman v Phipps* [1967] 2 AC 46.

It will be observed that the decision to make the allowance was founded upon the simple proposition that "it would be inequitable now for the beneficiaries to step in and take the profit without paying for the skill and labour which has produced it." Ex hypothesi, such an allowance was not in the circumstances authorised by the terms of the trust deed; furthermore it was held that there had not been full and proper disclosure by the two defendants to the successful plaintiff beneficiary. The inequity was found in the simple proposition that the beneficiaries were taking the profit although, if Mr Boardman (the solicitor) had not done the work, they would have had to employ an expert to do the work for them in order to earn that profit.

The decision has to be reconciled with the fundamental principle that a trustee is not entitled to remuneration for services rendered by him to the trust except as expressly provided in the trust deed. Strictly speaking, it is irreconcilable with the rule as so stated. It seems to me therefore that it can only be reconciled with it to theextent that the exercise of the equitable jurisdiction does not conflict with the policy underlying the rule. And, as I see it, such a conflict will only be avoided if the exercise of the jurisdiction is restricted to those cases where it cannot have the effect of encouraging trustees in any way to put themselves in a position where their interests conflict with their duties as trustees.

Not only was the equity underlying Mr Boardman's claim in *Phipps v Boardman* clear and, indeed, overwhelming; but the exercise of the jurisdiction to award an allowance in the unusual circumstances of that case could not provide any encouragement to trustees to put themselves in a position where their duties as trustees conflicted with their interests.

[emphasis added]

27 Even then, Lord Goff refused to grant the appellant an equitable allowance as he was concerned that this might amount to "interference by the court in the administration of a company's affairs when the company is not being wound up": at 701. Furthermore, the appellant had put himself in a position in which his interests were in stark conflict with his duty as a director by agreeing to provide his services in return for a substantial fee, the size of which was dependent on the amount of a successful bid by Guinness.

28 Assuming that there was such a jurisdiction in the court to grant an equitable allowance to a company director, RJ had not shown why such an allowance should be paid to him. Quite clearly, his claim for time costs would put him in a position of conflict with the interests of the company as the slower he worked the better it would be for himself but not so for the company.

29 Accordingly, RJ was not entitled to claim based on *quantum meruit.*

The question of costs

30 An ancillary point raised in this appeal related to the question of costs. Besides the claim for remuneration, RJ had in his counterclaim also claimed for reimbursement of expenses which he had incurred on behalf of SIS. The decision of the judge on this was as follows ([1] *supra*, at [8]):

> … [A]s I had alluded to them earlier, the words "costs and expenses" clearly meant that he would be reimbursed *if* he had incurred any out-of-pocket expenses on behalf of SIS. I, therefore, ordered an inquiry to determine *if any such costs and expenses* had, in fact, been incurred. [emphasis added]

31 RJ had set out in five tables his claim for the expenses which he had incurred on behalf of SIS. The position taken by SIS was that none of the items claimed were incurred on behalf of SIS. SIS did not say that it was not liable to reimburse RJ for expenses which he had properly incurred on behalf of SIS.

32 The judge gave the costs of the proceedings before him to SIS. Counsel for RJ argued that as RJ had won on the question of reimbursement for expenses, and thus had partially succeeded, the judge was wrong to have given full costs of the hearing before him to SIS. With respect, we did not share this perception. The judge did not determine whether any of the items which RJ had claimed as expenses should be allowed. Obviously, pursuant to the resolutions, RJ was entitled to be reimbursed with respect to expenses incurred on behalf of SIS. No one could argue against that. Neither did SIS. The inquiry which the judge ordered would go into the various items of claim to see if any of them was incurred on behalf of SIS. The costs to be incurred for the inquiry are a matter for the Registrar to decide after he has made his determination on the items claimed. The costs which SIS were entitled to pursuant to the decision of the judge were only in respect of the question of RJ's claim for remuneration.