Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another
[2006] SGHC 55

Case Number : Suit 815/2004

Decision Date : 30 March 2006

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Kenneth Tan SC (instructed), Wendy Tan (Haq & Selvam) for the plaintiff; Steven Chong SC, Sim Kwan Kiat and Kelvin Poon (Rajah & Tann) for the defendants

Parties : Otech Pakistan Pvt Ltd — Clough Engineering Ltd; William Harold Clough

Contract – Breach – Plaintiff suing first defendant for breach of alleged oral agreement – Whether oral agreement in fact entered into by parties

Tort – Inducement of breach of contract – Plaintiff suing second defendant for inducing first defendant's breach of alleged oral agreement – Whether plaintiff's claim against second defendant valid

30 March 2006 *Judgment reserved.*

Tan Lee Meng J:

1 This case highlights the importance of pleadings in defining the scope of arguments that may be advanced by a plaintiff or defendant and illustrates a counsel's nightmare, namely the complete undermining of his case by his sole witness. The plaintiff, Otech Pakistan Pvt Ltd ("Otech"), a company incorporated in Pakistan, sued the first defendant, Clough Engineering Ltd ("CEL"), a company incorporated in Australia, for breach of an oral agreement dated 1 November 1999 (the "oral agreement") and the second defendant, William Harold Clough ("Mr Clough"), for inducing the said breach of contract.

2 The defendants denied liability to Otech on three grounds. First, they contended that no oral agreement had been finalised on 1 November 1999. Secondly, even if the alleged contract had been finalised on 1 November 1999, Otech did not earn the remuneration claimed. Thirdly, the alleged agreement was unenforceable because it was champertous. As for Mr Clough, he further denied having induced any breach of contract.

Background

3 Otech acts as general agents in Pakistan for companies engaged in the design and construction of equipment and plants for the oil, gas, petrochemical, refining, power generation and other related industries. CEL is in the business of project development in the oil, gas, mineral, infrastructure and property industries. Mr Clough was the managing director of CEL until 1988.

4 In the 1990s, CEL was involved in a number of projects in Pakistan. In 1992, the Oil and Gas Development Company Limited ("OGDCL"), which is owned by the Pakistani government, awarded CEL a contract for the upgrading and extension of the Dhodak gas plant ("the Dhodak project"). In 1995, OGDCL awarded CEL a contract for the upgrading and extension of the Dakhni gas plant ("the Dakhni project").

5 Disputes arose between CEL and OGDCL with respect to both the Dhodak and Dakhni projects. CEL commenced legal proceedings in Pakistan against OGDCL with respect to the Dhodak project in 1997. As for the Dakhni project, it was suspended in November 1996 by OGDCL, which attempted to encash bank guarantees furnished by CEL for more than US$13m. CEL obtained an injunction in the Pakistani courts in March 1997 to restrain OGDCL from encashing the said guarantees.

6 As CEL thought that Otech could help resolve its problems with OGDCL, it entered into an agreement with the latter in April 1997, under which the latter agreed to do the following:

(a) render assistance to CEL to defend its rights against OGDCL and to present and negotiate CEL's claims against OGDCL in respect of both the Dhodak and Dakhni projects;

(b) retain, seek advice and give information and instructions to lawyers and other professionals to protect CEL's rights against OGDCL and to negotiate its claims against OGDCL; and

(c) assist CEL in reaching a negotiated settlement with OGDCL in respect of their pending claims in relation to the Dhodak and Dakhni disputes.

7 In return for the above-mentioned services, CEL agreed to pay Otech on the following basis:

(a) 40% of any sum in excess of US$8m recovered from OGDCL with respect to the Dakhni project dispute; and

(b) half of any amount in excess of US$3m recovered from OGDCL with respect to the Dhodak project dispute.

8 Despite having roped in Otech's assistance, CEL's disputes with OGDCL remained unresolved. Towards the end of 1999, CEL came to the conclusion that its claims against OGDCL were unlikely to succeed and decided that a negotiated settlement was preferable as it wanted to bid for further projects in Pakistan. As CEL wanted to offer Otech an incentive to conclude a negotiated settlement with OGDCL, the parties had discussions on a more generous remuneration package than that provided for under the April 1997 agreement. On 1 November 1999, CEL's international director, Mr Jeremy James Roberton ("Mr Roberton"), met Otech's president, Mr Sohail Latif ("Mr Latif"), to discuss a possible revision of the compensation formula for Otech. According to Otech, the parties agreed on that day that it was entitled to 20% of any settlement sum paid by OGDCL to CEL less taxes. However, CEL asserted that no such agreement had been reached on 1 November 1999 and that the parties were still negotiating the terms of the new arrangement after that date.

9 The dispute between CEL and OGDCL dragged on without any settlement in 2000 or 2001. CEL was unhappy that Otech persistently opposed its decision to reduce or withdraw some of its claims against OGDCL. The relationship between CEL and Otech deteriorated further to such an extent that on 26 February 2002, the former terminated its contractual relationship with the latter. It is common ground that Otech accepted the termination.

10 Otech admitted that it offered no assistance to CEL after the termination of their contractual relationship.

11 More than two years later, in July 2004, CEL finally settled its dispute with OGDCL for US$7,515,000. After the settlement was reached, Otech claimed from CEL 20% of the settlement

sum, which amounted to US$1,503,000. When CEL did not pay the sum claimed, Otech instituted the present proceedings against CEL and Mr Clough.

Whether there was a concluded agreement on 1 November 1999

12 Why Otech pleaded that its claim was based on an oral agreement that was concluded on 1 November 1999 and not on a contract concluded *after* 1 November 1999 cannot be fathomed. When cross-examined, Otech's sole witness, Mr Latif, confirmed his company's position in the following terms:

> Q: It is your case that the alleged revised agreement was concluded on 1st November 1999?
>
> A: That is correct …
>
> Q: You are now basing Otech's claim on the 1st November 1999 alleged agreement; correct?
>
> A. That is correct …

13 That a party is bound by its pleadings and the case is confined to the issues raised on the pleadings was reiterated in *Loy Chin Associates Pte Ltd v Autohouse Trading Pte Ltd* [1991] SLR 755 at 759, [19] ("the *Loy Chin* case") by Chao Hick Tin J, as he then was, who adopted the following passage from Scrutton LJ's judgment in *Blay v Pollard and Morris* [1930] 1 KB 628 at 634:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course.

14 In the *Loy Chin* case, the appellants, who were design and advertising consultants, pleaded that they concluded an oral contract on 27 February 1985 with the respondents for the preparation of a publicity brochure and logo for the estimated sum of $60,000. Chao J found that no such contract had been concluded on 27 February 1985 because the parties were then still exploring the possibility of an agreement. As the re-amended statement of claim was based on this alleged oral contract, he said that he was in no position to consider the question of *quantum meruit*. As such, the appellant's action against the respondents to recover compensation for work done and for loss of profit failed.

15 In similar vein, in line with its pleadings, Otech's case will fail if no oral contract was concluded on 1 November 1999. Its president, Mr Latif, stated in para 33 of his affidavit of evidence-in-chief ("AEIC") that the conclusion of the oral agreement on 1 November 1999 was confirmed by CEL's Mr Roberton in two e-mails to him on 8 November and 10 November 1999.

16 Far from confirming agreed arrangements, Mr Roberton's first e-mail of 8 November 1999 refers to a "draft" proposal on three occasions. It was in the following terms:

> Subject: *Draft* Proposal
>
> Further to our meeting last Monday attached please find a *draft* of our proposed revised agreement with you for the settlement of our outstanding matters in Pakistan.

It is a draft and I would like to meet and discuss it with you this Tuesday or Wednesday.

…

[emphasis added]

17 Apart from anything else, the final sentence quoted in the above-mentioned e-mail, namely, "It is a draft and I would like to meet and discuss it with you …", makes it absolutely clear that the proposed revision of the April 1997 arrangements had not been finalised on 1 November 1999.

18 It is important at this juncture to refer to Mr Latif's reply of 9 November 1999 to Mr Roberton's e-mail of the previous day. It is rather telling that this reply was not mentioned in the pleadings or in Mr Latif's AEIC. In his reply, Mr Latif did not refer to any concluded agreement. Instead, the reply was captioned "Your *draft* proposal" [emphasis added] and in it, Mr Latif had a counter-proposal in response to CEL's initial proposal to pay Otech 20% of the net settlement sum recovered by CEL from OGDCL. In his rather short note, he stated as follows:

Subject: Your *draft proposal* on E-Mail of 9 November 1999

Thank you for the *proposal*. On the point 1, *our friends suggested 30% instead of 20%*.

[emphasis added]

19 As Mr Latif responded on 9 November 1999 with a counter-offer to what he himself termed as Mr Roberton's "draft" proposal, he is in no position to contend that full and final agreement had been reached between the parties eight days earlier on 1 November 1999. Indeed, Mr Latiff's counter-offer terminates whatever offer Mr Roberton might have had in mind and is a new offer for CEL to accept: See *Hyde v Wrench* (1840) 3 Beav 334; 49 ER 132 .

20 Mr Latif tried to minimise the significance of his e-mail of 9 November 1999 when he was re-examined by his counsel. He explained why he sent this e-mail with a fresh proposal for 30% as follows:

When I saw [Mr Roberton's e-mail of 8 November 1999] ... I was very upset because I thought that in between, while part of it was what we had agreed, but in between there were other things being introduced which had nothing to do with the November 1 agreement ... In reaction to that, I said "Well, if that is what you are now saying, it is going to be 30 per cent". So that was in the e-mail which was sent in reaction to what I saw was [*sic*] new terms being introduced, not agreed on November 1.

21 I do not believe that Mr Latif has set out the true position. In any case, Mr Roberton's second e-mail of 10 November 1999 also does not confirm that an agreement had been reached between CEL and Otech on 1 November 1999. In this e-mail, Mr Roberton compared the sums to which Otech would be entitled to under the old arrangement of April 1997 and the new "proposed" arrangements upon the settlement of CEL's disputes with OGDCL. This e-mail is as follows:

For your consideration.

Settlement	Old fee	Proposed Fee (20%)
4.0	Nil	0.8
8.0	Nil	1.6
10.0	0.8	2.0
12.0	1.6	2.4
13.6	2.24	2.72
16.0	3.2	3.2

The "nett of tax" *proposal* may have some effect on Dakhni fee shown here.

The new *proposal* gives 20% on all claims.

…

[emphasis added]

22 As Mr Roberton used the words "proposed", "proposal" and "for your consideration", his e-mail of 10 November 1999 is not, as alleged by Mr Latif in his AEIC, evidence of a concluded contract on 1 November 1999. It is not disputed that Otech did not respond to this e-mail.

2 3 Notwithstanding what he had claimed in his AEIC about the conclusiveness of Mr Roberton's e-mails of 8 and 10 November 1999, Mr Latif finally conceded during cross-examination that they did not refer to any concluded agreement between the parties. The relevant part of the proceedings is as follows:

Q: Mr Latif, I put it to you that the two e-mails you referred to on the 8th and 10th November do not refer to the agreement; do you agree with me? …

A: It does not mention an agreement.

Q: Instead, it refers to a draft proposal, correct?

A: It mentions draft proposal …, yes.

Q: For your consideration; correct?

A It says that.

24 Mr Latif's *volte face* effectively scuttled Otech's case against CEL altogether.

25 For the sake of completeness, it ought to be mentioned that Otech also referred to correspondence exchanged between the parties long after November 1999 that, in its view, showed

that CEL agreed to pay it 20% of the net settlement amount received from OGDCL. However, these e-mails did not contradict the clear evidence that no oral contract had been concluded on 1 November 1999. If anything, they indicated that some understanding might have been reached *after* that date. Why Otech, which rested its entire case on the alleged agreement reached on 1 November 1999, did not plead that CEL was estopped from denying that it had agreed sometime after that date to pay it 20% of the settlement sum paid by OGDCL cannot be readily understood. What is clear is that had estoppel been pleaded, CEL would, no doubt, have responded to this and questions that could have been raised include whether any arrangement brought about by estoppel by convention could have survived the termination of the parties' contractual relationship in February 2002.

26 To sum up, as there was no evidence whatsoever of an agreement between the parties on 1 November 1999 for Otech to be paid 20% of the net settlement sum received by CEL from OGDCL, Otech's claim against CEL had no leg to stand on and must be dismissed.

Whether Otech earned the remuneration

27 Although the allegation that a revised agreement was concluded on 1 November 1999 was not proven by Otech, I will next consider CEL's assertion that Otech was not entitled to any remuneration even if the alleged agreement of 1 November 1999 had been concluded, because the remuneration to be paid was based on a "success fee".

28 In *Lau Liat Meng v Disciplinary Committee* [1965–1968] SLR 8, at 13, [26], Lord Hodson pointed out that "an agreement calling for payment by percentage of the amount recovered on the claim or in any action is undeniably one stipulating for payment only in the event of success". Although Otech claimed a percentage of the settlement amount received by CEL from OGDCL, its counsel, Mr Kenneth Tan SC, claimed in his closing submissions that it was only required to provide assistance to CEL and that its remuneration was not dependent on a successful outcome of CEL's claims against OGDCL. However, Otech's president, Mr Latif, said as follows during cross-examination:

> Q: So the nature of the services is *entirely based on successful outcome* of recovery; agreed?
>
> A: That was the November 1 agreement.
>
> [emphasis added]

29 Otech claimed to have done much for CEL before the termination of their contractual relationship. For instance, in regard to legal fees, it claimed that it spent millions of dollars on legal fees in Pakistan and Singapore. In an e-mail to Mr Roberton on 9 February 2002, Mr Latif went so far as to claim that it paid legal costs relating to money to "Court, Judges *etc*" in Pakistan, a very bold and unsubstantiated allegation that suggests that judicial officers had been bribed. However, when asked to furnish particulars of payments in relation to legal costs, Mr Latif was unable to provide any relevant documents. When cross-examined, he said as follows:

> Q: Although you have claimed to spend all these millions of dollars, when you were asked to specify in the requests for further and better particulars the amount of money extended and the dates, you were unable to answer; correct?
>
> A: Correct.

Q: [I]n all the discovery you have provided in this case, have you accounted for one cent you spent to fight this case? Do not talk of $3.5 million — one cent?

A: The specific documents were not provided …

30 In fact, in a letter to Mr Latif on 7 February 2002, Mr Roberton, who was totally unimpressed by Otech's record, wrote as follows:

[I]n the last 5 years you were unable to offer a logical way forward or a concrete suggestion on how to resolve this issue. Even now being critical of what we have done by "lowering the claim without consultation" you have not offered any alternative path we could have or should have followed.

As we have recently said many times - we are no longer prepared to sit around and wait for the "magic generous solution" to pop up - we now accept this will never happen. In the past (a few years ago) I guess we thought there may be a chance - not any longer.

31 When CEL terminated its contractual relationship with Otech in February 2002, no settlement had been reached between CEL and OGDCL. As such, Otech was at that time not entitled to any remuneration from CEL. Mr Latif candidly acknowledged that it had nothing to do with the negotiations between CEL and OGDCL after February 2002. The relevant part of the proceedings is as follows:

Q: After Otech accepted the termination on 26th February 2002, you would agree with me that Otech did not take any further steps to assist Clough to reach the negotiated settlement which was concluded in July 2004 — naturally?

A: Naturally.

32 Colonel Mansor Azam, OGDCL's Acting General Manager (Projects), confirmed that Otech had nothing to do with the negotiations between CEL and OGDCL. In paras 35 to 37 of his AEIC, he stated as follows:

35 As far as I am aware, throughout the entire negotiation process, OGDCL was never contacted by Sohail Latif (or any of his companies, servants or agent) representing Clough's interests.

36 As far as I am aware Sohail Latif (and his companies, servants or agents) did nothing to assist Clough in concluding negotiations with OGDCL.

37 As far as I am aware Sohail Latif (and his companies, servants or agents) did nothing to facilitate the ongoing negotiation process between Clough and OGDCL.

33 In the circumstances, the only conclusion one can reach is that even if the April 1997 compensation formula was, as Otech alleged, revised on 1 November 1999, Otech is not entitled to the amount claimed because it played no part in the conclusion of the settlement of the dispute between CEL and OGDCL. For this added reason, its claim against CEL must be dismissed.

Champerty

34 As Otech's claim against CEL lacks substance for reasons already stated, it is unnecessary for me to consider whether the alleged contract of 1 November 1999 is void on the ground of

champerty.

Otech's claim against Mr William Harold Clough

35 As I have found that CEL was not in breach of contract, Otech's claim against Mr Clough for inducing breach of contract is without any foundation. In any case, it is clear that even if CEL was in breach of contract, Otech's claim against Mr Clough was not proven.

36 In *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405 at [17], Yong Pung How CJ, who delivered the judgment of the Court of Appeal, outlined what must be proved to succeed in a claim for inducing a breach of contract as follows:

> An act of inducement per se is not by itself actionable. The plaintiff must satisfy a two-fold requirement in order to found a sustainable cause of action: First, he must show that the procurer acted with the requisite knowledge of the existence of the contract (although knowledge of the precise terms is not necessary); and second, that the procurer intended to interfere with its performance.

37 Otech pointed out that Mr Clough was in full control of his business empire and that no major decision could have been made without his knowledge or approval. However, its pleaded case against Mr Clough, which is found in para 30 of the statement of claim, is as follows:

> The Second Defendant *engineered and induced* the First Defendants to breach their contract or agreement to pay remuneration as described above. The Second Defendant did so *by direct interference*. *He did so by instructing Jeremy Roberton to state that the First Defendants would not pay the Plaintiffs their agreed remuneration*. [emphasis added]

38 In para 45 of his AEIC, Mr Latif stated as follows:

> It was [Mr Clough] who using his power and position induced and directed [CEL] to breach their contract or agreement to pay [Otech] the remuneration as described above. [Mr Clough] did so by direct interference.

3 9 When cross-examined, Mr Latif completely undermined Otech's case that Mr Clough "engineered" the decision to terminate CEL's contractual relationship with his company and his assertion in his AEIC that Mr Clough used his power and position to induce the alleged breach of contract. The relevant part of the proceedings is as follows:

> Q: [A]re you also saying that [Mr Harold Clough] engineered the termination?
>
> A: I have no idea. I have no reason to say that.

40 Mr Latif's replies to questions on a letter that he wrote to Mr Clough on 26 February 1999 also removed the ground on which Otech's claim against the latter stood. He accepted that he did not suggest in his letter, which was written after he had already been informed of CEL's intention to terminate its relationship with Otech, that Mr Clough was behind the plan to terminate the said relationship. The relevant part of the proceedings is as follows:

> Q: Is there any suggestion in this e-mail [to Mr Clough] that [he] was behind this whole ploy to terminate you and then to cut you off? Is there any suggestion [of that]?
>
> A: There is no suggestion of that.

Q: … What you were trying to tell [Mr Clough] is "Mr Clough, in case you do not know, this is what is happening on the ground. I want to tell you this"; correct?

A: Correct.

41 Otech's claim against Mr Clough must, in the light of Mr Latif's astonishing testimony in court, be dismissed.

Conclusion

42 Otech's claims against CEL and Mr Clough are dismissed with costs.