Otech Pakistan Pvt Ltd v Clough Engineering Ltd and Another
[2005] SGHC 98

Case Number : Suit 815/2004, RA 14/2005

Decision Date : 19 May 2005

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Wendy Tan Poh Ling and Anand Su Yin (Haq and Selvam) for the plaintiff; Surenthiraraj s/o Sauntharajah (Harry Elias Partnership) for the defendants

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

Civil Procedure – Striking out – Application by defendants to strike out plaintiff's claim – Plaintiff claiming against second defendant for inducing first defendant to breach contract – Whether plaintiff's claim disclosed no reasonable cause of action or an abuse of process

Tort – Inducement of breach of contract – Whether servant of company acting bona fide within scope of his authority liable to tort action for inducement of breach of contract – Whether second defendant's actions taken in good faith and within scope of his office – Whether action should be struck out

19 May 2005

Kan Ting Chiu J:

1 This is an action against a company for breach of contract and against its controlling shareholder for inducing the company to breach the contract.

2 The plaintiff, Otech Pakistan Pvt Ltd, is a company in Pakistan. The first defendant, Clough Engineering Limited, is an Australian company. The second defendant, William Harold Clough, is a shareholder of the first defendant.

3 The first defendant had entered into two contracts with Oil and Gas Development Co Ltd ("OGDCL"), a government-owned corporation in Pakistan, in connection with the construction of two gas-condensate processing plants. Both contracts did not run to the first defendant's expectations. One contract was suspended, and OGDCL was seeking to encash a performance guarantee furnished by the first defendant. The first defendant suffered loss and damage under the other contract.

4 The first defendant engaged the services of the plaintiff to assist it to defend OGDCL's claims against it and to prosecute its claims under the contracts against OGDCL.

5 The plaintiff claimed that in April 1997, the first defendant agreed to pay it for its services 40% of any amount recovered from OGDCL in excess of US$8m.

6 In November 1999, that agreement was renegotiated so that the first defendant was to pay the plaintiff 20% of the net amount recovered from OGDCL with no minimum on the amount the first defendant received.

7 In the action, the plaintiff alleged that after the first defendant had settled its claims against OGDCL for US$7,515,000, the first defendant did not pay the plaintiff its agreed fees of US$1,503,000 (20% of US$7,515,000).

8 The plaintiff sued the first defendant for breach of contract. It also sued the second

defendant for having induced the first defendant to breach the contract.

9 In the Statement of Claim, the plaintiff alleged:

> 3. The Second Defendant has been and is a controlling shareholder of the First Defendants. He was the Managing Director of the First Defendants until 1988. He has been a major and substantial shareholder of the First Defendant either directly or through other companies. As such, he has been the major motivating force behind the said the First Defendants and their alter ego.
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> …
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> 27. On or about 28 March 2002, Jeremy Roberton and Paul Archer of the First Defendants met with the Plaintiffs' Director, Sohail Latif and breached the First Defendants' agreement to pay 20% of the settlement amount of the First Defendants' claims against OGDCL. Jeremy Roberton stated so. Jeremy Roberton said to Sohail Latif that they were authorized and directed by the Second Defendant to state that the First Defendants would not pay the agreed remuneration. The breach occurred in Singapore.
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> …
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> 30. 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. The Second Defendant had full knowledge of the contract between the Plaintiffs and the First Defendants. He intentionally interfered with the Plaintiffs' contractual rights and had no justification for it. In the circumstances, the Second Defendant is liable in tort to pay the sum of US$1,503,000 as damages for inducing breach of contract.

10 The defendants applied for paras 3 and 30 in their entirety, as well as the third sentence of para 27, to be struck out on the basis that the claims against the second defendant "disclose no reasonable cause of action, are an abuse of the process of the Court and/or should be struck out pursuant to the inherent jurisdiction of the Court".

11 Although counsel for the defendants was convinced that the application must succeed, it was dismissed by the senior assistant registrar who heard it, and I dismissed the defendants' appeal against that decision. I will explain why the application had failed.

12 The defendants relied on the decision in *Chong Hon Kuan Ivan v Levy Maurice (No 2)* [2004] 4 SLR 801. In that case, the defendant, Maurice Levy ("Levy"), was a director of a company, Publicis Eureka Pte Ltd ("Publicis"). The plaintiff, Chong Hon Kuan Ivan ("Chong"), had been the managing director and chief executive officer of Publicis, whose employment was terminated by Publicis.

13 Chong commenced action against Publicis and Levy and other directors of Publicis. Chong's claim against Levy was that Levy had conspired with the other directors of Publicis to induce Publicis to terminate his employment, and his claim against Publicis was for the wrongful termination of his employment agreement.

14 Levy applied to strike out two paragraphs of the statement of claim which contained

allegations of the conspiracy, inducement and the resultant damages. Levy's application was founded on the principle that a company can only act by its officers, servants or agents and if the individual defendant was acting within the scope of his employment, as the company's *alter ego*, the claim of conspiracy must fail.

15 The application was heard by an assistant registrar who allowed it. Subsequently, Chong amended his statement of claim to rely on certain exceptions to the principle referred to. After the amendment, the assistant registrar reversed the previous order to strike out the action.

16 In the amended form, Levy was alleged to have conspired with the other directors of Publicis to procure Publicis' termination of Chong's employment. It was also alleged that Levy and the other directors were acting outside the scope of their office or employment when they did that.

17 Levy appealed against the assistant registrar's second decision. The appeal was heard by Woo Bih Li J. Woo J reviewed cases on this point from several jurisdictions. In particular, he acknowledged and adopted a principle enunciated by McCardie J in *Said v Butt* [1919] 3 KB 497.

18 In *Said v Butt*, the plaintiff had obtained a ticket for the first performance of a play at a theatre. He knew that the theatre would not sell him a ticket, and bought a ticket through a friend. The defendant, the managing director of the theatre, saw him at the theatre and directed the theatre attendants to refuse the plaintiff admission to the performance. After he was denied admission, the plaintiff sued the defendant for procuring the theatre to breach the contract for his attendance at the performance.

19 McCardie J dismissed the action. He found that there was no enforceable contract between the plaintiff and the theatre. But he went further and examined the claim on the assumption that there was a contract.

20 He noted at 504:

> If the plaintiff is right in his contention, it seems to follow that whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages, upon the principle of *Lumley* v. *Gye* (1853) 2 E. & B. 216, as for a tortious act. So, too, with the manager or other agent of a private firm, who does the like thing.

and went on to say at 505:

> [T]he servant who causes a breach of his master's contract with a third person … is the alter ego of his master. His acts are in law the acts of his employer. In such a case it is the master himself, by his agent, breaking the contract he has made, and in my view an action against the agent under the *Lumley* v. *Gye* principle must therefore fail, just as it would fail if brought against the master himself for wrongfully procuring a breach of his own contract. This, I think, is the true answer to the ingenious arguments … on behalf of the plaintiff upon this point.

and therefore:

> [I]f a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken.

21 It should be noted that although McCardie J referred to "servant" in the last two passages quoted, he was using the term broadly to cover persons of authority, such as directors and managers who are the management of a company, when he referred to "the servant who causes a breach of his master's contract".

22 Woo J reviewed cases from several jurisdictions and concluded that the principle was subject to two conjunctive qualifications: (a) that the servant must be acting *bona fide*; and (b) that he must be acting within the scope of his authority.

23 On the facts of that case, he ruled that the allegations that Levy and the other directors were acting outside the scope of their authority were bare allegations. Consequently, he allowed the appeal and struck out the allegations of conspiracy and inducement of breach of contract.

24 In deciding whether and how the principle applies to a case, the pleaded connection between the company and the human defendant is important. The claim may be made on the basis that the defendant, as a director or officer of a company, had conspired with others to induce the company to breach a contract. Or the claim may be framed simply that the defendant had conspired to and had induced the breach without reference to his office in the company.

25 When the allegation is that the defendant had conspired to and had induced the breach *qua* director, that, without more, must imply that the defendant had been acting *bona fide* and within the scope of his office. "*Bona fide*" here is to be taken to mean that the defendant was acting in good faith in the discharge of his office, and not that he was acting in good faith in the action complained of; a director may believe that it is for the good of the company to breach a contract intentionally. In such a situation, the principle would operate to defeat the claim against the defendant as a matter of law.

26 Where the allegation of conspiracy and inducement is made without reference to the defendant's office, the principle will not apply unless steps are taken to bring it into operation. The initiative would have to be taken by the defendant to show the acts alleged against him were done by him in good faith in the discharge of his office.

27 The position is the same where the allegation is that the defendant had acted in bad faith or in excess of his powers when he purported to act in the discharge of his office.

28 In the last two situations, the claims are not defeated unless the defendant proves the qualifying facts, *ie* that the actions (a) were taken in good faith, and (b) were within the scope of his office.

29 Coming back to the facts of the present case, there is no reference in the Statement of Claim to the second defendant's position in the first defendant. The allegations were that he "has been a major and substantial shareholder" and he "has been the major motivating force behind [the first defendant] and [its] alter ego". In fact, the second defendant was not a director of the company or, as far as it was disclosed, the holder of any office in the company when the alleged conspiracy or inducement took place.

30 In these circumstances, the plaintiff's claim against him does not carry the fatal flaw McCardie J identified in *Said v Butt* (see [20] and [21] above).

31 The second defendant may still rely on the principle in that case to defeat the claim if he can bring himself under the principle. But in his Defence filed to the claim, it was not pleaded that he was

acting in good faith and within the scope of his authority as an officer of the company. The invocation of the principle to strike out the claim against him was without basis.