Chip Hup Hup Kee Construction Pte Ltd v Lim Lian Choon
[2008] SGHC 227

Case Number : Suit 165/2007, SUM 2204/2008

Decision Date : 02 December 2008

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Ling Daw Hoang Philip and Hwa Hoon Luan (Wong Tan & Molly Lim LLC) for the plaintiff; Khoo Boo Teck Randolph, Loo Teck Lee Johnson and Chew Ching Li (Drew & Napier LLC) for the defendant

Parties : Chip Hup Hup Kee Construction Pte Ltd — Lim Lian Choon

Civil Procedure

2 December 2008

Kan Ting Chiu J:

1 This is a judgment on an application to amend pleadings made in the course of a hearing. The plaintiff in the proceedings, Chip Hup Hup Kee Construction Pte Ltd is a construction company. The defendant, Lim Lian Choon was a former employee of the plaintiff. He was first employed as the Site Foreman and then as the Plant and Machinery Manager of the plaintiff until his employment was terminated on 30 November 2006.

2 The plaintiff claimed that the defendant had breached his duties as an employee. The breaches came under three heads, that he:

(a) misappropriated the plaintiff's charges;

(b) failed to keep records and exercise proper custody, care and control over the plaintiff's plant and machinery which were entrusted to him; and

(c) failed to account to the plaintiff for monies he received from the disposal of the plaintiff's plant and machinery.

3 As the amendment now under appeal relates to head (c), I will set out the relevant paras of the Statement of Claim:

17. In the course of the Defendant's employment as Site Foreman and Plant and Machinery Manager of the Plaintiffs, the Defendant was also responsible for the disposal of the Plaintiffs' scrap metal and was under a duty and obligation to account to the Plaintiffs for any proceeds received therefrom.

19. Todate, of the said sum of $86,069.00 received by the Defendant, the Defendant has not accounted to the Plaintiffs for the sum of $44,508.70. By reason thereof, the Plaintiffs have suffered loss and damage.

4 The defendant denied the plaintiff's claims and counterclaimed that his employment was wrongfully terminated.

5 In response to the Counterclaim, the plaintiff filed a Reply and Defence to Counterclaim on 17 May 2007 where it asserted in para 11 that it was justified in terminating the defendant's employment on the grounds, *inter alia*:

> c. The Defendant had failed to account for and/or take proper control, care and/or custody of all plant and machinery belonging to the Plaintiffs which were entrusted to him …
>
> d. The Defendant had failed to account to the Plaintiffs for the monies received by the Defendant for the disposal of the Plaintiffs' plant and machinery …[note: 1]

6 The amendment to which the appeal relates was to add a sub-para (e):

> e. The Defendant had on or about 11 November 2006, without the knowledge, authority and/or consent of the Plaintiffs, wrongfully removed or caused or arranged to be removed from the Plaintiffs' worksite at Toa Payoh RC30 2 units of Diesel Bar Benders and 1 unit of Bar Cutter, and disposed of the same or caused or arranged for the same to be disposed of as scrap at the total price of S$2,000. The Defendant has to-date failed to pay and/or account to the Plaintiffs for any of the proceeds of such disposal. By reason of the Defendant's wrongful and criminal acts, a police report (no. D20070605/2093) was filed on behalf of the Plaintiffs against the Defendant, as a consequence of which the Defendant was charged with one count of theft as servant under Section 381 of the Penal Code (Chapter 224), which matter is still pending in the Subordinate Courts.

and to re-number the sub-paras which followed.

7 The application to amend was filed on 20 May 2008 after evidence of the criminal proceedings against the defendant came out in the course of the re-examination of Neo Kok Eng ("NKE"), the Managing Director of the plaintiff on 30 April 2008. When he was questioned on the disposal of three units of bar benders and bar cutter which took place on 11 November 2006, he said:

> Some time around February March 2007, when we needed these three machinery at the site, we went down to do a stock take and found them missing. We checked with the site supervisor as to where had the machinery gone to.
>
> The site supervisor told our accounts clerk that Cheong Machinery had actually taken away the three machinery. So we approached the boss of Cheong Machinery and asked him what had happened, whether we had sent the machines for servicing. And the boss informed me that no, actually Lim Lian Choon had sold these three machines as scrap. I asked him what was the purchase price and he said 2,000, and in fact Lim Lian Choon didn't return this 2,000 dollars to Chip Hup Hup Kee.
>
> We made a police report in regard to this matter. AGC is suing him. He is now out on bail of $6,000.[note: 2]

8 The plaintiff did not know of the disposal of the equipment till June 2007, whereupon a police report was made. The police report was made on 5 June 2007 by an employee of the plaintiff, Khoo Choon Yean. A copy of the report was exhibited in NKE's affidavit filed in support of the application, together with a copy of the plaintiff's solicitors' letter dated 27 June 2007 to the defendant's solicitors informing them of the discovery. The police report and the letter showed that the discovery was made after the Reply and Defence to Counterclaim was filed on 17 May 2007.

9 Mr Khoo, counsel for the defendant did not object when NKE spoke of the transaction and the criminal proceedings. I asked if there was a specific head of claim for the $2,000, and was informed by Mr Ling, counsel for the plaintiff, that the plaintiff was seeking an account of the plant and equipment disposed of. Following that exchange, Mr Khoo argued that the disposal of the bar benders and bar cutter was not pleaded as a ground for the termination of the defendant's employment[note: 3] and Mr Ling reiterated that the point was already covered in para 11(c) and (d) of the Reply and Defence to Counterclaim, and objected to the evidence.

10 That first tranche of the hearing ended on 2 May 2008. Before the second tranche of hearing commenced on 6 October 2008, the plaintiff applied to amend its Statement of Claim and Reply to Defence and Counterclaim. There were two amendments involved. The first was to state the defendant was appointed the plaintiff's Plant and Machinery Manager after his initial appointment as Site Foreman. There was no objection to this amendment. The second amendment was the amendment set out in [6] hereof, which the defendant objected to.

11 When the application came on for hearing before me on 25 June 2008, Mr Ling submitted that the plaintiff had pleaded in para 11(c) and (d) of the Reply and Defence to Counterclaim that the defendant had failed to account for monies received from the plaintiff's plant and machinery. As the disposal of the bar benders and bar cutter was discovered after the Reply and Defence to Counterclaim was filed, the plaintiff could not have referred to it. In his affidavit filed in support of the application, NKE stated that the amendment was sought for the sake of good order and clarity, for the sale and the proceeds of the sale of the bar benders and bar cutter to be treated as a part of the plaintiff's defence to the counterclaim.

12 The disposal of those items had been a matter of contention between the parties. The solicitors for the parties were in correspondence in June and July 2007 where the transaction was specifically brought up and allegations and denials were exchanged. On the evidence, it was clear that the transaction came within the general scope of para 11(c) and (d) of the Reply and Defence to Counterclaim.

13 The defendant always knew that the disposal of the equipment was a serious issue. He deposed in his affidavit filed in opposition of the application that criminal proceedings have been instituted against him in DAC No 15743/2008 and the case was fixed for hearing on 11 to 14 August 2008. (The criminal case had begun but had not ended at the present time as far as I am informed.)

14 He opposed the application to amend on the ground that "(i)t is too late for amendments to be allowed in the middle of trial in respect of matters apparent to the Plaintiffs a long time ago."[note: 4]

15 Three cases were cited and relied on by Mr Khoo. The first is *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109 ("*Goh v Pacific Can*"). This is also a case for wrongful dismissal. In this case, the plaintiff was dismissed as director and group managing director of the defendant company. The defendant company justified his dismissal on the ground that the plaintiff was in breach of his fiduciary duty. The defendant company relied on the fact that the plaintiff had not disclosed that he had been removed as a director of a company associated with the defendant company, although the non-disclosure had not been specifically pleaded by the defendant.

16 The judge, Judith Prakash J noted (at 139 G):

> The difficulty that arises is whether the above finding in fact aids the defendants. Although, as I stated earlier, they submitted that they were entitled to dismiss him based on such non-disclosure alone, *they did not specifically plead the non-disclosure as a defence.*

and added that (at 139 I-140 B):

> Nowhere in the defence is such an allegation made expressly and it would be wrong for me to read additional meanings into the pleading. The defendants chopped and changed their defence many times in the two years before the action came to trial. The allegation of a deliberate concealment of material information was in the defence from the very beginning. Yet at no time did the defendants expand that allegation to an assertion of breach of fiduciary duty. The defendants, having had and taken so many opportunities to change their stand, must be held strictly to their pleaded case. Thus in my opinion *since this particular breach of duty was not expressly pleaded, the defendants cannot now rely on it.*
>
> [Emphasis added]

17 There is a significant difference between *Goh v Pacific Can* and the present case. In *Goh v Pacific Can*, the defendant was relying on a matter that was not pleaded. In the present case, the plaintiff was seeking to include the transaction in the pleadings.

18 The second case cited was *Abdul Razak Valibhoy v Keppel Investment Management Ltd* [2002] SGHC 236 ("*Valibhoy v Keppel*"). In that case, the plaintiff had engaged the defendant, which carried on the business of professional investment managers. He sued the defendant for failing to discharge its duties to him. The plaintiff applied to amend the Further & Better Particulars to his Statement of Claim on the second day of the trial. Belinda Ang Saw Ean JC refused the application and explained at [85]:

> In my view it was too late for the amendments to be made. The court is normally slow to allow amendments at the trial stage in respect of matters apparent to the Plaintiff a long time ago. See *The Supreme Court Practice 1999 vol. 1* 20/8/11*; Hong Leong Finance Ltd v Famco (S) Pte Ltd* [1992] 2 SLR 1108.The proposed amendments came from the Offering Circular that was discovered in December 2001. The Plaintiff had this document in his own list of documents before [the defendant] gave discovery. *Mr. Valibhoy admitted receiving from Citibank NA a copy each of the Offering Circular and Bloomberg Report dated 27 July 1995 before he filed his claim.* Like the defendants in *Goh Kim Hai v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109, the Plaintiff has had many opportunities to put forward his case so much so that he must be held strictly to what has been previously stated.
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> [Emphasis added]

19 The learned judge also considered the effect of the proposed amendment and found at [86] that:

> The amendments, if allowed, would cause injustice to [the plaintiff] who would have to defend what would essentially be *a different case based on negligence*. If the amendments were allowed, [the plaintiff] would have to be afforded an opportunity to prepare and call witnesses to challenge the Plaintiffs on these allegations which happened some seven years ago. That in turn would have necessitated vacating the trial. It did not seem right to allow that to happen at so late a stage especially when the amendments sought by the Plaintiff were previously requested but refused.
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> [Emphasis added]

20 *Valibhoy v Keppel* is also distinguishable from the present case. The plaintiff in the present case

had pleaded that the defendant had disposed of its property in breach of his fiduciary duties, and was seeking to refer to a specific wrongful transaction. It was not seeking to put up a different case by the amendment, as the plaintiff in that case was doing. Unlike the plaintiff in *Valibhoy v Keppel*, the plaintiff in the present case did not have the information on the disposal of the three items from the start, and the application to amend was filed within three weeks from the time Mr Khoo objected to the evidence, during a break in the hearing.

21 The third case Mr Khoo cited is *Mohammed Anuar Bin Abdul Jalil v Chin Choon Company (Pte) Limited* [2002] SGDC 343, a decision of the District Court in which the plaintiff, a clerk of works in a construction project was dismissed by his employer sued for wrongful termination. At the trial, the defendant contended that there were valid reasons for the plaintiff's employment. One of the reasons given was the plaintiff's failure to submit omission reports on works, material and goods on time. Although this reason was stated in the letter of termination, it was not pleaded by the defendant in its Defence and Counterclaim.

22 Counsel referred to two paragraphs from District Judge Laura Lau Chin Yui's judgment where she held:

> 30 It is trite law that pleadings serve to notify the court of the issues which it will be asked to adjudicate upon. They serve to set the scope and chart the course of the action; it is the pleading process and not the court that sets the perimeters of the dispute. In *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793, Selvam J C (as he then was), was mindful of the binding effect of pleadings when he adopted the proposition that "the court may not make a finding or give a decision based on the facts not pleaded and a finding or decision or made will be set aside" (affirmed by the Court of Appeal in the same case: [1993] 2 SLR 113). The case of *Goh Kim Hai Edward v Pacific Can Investment Holdings Ltd* [1996] 2 SLR 109 emphasises the importance of pleading all material facts and a party who fails to take the opportunity to do so must bear the consequences that befall him. …
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> 31 In the present case, there is nothing in the Defence and Counterclaim from which the allegation of misconduct by failure to submit the omissions list in a timely fashion can be gleaned. Applying the principles stated in the preceding paragraph, [the defendant] is precluded from relying on this allegation and the court which is bound to decide on the issues on the record, is not entitled to make any findings on this unpleaded point. Whilst it is noted that [the plaintiff] was not taken by surprise and has not objected to the omission to plead or to the admission of the evidence on this unpleaded point, I am unable to depart from the fundamental rule which imposes on judges the duty to strictly decide a case upon and only upon the issues raised in the pleadings. Otherwise, the rule which declares that a party is bound by its pleadings will be rendered meaningless. *[The defendant] could have cured the defect in their pleadings by making an application to amend* their Defence and Counterclaim to include this aspect of [the plaintiff's] alleged misconduct. *No such application was made. [The defendant] must abide by the consequences of their omission.* By their failure to plead, [the defendant] cannot rely on [the plaintiff's] alleged failure to submit the omissions list in a timely manner as a ground justifying the termination of his employment. It follows that [the plaintiff's] claim for one month's salary in lieu of notice cannot be defeated on this ground.
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> [Emphasis added]

23 It is to be noted that the District Judge declined to rule on the alleged misconduct because it was not pleaded and the defendant did not amend its defence to include that allegation on the failure to submit omission reports on time. The plaintiff in the present case was doing exactly what the

District Judge said the defendant in that case should have done, *i.e.* to amend and include the specific allegation.

24 In the light of the pronouncements in the cases, the plaintiff was correct in seeking to amend its Reply and Defence to Counterclaim to refer to the disposal of the bar benders and bar cutter. The question is whether the plaintiff should be allowed to amend.

25 The common law rule relating to wrongful dismissal is that provided good case for dismissal in fact existed, it is immaterial whether or not it was known to the employee at the time of dismissal: *Halsbury's Laws of England* vol 16(1B) Fourth Edn Reissue at para 619. In *Goh v Pacific Can*, Prakash J referred to this rule at 116 H-J. Against this backdrop, the plaintiff was entitled to refer to and rely on the transaction to justify the termination of the defendant's employment.

26 Was the amendment application for that purpose made too late? It was not prohibited by the Rules of Court. Under O 20 r 5, a party may amend its pleadings at any stage of the proceedings with the leave of the Court. In deciding whether to allow an amendment, all relevant factors should be considered, including the nature and effect of the amendment, the conduct and interests of each party, and the fair and efficient disposal of cases.

27 After taking into account the following factors:

(a) a general assertion of failure to account for the disposal of the plaintiff's plant and machinery was already pleaded, and the effect of the amendment sought was to refer to a particular incident of failure;

(b) the disposal of the bar benders and bar cutter was discovered after the Reply and Defence to Counterclaim was filed on 17 May 2007;

(c) the application to amend was made within three weeks of the plaintiff having notice that the admission of the evidence on the disposal of these items was objected to;

(d) the disposal of the bar benders and bar cutter was a matter of dispute between the parties;

(e) the defendant had prepared and set his position on the disposal of the bar benders and bar cutter in the on-going criminal proceedings; and

(f) the defendant had the time and opportunity to prepare and present his response to the new para 11(e) because the amendment was made when the hearing of the case was adjourned (and this was evident when hearing resumed after the amendment was made),

I granted the plaintiff's application to amend.

[note: 1]Reply and Defence to Counterclaim (Amendment No.1) para 11

[note: 2]Notes of Evidence 30 April 2008, page 69 line 25 to page 70 line 16

[note: 3]Notes of Evidence 30 April 2008, page 108 lines 11-13

[note: 4]Defendant's Skeletal Arguments para 2.1