Recordtv Pte Ltd v MediaCorp TV Singapore Pte Ltd and Others
[2009] SGHC 146

Case Number : Suit 615/2007, RA 146/2009

Decision Date : 24 June 2009

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Ang Kai Hsiang (ATMD Bird & Bird LLP) for the appellant/plaintiff; Dedar Singh (Drew & Napier LLC) (instructed) and Cheah Yew Khuin (Wong & Leow LLC) for the respondents/defendants

Parties : Recordtv Pte Ltd — MediaCorp TV Singapore Pte Ltd; Mediacorp TV12 Singapore Pte Ltd; Mediacorp News Pte Ltd; Mediacorp Studios Pte Ltd

Civil Procedure – Striking out – When cause of action should be struck out – Whether cease and desist letters sufficient basis to prevent claim in conspiracy from being struck out

Equity – Issue estoppel – When exception to issue estoppel might arise – What qualified as "sufficient change in circumstances" to effect limited exception to issue estoppel

Tort – Conspiracy – What was required to prove sufficient claim in conspiracy – Whether cease and desist letters sufficient basis to found claim in conspiracy

24 June 2009 Judgment reserved.

Tan Lee Meng J:

1 The appellant, Recordtv Pte Ltd ("RPL"), relying on s 200 of the Copyright Act (Cap 63, 2006 Rev Ed) ("the Act"), instituted an action against the 1st defendant, MediaCorp TV Singapore Pte Ltd, the 2nd defendant, MediaCorp TV12 Singapore Pte Ltd, the 3rd defendant, MediaCorp News Pte Ltd, and the 4th defendant, MediaCorp Studios Pte Ltd (collectively referred to as "the MediaCorp companies") for making groundless threats of legal proceedings. In addition, RPL pleaded an alleged conspiracy on the part of the MediaCorp companies. Senior Assistant Registrar Yeong Zee Kin ("SAR Yeong") ordered the striking out of the paragraphs in RPL's Statement of Claim which concerned the alleged conspiracy as well as the particulars pertaining to the alleged conspiracy that were filed on 18 February 2008 pursuant to an Order of Court dated 30 January 2008. RPL appealed against SAR Yeong's decision.

Background

2 RPL provides a self-service online recording facility known as the "Internet-based Digital Video Recorder" ("iDVR") at the website www.recordtv.com. According to RPL, its iDVR is accessible by registered users of the iDVR in Singapore to record free-to-air television broadcasts for the registered user's private and domestic use. RPL also explained that its registered users will be able to view recordings that have been made within 15 days from the time the recording was made.

3 The MediaCorp companies are broadcasters licensed by the Media Development Authority of Singapore to broadcast a number of free-to-air terrestrial channels in Singapore. These are Channels 5, 8 and U, which are the first defendant's channels; Central and Suria, which are the second defendant's channels; and Channel NewsAsia, which is the 3rd defendant's channel.

4 Apart from operating the television channels referred to above, the MediaCorp companies also

produce various television programmes and are the makers of cinematographic films of such television programmes, which are broadcast over their channels.

5 The MediaCorp companies regarded the re-broadcasting of its progammes by RPL as an infringement of its copyright. As such, on 24 July 2007, the MediaCorp companies' former solicitors, M/s Allen & Gledhill, wrote to RPL to allege that the latter had committed acts of infringement by re-broadcasting the MediaCorp broadcasts and by making copies of them ("the first cease and desist letter"). The letter made it clear that the MediaCorp companies were entitled to commence legal proceedings against RPL but would refrain from doing so if RPL complied with the demands contained in the said letter.

6 On 24 September 2007, RPL received a letter from the MediaCorp companies' present solicitors, M/s Wong & Leow, alleging that RPL had infringed their copyright in MediaCorp's broadcasts as well as in various films made by the 3rd and 4th defendants ("the second cease and desist letter"). This time, legal proceedings were threatened and RPL's solicitors were asked whether they had instructions to accept service of MediaCorp's writ.

7 On 28 September 2007, RPL instituted legal proceedings against the MediaCorp companies, claiming that the latter had made groundless threats of legal proceedings pursuant to s 200 of the Act through the first and second cease and desist letters.

8 In addition to the issue of groundless threats, RPL also alleged that the MediaCorp companies had conspired with the sole or predominant intention of injuring it or had conspired to injure it by unlawful means. It pleaded in its Statement of Claim at [10] and [11] as follows:

> 10 Further and in the alternative, the Defendants (or any two or more together) conspired and combined together wrongfully and with the intention and/or in the sole or predominant intention of injuring the Plaintiff and/or in causing loss to the Plaintiff, by way of the aforesaid unlawful threats.
>
> Particulars
>
> (a) The Plaintiff is a competitor of the Defendants. The Defendants had acted in concert to make the aforesaid threats. The motivation of the Defendants was to damage or destroy the Plaintiff's business.
>
> 11 As a result of the Defendants' conspiracy as set out in paragraph 10 above, the Plaintiff has suffered loss and damage. The Plaintiff will suffer further loss and damage unless the Defendants are restrained.
>
> Particulars
>
> (a) The particulars set out under paragraph 9 above are repeated.

9 In response, the MediaCorp companies filed a counterclaim in relation to copyright infringement of their broadcasts and films.

10 On 25 April 2008, the MediaCorp companies filed an application to strike out the conspiracy claim. The application was allowed on 9 May 2008 by the Assistant Registrar. However, the decision was reversed by Andrew Ang J in RAS No 211 of 2008 on 2 June 2008.

11 After the Assistant Registrar's decision was reversed, RPL reiterated its request for further discovery in respect of:

(a) all correspondence and/or minutes of meetings between the 1st, 2nd and 3rd defendants in relation to the decision to issue the first cease and desist letter; and

(b) all correspondence and/or minutes of meetings between the 1st, 2nd, 3rd and 4th defendants in relation to the decision to issue the second cease and desist letter.

12 As the MediaCorp companies claimed privilege over the documents referred to above, RPL took out Summons No 4855 of 2008 to obtain an order that the MediaCorp companies provide the information in question. However, RPL's application was dismissed and no appeal against the said dismissal was filed.

13 In due course, the affidavits of evidence-in-chief ("AEIC") were exchanged. No evidence of the alleged conspiracy by the MediaCorp companies was disclosed in any affidavit filed in support of RPL's case. Not surprisingly, the MediaCorp companies applied for the striking out of paragraphs 10 and 11 of the Statement of Claim as well as paragraphs 15-20 of the particulars filed pursuant to the Order of Court dated 30 January 2008 on 18 February 2008. SAR Yeong allowed the application. RPL appealed against his decision.

Whether the offending paragraphs should be struck out

14 Order 18 r 19 of the Rules of Court provides as follows:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
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> (*a*) it discloses no reasonable cause of action or defence, as the case may be;
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> (*b*) it is scandalous, frivolous or vexatious;
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (*d*) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

15 In *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 ("*Gabriel Peter*"), the Court of Appeal, while considering the principles for striking out an action under O 18 r 19 of the Rules of Court, reiterated that the court's power to strike out an action is a draconian one and should not be exercised too readily unless the plaintiff's case is wholly devoid of merit. The Court of Appeal explained as follows at [18]:

> In general, it is only in plain and obvious cases that the power of striking out should be invoked. … It should not be exercised by a minute and protracted examination of the documents and facts

of the case in order to see if the plaintiff really has a cause of action. The practice of the courts has been that, where an application for striking out involves a lengthy and serious argument, the court should decline to proceed with the argument unless, not only does it have doubts as to the soundness of the pleading but, in addition, it is satisfied that striking out will obviate the necessity for a trial or reduce the burden of preparing for a trial.

16 In the present case, the MediaCorp companies asserted that the claim relating to a conspiracy should be struck out under O 18 r 19 (b) – (d) as none of RPL's witnesses had given any evidence of a conspiracy in the AEICs.

17 What is scandalous, frivolous or vexatious is very clear. In *The Osprey* [2000] 1 SLR 281, LP Thean JA reiterated at [8] that the words "frivolous and vexatious" mean actions which are "obviously unsustainable" or "wrong" and added that this expression also connotes "a lack of purpose or seriousness in the party's conduct of the proceedings". As for what amounts to an "abuse of process", in *Gabriel Peter*, the Court of Appeal stated at [22] as follows:

> The term "abuse of process of the Court" in Order 18 Rule 19(1)(d) has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being sued as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or abuse of process are not closed and will depend on all the relevant facts and circumstances of the case.

18 A useful case which sheds light on the striking out of a claim for conspiracy is *OCM Opportunities Fund II, LP and Others v Burhan Uray (alias Wong Ming Kiong) and Others* [2004] SGHC 115 ("*OCM Opportunities*"). In this case, the plaintiffs, who were institutional investors, instituted an action against the defendants for conspiracy. Their case was that the defendants or any two or more of them, conspired and defrauded them of substantial sums of money by means of fraudulent misrepresentations which induced or influenced them to purchase bonds in the form of 10% guaranteed notes due in 2007 ("the DGS notes") in the secondary market. The defendants sought to strike out the Writ of Summons and Statement of Claim under O 18 r 19 of the Rules of Court. Belinda Ang J rightly reiterated that a cause of action pleaded without the support of material facts is defective and should be struck out as disclosing no reasonable cause of action, or as being frivolous and vexatious or an abuse of court. However, she noted that the plaintiffs had relied on, among other things, the following assertions in support of their allegation of conspiracy:

(i) the defendants' persistent and fraudulent misrepresentations of the financial position of DGS based on fictitious trade receivables to investors of the DGS notes;

(ii) the defendants' fraudulent misrepresentation of the purpose of the issuance of the DGS Notes when they knew that DGS' funds were not solely for the use of DGS but for other businesses in the group controlled by the first defendant and his children;

(iii) channelling of funds between DGS and another company for the purchase of expensive logging equipment for the use of another company;

(iv) scaling down the business of DGS;

(v) resisting attempts by the plaintiffs to obtain an independent professional audit of DGS' business and verification of the alleged reasons for its financial difficulties;

(vi) the relationship between many of the defendants, the first defendant being the father of the second, third, fourth, fifth and ninth defendants; and

(vii) the fact that the remaining defendants were either companies controlled by the 1st defendant and his family or close business associates.

19 In view of the many assertions made by the plaintiffs, it was not surprising that Belinda Ang J dismissed the application to strike out the conspiracy claim.

20 The present case is totally different from *OCM Opportunities*. In the present case, RPL's counsel, Mr Ang Kai Hsiang, admitted that despite all the AEICs having been exchanged, the only evidence of a conspiracy presented by his client are the first and second cease and desist letters, in which the MediaCorp companies asserted that his client were in breach of their copyright. Mr Ang said that it is hoped that evidence of a conspiracy would be uncovered during cross-examination of the MediaCorp companies' witnesses. This smacks of a most blatant fishing expedition.

21 If RPL can assert a conspiracy solely on the basis of the first and second cease and desist letters, then whenever two or more related companies instruct a lawyer to send a letter to a person whom they allege is infringing their trademark or copyright, the recipient of the letter can plead a conspiracy without reference to material facts. This cannot be countenanced as companies within a group of companies who own copyright are entitled to issue cease and desist letters to protect their copyright without being accused of a conspiracy unless there is evidence to support that allegation. The MediaCorp companies, who are the owners of the copyright in the broadcasts and films in question, are surely the proper parties to instruct their solicitors to issue the first and second cease and desist letters.

22 At this juncture, it would be convenient to refer to the following passage from the judgment of Lai Kew Chai J in *Quah Kay Tee v Ong & Co Pte Ltd* [1997] 1 SLR 390 at [45], where the elements of the tort of conspiracy were summarized as follows:

> The tort of conspiracy comprises two types: conspiracy by unlawful means and conspiracy by lawful means. A conspiracy by unlawful means is constituted when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, and the act is carried out and the intention achieved. In a conspiracy by lawful means, there need not be an unlawful act committed by the conspirators. But there is the additional requirement of proving a 'predominant purpose' by all the conspirators to cause injury or damage to the plaintiff, and the act is carried out and the purpose achieved.

23 The above passage was approved by the Court of Appeal in *Chew Kong Huat v Ricwil (Singapore) Pte Ltd* [2000] 1 SLR 385 at [34] and in *Beckkett Pte Ltd v Deutsche Bank Ag and Another and Another Appeal* [2009] SGCA 18 at [120].

24 One must be mindful of the fact that at this interlocutory stage, a party is not required to lay all the evidence on which he will rely at the trial to support his claim and a plaintiff should not be prevented from proceeding with his or her case merely because it is weak. However, it cannot be overlooked that material facts must be pleaded. In the present case, although RPL claimed that there was a conspiracy by unlawful means or a conspiracy by lawful means, the first and second cease and

desist letters do not prove a conspiracy of any kind and there is no evidence of the alleged conspiracy in the AEICs that have been exchanged.

25 While referring to the AEIC of RPL's director, Mr Carlos Nicholas Fernandez ("Carlos") in his Notes of Evidence ("NE") at p 5, SAR Yeong cogently stated as follows:

> I have reviewed Carlos' [AEIC]. The relevant sections are paragraphs (a) 31 to 36 and (b) 52-55 and 61-63. To my mind, the paragraphs in (a) are not more than Carlos reciting what was written in letters between solicitors on the instruction of clients. Crucially, these were allegations flowing from the Plaintiff as instructions to their solicitors. They do not amount to evidence of an intention to injure, whatever the degree.
>
> The paragraphs in (b) are essentially Carlos' account of the battles between rights holders and the owners of new technology. Crucially, these complaints of use (or abuse) of IPR to stifle innovation and kill new technologies are complaints against the behaviour of rights holders in the US, not of the Defendants.
>
> In order to prove intention to injure, Plaintiff must adduce either (a) direct evidence of such intention on the part of the Defendants or () primary evidence from which such intention may be inferred. Based on my review of the [AEIC] in question, the paragraphs Plaintiffs seek to rely on falls into neither (a) or (b).

26 The trial is just a few weeks away and the lack of evidence of any agreement between the companies in the MediaCorp stable of companies to cause injury to RPL is fatal to RPL's conspiracy claim, which is hopelessly doomed to fail. In *Bandung Shipping Pte Ltd v Keppel TatLee Bank Ltd* [2003] 1 SLR 295, where the Court of Appeal struck out a claim that was hopeless, the Court noted at [34] that to "allow the case to go further for trial would be to compel the defendants to expend time and money in defending a case which obviously had no merit whatsoever". That statement is equally applicable in the present case.

27 It follows that RPL's conspiracy claim must, without more, be struck out because it is scandalous, frivolous and vexatious or an abuse of the process of the court. The nub of the matter before the court at the trial is copyright infringement and allowing the conspiracy claim to stand will prejudice and delay the fair trial of the action.

28 The only remaining question is whether RPL's assertion that *res judicata* arises has any merit. It may be recalled that an earlier attempt to strike out the claim before the exchange of AEICs was dismissed by Andrew Ang J in RAS 211 of 2008. As such, RPL submitted that the MediaCorp companies are not entitled to institute the present proceedings to strike out the conspiracy claim. In rejecting this argument in the hearing below, SAR Yeong stated in his NE at p 4 as follows:

> [T]here is no issue estoppel in this case as the earlier decision by Andrew Ang J was … before discovery was completed and [AEICs were] exchanged. To my mind, these are substantive changes in circumstances that justify a revisiting of the issues if there are sufficient grounds to do so.

29 In *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853 Lord Upjohn observed at p 947 that all estoppels are not odious and "must be applied so as to work justice and injustice" and that "the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind. When endorsing this statement in *Arnold v National Westminster Bank Plc* [1991] 2 AC 93, Lord Keith said as follows:

> In my opinion your Lordships should confirm it to be the law that there may be an exception to issue estoppel in the special circumstances that there has become available to a party material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognize that in special circumstances inflexible application of it may have the opposite result ….

30 I hold that the exchange of AEICs constitutes "material relevant to the correct determination of a point" and that this material could not have been adduced earlier on by reasonable diligence. I agree with SAR Yeong that there are sufficient changes in the circumstances since the last application to strike out the conspiracy claim to warrant a consideration of the present application by the MediaCorp companies to have the said claim struck out.

31 For the sake of completeness, it ought to be pointed out that the MediaCorp companies also argued that the question of a conspiracy cannot arise in an action for groundless threats because the Act has already made specific provision in s 200 for damages to be awarded to the plaintiff if it is found that groundless threats had been made. As I have already concluded that the action should be struck out, there is no necessity for this other argument to be considered in this judgment.

32 For the reasons stated, I dismissed the appeal against SAR Yeong's decision with costs.

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