

Info-Communications Development Authority of Singapore v Singapore Telecommunications
Ltd
[2002] SGHC 95

Case Number : Suit 934/2001, RA 84/2002, 86/2002
Decision Date : 02 May 2002
Tribunal/Court : High Court
Coram : Choo Han Teck JC
Counsel Name(s) : Cavinder Bull (Drew & Napier LLC) for the plaintiff; Muthu Arusu and Prakash Pillai (Allen & Gledhill) for the defendant
Parties : Info-Communications Development Authority of Singapore — Singapore Telecommunications Ltd

Civil Procedure – Disclosure of documents – Application for further discovery – Waiver of privilege – Disclosure of solicitor's letter of advice – Whether waiver of privilege for letter of instruction as well – Whether any difference between waiver of privilege made out of court and one made in court – Whether mere disclosure of a document makes it a fact in issue

Civil Procedure – Disclosure of documents – Application for further discovery – Electronic mail printouts referring to certain documents – Whether such documents relevant and subject to disclosure

: The plaintiff is a body corporate established under the Info-Communications Development Authority of Singapore Act and succeeds its predecessor, the Telecommunication Authority of Singapore (`TAS`), taking over the assets, rights, privileges, liabilities, and obligations of the latter on 1 December 1999. The defendant is a public company whose main business lay in providing telecommunication services. In 1992 TAS granted the defendant a licence to provide telecommunication services in Singapore until 2017. The licence also conferred a monopoly in respect of various services until 2007. This licence agreement was amended in 1993 so that from 1 April 2002, TAS was to be entitled to grant other operators a licence to provide telecommunication services if the services are `ancillary and incidental` to the business of those operators. This amendment naturally affected the monopoly rights of the defendant, but the amendment has no material bearing in the present action. It has only a historical and narrative relevance, the details of which I shall come to shortly. In the proceedings before me, the plaintiff was represented by Mr Cavinder Bull and the defendant by Mr Muthu Arusu and Mr Prakash Pillai.

In May 1996 TAS sought to modify one of the conditions of the licence in a way that would further affect the defendant`s monopoly rights. In its letter of 11 May 1996 TAS gave the defendant the requisite formal notice with an offer of \$1.5bn as compensation for the further amendment. The defendant made its own calculations as to what the proper compensation ought to be and by its reckoning the compensation should be between \$2.4 to \$6.5bn. Mr Muthu Arusu submitted that the defendant had taken the phrase `ancillary and incidental` in the 1993 amendment into account in its calculations. I will set out the entire condition 1.7 so that the phrase in question can be appreciated in its context:

Provided that from 1 April 2002 the Authority shall have the right to license on a case-by-case basis, broadcasting operators and other Public Telecommunication Licensees to provide telecommunication services which overlap with the first six services listed in Part II(A) of the Appendix to the Licence, provided that these are ancillary and incidental to the broadcasting services or to the principal services provided by these broadcasting operators and other Licensees.

The defendant understood the 1993 amendment and the words `ancillary and incidental` to mean only the necessary appendages to the main business of the operators. The plaintiff, on the other hand, appears to regard the phrase in question as having a broader and looser meaning, that is to say, anything connected with the operator`s principal business. The plaintiff disagrees with the defendant`s interpretation, but Mr Bull accepts that this difference in opinion is not an issue in this action. The relevance of the true meaning and effect of the phrase `ancillary and incidental` from the defendant`s viewpoint is that if the defendant`s interpretation is the correct one then the compensation for any reduction of its monopoly rights would be more substantial than it would be if the plaintiff`s version is correct, and, therefore, its assessment of \$2.4 to \$6.5bn as compensation would have been nearer the fair value. This point is now only of academic interest because there is no dispute that the defendant eventually accepted the sum of \$1.5bn offered by the plaintiff. The only issue is whether it was contemplated, or agreed, that if no tax was payable by the defendant on this amount, the tax component of \$388m must be refunded to the plaintiff.

Reverting to the narrative, the defendant accepted TAS`s offer of \$1.5bn on 30 May 1996 and TAS acknowledged by letter on the same day that the \$1.5bn `will be in full and final payment`. One year later, on 31 March 1997 the full sum was paid to the defendant. Sometime in 2000 the plaintiff decided to shorten the monopoly period of the defendant even more, that is, from 2002 to 2000. Arising from this, another payment by way of compensation was made. This second payment came to \$859m. There is no dispute concerning this payment; but the inquiries over the tax liability of the defendant on this amount eventually resulted in the present action in respect of the first payment, that is, the \$1.5bn. This was how it happened. On 4 October 2000 the Inland Revenue Department indicated in their letter to the plaintiff that no tax was payable by the defendant on the \$859m it received from the plaintiff. In this same letter, the Inland Revenue Department also stated in words to the effect that no tax was payable on the previous payment of \$1.5bn either. Consequently, on 14 March 2001 the plaintiff wrote to the defendant asking for a refund of \$388m being the sum believed to be payable as tax on the \$1.5bn payment. The plaintiff`s case is that it believed that tax was payable on the compensation it paid to the defendant, and since it was intended that the defendant should not have to pay any tax out of the moneys it received, the plaintiff therefore factored the tax component into the \$1.5bn. Now that it is known that tax need not be paid on the compensation, the plaintiff takes the view, therefore, that the portion (\$388m) allotted for tax ought to be paid back to it. The defendant rejected this request for refund and raised various defences, including a denial that there was any mistake by the plaintiff, compromise, estoppel and change of position. All these are among the issues for trial.

In the meantime, the parties applied for specific orders for the discovery of documents after the standard discovery process was completed. The two appeals before me presently are from each of the parties. In the case of the plaintiff, it appealed against the assistant registrar`s refusal to order the defendant to disclose advice and correspondence between the defendant and its solicitors, Allen & Gledhill. In the case of the defendant, it appealed against the assistant registrar`s refusal to order disclosure by the plaintiff of various drafts and attachments referred to in the electronic mail printouts produced by the plaintiff during the discovery process. I proceed first to deal with the plaintiff`s appeal.

The plaintiff`s request for further discovery arises in this way. A letter from the defendant`s solicitors Allen & Gledhill, dated 16 April 1996, setting out its legal advice on the meaning of the phrase `ancillary and incidental` (found in condition 1.7 of the 1993 amendment) was disclosed by the defendant to be in their possession. Mr Bull submitted that this letter of advice may not provide the complete picture and therefore the letter or letters of instruction, as the case may be, and any related correspondence are material and must be disclosed. Mr Muthu Arusu resisted on two grounds.

First, he says that other documents relating to Allen & Gledhill`s advice are protected by legal privilege; and second, even if they are not (by reason of a waiver of that privilege) they are of no relevance to the issues in the present action. Mr Bull`s case is that by disclosure of the letter of advice the defendant had indeed waived the solicitor-client privilege accorded to it under s 128 of the Evidence Act (Cap 97, 1997 Ed). Counsel relied on **George Doland v Blackburn Robson Coates & Co (a firm)** [1972] 3 All ER 959[1972] 1 WLR 1338 in support. In that case, a solicitor testified as a witness for his client, the plaintiff, and recalled his telephonic conversation with the plaintiff`s managing director. He referred to two topics (which are not necessary for me to elaborate here) during his testimony, and consequently, in cross-examination, the defendant`s counsel asked to see a record of that conversation as well as any other document relating to it that might have existed. The plaintiff`s objection on the ground of privilege was overruled by the court. A similar issue arose in **Great Atlantic Insurance Co v Home Insurance Co** [1981] 2 All ER 485[1981] 1 WLR 529. In that case, a memorandum prepared by the plaintiff`s American lawyers was produced and read in court. When it transpired that the memorandum produced was incomplete, the court upheld the contention of the defence that privilege had been waived in respect of the entire memorandum, including those parts that had not been read. Mr Muthu Arusu says that these cases are of no assistance to the plaintiff here because the issue in the cases cited arose in the midst of trial. That is true, but I do not regard this fact as a material distinction. There is no reason why a waiver of privilege made out of court should have less weight than one made on the witness stand. The test is whether there is a waiver or not. Where it was made is only relevant in so far as it may incline the court to find a statement made under oath to be more reliable than one that was not. But once the court accepts that statement to have been made and that it amounts to a waiver, the place where it was made becomes unimportant.

It will be helpful to understand the precise issues in the context in which they arise. It is not disputed that Allen & Gledhill`s letter of advice is covered by legal privilege. The question is whether privilege has been waived. Mr Muthu Arusu sensibly accepts that by putting in Allen & Gledhill`s letter, the defendant had waived privilege attached to that letter. However, he argued that it does not follow that privilege attached to other documents is thereby waived. In the **Great Atlantic Insurance Co** case (supra), Templeman LJ referred to the **Doland** case (supra) with approval. He was of the view that the deliberate introduction of a part of a document into the trial record is a waiver of privilege in respect of the entire document. He also expressed the view that ([1981] 2 All ER 485 at 492):

it would not be satisfactory for the court to decide that part of a privileged document can be introduced without waiving privilege with regard to the other part in the absence of informed argument to the contrary, and there can be no informed argument without the disclosure, which would make argument unnecessary.

I am in full agreement with the views above expressed, but that does not signal the end of the matter. If privilege is waived in respect of a solicitor`s letter of advice, it is also waived in respect of the letter of instruction that brought forth that advice; but the waiver of privilege is the secondary question. The primary question is whether the document is admissible evidence. The fundamental rule is set out in s 5 of the Evidence Act as follows:

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

On the facts as presented to me the letter of advice relates to the defendant`s desire for assistance in the interpretation of the 1993 amendment so that it can quantify its loss. The eventual quantification made by the defendant did not appear to be of any relevance at any time in the dispute with the plaintiff from what has been set out before me. The only indication of its relevance from the submission of Mr Bull is that the letter of advice was put in as a fact in issue by the defendant, an assertion disputed by Mr Muthu Arusu. I am in agreement with Mr Muthu Arusu that the mere disclosure of a document does not make it a fact in issue. The only other way that this document may be considered relevant is to accept the tenuous suggestion that the document itself is indicative of the defendant`s knowledge that the \$1.5bn included a tax component. There is no direct evidence to show that this is plausible (at the moment). The letter of advice itself has no indication relating to the tax component. It may perhaps become relevant at trial once other facts are introduced, but until then there is nothing to indicate that there is any relevance in the production of further documents connected with that letter of advice. Accordingly, the assistant registrar`s order will not be disturbed save to say that the plaintiff shall not be precluded from making a fresh application to the trial judge. Consequently, the plaintiff`s appeal is dismissed. I ordered costs to be reserved to the trial judge because if Mr Bull is right and counsel succeeds in persuading the trial judge that Allen & Gledhill`s letter is of significance to the issues at trial, the judge will be entitled to order disclosure and, in deciding costs at that stage, may find it helpful to be able to take this present application into account.

I now come to the defendant`s appeal. The defendant applied before the assistant registrar for an order that the plaintiff discloses the drafts and attachments referred to in the electronic mail passing between TAS and the ministry. Mr Bull submitted that the drafts and attachments are irrelevant because the main issue at trial is whether the plaintiff made a mistake in the inclusion of the tax component into the \$1.5bn payment and that the defendant was aware that this sum included a tax component. How the plaintiff`s mistake was made, counsel submitted, is not material if there is in fact a mistake. I am unable to agree with this argument. The trial judge has to determine whether there was a mistake or not, and it must therefore be relevant for him to consider how the mistake arose. The drafts, discussion and other evidence tracing the path to the final act constituting the error must, accordingly, be material. Although the defendant is raising a number of positive defences, it is also denying and therefore, challenging the plaintiff to prove its case. In so doing, it is entitled to challenge the assertion of mistake and put the plaintiff to prove how that mistake occurred. The view that I express here finds support in [Ormerod Grierson & Co v St George`s Ironworks \[1906\] 95 LT 694](#) where Kekewich J expressed his opinion as follows (at p 696):

I am prepared to lay down that, for the purpose of an application of this kind, but not for any other purpose, if a letter scheduled to an affidavit of documents relating to the matters in question in the action is produced - that is to say, not claiming privilege, refers to any other letter or document - that other letter or document is at once prima facie relevant to the matter in question.

In this instant case, the documents requested by the defendant are referred to in the plaintiff`s electronic mail in terms such as, `**attached is the draft notification letter** to ST, drafted along the lines of the first modification letter of Oct 93` (my emphasis). In the absence of any objection based on privilege, such drafts are relevant for they may or may not go towards proving the fact in issue, that is, the plaintiff`s mistake. Whether they do so or not is a matter for the trial judge to decide, but they must necessarily be disclosed so that the court may receive a balanced and informed submission from both sides. For the reasons above, the defendant`s appeal was allowed with costs in the cause.

Outcome:

Plaintiff`s appeal dismissed; defendant`s appeal allowed.

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