Tan Chor Chuan and Others v Tan Yeow Hiang Kenneth and Others [2004] SGHC 259

Case Number : Suit 261/2004, SIC 4932/2004

Decision Date : 17 November 2004

Tribunal/Court : High Court

Coram : Joyce Low Wei Lin AR

Counsel Name(s) : Prakash Pillai / Melvin See (Wong Partnership) for plaintiffs; Alvin Tan (Wong Thomas and Leong) for defendants

Parties : Tan Chor Chuan; Yap Swee Chee; Ee Boon Peng Lawrence; Ong Chong Ghee; Rolles Rudolf Jurgen August; Chern Seng Pau; Yung Yew Kong; Menon Nelly; Tan Lian Seng — Tan Yeow Hiang Kenneth; Chan Lai Fung; Chia Chung Mun Alphonsus; Tan Lian Ann; Aplin Nicholas Giles; Yeo Kok Ching Alan; Chong Yeh Shen Jason; Goh Hin Tiang; Lim Ting Fai Lawrence; Seow Yongli; Wong Loong Tat

17 November 2004

AR Joyce Low:

This is the plaintiffs' application for the defence to be struck out and judgment to be entered for the plaintiffs or for an "unless" order for the production of certain documents, pursuant to O 24 r 16 of the Rules of Court ('the Rules'), because the defendants allegedly breached their discovery obligations. In the alternative, the plaintiffs contend that the court is entitled to invoke its inherent power to strike out the defence on the basis that the defendants abused the court's process by destroying material documents when litigation was anticipated.

2 The documents in question are emails passing between the defendants and emails passing between the defendants and the Singapore Chess Federation ('SCF') relating to its extra-ordinary general meeting ('EGM') held on 12 January 2004 ('the Emails'); and the audio recordings of the EGM and SCF's Annual General Meeting ('AGM') held on 26 June 2004. The relevancy of these documents was not in dispute. For the reasons set out below, I dismissed the application.

Facts

3 The plaintiffs are members of SCF and the defendants are members of the Executive Council of the SCF. The plaintiffs were members of a party that requisitioned the EGM to, amongst other things, pass a resolution to ask the defendants to step down as office bearers of SCF. In response to the requisition, the defendants published a document on the SCF's website that the plaintiffs considered defamatory. The plaintiffs therefore commenced an action in defamation against the defendants. On 5 July 2004, the court recorded a consent order that the offending words in the document were defamatory of the plaintiffs. Consequently, the trial of the present action relates only to whether the defendants' defences of justification, fair comment and privilege can be established.

4 On 7 May 2004, an order of court was made for the parties to provide discovery by filing a list of documents and an affidavit verifying the same. The defendants filed their list of documents, which disclosed four cassette tapes containing audio recordings of the AGM but not the Emails. The tenth defendant deposed that he used to have a cassette tape recording of the EGM but misplaced it. The plaintiffs subsequently came into the possession of some emails that passed between the defendants in relation to the EGM. In addition, upon the inspection of the four cassette tapes that the defendants had disclosed, the plaintiffs discovered that three of the tapes were recordings of the

AGM while the last one was, in fact, a recording of the EGM.

5 In response, all the defendants filed affidavits to state that none of the Emails was in their possession because they deleted them shortly after the conclusion of the EGM as part of the regular housekeeping of their email accounts. In relation to the cassette tapes, the tenth defendant affirmed that he must have forgotten that he had returned the tape recording of the EGM to the organising secretary ('OS') of the SCF. The ninth defendant affirmed that he was the one in charge of the management of the audio recording of the AGM and that there were only three cassette tapes recording the same. The plaintiffs found the explanations incredible and took out the present application.

Alleged breach of discovery obligations

6 O 24 r 16(1) of the Rules gives the court the power to strike out a defendant's defence and enter judgment for the plaintiff or make any other order that it thinks just for the defendant's failure to comply with his discovery obligations. The principles governing the exercise of this power and the proper treatment of an affidavit as to discovery of documents are found in *Lornho plc v Fayed and Others (No 3)*, The Times, 24 June 1993. These principles were adopted by the Singapore High Court in *Soh Lup Chee and Ors v Seow Boon Cheng and Anor* [2002] 2 SLR 267.

7 In *Lornho v Fayed*, the plaintiffs took out an application pursuant to O 24 r 16 to strike out the defendants' defence and enter judgment either immediately or after cross-examination of the defendants on their affidavits of documents. The plaintiffs alleged that the defendants' discovery was deficient and that their explanation for the non-production of discoverable documents was false. Stuart-Smith LJ held that a deposition on oath that the deponent does not have documents requested for in specific discovery is conclusive and cannot be contravened by a further contentious affidavit or cross-examination before trial. The learned judge was of the view that there must be "clear and uncontested evidence", either as a result of admitted breach or because the breach could be ascertained from a party's own documents, affidavits or pleadings before a defence could be struck out under O 24 r 16. The standard is analogous to that applied in summary judgment proceedings pursuant to O 14.

8 The same high standard was applied in *Soh Lup Chee*'s case. In that case, Choo Han Teck JC (as His Honour then was) concluded that the plaintiffs made out a sufficient case to strike out the defence under O 24 r 16 because they had "amply demonstrated…the *numerous obvious omissions* of documents that *must surely exist* or…had existed" and furthermore, the defendants provided no explanation as to the omissions. His Honour, however, did not order that the defence be struck out and made an "unless" order for the production of the documents instead, because of the draconian nature of a striking out order.

9 In the present case, counsel for plaintiffs, Mr Prakesh Pillai made numerous attacks on the credibility of the affidavits that the defendants have filed. In summary, he made the following submissions in relation to defendants' explanation for the non-production of the Emails:

(a) It is inherently incredible that all 11 of the defendants separately and independently deleted the Emails for housekeeping purposes, without archiving or making any copies of the Emails;

(b) It was obvious that the Emails have a clear relevance to impending litigation when they were purportedly deleted;

(c) It is incredible that the defendants, as committee members of the SCF, were not in control of the Emails because they should be able to obtain them from the OS, who would not have deleted them since he had administrative functions in the SCF;

(d) The first defendant's explanation that he deleted the Emails from his office account because they were not work-related was false since the Emails had been sent from his personal account; and

(e) The defendants made contradictory claims in their affidavits by deposing that it was their practice to delete *old* emails while stating that the Emails were deleted *shortly* after the EGM.

10 As for the audio recordings, Mr Pillai submitted that the "inescapable inference" to be drawn from the defendants' changes in testimonies with respect to the number of cassette tape recordings of the AGM and EGM in their possession is that the defendants had attempted to suppress part of the audio recording of both meetings.

11 Mr Pillai raised many doubts about the veracity of the defendants' affidavits. However, in my view, the mere existence of doubts is insufficient to prove that there is, in the words of Stuart-Smith LJ in *Lornho v Fayed,* "clear and uncontested evidence" that the documents have been suppressed, entitling the plaintiffs to terminate the action now. On the facts, the defendants have offered plausible explanations on affidavit for the non-production of the documents in question and without testing their evidence through cross-examination, it is not possible to conclude decisively that the documents have been suppressed. The proper forum for the resolution of the doubts raised by Mr Pillai is at trial, as the trial judge will have the benefit of hearing all the relevant evidence by way of examination of the witnesses. Consequently, I declined to try the issue prior to the trial by an elaborate analysis of competing affidavit claims and refused to terminate the action pursuant to O 24 r 16.

12 I am also of the view that an order for specific discovery of the documents in question, whether peremptory or otherwise, should not be made. Such an order has no utility in light of the fact that the defendants have already filed affidavits stating that they do not have the documents and explaining what became of the documents that are no longer in their possession.

Alleged pre-action destruction of material evidence

13 The plaintiffs' alternative argument was that the defendants had destroyed the Emails prior to the commencement of the action in an attempt to pervert the course of justice. The court should therefore exercise its inherent power to prevent abuse of its process by striking out the defence and entering judgment. Mr Pillai relied on the very recent cases of *British American Tobacco Australia Services v Cowell and McCabe* [2002] VSCA 197 ('*McCabe*'), a decision of the Court of Appeal of the Supreme Court of Victoria and the English High Court decision of *Douglas & Ors v Hello! Ltd & Ors* [2003] EWHC 55 (Ch) in support of his contention that the court has the power to strike out the defence in the present application.

14 In *McCabe*, the plaintiff contracted lung cancer that allegedly resulted from smoking since she was 12 years old. She sued the defendant, a tobacco company, for personal injury and claimed that it acted unreasonably in failing to take necessary steps to reduce or eliminate the health risks involved in smoking and that it ignored and even disparaged research results that indicated the dangers of smoking. The defendant destroyed thousands of documents that contained research results indicating the dangers of smoking after the conclusion of other similar actions against it, at a

time when further litigation on its treatment of the research results was anticipated.

15 At the first instance, Eames J used the criterion of whether a fair trial was possible in light of the pre-action destruction of evidence to determine if the court should intervene to prevent abuse of process. His Honour concluded, *inter alia*, that the test had been met on the facts and struck out the defence and entered judgment for the plaintiff.

16 On appeal, the Court of Appeal rejected the test applied by Eames J. It considered that test was unhelpful as the concept of a fair trial was too vague to form a useful criterion and hence, "what is a "fair trial" must inform any test which is adopted, but it cannot stand in place of one". The court laid down the condition for its intervention, particularly if the sanction sought is a striking out order, *ie* the applicant must establish that the destruction amounts to the criminal offence of attempting to pervert the course of justice or criminal contempt ('the *McCabe* test'). It was of the view that such a test balances the right of a party to manage his own documents and the right of a litigant to have resort to the documents of his opponents. Apart from that substantive requirement, the court added that it should only consider intervention if the party seeking relief presents his case specifically on the ground of the *McCabe* test.

17 As the plaintiff in *McCabe* did not present his case on the basis that the pre-action destruction of evidence amounted to an attempt to pervert the course of justice, the Court of Appeal refused to consider that as a ground to justify the striking out order made at first instance.

18 The *McCabe* test was adopted and applied in the English High Court in *Douglas v Hello!*, without any detailed analysis of the test.

19 The treatment of pre-action destruction of evidence is a novel issue that has not been considered in any local decision. There is, however, a useful exposition of the issue in the recent article by Jeffrey Pinsler, *"Destruction of Evidence Prior to the Commencement of Civil Proceedings: How is a Court to respond?"* [2004] SJLS 20. The learned author treated the application of the *McCabe* test in Singapore as requiring, in effect, a party seeking relief to prove that an offence under s 204 of the Penal Code has been committed on a balance of probabilities. The provision most closely corresponds to the offence of attempting to pervert the course of justice and is a specific application of the more general doctrine of criminal contempt. The offence is committed when there is secretion or destruction of a document that a person may be required to produce as evidence in court or legally sanctioned proceedings, with a specific intention to prevent the production of the document as evidence, at the time the person destroys or secretes it.

20 The author argued that the *McCabe* test should not be applied in Singapore without qualification. This is because it would be too restrictive to limit the cases of intervention only to cases in which an offence under s 204 is made out. In particular, a strict adherence to the requirement of specific intention to prevent the production of a document as a prerequisite to the court's intervention to make any orders may preclude the imposition of lesser sanctions when such intention has not been made out but when there is some lesser form of culpability in the destruction of evidence. For example, the court will not be able to act when the destruction of evidence was intentional and amounted to a reckless disregard of the administration of justice. The author advocated the exercise of the inherent power of the court to prevent abuse of its process in a more flexible manner, according to the touchstones laid down by the decision of the Court of Appeal in *Samsung Corporation v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382. These are 'need', 'justice of the case' and 'prevention of abuse'.

21 I agree with Professor Pinsler's view that the court's inherent power to respond to any pre-

action destruction of evidence should not be circumscribed by the strict adherence to the *McCabe* test, but rather its exercise should be governed by its usual touchstones. The use of such general touchstones means that the court has to grapple with amorphous concepts, an approach that did not find favour with the Court of Appeal in *McCabe* and led to its decision to lay down the *McCabe* test. Our courts have consistently refused to formulate specific tests that circumscribe the exercise of its inherent power. This is to avoid the ill of limiting the dynamism of the concept (see *eg* the decisions of the Court of Appeal in *Wee Soon Kim v Law Society of Singapore* [2001] 4 SLR 25 at para 27 and *Samsung Corporation* at para 15). The lack of specific tests gives the court the flexibility to tailor its orders to the needs of specific situations to do justice. This is particularly important in the treatment of pre-action destruction of evidence because of the diversity of factual scenarios that may lead to an application for relief.

22 In assessing whether there is a 'need' for intervention, some relevant considerations are the extent to which the destruction of evidence has compromised the conduct of a fair trial and the culpability of the person who destroyed the evidence. The court is concerned with striking the same balance identified by the Court of Appeal in *McCabe*, *ie* the right of a party to manage his own documents and the right of a litigant to have resort to his opponent's document. The form of intervention should be proportionate and address the injustice suffered by the innocent party. With respect to the imposition of the draconian remedy of terminating a party's action, it is useful to remember the following words of Millet J in *Logicrose Ltd v Southend United Football Club Ltd*, The Times, 5 March 1988:

> I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that the conduct would render the further conduct of proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.

This warning was made in the context of an application pursuant to O 24 r 16 but is equally applicable to the exercise of the court's inherent power in response to pre-action destruction of evidence.

23 On the facts, the defendants admitted that they deleted the Emails *shortly* after the EGM on 12 January 2004 although they could not remember the precise dates of deletion. The plaintiffs commenced the action against the defendants on 31 March 2004. Before me, parties did not take issue with whether the Emails had actually been destroyed prior to the commencement of proceedings. Even if I accept that the defendants had deleted the Emails prior to the commencement of the present action, should their conduct attract sanctions?

24 The defendants explained that they deleted their own emails shortly after the EGM, as it was their practice to delete emails from their computer systems regularly to free up memory space. They saw no necessity to archive or keep copies of the emails after the EGM because the meeting was an overwhelming success for them. The defendants also contended that when they deleted the Emails, litigation had not been anticipated. Although the plaintiffs had already threatened to institute defamation proceedings against them, they did not take the threats seriously because the plaintiffs had made similar empty threats previously. The plaintiffs relied on the same arguments that they made in relation to the incredibility of the explanations given for the deletion of the Emails to infer that the defendants had synchronised their actions with the specific purpose of perverting the course of justice.

25 In my judgment, this is not an appropriate case for the exercise of the court's inherent power to intervene to prevent an abuse of process. The plaintiffs may well be able to make out a stronger

case that the defendants were culpable in their destruction of evidence after subjecting the defendants to cross-examination. That may lead to the court drawing adverse inferences against the defendants or a re-application for relief for culpable pre-action destruction of documents. However, at this juncture, I find nothing sinister about the defendants' explanation as to the deletion of the Emails to necessitate the making of any orders in favour of the plaintiffs.

26 Finally, it is notable that in *Douglas v Hello!*, on strikingly similar facts, the court refused to intervene, albeit after applying the *McCabe* test. In that case, the first, second and third defendants admitted that they had destroyed relevant incriminating emails passing between their personnel and the fourth defendant prior to the commencement of the action because it was their practice to delete emails after reading them and that such practice was common. Sir Andrew Morritt V-C held that the deletion of emails for that reason and without more, "plainly" could not justify the court's intervention.

27 For these reasons, I also refused to exercise the court's inherent power to impose sanctions on the defendants for the deletion of the Emails.

Result

28 I dismissed the application with costs.