

Altwater Jakob Pte Ltd v Toh Eng Peng and Others
[2004] SGHC 269

Case Number : Suit 579/2003, RA 293 of 2004
Decision Date : 02 December 2004
Tribunal/Court : High Court
Coram : Tay Yong Kwang J
Counsel Name(s) : Adeline Maler James (Bernard Rada and Lee Law Corporation) for plaintiff; Jason Dendroff (Dhillon Dendroff and Partners) for seventh and eighth defendants
Parties : Altwater Jakob Pte Ltd — Toh Eng Peng; Lim Hui Kiang; Always Corporation Pte Ltd; Toh Ng Siow; Sin Guan Lee Paper Pte Ltd; Merger Link Sdn Bhd; Paper Global Pte Ltd; Tang Synnie

Civil Procedure – Discovery of documents – Failure of seventh and eighth defendants to comply with "unless order" relating to discovery of documents – Judgment entered for plaintiff – Whether failure to comply with "unless order" was contumelious or contumacious

2 December 2004

Tay Yong Kwang J:

1 This is an appeal against the decision of Assistant Registrar Vincent Leow who entered judgment for the plaintiff against the seventh and eighth defendants by reason of their failure to comply with an "unless order" relating to discovery of documents. I allowed the appeal and ordered the seventh defendant to give discovery of all documents relating to its business within three weeks from 19 October 2004. I also ordered the costs of the hearing before the assistant registrar and of the appeal before me to be costs in the cause. The plaintiff has appealed to the Court of Appeal against the whole of my decision.

The plaintiff's arguments

2 The plaintiff belongs to the Sulo group of companies based in Germany which provides recycling and waste management-related services worldwide. The plaintiff carries on the business of trading, collecting and processing waste paper for recycling and waste management and such related services.

3 The fifth defendant is a family company under the control of the first defendant and his brothers, the fourth defendant and Toh Eng Tiah. By a sale of business agreement dated 16 November 1998, the fifth defendant sold its business and goodwill to the plaintiff and covenanted not to compete with the plaintiff or to take the plaintiff's employees. The first defendant and his brother, Toh Eng Tiah, also covenanted not to compete with the plaintiff and agreed to refer all business enquiries to the plaintiff. The first defendant was employed as Vice-President of the plaintiff on the same date and covenanted not to compete with the plaintiff or to take its employees for two years after the termination of his employment. The fourth defendant was employed as a production supervisor with the plaintiff.

4 Subsequently, the plaintiff discovered that the first defendant and his brothers had been conducting business in competition with the plaintiff. The first defendant continued the business of the fifth defendant and in May/June 2003, incorporated the third defendant as the fifth defendant's export arm. The third defendant also wrongfully removed more than 428 container-loads of waste paper from the plaintiff's warehouse without the plaintiff's knowledge or consent. The business of the

first defendant ceased suddenly when the plaintiff executed an Anton Piller order against the second defendant who was the first defendant's personal secretary at that time. The plaintiff alleged that the business of the third defendant had been transferred to the seventh defendant upon the plaintiff's discovery of the third defendant's business. The eighth defendant, a confidante of the first defendant, was formerly employed by the plaintiff. Despite her lack of experience in managing a company in the paper industry, the eighth defendant was appointed a director of the seventh defendant.

5 The plaintiff has obtained judgment against the first and the third to sixth defendants. It has also entered into a deed of settlement with the second defendant.

6 Its claim against the seventh defendant is for conspiracy with the other defendants to act in competition with the plaintiff in breach of the first defendant's contract of employment while its claim against the eighth defendant is in respect of breach of duty during her employment by the plaintiff by helping the first defendant to conduct business in competition with the plaintiff. The eighth defendant is also alleged to have conspired with the other defendants to act in competition with the plaintiff by being involved in the business of the third defendant through her business known as Allways Designs. This business was conducted using the business registration number of the third defendant. The eighth defendant is also accused of being involved in the business of the seventh defendant, conducting its business as one of its directors under the instructions of the first defendant.

7 The seventh and eighth defendants deny any link between the seventh defendant and the other defendants. The eighth defendant claims to be operating three independent businesses, namely, Allways Designs, Art Bizz and the seventh defendant. The eighth defendant claims that although Allways Designs used the business registration number of the third defendant, she maintained a separate account and Allways Designs was never part of the business of the third defendant.

8 On 30 January 2004, at the hearing of the summons for directions, the seventh and eighth defendants were ordered to file and serve a list of documents by 15 March 2004. On 7 April 2004, 23 days after the deadline, they filed a list comprising a letter, copies of the three invoices expressly referred to by the plaintiff in the Statement of Claim and copies of Biznet searches conducted on the third and seventh defendants.

9 On 21 April 2004, the plaintiff wrote to the seventh and eighth defendants to ask for further discovery but did not receive a response. It therefore filed an application for discovery against them.

10 On 4 June 2004, Assistant Registrar Amy Tung granted the plaintiff's application and ordered the seventh and eighth defendants to give discovery of seven categories of documents by 26 June 2004. On 5 July 2004, ten days beyond the deadline, the said defendants purported to comply with the order for discovery by serving their supplementary list of documents.

11 The plaintiff was not satisfied with this and sought further discovery by way of a letter to the seventh and eighth defendants. Having had no response again, it proceeded to file a second application for discovery.

12 This was heard by Senior Assistant Registrar Thian Yee Sze on 19 July 2004 when she ordered, together with consequential directions, that:

[T]he 7th and 8th Defendant[s] do serve on the Plaintiff a full list of documents with regard to paragraphs 1.3, 1.6 and 1.7 of the Order of Court dated 4 June 2004 and an affidavit stating whether they have or have at any time had in their possession, custody and power the

documents listed in the Order of Court dated 4 June 2004 and if the documents listed therein are not in their possession, custody or power, stating when they parted with the same and what has become of the same on or before 2 August 2004, failing which the Defence and Further and Better Particulars filed by the 7th and 8th Defendants be struck off and Judgment be entered in favour of the Plaintiff; ...

The documents referred to in the above order ("the unless order") related to the following categories:

- (a) documentation relating to "the 8th defendant's, Art Bizz's and Allways Design's business including all accounts, financial statements and/or ledger books";
- (b) documentation relating to "the 8th defendant's appointment as director of the 7th Defendant, including her employment contract with this company";
- (c) copies of employment contracts of all persons who were employed by Allways Designs and Art Bizz.

13 On 3 August 2004, one day later than the deadline set by the unless order, the said defendants filed a supplementary list of documents comprising:

- (a) seven quotations and three invoices issued by Art Bizz to various customers;
- (b) miscellaneous sales agreements between Art Bizz and various persons which relate to the starting up of this business;
- (c) a licence and software agreement between Art Bizz and Oversea-Chinese Banking Corp.

14 Not satisfied that full discovery as ordered had been made, the plaintiff filed Summons in Chambers No 4505 of 2004 on 16 August 2004 praying for judgment to be entered for the plaintiff by reason of the seventh and eighth defendants' failure to comply with the unless order.

15 The date appointed for hearing was 29 September 2004. One day before the hearing date, the seventh and eighth defendants filed affidavits to oppose the plaintiff's application.

16 On 29 September 2004, Assistant Registrar Vincent Leow granted the plaintiff's application on the basis that the said defendants had failed to provide any discovery on the business of the eighth defendant, that is to say, the seventh defendant. The only explanation provided by counsel for the said defendants to the Assistant Registrar was that there was an oversight on his clients' part in not noticing the comma after the words "the 8th defendant's" (see [12(a)] above). The Assistant Registrar felt that the error was going to be a very costly one as the breach concerned an "unless order" which, he pointed out, would be made only if there was a history of failure to comply with the terms of the order and which was essentially the defaulter's last chance to put his house in order. He held that, given the draconian sanctions attached, it was not too onerous a burden to require the defendants to examine carefully the order made so as to determine exactly what their obligations were. He did not think an extension of time ought to be given to the said defendants as the hearing was already the third one on discovery. It was therefore with much regret that he entered judgment against the said defendants pursuant to the unless order. He also ordered costs fixed at \$800 to be paid to the plaintiff. However, the assistant registrar did not accept that the eighth defendant had lied in her affidavits relating to the documents disclosed for Allways Designs and Art Bizz.

17 Before me, counsel for the plaintiff argued that the seventh and eighth defendants had failed to comply with the unless order on three grounds:

- (a) they had not made full discovery of all the quotations and invoices of Art Bizz;
- (b) they had failed to produce any documents relating to the business of Art Bizz, Always Designs or the seventh defendant;
- (c) they had failed to set out details of documents which were no longer in their possession, custody or power, and to state when they had parted with the same and what had become of them, but had merely claimed that all other documentation had been discarded.

The seventh and eighth defendants' arguments

18 At the hearing before Senior Assistant Registrar Thian Yee Sze, it was acknowledged that most of the directions contained in the Order of Court made on 4 June 2004 had been complied with. Accordingly, the unless order dealt with only the three categories of documents mentioned earlier (at [12] above).

19 For the latter two categories, the eighth defendant had provided the resolution appointing her as a director of the seventh defendant and stated that she did not have any employment contract with the company. She had also furnished the employment contract of her staff in Art Bizz and stated that there was no employment contract for the staff in Always Designs as she had only a freelance helper in that business.

20 In so far as the first category of documents was concerned, it was submitted that the obligation to discover did not extend to the seventh defendant. The eighth defendant honestly thought that the reference to her was only in respect of her businesses, Always Designs and Art Bizz. The seventh defendant could not be said to be the business of the eighth defendant as she was only a director and shareholder of the company. If it had been intended that the financial documents of the seventh defendant be disclosed, the unless order would have specifically mentioned the seventh defendant instead of referring to the company obliquely as the eighth defendant's business.

21 If the court should hold that the seventh defendant was meant to be included in the first category of documents, it was clear from the affidavits that an honest mistake had been made by the seventh and eighth defendants in interpreting the ambiguous terms and that there was no intention to disobey the unless order. There was no reason why they would comply with all other directions except this one.

The decision of the court

22 The Court of Appeal in *Syed Mohamed Abdul Muthaliff v Arjan Bisham Chotrani* [1999] 1 SLR 750 stated that the power of the court to extend time for complying with an unless order should be exercised cautiously and that the onus was on the defaulting party to show why his failure to obey the order did not warrant the striking out of the pleading. The defaulter must establish that there was no intention to ignore the peremptory order and that he had made positive efforts to comply but was prevented from doing so by extraneous circumstances. The default must not have been intentional and contumelious or contumacious. Prejudice to the other party was also a factor to be considered. The nature of the relief sought by the defaulting party and whether or not the penalty imposed was proportionate to the default in question were also relevant.

23 I agree with Assistant Registrar Vincent Leow that it would be premature in the circumstances of this case to decide at this stage of the proceedings that the eighth defendant's affidavit as to the existence of documents must necessarily be untrue. Different individuals and corporate entities may have different standards in maintaining documents in their businesses. Some are extremely meticulous while others may be hopelessly careless or even dishonest in their documentation. Whether documents that were no longer in the seventh and eighth defendants' possession had been discarded, the reasons for doing so or whether they were being withheld from the plaintiff are issues best left to be determined after cross-examination at trial. The trial judge would be in a position to draw the necessary inferences and make the appropriate orders should he be of the view that any party had not been forthright in its obligations in discovery.

24 It was possible, considering the way the plaintiff had drafted the unless order, that the said defendants were misled into thinking that the seventh defendant was not within the scope of the order. The order could have stated explicitly that it encompassed "the eighth defendant's businesses, namely, the seventh defendant, Allways Designs and Art Bizz" instead of referring to the seventh defendant in that oblique manner.

25 The plaintiff argued that the mere fact that the order for discovery was made against both the defendants must have made it clear that the business of the seventh defendant was within the terms of the order. However, it can be seen that the seventh defendant also had an obligation to furnish the documents relating to the appointment of the eighth defendant as one of its directors, including the employment contract if any (see the second category of documents covered in the unless order). It was not as if the unless order would be rendered meaningless against the seventh defendant if it had no obligation in respect of the first category of documents.

26 I accept that the said defendants were tardy on a number of occasions in complying with orders of court but am unable to conclude that they were being contumelious or contumacious in this particular instance. I therefore do not think that they should be deprived of the opportunity to defend themselves in a trial. Accordingly, I allowed the appeal and set aside the judgment entered against them. As the error was an honest one caused by the rather unfortunate wording in the unless order, I decided that the costs of the hearing before the assistant registrar and before me in this appeal should be costs in the cause.

Appeal allowed, judgment set aside.