

TCL Industries (Malaysia) Sdn Bhd v ICC Chemical Corp
[2008] SGHC 235

Case Number : Suit 24/2005, RA 302/2008
Decision Date : 19 December 2008
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Jones Simon Dominic (Grays LLC) for the plaintiff; Peter Gabriel and Kelvin Tan (Gabriel Law Corporation) for the defendant
Parties : TCL Industries (Malaysia) Sdn Bhd — ICC Chemical Corp

Civil Procedure – Discovery of documents – One document previously disclosed by plaintiff had handwritten annotation to "File 15A" – Whether defendant entitled to further discovery of documents in "File 15A"

Legal Profession – Duties – Court – Plaintiff's counsel gave impression that he had perused documents in "File 15A" and decided they were not relevant to matter when plaintiff's counsel did not have sight of documents in "File 15A" – Whether plaintiff's counsel misled court by creating such an impression

19 December 2008

Lee Seiu Kin J:

1 This is an appeal by the plaintiff against the order of the assistant registrar of 30 July 2008 for further discovery in Summons No 3240 of 2008 ("the Summons"). The assistant register had ordered the plaintiff to file a further and better list of documents "in respect of File 15A referred to in their Production Department Monthly Report for September 2003 and that the Affidavit should include all the documents in Box File 15A".

2 The defendant had applied for further discovery on the basis of a handwritten annotation to "File 15A" in a document that the plaintiff had given in discovery, namely "Production Department Monthly Report for September 2003". Rules of Court (Cap 322, R5, 2004 Rev Ed) O 24 r 5(1) ("the Act") provides that the court may, on an application by a party, make an order requiring the other party to make an affidavit stating whether any document specified or described in the application is in his possession, custody or power. The nature of the documents within the scope of this order covers relevant documents, as well as (O 24 r 5(3)(c) of the Act):

a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may –

- (i) adversely affect his own case;
- (ii) adversely affect another party's case; or
- (iii) support another party's case.

File 15A has been referred to in a relevant document, and it is open to the defendant to assert that the documents therein may lead it to such a train of inquiry.

3 The plaintiff had refused to accede to the defendant's written requests to give disclosure of "File 15A" and it would appear that a considerable amount of correspondence had flowed over this matter. In opposition to the summons, the plaintiff's solicitor, Mr Jayagobi Jayaram ("Mr Jayaram"), filed an affidavit on 29 July 2008. Apart from complaining about the length of time it took for the defendant to make the request for specific discovery, Mr Jayaram deposed that the defendant was not entitled to the documents in "File 15A" for the following reasons. He explained that "File 15A" was "not a document, but an old standard box file, containing copies of all the Plaintiff's PDMRs from April 1998 to December 2005". However this is a specious argument as the request would clearly be directed at the documents in the file. Mr Jayaram went further to say, at [18] that the defendant's affidavit supporting the application:

does not state the Defendants' reasonable belief that "*File 15A*" is in any way relevant to the forthcoming Assessment of Damages. This fact in itself is fatal to the Defendants' application. (emphasis in original)

4 In the discovery process, the onus lies on each party to list all documents in its possession, custody or power that (O 24 r 1 of the Act):

(a) the party relies in the action; and

(b) could adversely affect the case for one or the other party or could support the case for the other party.

The usual shorthand for such documents is that they are "relevant to the issues in dispute". Each party is bound to give discovery of relevant documents in its possession, custody or power.

5 In the present case, the defendant sought discovery of documents in a file ("File 15A") that had been referred to in one of the documents given in discovery. Now the documents in that file are either relevant or are irrelevant. However Mr Jayaram's affidavit does not make the assertion that they are irrelevant and therefore the plaintiff is not liable to give discovery thereof. Instead, he merely states that the defendant did not say why those documents are relevant. The assistant registrar below held that, as File 15A was referred to in a document given by the plaintiff in discovery, the burden fell on the plaintiff to show why the documents therein were not relevant. The plaintiff failed to do so, and the assistant registrar made the order for further discovery against which the plaintiff appealed before me.

6 Counsel for the parties first appeared before me on 6 August 2008. At this hearing, Mr Jones, lead counsel for the plaintiff explained, both in his written and oral submissions, that "File 15A" was a box file containing Production Department Monthly Reports ("PDMR") from April 1998 to December 2005. One of the assertions was that none of those PDMRs "relate in any way to a period which is material to this Suit" (at [16] of the plaintiff's written submissions). Mr Jones gave a detailed explanation about the nature of the annotation in question, specifically that they signified the manner in which the PDMR (in which the annotation is found) would be routed, with the intention that it would be finally filed in "File 15A". At [45] of the written submission, Mr Jones said:

It is submitted that it is very clear that neither "***File 15A***" nor the PDMR, contain anything of relevance to the forthcoming Assessment. (emphasis in original)

7 Mr Jones also made certain oral assertions about the contents of File 15A, which I recorded in the following manner at the time:

Plaintiff's solicitors had considered the contents of file 15A, and deemed that only September 2003 Monthly Production Report for assessment of damages.

8 As the explanation on the nature of the annotation was given from the Bar and not on affidavit, I indicated that I was not inclined to disallow the defendant's application in the absence of an affidavit from the plaintiff to explain the annotation. Mr Jones then made an application which I recorded in the following manner:

Apply for leave to file affidavit: (i) explaining the nature of the annotation; (ii) stating that the contents of file 15A had been considered in drawing up original supplementary list for discovery.

9 I gave the plaintiff leave to do so and pursuant to this, on 7 August 2008 Mr Jayaram filed an affidavit. In [4] of that affidavit, Mr Jayaram stated as follows:

I confirm that the documents, which are now contained in "**File 15A**" were considered when the Plaintiffs' Supplemental List for the Assessment was filed on 29 March 2007. The only document that was relevant, and duly disclosed to the Defendants as S/No 3 of the said List, was the Plaintiffs' Production Department Monthly Report for September 2003. (emphasis in original)

10 On 1 September 2008 the parties appeared before me at the request of the defendant. It appeared that on the first day of the assessment hearing, 13 August 2008, the plaintiff's witness disclosed that the plaintiff had, at the outset, only sent the Production Department Monthly Report for September 2003 to its solicitors in Singapore and that the remaining contents of File 15A were sent to Singapore only about a week prior to 1 September 2008. In other words, as of 6 August 2008, when Mr Jones represented to the court by way of written and oral submissions that nothing else in "File 15A" contained any document of relevance to the assessment, his firm did not have sight of those documents.

11 Mr Jones gave an explanation that I recorded in the following manner:

Documents were considered, not in the sense of actually looking at the documents, but from a description of the documents from the clients.

12 Mr Jones denied that he had given, nor had he intended to give, the impression that his firm had sight of those documents in order to decide whether they were relevant. While I accepted Mr Jones' assurance that he had no intention to mislead, I would state in no uncertain terms that the impression given by the oral communications, and reinforced by the written submissions, was that the plaintiff's solicitors had perused the documents in File 15A and had decided that they were not relevant to the matter. An advocate and solicitor is an officer of the court and should guard against any possibility that his words may be misconstrued by the court especially on a matter that is material to the decision that the court is asked to make. If, at the first hearing of the appeal on 6 August 2008, Mr Jones had stated that he did not have sight of the documents but had relied on the plaintiff's employees to decide on which documents were relevant, my decision would have been very different. I should state that the words in paragraph 4 of Mr Jayaram's affidavit, that the documents in File 15A "were considered" when the discovery list was filed, certainly gave the impression that such consideration was carried out by the plaintiff's solicitors rather than the plaintiff's employees who were laypersons. In the circumstances, it ill behoves any officer of the court to say that such words were not specific and therefore cannot be considered misleading.

13 Be that as it may, I found that since the plaintiff's solicitors had not viewed the documents in question to form a view that they were not relevant, and as those documents were referred to in a

relevant document, I was of the view that the defendant was entitled to further discovery thereof. I accordingly dismissed the plaintiff's appeal with costs.

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