Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd
[2008] SGHC 12

Case Number : Suit 779/2006, RA 131/2007, 159/2007, 189/2007

Decision Date : 25 January 2008

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Indranee Rajah SC, Randolph Khoo, Johnson Loo and Keow Mei Yen (Drew & Napier LLC) for the plaintiff; Molly Lim SC, Philip Ling, Hwa Hoong Luan and Chu Hua Yi (Wong Tan & Molly Lim LLC) for the defendant

Parties : Lim Leong Huat — Chip Hup Hup Kee Construction Pte Ltd

Civil Procedure – Summary judgment – Allegation raised in affidavit not pleaded in defence – Whether defendants can rely on such allegation over and above those pleaded in defence – Order 14 Rules of Court (Cap 322, R 5, 2006 Rev Ed)

25 January 2008

Woo Bih Li J

Background

1 The plaintiff Lim Leong Huat ("Lim") was at all material times an employee of the defendant Chip Hup Hup Kee Construction Pte Ltd ("CHHKC"). Lim was employed as General Manager and designated as Executive Director/Projects Director of CHHKC from about 16 November 1994 to about 29 November 2006. In this action, Lim claims the return of various loans amounting to $7,635,000 alleged to have been made by him to CHHKC, at the request of CHHKC's Managing Director Neo Kok Eng ("Neo"), from about July 2003 to September 2006. CHHKC disputes the claim and has in turn made a counterclaim on various grounds for alleged wrongful acts by Lim. The counterclaim is made against Lim, his wife Mdm Tan Siew Lim ("Tan") and AZ Associates Pte Ltd ("AZ") a company said to be owned and controlled by Lim.

2 Consequently, Lim applied in Summons No. 713 of 2007/N for summary judgment for $7,205,000 or for certain smaller sums as stated in the Summons. In turn, CHHKC applied in Summons No. 1595 of 2007/K for summary judgment for various sums against various parties. An assistant registrar ("AR") declined to grant judgment in favour of Lim. As regards CHHKC's application for summary judgment, the AR also declined to grant judgment in favour of CHHKC and granted conditional leave to defend in respect of three sums:

(a) $347,030

(b) $469,740

(c) $260,000

The condition was the provision of security for these three sums.

3 Lim filed an appeal in RA 131 of 2007 for summary judgment. CHHKC also filed an appeal in RA 159 of 2007 to seek final judgment for:

(a) $347,030 (originally stated in the notice of appeal to be $337,855 or $363,830)

(b) $469,740

(c) $260,000

Lim also filed an appeal in RA 189 of 2007. This was to reduce one of the sums, ie, $347,030 (which he was to provide security for) by $55,926.

4 All three appeals were heard by me. I decided as follows:

(a) Lim's appeal in RA 131 of 2007 was dismissed.

(b) CHHKC's appeal in RA 159 of 2007 was partially allowed in that summary judgment was granted for $347,030 against Lim and for $426,700 (being $469,740 less $43,040) against Lim and Tan with interest on each sum at the rate of 5.33% per annum from date of counterclaim till judgment.

(c) Lim's appeal in RA 189 of 2007 was dismissed.

5 An appeal has been filed to the Court of Appeal in respect of the judgments in favour of CHHKC for $347,030 and $426,700 and the dismissal of Lim's appeal in RA 189 of 2007. My grounds of decision will address these issues only.

Judgment for $347,030

6 CHHKC claimed that Lim had misappropriated various sums of money amounting to a total of $2,243,266. Lim's defence was that these were payments to third parties for work done on some of CHHKC's projects. However, CHHKC managed to obtain copies of various cheques which showed that some of the payments in fact went into Lim's own bank account no. 976-XXX-XXX-X. These cheques were supposed to total $347,030. However, Lim had three responses to these.

7 First, Lim's counsel Ms Indranee Rajah SC submitted that CHHKC had made a claim against one Khoo Kiat Hoon ("Khoo") also known as Jean Khoo for misappropriation of the entire $2,243,266 in Suit no 149 of 2007. This was inconsistent with CHHKC's claim for summary judgment for $347,030 which was part of the $2,243,266.

8 Secondly, Ms Rajah submitted that of the copies of cheques disclosed, there was some doubt as to whether the money from seven cheques dated between 9 January 2006 and 25 January 2006 were in fact credited into Lim's bank account. These were cash cheques with the numbers 506201, 506202, 506278, 506279, 506280, 506295, 506296. They totalled $55,000. The reverse side of these cheques had the alphabets "OVR". Ms Rajah submitted they meant "override" and since the signatures on the reverse side were those of Khoo, then it might be that it was Khoo who took this sum. Accordingly, Ms Rajah submitted that the amount of security which Lim should provide, being the condition to defend this part of CHHKC's counterclaim, should be reduced by $55,000. This was the subject of RA 189 of 2007.

9 Thirdly, Ms Rajah submitted that even if certain sums of money had been credited into Lim's bank account, this did not necessarily mean that the money remained there and did not subsequently go into someone else's account.

10 Ms Molly Lim SC counsel for CHHKC explained that the claim against Khoo was made before CHHKC managed to get copies of the cheques in question. She said that CHHKC would withdraw its claim against Khoo for the $347,030 in view of the evidence that the money had gone into Lim's bank account and since Lim did not dispute this.

11 I would add that Ms Rajah informed me that the claim against Khoo was for breach of implied duty of good faith and fidelity and not because she had received the money. It seemed to me that a plaintiff may have different causes of action against different parties or the same cause of action against different parties. A plaintiff may also obtain judgment against more than one party for the same loss. The qualification is only that a plaintiff may not receive over-payment for his loss. So, if, for example, CHHKC has received payment of $347,030 from Lim, it cannot receive this same sum again from Khoo.

12 Accordingly, in the light of [10] and [11], I did not think that the action against Khoo precluded CHHKC from obtaining judgment against Lim for this sum of $347,030.

13 This brings me to the most important point against Lim in respect of the sum of $347,030. The documentary evidence to show that various amounts had been credited into his bank account was filed late in the hearing before the AR, *ie*, it was not part of the original evidence but at least it was filed before the AR gave her decision. It was open to Lim to seek an adjournment to respond to such evidence. He could then have filed an affidavit to say that for the sums totalling $55,000, they were in fact received by Khoo and not by him and for those other sums which were in fact credited into his bank account, they were eventually used to pay third parties. After all, Lim was the best person to know what sums he had received and what became of them. Yet, no adjournment was sought to file such an affidavit. Indeed, Ms Lim stressed that even in the hearing before me, Lim had introduced new affidavit evidence on other points but not on this one.

14 I was of the view that it was not for Ms Rajah to make arguments which were not even based on Lim's own assertions. The possibilities which she raised were matters within Lim's own knowledge. If he chose not to assert as a fact that either he did not receive certain sums or that the sums were received but he used them to pay third parties, then it was not for Ms Rajah to raise them in argument. Accordingly, I granted judgment in favour of CHHKC for $347,030. As the $55,000 was part of the $347,030, it followed that Lim's appeal in RA 189 of 2007 had to be dismissed and I so ordered.

Judgment for $426,700

15 CHHKC also discovered that Lim had caused various sums totalling $469,740 to be paid into Tan's account as salary. As mentioned above, Tan is Lim's wife. However, Tan was not an employee of CHHKC.

16 In the defences of Lim and of Tan, the following explanation was given. The Ministry of Manpower requires companies in the construction industry to observe a minimum ratio of local workers to foreign workers. In order to be able to employ more foreign workers, it was Neo (not Lim) who caused CHHKC to maintain a fictitious record of local workers which included the names and particulars of "proxies" who were in fact not employed by CHHKC. Each proxy was recorded as being paid a certain wage per month but in reality only the Central Provident Fund ("CPF") contributions were paid. Apart from this, the proxies did not receive any other remuneration. Tan was one of the proxies. Her name had been provided by Lim at the request of Neo who had asked Lim to provide proxies for the above purpose.

17 However, CHHKC's argument was that even if this allegation was true, the proxies were not to

receive any remuneration apart from contributions to their CPF account as required by law. Yet, Tan was receiving money in her bank account.

18 Tan and Lim then sought to counter this argument by their affidavits each of which was filed only on or about 3 August 2007 after the decision of the AR had been given. Taken together, they asserted that the payments to Tan were actually part of the salary due to Lim. Neo had agreed with Lim that part of Lim's salary would be paid to Tan. It was also asserted that Neo was aware of this. Also, Neo had signed every cheque and all GIRO payment authorizations which would reveal Tan's name as a beneficiary of the payments.

19 Ms Lim submitted that Neo had trusted Lim all along and that the GIRO forms were prepared by a staff. In any event, the new allegation by Lim and Tan, *ie*, that the payments to Tan were part of Lim's salary, was not found in the defence of Lim or of Tan.

20 It seemed to me that not only was the new allegation not pleaded, it was contradictory to the pleaded allegation that the payments to Tan were made because she was a "proxy". Ms Rajah accepted that as matters stood, there was an inconsistency between the affidavits and the specific defence of Tan. However, Ms Rajah submitted that she was entitled to rely on a fact asserted in an affidavit even though it was not pleaded. She relied on *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("*Lin Securities*"). In that case, the plaintiff and the defendant were stock brokers in Singapore and Kuala Lumpur respectively. The plaintiff applied for summary judgment. Counsel for the defendant took up a point about foreign law, *ie*, Singapore law, which had not been pleaded in the defence. He was allowed to do so by the High Court of Kuala Lumpur which said at 322:

> … No doubt a defendant is bound by the four corners of his pleading at the trial of the action but he is not so bound at the O 14 proceedings. Order 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise. He is entitled to show at the hearing of the O 14 application that over and above what has been pleaded in the statement of defence he has other defences. The issue at an O 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence.

21 Ms Rajah also drew my attention to another case subsequently. This was a recent decision of a District Court on 28 May 2007 in *Superbowl Jurong Pte Ltd v Sami's Curry Restaurant Pte Ltd* [2007] SGDC 157. In that case, the District Court cited the decision in *Lin Securities* with approval to say that parties are at liberty to raise matters outside the pleadings at the Order 14 stage, *ie*, the stage where an application for summary judgment is made. No English precedents were drawn to my attention.

22 I had some reservation about the correctness of the decision in *Lin Securities* for various reasons. It is one thing for a rule to say that a defendant may show cause against an application for summary judgment by affidavit or otherwise. In such a rule, a defendant need not file an affidavit to show cause if, for example, he is able to rely on the statement of claim and/or the affidavit for the plaintiff to establish that summary judgment should not be granted. The rule does not necessarily mean that a defendant may say something in his affidavit which is not pleaded in his defence. Let me elaborate. Supposing a defendant were to be allowed to rely on an allegation in his affidavit which is not in his defence and, solely because of that allegation, he is able to avoid summary judgment. What happens if, when he subsequently applies to amend his defence to include this allegation he is not allowed to amend? This would mean that summary judgment should have been entered in the first place. Such an incongruous situation would be avoided if he were not to be allowed to rely on the allegation unless the defence is first amended to include that allegation. I was also of the view that the pleadings govern the issues between the parties throughout the action and the pleadings apply to

all interlocutory proceedings. On the other hand, the decision in *Lin Securities* seemed to suggest that for the purpose of applications for summary judgment, the pleadings did not govern.

23 It should also be remembered that previously, applications for summary judgment were often made before a defence was filed. Accordingly, there was usually no question of an affidavit for a defendant raising an allegation which was not in the defence. Such a problem would arise only when a defence had already been filed. I will say more about this later.

24 Secondly, it is one thing to say that a defendant may rely on an affidavit allegation not pleaded in his defence but it is quite a different thing to say he may rely on an affidavit allegation which is contradictory to that which has already been pleaded in his defence. In such a situation, it seemed to me all the more so that the defence must first be amended before he can rely on the affidavit allegation. As mentioned above, it is by no means certain that the application to amend the defence would be allowed. Certainly in the case before me, Lim and Tan would have to explain why, if the new allegation were true, it was not mentioned at the earliest opportunity when the initial defences were filed. It would then be questionable whether an application to amend the defence would be allowed.

25 Thirdly, our Rules of Court were amended recently in 2006 so that currently, a plaintiff may apply for summary judgment only after the defence has been served. This is unlike the previous situation where, as I have mentioned, a plaintiff might and often did apply for summary judgment even before the defence was filed. The purpose of the amendment was so that a plaintiff would know the specific defence before applying for summary judgment. I was of the view that to allow a defendant to raise a substantive allegation in his affidavit which was not pleaded in his defence would undermine the purpose of the amendment.

26 Ultimately, I concluded that it was not open to Lim and Tan to rely on an affidavit allegation which was inconsistent with their pleadings. It was also not sufficient for them to say that Neo knew what was happening. To me, that *per se* was not a defence. Indeed, their defence was not based solely on Neo's knowledge. Money had been paid to Tan's bank account. Either there was a legitimate basis for this or there was not. If it was the former, then, for the reasons already stated, the legitimate basis had to be stated in their pleadings. If there was no defence, then the money has to be paid back to CHHKC by Tan who received the money and by Lim who was in breach of his duty to CHHKC as it was not in dispute that he caused the money to be paid to Tan. Naturally there should be no double recovery.

27 I would add that Ms Rajah did not take any step towards an application to amend the defences in the course of arguments before me. At one point, she said that she did not want to make an oral application to amend because the amendments had to be carefully thought through to ensure consistency with the other parts of the defences. I did not think that that was a valid reason. If there was a genuine intention to amend, she could and should have applied for an adjournment to prepare not just a draft of the proposed amendments but also the affidavit or affidavits to justify the application to amend. She did not apply for an adjournment.

28 As for the amount claimed by CHHKC for this item, I deducted $43,040 being the sum paid to Tan's CPF account. The sum being paid to Tan's CPF account was still consistent with the "proxy" allegation and it was arguable whether CHHKC was entitled to recover it if it was knowingly paid to Tan to achieve the alleged illegal purpose. The balance after the deduction was $426,700 and I granted judgment for that sum.

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