Low Tuck Kwong v Sia Sukamto
[2009] SGHC 147

Case Number : Suit 703/2008, RA 164/2009

Decision Date : 24 June 2009

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Tony Yeo Soo Mong and DK Rozalynne PG Dato Asmali (Drew & Napier LLC) for the plaintiff; Chandra Mohan and Mark Tan (Rajah & Tann LLP) for the defendant

Parties : Low Tuck Kwong — Sia Sukamto

Civil Procedure

24 June 2009

Tan Lee Meng J:

1 The plaintiff, Mr Low Tuck Kwong ("Mr Low"), who sued the defendant, Mr Sukamto Sia ("Mr Sia") for defamation, appealed against the decision of Assistant Registrar David Lee ("AR Lee") to grant leave to Mr Sia, to amend his Defence. I affirmed the decision of AR Lee and now give the reasons for my decision.

Background

2 On 21 July 2008, Mr Sia's Indonesian solicitors, M/s Hotman Paris & Partners, wrote a letter in Bahasa Indonesia on his instructions to a number of third parties in Indonesia ("the letter to the third parties"). Those who received the said letter included the Head of the Indonesian Capital Market and Financial Institutions Supervisory Agency, the Managing Director of the Indonesian Stock Exchange, Merrill Lynch Indonesia, Macquarie Securities Indonesia, Macquarie Consultants Indonesia and PT Trimegah Securities Indonesia Tbk. All these parties were interested in and/or involved in the listing in Indonesia of an Indonesian company, PT Bayan Resources Tbk ("PT Bayan"). Mr Low is the controlling shareholder of PT Bayan.

3 The letter to the third parties indicated, among other things, that Mr Sia had a share in PT Bayan and that its purpose was to stop the listing of that company's shares on the ground that PT Bayan and the plaintiff had a dispute with the defendant with respect to the latter's claim to 50% of the shares in PT Bayan and its group of companies.

4 Mr Low alleged that the letter to the third parties defamed him as it suggested that he faced a financial crisis, that he was not credit-worthy, that he could not be trusted and that he had breached his agreement or gone back on his word. He thus instituted the present suit in Singapore against Mr Sia. Mr Low also sought to hold Mr Sia liable for the re-publication of the letter to the third parties in the Supplement and Final Offering Memorandum, which were distributed in Singapore and elsewhere.

5 Mr Low averred in his amended Statement of Claim at [14] and [21] that the "publication of the Words complained of in Indonesia is and was actionable by the laws of Indonesia" and further averred that he would "rely on the presumption that the law of Indonesia is that same as the law of Singapore". AR Lee noted that it was not clear from the Statement of Claim whether Mr Low is

seeking to rely on Indonesian or Singapore law.

6 In his Defence, Mr Sia averred that "the Plaintiff's claim is governed by Indonesian Law which laws pertaining *inter alia* to defamation are not the same as those in Singapore". In his Defence, Mr Sia pleaded the relevant Indonesian statutes and laws.

7 In his Reply, Mr Low contended that Singapore law governed his claim and he did not admit that the laws of Singapore and Indonesia that govern his claim are not the same. Furthermore, Mr Low did not specifically address the defences under Indonesian law pleaded by Mr Sia in his Defence.

8 Mr Sia's solicitors thought that as matters stood, the parties were proceeding with their respective cases on the basis that there were different governing laws. As such, to allow the parties to move forward on a common platform, Mr Sia sought leave to amend his Defence in order to include the defences of justification and qualified privilege under Singapore law. The amendments were allowed by AR Lee. Mr Low appealed against his decision.

Whether the amendment should be allowed

9 The amendment of pleadings is governed by O 20 r 5(1) of the Rules of Court (2006 Rev Ed), which provides as follows:

> Subject to Order 15 Rules 6, 6A, 7 and 8, and this Rule, the Court may any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

10 In *Wright Norman v Oversea-Chinese Banking Corp* [1994] 1 SLR 513 at [6], the Court of Appeal stated as follows:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise…. This is so even though the omission was caused by carelessness or the application for amendment was made very late in the day …

11 In the present case, Mr Sia's amendments will certainly enable the real issues in the dispute to be tried. If, as Mr Low insists, the law of Singapore is applicable, then surely Mr Sia should not be prevented at this early stage of the proceedings to plead his defences under Singapore law.

12 Mr Low insisted that Mr Sia must elect at this stage whether he is relying on Singapore law or Indonesian law in his defence. In his affidavit filed for the purpose of the hearing of Mr Sia's application to amend his Defence, Mr Low argued at [14] and [15] that if leave is granted, Mr Sia's defence would be that either Indonesian law or Singapore law applies and that this is "absurd". Furthermore, he stated in the said affidavit at [16] that if Mr Sia is unable to decide whether or not Indonesian or Singapore law applies, "it is clear that he has no defence to begin with."

13 Mr Low's counsel, Mr Tony Yeo, accepted that the trial judge may take the view that either Singapore law or Indonesian law governs the dispute between the parties. In view of this, the question as to which law governs the dispute should not be settled at a hearing of an application to amend the Defence but should be left to the trial judge. As AR Lee rightly stated in his grounds of decision at [28], this is an issue for the trial judge to decide and that "the legal issues ought to be

fully ventilated in the pleadings to allow the Court to make the findings at trial as it deems necessary".

14 As Mr Low claims that the defamation is actionable in the *lex loci delicti* and the *lex fori*, Mr Sia may plead defences under both Indonesian and Singapore law. The following passage from *Cheshire and North's Private International Law* (11th ed, Butterworths 1987) at p 532 explains the position:

> *The defendant can rely on any defence available to him according to either the lex fori or, provided the defence is not procedural only, the lex loci delicti*. This means the plaintiff gets the worst of both laws.

15 A similar view is expressed in *Dicey, Morris and Collins on The Conflict of Laws*, (14th ed, London Sweet & Maxwell, 2006) at pp 1900-1901 as follows:

> [T]he common law rule could work injustice in the sense that it gave an advantage to the defendant because the plaintiff could not succeed in any claim unless both the *lex fori* and the *lex loci delicti* made provision for it, whereas the defendant could escape liability by taking advantage of any defence made available under either of these laws.

16 It may also be noted that in the United Kingdom, in the course of the proceedings of the Special Public Bill Committee (SPBC, HL, Paper 36, Session 1994-95, March 1993, p 3), Lord Mackay of Clashfern stated as follows:

> The law is to the advantage of the defendants, because as a general rule, the plaintiff cannot succeed in any claim unless both the law of the forum and the law of the place where the wrong occurred make provision for it whereas the defendant can escape liability by taking advantage of any defence available under either law. This appears unfair to plaintiffs, because *it ensures that they cannot succeed to a greater extent than is provided by the less generous of the two systems of law concerned*.
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> [emphasis added]

17 In *Goh Chok Tong v Tang Liang Hong* [1997] 2 SLR 641, the High Court, which did not have to consider the application of the double actionability rule as the defendant failed to plead the relevant following law, nonetheless opined at [82]:

> The option of pleading actionability under a foreign law (or the lack of it, as the case may be) is equally open to, and is frequently invoked by a defendant, where the application of the general rule exonerates him under the lex fori or lex loci delicti.

18 It follows that Mr Sia should not be prevented from amending his pleadings to include defences under Singapore law and especially so when his application was made about one month after Mr Low filed his amended reply on 9 March 2009 and before the parties had exchanged their affidavits of evidence-in-chief. Furthermore, the trial dates have not been allocated. As Mr Low will suffer no substantial prejudice that cannot be compensated by costs if the amendments are allowed, I dismissed the appeal against AR Lee's decision with costs.