Rockline Ltd and Others v Anil Thadani and Others
[2009] SGHC 209

Case Number : Suit 375/2007, SUM 4794/2009

Decision Date : 17 September 2009

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Indranee Rajah SC, Rakesh Kirpalani and Arvindran Manoosegaran (Drew & Napier LLP) for the plaintiffs; Eddee Ng, Cheryl Koh and Emmeline Lim (Tan Kok Quan Partnership) for the 1st to 4th and 7th to 9th defendants; S Suressh (Harry Elias Partnership) for SVMI and AVI; Vinodh Coomaraswamy SC and David Chan (ShookLin & Bok LLP) for Schroders plc

Parties : Rockline Ltd; Superon International Limited; Asia Atlas Limited; Schroder Asian Property Managers Limited as General Partner of Schroder Asian Properties L.P. — Anil Thadani; Adriaan Willem Lauw Zecha; Silverlink Holdings Limited; Argent Holdings Limited; George Robinson; Liakat Dhanji; Sunil Chandiramani; Symphony Capital Partners Limited; Symphony Capital Partners (Asia) Pte Ltd

Evidence

17 September 2009 Judgment reserved.

Choo Han Teck J:

1 This decision concerned the preliminary applications by the defendants - except the 5th and 6th - ("the defendants") to expunge a total of 409 passages from the affidavits of evidence-in-chief of two of the plaintiffs' witnesses, Gordon Stavert Byrn ("Byrn") and Peter Leslie Everson ("Everson"), and the plaintiffs to expunge various documents from the defendant's bundle of documents. The numbers and length of text in the expungement exercise were matched only by the written submissions of counsel. This suit is related to Suit 834 of 2005 ("the first action") which has been concluded but judgment deferred until the conclusion of this suit because part of this suit had been consolidated and heard together with the first action. The first action was an action founded on breach of contract. This action ("the second action") was founded on breach of contract, namely, the Silverlink Shareholders Agreement, and the tort of conspiracy by some of the principal individuals involved in the matters litigated in the first action.

2 The defendants' objections to the Byrn and Everson affidavits in the second action fall into three broad categories. The first was based on s 54 of the Evidence Act (Cap 97, 1997 Rev Ed) which provides that:

> In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

Section 54 is not a shelter for bad character. In civil cases, as it is generally, the law protects a person from adverse findings against him only on the evidence that he was of bad character. Character in itself is an irrelevant fact. A person might be in breach of contract whether or not he was of good character; and conversely, a person of bad character might suffer a civil wrong inflicted on him by a person of good character. Section 54 emphasized the point that relevant evidence may sometimes leave impressions of character that might influence the court's findings of fact but such

subsidiary impressions are not grounds for rejecting the otherwise relevant evidence. The second ground was based on the complaint that the passages in the affidavits in question contain scandalous or vexatious assertions concerning some of the defendants. Where affidavits are concerned, the applicable rule is found in O 41 r 6 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) which provides as follows:

> The court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive

The reference to "vexatious" matters appears only in O 18 r 19(2), but that rule applied only to pleadings and not affidavits. The relevant objection on this ground before me must rest on O 41 r 6 and the inherent jurisdiction of the court. One can say that generally, there can be assertions that are ostensibly scandalous while others can be deemed scandalous only in the context of the entire statement in which the assertions appear. Again, generally, assertions of dishonesty or impropriety are not scandalous if they are relevant to the issues at trial. The third ground was based on the rule commonly referred to as the rule regarding "similar fact evidence", encapsulated in ss 14 and 15 of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act") which appear to have a more generous application than what was stated in *Makin v A-G for NSW* [1894] AC 57, ("Makin") the *locus classicus* for similar fact evidence, or in the further explanation in *DPP v Boardman* [1975] 1 AC 421 ("Boardman"):

> 14 — Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.
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> 15 — When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

But it is important to remember that *Makin* and *Boardman* are criminal cases whereas ss 14 and 15 apply to civil as well as criminal cases as the illustrations there show. The court in a criminal case is likely to be stricter when exercising its discretion in admitting similar fact evidence. The point was made by Lord Denning in *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] 1 Ch 119, at 127:

> The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice: and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it.

I am in full agreement with the passage quoted above. I need only add one further point to it. Many of the rules of evidence found in the Act were originally formulated to regulate the flow of evidence in jury trials. Lay persons are not trained to assess the relevancy of evidence and can be more readily misled by irrelevant considerations than a legally trained professional judge. Lay persons may be more likely to infer that a person shown to have bad character was likely to be guilty of the wrong alleged to have been done by him. They may be more likely to accept that a party was likely to have done the act complained of when they hear evidence of similar facts. They may also be more easily

affected by scandalous statements in the evidence. I am mindful of the submission made by counsel for the defendants that the individual defendants are men held in high regard and their reputations may be adversely affected if the passages impugned are not expunged. I shall revert to this shortly. I am also in agreement with counsel who submitted what I hoped would be the last submission, tendered late in the afternoon of 16 September 2009, that "there is considerable overlap between character evidence and similar fact evidence." That is why in a case such as this, the overall evidence in the affidavits and the pleadings must be considered as a whole if the court were to detect unfairness or the harm that individual statements might create. That, I should add, must be done after each passage complained of is examined individually to get a taste of the venom complained of. I noted Drew & Napier's response to the above submissions from Tan Kok Quan and Partners, sent in a few hours later, but I do not think that I need to address that reply. The points are covered below.

3 Rules to help regulate the admission and exclusion of evidence are meant to ensure a fair trial. Whenever there are disagreements as to the admissibility of any evidence, the court will first determine whether there is a rule that was clearly and directly applicable. If there were, the court has no discretion. Obedience to rules of procedure is an important commitment to a fair trial. All other alternatives to the adherence to such rules are permissible only when the rules admit diverse interpretations, or where its application depended on an interpretation of what the fact or evidence sought to be adduced or excluded meant – whether it could be reasonably construed to be subject to the rule in question. Sometimes, the fact or evidence in question may attract more than one rule of evidence with contradictory results depending on how they were applied. In such situations, the court will find itself obliged to exercise its discretion in a manner that best ensures fairness to the parties.

4 Before I refer to the substance of the text complained of I should mention that although the legal issues may not be complex or complicated, the facts in the first and second actions are complicated. They are complicated because of the long history leading to the dispute and the complex nature of transactions which had, in turn, generated voluminous documents. I needed to make this point because in determining whether or not to expunge the material in question, I took into account the need in such cases for the narrative to flow smoothly so that there may be minimal gaps in the narrative when the opposing versions are assessed at the end of the trial. I am of the view that innominate statements, that is to say, statements that are not palpably offensive or inadmissible, could be excluded from consideration after counsel have made their closing submissions.

5 The parts of the Byrn and Everson affidavits complained of dealt with incidents and events that took place between 1993 and 2002 and related to the personalities of Anil Thadani ("Thadani") and Adrian Zecha ("Zecha") and their roles and conduct in relation to the third defendant Silverlink Holdings Ltd ("Silverlink") and the conduct of Silverlink itself. Allegations of breaches of duties and conflicts of interests were raised by both sides against each other in this and the first action. Strong words were employed, for example, in Byrn's affidavit, at paragraph 301: "The pattern of 'as soon as you get what you want, ignore your commitments' emerged." Another example can be found in paragraph 464:

> One element of Thadani's pattern of behaviour is that he would withhold information from others who would ordinarily be entitled to it. Then, at the last minute, they would release the information and ask for urgent approval, citing various reasons.

I accept that some of the descriptions might be more appropriately found in the closing submissions than in affidavits of evidence-in-chief. Some descriptions could be opinion evidence which would be irrelevant, for example in paragraph 45:

> After Thadani left, there was a discussion amongst the CEOs of what we thought of him. The consensus amongst us was that Thadani was a clever and experienced deal-doer with a good academic background. However, we noted that certain aspects of his presentation were exaggerated or boastful, sometimes even to the extent of not being entirely truthful.

I am of the view that such descriptions might be provocative and might not have been missed if excluded but, on the whole, they served to explain the conduct and action of the CEOs. I would allow them to remain since I am only concerned with the veracity of Thadani in court and not what the witnesses thought of him. Thadani seemed to be a reputable businessman holding positions in the boards of institutions such as the Singapore Management University as he told the court when he testified in the first action. We do not know as much of Zecha since he had not yet testified but by the accounts in the documents and materials before me, he too seemed to be a reputable businessman with a reputation for creativity; and I use this term in the positive, complimentary sense for the talent he exhibited in establishing the Aman resorts. Men of such standing would not be sullied by assertions made by opposing parties in litigation with him, and this court is not interested in their general character. What is in issue are their knowledge, intention, motives, and conduct in the roles they played in the dispute under litigation. That has to be established by evidence and tested under cross-examination. I am of the view that the passages that the defendants say ought to be expunged on the ground of similar fact evidence were not such evidence but evidence intending to show the knowledge, intention and motives of the defendants. Whether they will succeed is a large part of what this trial is about.

6 Further, as to the few references that might appear to cast the defendants, particularly Thadani and Zecha in poor light, character-wise, given the nature and the long and complicated transactions in question, I am of the view that the benefit of leaving the narratives as they stand outweighed any detriment. I do not think any further time or effort should be expended to delete the unpleasant adjectives. It is far easier to ignore them, not as a general principle, but on the particular nature and circumstances of this case. Counsel will no doubt make the appropriate submissions as to what conclusions of fact I should draw when the dust finally settles. For these reasons the defendants' application under Summons No 4794 of 2009 is dismissed. May I now express a little gratuitous advice to solicitors? Adjectives and adverbs, judiciously used, add colour and sparkle to speeches and submissions of counsel; but every adjective and every adverb in a witness's affidavit increases the burden of proof accordingly.

7 I now turn to Miss Rajah's oral application to expunge various documents she claimed to be privileged communication. This was a more straightforward application. The documents in issue had been helpfully set out in Annexure C in Miss Rajah's written submissions. The documents in question were not new. They were part of a preliminary exercise in the first action and had been dealt with. Some of them had been excluded by order of court and some by agreement. Counsel for the defendants wished to introduce the documents in the second action on two grounds. First, it was argued that the documents were excluded from the first action because they were not "germane" to that action and by that counsel meant that they were not relevant there but are relevant in the second action. It is clear at the conclusion if not the commencement of the trial of the first action, that so far as relevance was concerned, they would be relevant in both actions because the connection between the two actions made it impossible to exclude the documents in one only to be included in the second. This might have been a plausible solution were the actions heard by separate courts, but the nature of the claims were such that they cannot and should not be heard by different judges in separate proceedings. That being the case, whatever has been excluded in the first action should not now be admitted in this action. More importantly, these documents were prepared for the purposes of obtaining legal advice and in my view, were properly deemed privileged. Counsel argued

that the conduct of SVMI laid open that privilege. I do not think so. SVMI might have consented to disclosing some of those documents to Thadani only because Thadani was then an internal member of SVMI and would have under other circumstances, been obliged to protect those very documents on grounds of confidentiality and privilege. I thus hold that the documents that were excluded previously do remain excluded. Costs of both applications will be determined at the end of the trial.