Lau Chin Eng and Another v Lau Chin Hu and Others
[2009] SGHC 225

Case Number : Suit 839/2006, RA 224/2009

Decision Date : 01 October 2009

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Audrey Chiang and Calvin Lim (Rodyk & Davidson) for the plaintiffs; Foo Soon Yien and Daniel Tay (Bernard & Rada Law Corporation) for the second defendant

Parties : Lau Chin Eng; Lau Chin What — Lau Chin Hu; Lew Kiat Beng; Law Chin Chai; Hiap Seng & Co Pte Ltd; Winstant Holding Pte Ltd

Evidence – Privilege-Waiver

1 October 2009

Woo Bih Li J:

Introduction

1 The dispute in this action is between members of the Lau family, in particular, between four brothers (namely, the first and second plaintiffs and the first and third defendants) and their nephew (the second defendant) whom I shall refer to as "D2". All of the aforesaid parties are shareholders and directors of the fourth defendant which is a family-run company.

2 The underlying dispute involves the properties and other assets of the fourth defendant as well as properties/assets in the names of the first to third defendants, their immediate family members and their companies (including the fifth defendant) which the plaintiffs say are held on trust for members of the Lau family.

3 On 21 April 2009, D2 filed Summons 1866 of 2009 to strike out parts of the plaintiffs' pleadings (including the particulars thereof) on the basis that those parts referred to alleged admissions made by D2 in circumstances where he was seeking to compromise or settle the plaintiffs' claim against him, *ie*, that the "without prejudice" privilege applies. D2 was complaining that a total of more than ten documents and meetings in which such admissions were allegedly made were cloaked with the "without prejudice" privilege.

4 The application was heard on 8 May and 1 June 2009 by Assistant Registrar Lim Jian Yi ("AR Lim"). On 2 June 2009, he decided that only one such meeting (the meeting of 30 November 2005) enjoyed the "without prejudice" privilege. Hence, the transcript thereof was not admissible. Consequently, the plaintiffs' pleadings which referred to that meeting were ordered to be struck out. I would add that the recording of that meeting was done without D2's knowledge as was presumably the case for the other meetings/discussions.

5 There was also a telephone conversation with D2 on 30 November 2005. Although AR Lim found that that conversation should have enjoyed the same privilege as well, he found that D2 had waived the privilege for that conversation.

6 The plaintiffs then appealed against the decision of AR Lim. There was no cross-appeal by D2.

7 There were two main parts to the appeal:

(a) The first was in relation to the meeting of 30 November 2005 and the transcript thereof.

(b) The second was in relation to the quantum of costs awarded by AR Lim at the hearing below.

8 With respect to the first part of the appeal, each side referred to selective parts of the transcript to persuade me that the 30 November 2005 meeting was not to compromise or settle claims against D2 or it was, as the case may be.

9 After considering the transcript, I saw no reason to disturb AR Lim's finding that the meeting enjoyed the "without prejudice" privilege.

10 However, Ms Chiang, the plaintiffs' counsel, also relied on waiver of such a privilege. Ms Chiang submitted that the transcript of the 30 November 2005 meeting was attached to an affidavit of the first plaintiff filed on 13 February 2009 in support of the plaintiffs' discovery application for documents relating to a property in Hong Kong, among other documents. D2 did not file an affidavit in response. Moreover, the transcript was referred to by Ms Chiang at the hearing of the discovery application on 17 February 2009 and D2's counsel, Ms Foo did not object when the transcript was being referred to.

11 I was of the view that the fact that D2 did not file an affidavit in response to the first plaintiff's affidavit of 13 February 2009 was not a waiver of the privilege. In the first place, D2 was not supposed to file an affidavit in response and the omission to ask for leave to file such an affidavit was neither here nor there. This was not a case in which D2 had filed an affidavit in response and also referred to the minutes of the 30 November 2005 meeting.

12 The other argument about waiver was that Ms Chiang had referred to the transcript during arguments without objection by Ms Foo. However, the relevant part of the notes of argument that day states:

> Surprise to say that 2nd Defendant tried to play down his role in the company. See affidavit of 1st Plaintiff dated 13 February 2009 at page 33 – minutes of meeting – MB4 said that "The company is run by you, by your later father and the second brother, and now run by you and the second brother". 2nd Defendant's reply was "I know". He admits that he is running the company with 1st Defendant (2nd Defendant has however filed notice of objection to this doc exhibited).

13 As can be seen, Ms Chiang had alluded to a notice of objection (filed by D2) to the minutes (of the 30 November 2005 meeting) immediately after referring to the minutes during arguments. The actual notice filed was a notice of non-admission which was filed on 14 August 2008.

14 Ms Chiang suggested before me that that notice of non-admission was really to contest the authenticity of the transcript and not to contest admission on the basis that the meeting was to compromise or settle claims. However, I did not have to decide whether such a distinction was valid because, even if it were valid, Ms Chiang had referred to that notice as a notice of objection, and not as a notice of non-admission, during the arguments on 17 February 2009.

15 On the other hand, Ms Foo submitted before me that since Ms Chiang had then mentioned a notice of objection from D2 to the minutes, it was unnecessary for her (Ms Foo) to object to Ms Chiang's reference to the minutes in the course of arguments. In other words, the objection had

already been noted by Ms Chiang.

16 It seemed to me that the court had neither ruled in favour or against the objection in the discovery application. Presumably it was not necessary to do so.

17 I was of the view that, ideally, Ms Foo should have expressly objected to the reference to the minutes and not assume that Ms Chiang's reference to a notice of objection was sufficient. Be that as it may, I was of the view that there should be clear evidence of waiver even though the standard of proof on the party relying on waiver in civil cases was on a balance of probabilities. In my view, the evidence did not clearly establish waiver. I would add that Ms Chiang did not raise the argument about waiver in the hearing before AR Lim. That argument was only raised in the course of the hearing before me. This suggested that Ms Chiang herself had not initially thought that there had been a waiver on 17 February 2009 but then decided to advance that argument in the appeal before me.

18 I would add that Ms Chiang's reliance on *Tentat Singapore Pte Ltd v Multiple Granite Pte Ltd and others* [2009] 1 SLR 42 did not assist the plaintiffs because the facts there were different from those before me.

Costs

19 As for the issue about the quantum of costs allowed by AR Lim, Ms Chiang submitted that the $1,000 granted to the plaintiffs below was manifestly low. D2 had lost most of the application below and succeeded only in respect of the minutes of the 30 November 2005 meeting. Ms Chiang also submitted that an oral application for the plaintiffs to amend their pleadings in five places to ensure consistency did not take long.

20 On the other hand, Ms Foo submitted that much time was spent (a) to identify all the references in the plaintiffs' pleadings to the 30 November 2005 meeting and (b) to point out inconsistencies in such pleadings.

21 I was of the view that there was no sufficient reason for me to disturb the amount of costs granted by AR Lim to the plaintiffs.

Summary

22 In the circumstances, I dismissed the plaintiffs' appeal with costs. They have appealed to the Court of Appeal.