

Foo Ko Hing v Foo Chee Heng
[2002] SGHC 70

Case Number : Suit 792/2001, RA 49/2002

Decision Date : 11 April 2002

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Tongel Yeo (T-G Yeo & Tan) for the plaintiff; Valerie Tan (Allen & Gledhill) for the defendant; P Padman (KS Chia Gurdeep & Param) for Rey Foo Jong Han

Parties : Foo Ko Hing — Foo Chee Heng

Civil Procedure – Interrogatories – Application for leave – Application for leave to serve interrogatories on former solicitor – Whether requirement of relevance satisfied – Further factors to consider – Whether applicant should pay costs of former solicitor – O 26A rr 1(3)(b), 1(5), 2 & 5 Rules of Court

Legal Profession – Professional privileges – Solicitor-client privilege – Both plaintiff and defendant former clients of solicitor in respect of same matter – Whether solicitor-client privilege prohibits disclosure by solicitor of former client's communications – s 128 Evidence Act (Cap 97, 1997 Ed)

Judgment

GROUND OF DECISION

1. This Registrar's Appeal is against the order of an Assistant Registrar given on 6 March 2002 dismissing the Plaintiff's application for leave to serve interrogatories on Rey Foo Jong Han, an advocate and solicitor in the law firm of K S Chia Gurdeep & Param. I allowed the Plaintiff's appeal and made certain consequential orders as to costs. I will refer to the interrogatories later.

THE FACTUAL BACKGROUND

2. Rey Foo Jong Han was the former solicitor of both the Plaintiff and the Defendant. He was instructed by them in June or July 2000 to act for them in the sale and purchase of 90 million shares in Lee Kim Tah Holdings Ltd. He acted on their joint instructions and was involved in the drafting and finalisation of the Sale and Purchase Agreement for the said shares. Under the Agreement, the Plaintiff and the Defendant were named as joint-purchasers of the 90 million shares from the vendors.

3. In this action, the Plaintiff is claiming half the purchase price of the first tranche of shares under the Agreement. He paid for the shares solely.

4. In his Defence, the Defendant averred that there was a "Precedent Agreement" between him, the Plaintiff and one Mr Ong Puay Koon wherein they would each purchase one third of the 90 million shares. The Plaintiff denied the existence of any "Precedent Agreement". He asserted that he had not given Rey Foo any instructions on a Precedent Agreement and had not received any advice from his former solicitor regarding such. Accordingly, the Plaintiff stated, the interrogatories would be directly relevant to the Defence raised by the Defendant as they concerned the probability of the existence of the alleged Precedent Agreement

5. Further, if Rey Foo was aware of the existence of such a Precedent Agreement from the instructions he received from the Defendant, he and his firm would be potentially liable to the Plaintiff for failing to advise him on its repercussions on the Sale and Purchase Agreement. The Plaintiff was

advised by his present solicitors that an inspection of the file maintained by M/s K S Chia Gurdeep & Param on 21 February 2002 revealed no evidence of any Precedent Agreement or of advice on this subject.

6. The Plaintiff's present solicitors sought the co-operation of Rey Foo but he declined to reveal any information unless the Defendant waived solicitor and client privilege. However, the Defendant was not willing to do so. In response to the Plaintiff's solicitors' letter of 14 February 2002 asking for confirmation that the Defendant had no objections to them interviewing Rey Foo and inspecting his file on the transaction in question, the Defendant's solicitors stated in their letter dated 24 February 2002 as follows:

"Both our clients instructed Mr Rey Foo of M/s K S Chia Gurdeep & Param. As such your client is perfectly entitled to speak to his own solicitor, Mr Rey Foo. Your client is also perfectly entitled to review whatever documents that Mr Rey Foo has in his files, that he is entitled to under the usual solicitor-client relationship.

However, at this time, our client does not waive privilege in respect of any instructions/communications between himself and Mr Rey Foo. Your client may well wish to ascertain the relevance of the information he seeks from Mr Rey Foo, before considering further steps."

THE APPLICATION

7. Accordingly, the Plaintiff took out this application on 25 February 2002, by way of Summons for Further Directions, for the following orders:

"1. That the Plaintiff be at liberty to serve on Mr Rey Foo Jong Han of M/s K S Chia Gurdeep & Param interrogatories in writing as set out in a copy of which is attached hereto and that the said Mr Rey Foo Jong Han do answer the questions in writing by affidavit to be filed within twenty-eight (28) days after service of the Order to be made hereon and of the interrogatories ;

2. That the affidavit of evidence-in-chief of Mr Rey Foo Jong Han be dispensed with and his evidence be given orally at the trial of this action.

3. That the costs of this application be paid by the Defendant to the Plaintiff."

8. The interrogatories were:

"INTERROGATORIES

A. Origin of document

1. Look at the Sale and Purchase Agreement dated 20 July 2000 made between the Plaintiff and the Defendant of the one part and Lee Kim Tah Investments Pte Ltd, the estate of Lee Kim Tah deceased and Lee Kim Tah Foundation of the other part relating to the sale and purchase of 90,000,000 shares in Lee Kim Tah Holdings Ltd. Were you

the solicitor acting for the Plaintiff and the Defendant in the said transaction?

2. If the answer to the 1st interrogatory is yes, who presented the 1st draft of the said agreement?

B. Instructions

3. Were you, at any time in the course of your retainer, informed by the Defendant that one-third of the said shares were to be purchased by a Mr Ong Puay Koon?

4. If the answer to the 3rd interrogatory is yes,

a. when and where was the information received?

b. why did you not name Mr Ong Puay Koon as a co-purchaser in the said Agreement?

c. did you, at any time, advise the Plaintiff on the repercussions of not naming Mr Ong Puay Koon as a co-purchaser in the said agreement?

5. If the answer to interrogatory 4(c) is no, why not?

6. If the answer to interrogatory 4(c) is yes, what was the nature of your advice and was it dispensed orally or in writing?

You, Rey Foo Jong Han, are required to answer all the above interrogatories within twenty-eight (28) days from the date of receipt of these interrogatories in writing by affidavit."

9. The Assistant Registrar granted an order in terms of prayer 2 of the above application and dismissed prayer 1 as he was of the opinion that the interrogatories would not serve the purpose of disposing of the issues at trial. He also made no order as to costs.

THE APPEAL

10. Order 26A of the Rules of Court, which permits interrogatories to be administered to a non-party, provides:

"Interrogatories against other person (O. 26A, r.1)

1. – (1) ...

(2) An application after the commencement of proceedings for an order to administer interrogatories to a person who is not a party to the proceedings shall be made by summons, which must be served on that person personally and on every party to the proceedings.

(3) The summons under paragraph (1) or (2) shall be supported by an affidavit which must –

(a) in the case of a summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and

(b) in any case, specify the interrogatories to be administered and show, if practicable by reference to any pleading served or intended to be served in the proceedings that the answers to the interrogatories are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings or the identity of the likely parties to the proceedings, or both.

(4) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.

(5) An order to administer interrogatories before the commencement of proceedings or to administer interrogatories to a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

Interrogatories to be ordered only if necessary (O. 26A, r. 2)

2. On the hearing of an application for an order under Rule 1, the Court, if satisfied that interrogatories are not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that interrogatories are not necessary either for disposing fairly of the cause or matter or for saving costs.

...

Costs (O. 26A, r. 5)

5. Unless the Court orders otherwise, where an application is made in accordance with this Order, the person against whom the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis."

11. I will deal first with the issue whether interrogatories ought to be ordered. Rey Foo was not willing to provide an affidavit of evidence-in-chief before the trial although he has consented to give oral testimony at the trial. His answers to the interrogatories would clearly be crucial for an important issue in the proceedings – the existence of the Precedent Agreement and, if there was one, the circumstances in which it came about. The Plaintiff has therefore satisfied the requirement of relevance specified in Order 26A rule 1 (3)(b). Further, Rey Foo's evidence may assist the Plaintiff in deciding whether to add him or his firm as a party to the proceedings, a purpose allowed under rule 1

(5) of the same Order. I emphasize here that I do not imply any wrongdoing on the part of Rey Foo or his firm.

12. Rey Foo's evidence would also clarify the above-mentioned important issue before the trial. This would be beneficial to both parties as it would help them prepare the case they have to meet and no one would be taken by surprise by the solicitor's evidence. The present solicitors would probably need to ask the trial judge for time to take further instructions if Rey Foo were to proffer his evidence only at the trial. This would be obviated if the interrogatories were answered before the trial. The interrogatories should therefore result in a fair disposal of the action and would save some costs for the parties, factors the court should take into consideration pursuant to Order 26A rule 2. I therefore allowed the interrogatories to be administered.

13. I now come to the issue of solicitor-client privilege. This is governed by Section 128 of the Evidence Act which is in the following terms:

"128. – (1) No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

(2) Nothing in this section shall protect from disclosure –

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate or solicitor in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(3) It is immaterial whether the attention of such advocate or solicitor was or was not directed to such fact by or on behalf of his client.

Explanation – The obligation stated in this section continues after the employment has ceased.

"

14. Both the Plaintiff and the Defendant were former clients of Rey Foo in respect of the same matter. They employed him as their solicitor jointly. Rey Foo's obligation in the above section continues even though he has ceased to be their solicitor. "Client" in this context would obviously mean both the Plaintiff and the Defendant as "words in the singular include the plural" [Section 2(1) Interpretation Act]. The privilege conferred by the Evidence Act is a joint privilege in these circumstances. Rey Foo would be prohibited from disclosing any communication made by one or both of them in the course of his employment as their solicitor unless both of them expressly consent. However, the prohibition is against disclosure to third parties – that is, anyone not within the solicitor-client relationship. The said Section 128 does not seek to regulate disclosure within that relationship.

15. Solicitors dealing with such clients would take instructions from both of them jointly or from one of them by convention or by express instruction. They would also write to such clients jointly on any matter falling within the scope of their employment. It would therefore be highly artificial, and indeed an impossible task, for the solicitor to have to distinguish between communication with client A and with client B in respect of the same matter. This is not a case of vendor and purchaser instructing the same solicitor where a distinction must be made between communication to the solicitor in the character of one party's own legal advisor and communication to him in the adverse character of legal advisor for the other party [see *Perry v Smith* (1842) 9 M & W 681].

16. There could therefore be no question of solicitor-client privilege in the interrogatories in issue here.

COSTS FOR THE NON-PARTY

17. The general rule as to costs in respect of the non-party is found in Order 26A rule 5 (quoted above). The Plaintiff submitted that he should not be ordered to pay the costs of Rey Foo here as there was "some measure of culpability" on the part of Rey Foo. The Plaintiff referred to a letter dated 1 March 2002 from Rey Foo's firm to the Plaintiff's solicitors which stated that the interrogatories were not necessary or not necessary at that stage of the proceedings and that, in any event, Rey Foo did not accept that there was no privilege attaching to the interrogatories. The Plaintiff relied on a passage from Jeffrey Pinsler's *Civil Practice in Singapore and Malaysia* (2002) where, at paragraph 634, the author said, in reference to Order 24 rule 6 (which deals with discovery against non-parties but which has a similar provision on costs):

"However, there may be circumstances in which the court may vary this position by requiring the person to pay the costs in part or full. He may even be required to pay part or all of the applicant's costs. For example, if he unreasonably refuses to comply with a justified request for the information or his unreasonable conduct has resulted in delay in obtaining the information."

The author actually made much the same remarks in commenting on Order 26A rule 5 in his *Singapore Court Practice* (2001).

18. While I did not quite understand why Rey Foo should take the stand that the interrogatories were not necessary at that stage or at all, the crux of his difficulty was that he was caught in a dispute between two erstwhile clients and was concerned about breaching his obligation owed to both. I decided that the proper order to make was that the Plaintiff would pay Rey Foo costs on an indemnity basis pursuant to Order 26A rule 5, such costs to be agreed between themselves, and that such costs and the costs of the application and of the appeal be costs in the cause.

Sgd:

TAY YONG KWANG
JUDICIAL COMMISSIONER

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