Ng Chee Weng *v* Lim Jit Ming Bryan and another
[2011] SGHC 120

Case Number : Suit No. 453 of 2009/F (Registrar's Appeal No.379 of 2010/D)

Decision Date : 16 May 2011

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Tan Cheng Han SC (instructed) and Vijay Kumar (Vijay & Co) for the Plaintiff; Cavinder Bull SC, Woo Shu Yan and Lin Shumin (Drew & Napier LLC) for the Defendants.

Parties : Ng Chee Weng — Lim Jit Ming Bryan and another

Civil Procedure – Pleadings

16 May 2011

Kan Ting Chiu J:

1 The plaintiff Ng Chee Weng applied to amend his Statement of Claim against the defendants. Some of the amendments were dismissed by an Assistant Registrar ("AR"), and the plaintiff appealed against the dismissal. I affirmed the AR's decision and set out my grounds.

Background

2 On 26 May 2009, when the plaintiff commenced the action against the defendants, he set out the basis of his claim in para 1 of the Statement of Claim:

> The Plaintiff was the beneficial owner of 50% of the shareholding in Sinco Technologies Pte Ltd (the "Company") which was held in trust for the Plaintiff by the 1st Defendant up to April 2007. The Plaintiff was therefore entitled to dividend payments made whilst he was the beneficial owner of the 50% shareholding interests in the Company.

3 The Statement of Claim went on to state that the plaintiff had sold his shares in the company to the first defendant:

> 17. On or about late April or May 2007, the 1st Defendant approached the Plaintiff inquiring if the Plaintiff was interested in selling all his 50% shareholding in the Company to the 1st Defendant. The 1st Defendant offered to purchase all of the Plaintiff's shareholding in the Company. But, the 1st Defendant suppressed the material fact that indeed substantial dividend payments were previously made, in particular, between the period 2003 and 2007.
>
> 18. The Plaintiff agreed to sell his 50% shareholding in the Company to the 1st Defendant at the price of $5,000,000.00. The Plaintiff – at that time – had no inkling that dividend payments were previously paid out by the Company.

4 The plaintiff's complaint was that the first defendant had not accounted for and paid over to

him dividend payments the company paid in respect to his shares prior to the sale. He alleged that:

> 28. Given that the 1st Defendant holds 50% shareholding in the Company in trust for the Plaintiff between the period of 2003 and 2007, the Plaintiff was beneficially entitled to payment of dividends of $12,015,000.00 (being 50% of dividend payments of the Company of $24,030,000.00 for the period from 2003 to 2007). However, there was a prior agreement between the Plaintiff and the 1st Defendant that 5% out of the 50% of the Plaintiff's beneficial entitlement to the dividend payments of the Company would be paid to the 1st Defendant. Accordingly, the Plaintiff's rightful 45% share of the dividend payments for the period 2003 to 2006 amounts to $8,880,916.67.

5 The plaintiff concluded the Statement of Claim with a claim for the dividends of $8,880,916.67.

The negotiations

6 Besides his entitlement to the dividends, the Statement of Claim also alluded to discussions between the plaintiff and the first defendant. References were made to them in several parts of the Statement of Claim, mainly in:

> 29. Between the period from March 2009 and April 2009, the Plaintiff had various meetings and/or telephone conversations with the 1st Defendant [in the presence of or through one Roy] during which the 1st Defendant:
>
> (1) did not deny that he was holding the 45% shareholding of the Company in trust for the Plaintiff;
>
> (2) did not deny that the Plaintiff was entitled to dividend payments of the Company, the shares of which was held in trust for the Plaintiff by the 1st Defendant; and
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> (3) offered, first $3,500,000.00 [at the meeting on 23 March 2009] and then $4,500,000 [at the meeting on 31 March 2009] to the Plaintiff in settlement of the dividend payments which the Plaintiff was beneficially entitled to.
>
> 30. The particulars of the relevant meetings and/or telephone conversations between the parties are set out as follows:
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> (1) ...
>
> (2) ...
>
> (3) ... [At a meeting on 31 March 2009] [t]he 1st Defendant then offered the Plaintiff $4,500,000.00. The Plaintiff decided to accept this given his long-standing friendship with the 1st Defendant.
>
> (4) 15 April 2009 telephone conversation between the Plaintiff [through Roy Ng] and the 1st Defendant – Roy Ng, on the Plaintiff's behalf, called the 1st Defendant on the telephone and informed him of the Plaintiff's decision to reject the $4,500,000.00 offer and the Plaintiff's counter-proposal of $6,500,000.00 as a global sum for the settlement of his share of the dividend payments. However, the 1st Defendant rejected the Plaintiff's proposal; and..

Although the plaintiff referred to the discussions, he stopped short of alleging that there was a concluded agreement.

The striking-out application

7 The defendants applied to strike out parts of the Statement of Claim including the parts quoted in the foregoing paragraph on the ground that they referred to "without prejudice" communications, which were privileged from disclosure. The plaintiff resisted the application and contended that the negotiations were not carried out on a "without prejudice" basis.

8 The application came on for hearing before Justice Belinda Ang Saw Ean, who granted the application and struck out the paragraphs in question. The plaintiff was not satisfied with her decision and brought an appeal to the Court of Appeal.

9 In the course of the arguments before the Court of Appeal, the plaintiff put forward amendments to the Statement of Claim to plead a claim to enforce a settlement agreement as an alternative claim to the claim for the dividends. (I refer to these amendments, which were not incorporated into any application for amendment, as the proposed amendments.) The essence of the amendments is in [33] of the proposal:

> On 31 March 2009 the Plaintiff and the 1st Defendant entered into another oral Settlement Agreement under which agreement *the 1st Defendant agreed to pay the Plaintiff S$4.5 million* in discharge of the 1st Defendant's liability as trustee to account for dividends declared and paid by the Company to the 1st Defendant for the period 2003-2007, ...
>
> [emphasis added]

The critical change was that the settlement negotiations became an agreement to settle at $4.5m.

10 The defendants objected to the proposed amendments on the ground that if they were allowed, the plaintiff's case would be that there was a concluded settlement agreement, and the plaintiff cannot have a claim for the dividends anymore. The argument found favour with the Court, which disapproved the proposed amendments and dismissed the plaintiff's appeal.

11 However, the Court of Appeal went on to issue an Addendum to its order that:

> The dismissal of the appeal should not be taken as precluding the appellant from applying for leave to make such further amendments to his statement of claim as he may deem fit, subject always to the right of the respondent to object to the same in accordance with general principles. However, any proposed amendment which is in the precise form and sequence as set out in the draft enclosed in the appellant's submission to this court on 18 May 2010 should not be allowed as we have already ruled that that draft was not in order.
>
> Whether any "without prejudice" evidence ("the contested evidence") may be permitted to be adduced in the proceedings would have to be determined in accordance with the general law and in the light of any future amendments to pleading (if any) as may be allowed. For the avoidance of doubt we should state that the dismissal of the appeal does not mean that we have ruled that the contested evidence is inadmissible under any circumstances. We have only determined that the contested evidence is inadmissible on the basis of the existing pleadings.

The application to amend

The application to amend

12 The plaintiff took heed of the Addendum and applied in Summons No. 3969 of 2010 ("SUM 3969/2010") to amend the Statement of Claim. The main amendments (I refer to the amendments in the application as the draft amendments) are:

> 30. The Plaintiff's primary case is that those negotiations culminated in a *binding oral agreement* between himself and the 1st Defendant, *which was made on 31 March 2009* ... by which it was agreed that the 1st Defendant would pay the Plaintiff the sum of $4,500,000 in full and final settlement of his claim in respect of the dividends. ...
>
> Particulars
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> a. ...
>
> b. ...
>
> c. ...
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> d. ...
>
> e. ...
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> f. The 1st Defendant asked the Plaintiff why he had turned down his offer of $3.5 million and the Plaintiff said that he was entitled to much more than that. He gave the 1st Defendant the same explanation as he had given to Roy Ng. Initially the 1st Defendant did not react to this, and discussions turned to other matters. However, towards the end of the meeting Roy Ng proposed to the 1st Defendant that he should settle with the Plaintiff by paying "what is rightfully due to [the Plaintiff]". *The 1st Defendant made an offer to pay $4.5 million which the Plaintiff verbally accepted then and there*.
>
> [emphasis added]

and:

> 34. Alternatively if, contrary to the Plaintiff's primary case based upon the oral settlement agreement, the Court concludes that there was no binding settlement agreement made on 31st March 2009 or that the 1st Defendant is not bound by that agreement for any reason, then the Plaintiff is entitled to continue to pursue the claim for an account of the dividends that was ostensibly compromised by the said agreement.

Election

13 These amendments were disallowed by the AR. In the appeal, the plaintiff submitted that [note: 1] :

> 7. It is respectfully submitted that the Assistant Registrar fell into error on both the grounds on which he refused leave. The current draft amendment does not offend any rule of law, nor does it

seek to re-open the matters ruled upon by the Court of Appeal, and the requirements of the rules of procedure are satisfied. As will be explained in more detail below, *the Plaintiff is not seeking to run two mutually inconsistent cases*, in circumstances where he either must elect between them or has already done so, as the Defendant has suggested. [emphasis added]

8. If the Plaintiff's claim in respect of the dividends was settled, then his cause of action arises in respect of the settlement agreement and the original cause of action was extinguished by the settlement. ...

9. However, the Defendants' case is that the claim was not settled. If the Court concludes that there was no binding settlement agreement, the original cause of action will survive, and in those circumstances the Plaintiff is still entitled to pursue it. The Plaintiff cannot be required to give up his original claim (if it still survives) as a condition of pursuing his claim under the settlement agreement.

14 The defendants' response was:

What the Plaintiff seeks to do by way of these amendments is to plead breach of a settlement agreement as an alternative cause of action. Yet, the law is clear that one cannot plead as alternatives, both the original claim which was purportedly settled as well as breach of a purported settlement agreement. This is because the law requires a party to elect whether he is going to sue on the original claim or sue on a alleged settlement agreement. [note: 2]

15 The requirement for election the defendants referred to was an election between inconsistent rights. This was explained by Stephen J in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641:

The doctrine of election as between two inconsistent legal rights is well established ... The doctrine only applies if the rights are inconsistent the one with the other and it is this *concurrent existence of inconsistent sets of rights* which explains the doctrine; because they are inconsistent neither one may be enjoyed without the extinction of the other ...

[emphasis added]

and this exposition of the doctrine was adopted by the Court of Appeal in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [30].

16 In the present case the right to the dividends and the right to the settlement sum are *not* concurrent rights because the right to the dividends existed before the right to the settlement sum, and was extinguished by it.

17 The plaintiff's submission that he was not seeking to run two mutually inconsistent cases called for scrutiny. Two claims were pleaded, the first for the dividends, which he claimed in trust on the basis that he was the beneficial owner of the dividends and the first defendant was holding them as his trustee, and the second under contract, on the basis that the plaintiff and the first defendant had agreed to settle his claim for the claim for dividends.

18 These two claims are mutually exclusive. If there was a settlement agreement, it extinguished the dividends claim. If the defendants did not honour the agreement, the plaintiff can sue on the agreement or repudiate it. If he sues on the agreement, he cannot pursue the dividends claim. If he repudiates the agreement, he cannot claim for the settlement sum.

19 The defendants argued that when the plaintiff asserted that he is entitled to the $4.5m under the settlement agreement, he could not retain his claim to the dividends. The defendants' argument was that the plaintiff had elected at the time he filed his Statement of Claim. That is not really correct because at that stage, the question of the election did not arise since the plaintiff was only asserting one right, the claim in trust for the dividends, and he was not asserting that there was a settlement agreement.

20 By the proposed amendments and the draft amendments, the plaintiff changed his position and complicated matters. When he presented the proposed amendments to the Court of Appeal, he put forward two causes of action – one in contract and one in trust, and when he filed SUM 3969/2010, he was also pleading the same causes of action *albeit* in the reversed order.

21 Professor Tan Cheng Han SC, counsel for the plaintiff, argued that this did not call for election, that the plaintiff is entitled to plead in the alternative, with the claim for the $4.5m as the main claim and to fall back on the dividends claim if it is found at trial that there was no settlement agreement. That explanation did not remove the need to elect if he was allowed to plead in the alternative in the manner set out in the application. When the plaintiff takes the position that he has a claim in contract and another claim in trust, he is putting forward two claims. Despite his apprehension that the claim on the settlement agreement may fail, he was making the claim. Election arises out of the multiplicity of inconsistent claims, not the strength of the claims.

22 The plaintiff had to confront a basic issue, whether he was entitled to plead in the alternative as set out in his application. Holding the plaintiff to his case, he had compromised the dividends claim by the time he commenced this action. There was one surviving claim, the claim under the settlement agreement. He cannot be allowed to maintain the dividends claim when his case was that the claim had been compromised. It is not a question of election because election implies that the elector has two proper claims between which he must choose, and there was only one claim.

23 On this ground alone, the plaintiff's appeal fails. However, there is another issue with the draft amendments. Even if it is assumed that the form of the draft amendments is acceptable, the draft amendments still have to conform to the rules on pleadings.

The settlement agreement amendment

24 The circumstances in which the plaintiff presents the draft amendments on the $4.5m settlement agreement must be remembered. The $4.5m figure had been mentioned in the plaintiff's pleadings and affidavits from the commencement of the action. Unfortunately, the plaintiff has been of two minds over whether it was an offer or a settlement agreement. In para 30(3) of the Statement of Claim, the plaintiff alleged that on 31 March 2001, the first defendant offered him $4.5m, and he decided to accept it. In para 30(4), the plaintiff alleged that on 15 April 2009, he informed the first defendant that he decided to reject the $4.5m offer, and made a counter-proposal of $6.5m, which the first defendant rejected. It was on that basis that the plaintiff claimed for the dividends. The plaintiff explained in his affidavit filed on 26 May 2009 in support of the claim that:

> My claim for $8,880,916.67 is for dividends due to me which the 1st Defendant held on trust for me. He has admitted that dividend payments – which were due to me – were wrongfully retained by him. But he offered to repay me only $3,500,000.00 at first – and later, $4,500,000.00. To settle our dispute, I offered to accept $6,500,000.00 but the 1st Defendant refused to accept my offer. Hence, this lawsuit which I was reluctantly compelled to commence.

But in an affidavit he deposed more than a year later on 23 August 2010 to support the draft amendments in SUM 3969/2010, he maintained that:

> The facts pleaded are all the same or substantially the same as what has been originally pleaded and as set out by both parties in their affidavits.

without acknowledging or explaining the fundamental difference between a $4.5m offer and a $4.5m settlement agreement.

25 The defendants had drawn attention to the contradictions in the plaintiff's case. The first defendant affirmed an affidavit on 30 August 2010 where he reiterated in [26] thereof that there was no concluded settlement agreement. In support of his contention he exhibited an e-mail from the plaintiff to him and one Terence Ng dated 21 April 2009 [note: 3] in which he stated:

> In fact in one morning in the early month of march [sic] it was brought out in the meeting that I only sold my shares to [the 1st Defendant] for sum of S$5 million in the middle of year 2007 and therefore [the 1st Defendant] should pay me the dividends. So far *the highest sum he offered is $4.5 million which I turned down*. Now I am giving him time to think about it and hope he will come back asap.
>
> [emphasis added]

This e-mail squarely contradicted the assertion in the draft amendments that a settlement agreement was made on 31 March 2009.

26 The plaintiff had responded to the first defendant's affidavit. He filed an affidavit on 31 August 2010 and stated at [13]:

> *I accepted $4.5 million offer on the spot*. I am advised that this gave rise to a binding agreement. My unsuccessful attempts to re-negotiate the terms of a settlement, I believed will not affect its enforceability. The compromise with the 1st Defendant was a full and final settlement. [emphasis added]

without saying anything about his e-mail of 21 April 2009. In the circumstances, he is deemed to admit that he had sent the e-mail.

27 The last word on the settlement from the plaintiff was in his written submissions dated 15 October 2010 where it was stated at para 12(h) that:

> Having initially accepted the offer to pay $4.5 million the Plaintiff subsequently purported to "turn it down" and sought a larger amount, but the 1st Defendant did not agree to pay the larger sum.

again without reference to the e-mail of 21 April 2009.

28 When all the plaintiff's narrations were examined, it is clear that he has no consistent position on this issue. In fact, he had taken opposite positions on it at different times with equal conviction. Quite obviously, his recollection of the events cannot be relied on. Beyond his recollection, however, there is one document which recorded his position on the issue – the e-mail of 21 April 2009 which he had not disputed, explained or retracted.

Whether the application is an abuse of process of court

29 Counsel for the plaintiff had explained that the draft amendments were presented after the proposed amendments were rejected by the Court of Appeal. The draft amendments reversed the order of the claims in response to the Court of Appeal's rejection.

30 The draft amendments may have dealt with that difficulty, but they faced other objections. When the Court of Appeal kept the door open for further amendments, it made clear that any other amendments must be in accordance to general rules or pleadings.

31 The plaintiff equivocated over the negotiations and the settlement since the commencement of the action in May 2009. The positions he had taken are:

(a) in the Statement of Claim filed, that there were negotiations, and an offer that he accepted, but rejected subsequently;

(b) in his e-mail of 21 April 2009, that he turned down an offer of $4.5m;

(c) in his affidavit of 31 August 2010, that he accepted the $4.5m offer "on the spot".

without regard to consistency and credibility.

32 Serious questions arise out of the plaintiff's evolving presentation of his case:

(a) if he believed that there was a settlement agreement at $4.5m, why did he take the opposite position when he filed his claim?

(b) why did he send the e-mail on 21 April 2009 if he had accepted the $4.5m offer? and

(c) since he did not deny, explain or dispute that e-mail, was there any evidence, by his own case, that there was a settlement agreement at $4.5m?

33 The draft amendments must be reviewed against O 18 r 19(1) of the Rules of Court (Cap 322, R5, 2006 Rev Ed) that:

(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —

(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Although the rule refers to the striking out of pleadings, the reasoning employed should be extended

to prohibit any amendment which comes under (*a*), (*b*), (*c*) or (*d*).

34 For the reasons stated in [21] and [22] *supra*, the alternative claim for the dividends disclosed no reasonable cause of action and is an abuse of the process of court, and the draft amendments cannot be allowed.

[note: 1] Appellants' Skeletal Arguments/Submissions

[note: 2] Defendants' Submissions, para 4

[note: 3] Exhibit BL-50, pa 73