Ng Chee Weng *v* Lim Jit Ming Bryan and Another
[2010] SGHC 35

Case Number : Suit No 453 of 2009, Summons No 2957 of 2009/H and Summons No 2966/J

Decision Date : 29 January 2010

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Cavinder Bull SC, Woo Shu Yan and Lin Shumin (Drew & Napier LLC) for the applicants/defendants; Peter Low and Wong Shyen Sook (Colin Ng & Partners LLP) for the respondent/plaintiff.

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

Civil Procedure

29 January 2010

Belinda Ang Saw Ean J:

Introduction

1 Summons Nos 2957/2009 and 2966/2009 were brought by the defendants in this action, Bryan Lim Jit Ming ("D1") and Josephine Teo Soo Geok ("D2"), to strike out certain paragraphs in the plaintiff's Statement of Claim and in his supporting affidavit filed on 26 May 2009 in respect of a Mareva injunction application ("the plaintiff's first affidavit"). The defendants also applied to strike out certain paragraphs in the first affidavit of one Ng Soo Kok (also known as Roy Ng) filed also in support of the plaintiff's Mareva injunction application. The grounds for the striking out applications were that the paragraphs in question disclosed "without prejudice" communications between the parties for the purpose of settlement of a dispute. On 14 July 2009, I struck out the offending paragraphs in the Statement of Claim and in the two affidavits. I now publish the reasons for my decision.

Background facts

2 The facts pertinent to the striking out applications can be stated quite shortly. In the main action, the plaintiff, Ng Chee Weng, who is also known as Patrick Ng, claims to be the beneficial owner of 50% of the shareholding in SinCo Technologies Pte Ltd, a company incorporated in Singapore. Patrick Ng's pleaded case is that the shares were being held on trust for him by D1, and that D1 had failed to pay to him the dividends paid out on the shares from 2003 to 2007. In his prayer for relief, Patrick Ng claimed, amongst other things, dividends totalling $8.8m against D1 and his wife, D2. The Writ of Summons was issued and served on 26 May 2009.

3 Paragraphs 29 and 30(2)-30(5) of the Statement of Claim referred to and gave particulars of various meetings and telephone conversations between the plaintiff and D1. Specifically, the plaintiff pleaded that D1:

(i) Did not deny that he held shares on trust for the plaintiff;

(ii) Did not deny that the plaintiff was entitled to the dividends paid on the shares he held on trust for the plaintiff; and

(iii) Made offers to settle the plaintiff's claim for those dividends.

4 The same events together with other exchanges were repeated in paras 62, 69-74, 77-90 and 100 of the plaintiff's first affidavit dated 26 May 2009 ("the plaintiff's first affidavit"). Roy Ng, who claimed to be a mutual friend of the plaintiff and D1, also made reference to some of the same events at which he was present, in paras 6 and 18-42 of his first affidavit dated 26 May 2009 ("Roy Ng's first affidavit"). For convenience, the offending paragraphs in the Statement of Claim, in the plaintiff's first affidavit and Roy Ng's first affidavit are hereinafter referred to collectively as "the Relevant Paragraphs". Counsel for the defendants, Mr Cavinder Bull SC, had in his written submissions summarised the respective deponents' version of the discussions with D1 as follows:

(i) On 23 March 2009, at a meeting between Patrick Ng, D1 and Roy Ng (as mediator), D1 offered to pay Patrick Ng the sum of $3.5m in settlement of Patrick Ng's claim that he was entitled to dividend payments from 2003 to 2007. Patrick Ng indicated that he was willing to accept a settlement payment of $3.5m.

(ii) On 31 March 2009, at a meeting between Patrick Ng, D1 and Roy Ng, Patrick Ng turned down the earlier offer of $3.5m. D1 made a second offer of $4.5m to settle the dispute.

(iii) On 15 April 2009, Roy Ng forwarded to D1 a message from Patrick Ng informing him that Patrick Ng was rejecting the offer of $4.5m. On the same day, Roy Ng called D1 to inform him that Patrick Ng proposed a global sum of $6.5m to settle the dispute. D1 rejected this offer to settle the dispute.

(iv) On 16 April 2009, Patrick Ng copied D1 on an email sent to one Terence Ng that he (Patrick Ng) had turned down D1's offer to settle the dispute at $4.5m, and that he had proposed to settle the dispute at $6.5m but D1 had rejected his proposal.

5 Mr Bull took issue with the Relevant Paragraphs, emphasing that they referred to discussions between D1, the plaintiff as well as Roy Ng, which were made for the purpose of trying to settle and resolve the dispute between the plaintiff and D1, and are therefore privileged and inadmissible in evidence. Mr Bull also pointed out that there were no documents creating the alleged trust. The trust was alleged to have been constituted orally between 2002 and 2003. D1 for his part had asserted that he bought the shares from the plaintiff for valuable consideration. D1 further asserted that the issue of dividend payments was raised at the first meeting between the plaintiff, Terence Ng and D1. According to D1, the first meeting was on 16 March 2009, and not on the 23 March 2009. Be that as it may, on the plaintiff's version, his claim for the refund of dividend payouts to D1 was put on the table at the first meeting. The plaintiff had deposed that before he left that meeting, he told D1 to "work out" and "compensate" him for the dividends due to him. [note: 1] It was D1's case that between March and April 2009, Patrick Ng and D1 entered into a series of settlement negotiations. It was at the 23 March 2009 meeting that Roy Ng attended for the first time as mediator. The plaintiff's first affidavit and Roy Ng's first affidavit stated that the discussions at the various meetings were on the "settlement" of Patrick Ng's claim for dividends; that a mutual friend, Roy Ng, was called in to "mediate" the dispute; and that various settlement "offers" and "proposals" were made and rejected.

6 Counsel for the plaintiff, Mr Peter Low, took the contrary position. His argument was that there was no dispute since D1 had admitted that dividends were due to the plaintiff. The discussions, he argued, pertained only to payment terms since D1 had already admitted to the claim for dividends. As such the discussions were not protected by privilege under the "without prejudice" rule.

7 I was reminded by Mr Bull that D1 had asserted that the plaintiff and Roy Ng had recounted the

various communications inaccurately. That said, Mr Bull focussed his arguments on what the plaintiff and Roy Ng asserted in the Relevant Paragraphs. Since I agreed with Mr Bull that the Relevant Paragraphs disclosed inadmissible "without prejudice" communications, there was no need for me to address D1's assertion that the plaintiff and Roy Ng had recounted the various communications inaccurately.

Without prejudice communications: the law

8 As a general rule, communications between parties which are made on a "without prejudice" basis in the course of negotiations for a settlement are not admissible in evidence (see *eg Quek Kheng Leong Nicky v Teo Beng Ngoh* [2009] 4 SLR(R) 181 at [22]). The "without prejudice" rule applies to exclude evidence of all negotiations genuinely aimed at settlement whether oral or in writing. Furthermore, the application of the rule is not dependent upon the use of the phrase "without prejudice" if it is clear from the surrounding circumstances that the parties were seeking to compromise an existing dispute which may or may not have given rise to legal proceedings (*per* Lord Griffiths in *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280 at 1299; followed in *Greenline-Onyx Envirotech Phils Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40). In *Muller v Linsley & Mortimer* [1996] PNLR 74 at 77, Hoffmann LJ (as he then was) helpfully explained the two justifications for the "without prejudice" rule in these terms:

> First, the public policy of encouraging parties to negotiate and settle their disputes out of court and, secondly, an implied agreement arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice. In some cases both these justifications are present; in others, only one or the other.

9 Hoffmann LJ's explanation was cited with approval by the Court of Appeal in *Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd & Anor* [2006] 4 SLR(R) 807 at [24] ("*Mariwu*"). In that case, Chan Sek Keong CJ observed at [24] that s 23 of the Evidence Act (Cap 97, 1997 Rev Ed) is the statutory enactment of the common law principle relating to the admissibility of "without prejudice" communications based on the policy of encouraging the settlement of disputes out of court. Relevant to this case is the second of the two situations contemplated in s 23, *viz*., where an admission is made "under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given". The type of cases that could fall within the second situation was identified by Chan CJ. He said (at [24]):

> This [second] situation will cover cases where even though a statement is not expressly made "without prejudice" the law holds that it is made without prejudice because it was made in the course of negotiations to settle a dispute: see the judgment of Lord Hoffmann in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2006 at [13].

10 Equally relevant to this case are Chan CJ's further comments at [25]:

> Section 23, properly construed, only refers to situations where it is the parties to the negotiations themselves who are attempting to renege on an express or implied agreement not to use admissions made in the course of negotiations against each other. The admissions in such cases are not relevant.

Chan CJ's interpretation of s 23 clearly echoes the other basis or justification for the "without prejudice" rule, *viz*., the express or implied agreement of the parties themselves that communications in the course of their negotiations should not be admissible in evidence if, despite the negotiations, litigation ensued.

Application to the facts

11 With these principles in mind, I turn to the facts of this case and the arguments canvassed by the parties as outlined in earlier paragraphs above. It was obvious, and I agreed with Mr Bull, that the Relevant Paragraphs were describing negotiations made in the course of an attempt to settle the dispute between the plaintiff and D1 to avoid litigation, and were therefore *prima facie* protected by the "without prejudice" rule. Mr Bull made the point, which I accepted, that the very presence of Roy Ng acting as mediator during the negotiations and the various offers to settle including the plaintiff's counteroffer of $6.5m showed that the purpose of the negotiations was to settle the dispute between the plaintiff and D1. The plaintiff's attempt in his subsequent affidavit to dispute this was wholly without merit.

12 Mr Low's arguments boiled down to the simple proposition that the prerequisite for the "without prejudice" privilege to apply, *ie* the existence of a dispute, was not satisfied here. Mr Low's general proposition was not challenged by Mr Bull, and rightly so, since the "without prejudice" rule, being aimed at encouraging the settlement of disputes, applies only when a dispute between the parties (see *Mariwu* at [30]). The issue between the parties is purely factual, *ie* whether, on the facts, D1 had any point waved the "white flag of surrender" by admitting his liability, such that a dispute no longer existed between the parties (see *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR(R) 433 at [45] ("*Sin Lian Heng*"); *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769).

13 In developing his argument, Mr Low explained that on the facts in evidence there was no dispute because D1 had in the negotiations admitted his liability to pay dividends due to the plaintiff as beneficial owner of the shares held on trust by D1. At the hearing before me, Mr Low argued that D1's admission of liability could be deduced from the following facts:

(i) D1's silence when confronted with the claim;

(ii) D1's offers of $3.5m and then $4.5m; and

(iii) Email dated 16 April 2009 from Patrick Ng to Terence Ng and copied to D1 on the dividends paid out to D1 and email dated 21 April 2009 from Terence Ng to D1.

I noted that earlier on in the plaintiff's second affidavit, the position he took was that if D1 was not the trustee of the shares there was no reason for D1 to negotiate any settlement and/or there would be no basis for settlement negotiations or discussions. The plaintiff concluded that D1 in having discussions and negotiating settlement with him had effectively admitted the trust arrangement. [note: 2]

14 I found Mr Low's submissions unconvincing. D1's alleged silence by itself was equivocal at best; there must be something more from the circumstances to show that the silence was not susceptible to any innocent explanation and must consequently be taken as an admission of liability. I could discern nothing of that nature; in fact, D1 had made several positive denials of liability. In para 72 of the plaintiff's first affidavit, he recounted that D1 had claimed that he (D1) was entitled to keep the dividends. The plaintiff's first affidavit also exhibited an email dated 13 May 2009 where D1 expressly rejected the allegations of trusteeship made in the plaintiff's emails of 16 April 2009. [note: 3] Terence Ng's email of 21 April 2009 to D1 was refuted by D1 in his email dated 6 May 2009. [note: 4] I agreed with Mr Bull that the two emails sent in April 2009 did not advance the plaintiff's case because they have been denied in correspondence between the parties.

15 Mr Low next argued that D1's various offers to settle amounted to an admission of liability. Factually, an offer to settle a dispute, without more, could not amount to an admission of legal liability in respect of that dispute. A person may wish to settle a dispute for any number of reasons which do not relate to his views on his liability in law (see *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 2 SLR(R) 168 at [32]), and on the facts there was nothing to show that D1's offers were motivated by or constituted an admission of his legal liability.

16 I think that, at the highest, Mr Low can only argue that the Relevant Paragraphs amounted to admissions against interest not amounting to admissions of liability. The plaintiff's case will fail even so. As Menon JC explained in *Sin Lian Heng* ([12] above at [42] – [43]), the protection of admissions against interest is the most important practical effect of the "without prejudice" rule. To recognise such admissions as admissible would be contrary to the underlying objective of giving protection to the parties to speak freely in settlement negotiations.

Conclusion

17 For the reasons stated, I granted the defendants an order in terms of prayers 1 and 2 of both SUM 2957/2009 and SUM 2966/2009 on the simple ground that the Relevant Paragraphs disclosed communications which fell within the ambit of the "without prejudice" rule. I further ordered the plaintiff to refile the Statement of Claim, his first affidavit, and the first affidavit of Roy Ng within 7 days of the date of my order (*ie* by 21 July 2009) with the Relevant Paragraphs expunged. The costs of both applications were fixed at a global sum of $5,000 plus disbursements.

[note: 1] Plaintiff's first affidavit para 49

[note: 2] Plaintiff's second affidavit of 17 June 2009 para 14

[note: 3] Plaintiff's first affidavit of 26 May 2009 pp 196 and 200

[note: 4] D1's third affidavit exhibit marked "BL-17"