

Carriernet Global Ltd v Abkey Pte Ltd
[2010] SGHC 104

Case Number : Suit No 269 of 2007
Decision Date : 07 April 2010
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Jimmy Yap Tuck Kong, Wong Shyen Sook and Rasanathan s/o Sothynathan (Colin Ng & Partners LLP) for the plaintiff; Boey Swee Siang, Leong Jia Rong Lynette, Chou Tzu (Rajah & Tann LLP) for the defendant.
Parties : Carriernet Global Ltd — Abkey Pte Ltd

Contract – Breach

Contract – Privity of Contract – Contracts (Rights of Third Parties) Act

7 April 2010

Judgment reserved.

Kan Ting Chiu J:

Background

1 This is an unusual case. Bob Teo Seng Kee ("Bob Teo") invented a computer key board which was believed to be an improvement on the ubiquitous Qwerty keyboard. He obtained a patent on it and had plans for the defendant company, Abkey Pte Ltd ("Abkey") to realise the commercial promise of the invention.

2 As Bob Teo and Abkey did not have the necessary funds or the development and manufacturing capability to produce the keyboards, the plaintiff company was invited to participate in the venture.

3 The plaintiff company purchased 300,000 shares in Abkey and also entered into an agreement on 21 May 2004 under which the plaintiff was to develop and manufacture the keyboards for Abkey ("the manufacturing agreement"). The relationship did not endure. The project did not progress to the parties' expectations and the manufacturing agreement was terminated by mutual consent in September 2005.

4 The termination of the manufacturing agreement left other issues between the parties unresolved, including the shares that the plaintiff company held in Abkey and the parts and components for the keyboards that the plaintiff company was holding. Further negotiations followed in December 2006 and January 2007 for the plaintiff company to sell its shares in Abkey back to Bob Teo for \$300,000, to release the board moulds, stocks and materials (except membranes) for the manufacture of the keyboards (collectively referred to as "the inventory") to Abkey and to extinguish Abkey's debts to the plaintiff company.

5 Bob Teo took the position that the negotiations resulted in a concluded settlement agreement, but the plaintiff company maintained that there was no concluded agreement. This led to Bob Teo's filing of Suit No 243 of 2007 ("Suit 243"), against the plaintiff company for a declaration that there was a concluded agreement and for specific performance of the agreement. The action resulted in a

judgment on 30 May 2008 in favour of Bob Teo: see *Teo Seng Kee Bob v Arianecorp Ltd* [2008] 3 SLR(R) 1114.

The present action

6 In the present action, the plaintiff company sought relief from Abkey for loss and damage incurred as a result of the termination of the manufacturing agreement. Abkey made a counterclaim for the loss and damage it had incurred from the termination of the agreement.

7 In the course of the trial, attention was drawn to the consensual termination of the agreement and the judgment in Suit 243. The plaintiff company then decided that it would not proceed with its claim, and Abkey limited its counterclaim to the damages arising from the plaintiff company's delayed delivery of the inventory to Abkey until 19 December 2008. (This counterclaim was incorporated into the counterclaim on 19 January 2009.)

8 The counterclaim for damages for the late delivery of the inventory is based on two issues that were raised in Suit 243, *ie*, whether there was a binding settlement agreement, and whether the plaintiff company was obliged to deliver the inventory to Abkey.

9 Against this background, it was necessary to consider whether with the final disposal of Suit 243, any claim for damages for late delivery is extinguished under the doctrine of *res judicata*.

10 In Suit 243, Bob Teo had sought the delivery up of the inventory, and alternatively damages in lieu of specific performance. At the conclusion of the case, the court ordered the delivery of the inventory. Bob Teo could have sought (a) damages for the late delivery of the inventory as well as (b) specific performance of the delivery of the inventory, or alternatively damages if the inventory was not delivered.

11 Even though damages for late delivery were not claimed in Suit 243, such a claim may nevertheless be extinguished under the doctrine of *res judicata* if it could and should have been brought up. As explained by Wigram V-C in *Henderson v Henderson* [1843–60] All ER Rep 378 at 381–2:

[W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at that time.

12 Accordingly, Bob Teo would be barred from making a claim for damages that he may have suffered as a result of the late delivery of the inventory to Abkey. If Bob Teo had contracted with Abkey that the inventory would be delivered to Abkey by the plaintiff company by a certain date, and the inventory is delivered late, and Bob Teo had to pay damages to Abkey, Bob Teo cannot make a claim from the plaintiff company to indemnify him against these damages after the conclusion of Suit 243.

13 In the present case, however, it is not Bob Teo but Abkey that is making the claim. The claim is for damages that Abkey suffered from being deprived of the inventory during the period when delivery was delayed. Abkey's damages are distinct from any damages Bob Teo may have incurred; Bob Teo could not have claimed these damages for Abkey in Suit 243. Abkey's claim is therefore not extinguished.

14 That leads to the next question: whether Abkey can sue for them in its own name. Abkey's counterclaim was made in reliance on s 2(1) of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("the Act") which states:

Right of third party to enforce contractual term

2. —(1) ... a person who is not a party to a contract (referred to in this Act as a third party) may, in his own right, *enforce a term of the contract* if –

(a) the contract expressly provides that he may; or

(b) ... the term purports to confer a benefit on him.

[emphasis added]

15 The Act confers on a third party to a contract within its purview the right to sue on the contract as though it were a contracting party. On the facts of the case, Abkey is conferred the right to sue in its own right on the contract between Bob Teo and the plaintiff company although it is not a party to it.

16 Another question was posed: by the time Abkey made the counterclaim for damages for late delivery, the inventory had been delivered. Unlike Bob Teo in Suit 243, Abkey was not seeking the delivery of the inventory. When Abkey sought the damages, the inventory was already delivered, which term of the contract was it seeking to enforce?

17 The question assumed that to enforce a term is to require the adverse party to do something it had undertaken to do, *eg* to deliver the inventory, but that construction is too narrow. Enforcement has a broader meaning, and it has been succinctly put that "[e]nforced' must refer not merely to an action for specific performance, but also for breach of covenant": per Collins J in *Tassell and another v Hallen and others* (1891–1892) 36 SJ 202. In the same vein, "enforce" is defined in *Black's Law Dictionary*, (Bryan A Garner chief ed) (West 9th Ed, 2009) as:

enforce, vb. **1.** To give force or effect to (a law, etc.); to compel obedience to. **2.** Loosely, to compel a person to pay damages for not complying with (a contract).

18 In the contractual context, "enforce" covers the seeking of compliance or performance of a term of a contract as well as the seeking of damages for the breach of contract. If further support is necessary, this can be found in the Court of Appeal's statement in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 at [31] that "every breach of contract *will always* entitle the innocent party to claim damages *as of right*" [emphasis in original].

19 Against the background of these clarifications, a party seeking to recover damages incurred as a result of the breach of a term of a contract is enforcing the term. Consequently, when Abkey made the claim for damages for late delivery, it was enforcing the term for the delivery of the inventory, albeit the inventory had already been delivered and Abkey was not seeking specific performance.

20 In the circumstances, interlocutory judgment is entered on the counterclaim with damages to be assessed by the Registrar who shall decide on the nature and quantum of the damages to be awarded. Abkey shall have the costs of this counterclaim up to this stage. The costs of the assessment of damages are reserved for determination by the Registrar.

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