Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd [2007] SGCA 25

Case Number : CA 78/2006

Decision Date : 26 April 2007

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tan Lee Meng J

Counsel Name(s) : Tan Kah Hin (Choo Hin & Partners) for the appellant; Teh Ee-von (Infinitus Law Corporation) for the respondent

Parties : Greenline-Onyx Envirotech Phils, Inc — Otto Systems Singapore Pte Ltd

Civil Procedure – Pleadings – Foreign law not pleaded – Foreign law a matter of fact – Whether court obliged to take judicial notice

Evidence – Documentary evidence – Private documents – Parties unable to agree on amount owing under settlement agreement – Whether letter from one party to the other denying amount of debt owing and re-stating amount owing may be considered an acknowledgment of debt – Whether letter not marked "without prejudice" part of negotiations and subject to without prejudice privilege

Debt and Recovery – Acknowledgment of debt – Whether subject to without prejudice privilege

26 April 2007

Chan Sek Keong CJ (delivering the grounds of decision of the court):

1 This was an appeal against the decision of Judith Prakash J ("the trial judge") in *Otto Systems Singapore Pte Ltd v Greenline-Onyx Envirotech Phils, Inc* [2006] 4 SLR 924 ("*Otto*"), who allowed the application by the respondent for leave for trial of the preliminary issue under O 33 rr 2 and 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) as to whether the appellant had, by its letter dated 23 May 2002 and/or other documents, acknowledged its debt to the respondent.

2 At the conclusion of the hearing of the appeal, we unanimously dismissed the appeal and reaffirmed the decision of the trial judge. We now give the reasons for our decision.

Facts

3 The appellant is a company incorporated in the Philippines and it carries on the business of waste management and waste collection, transportation and disposal. The respondent is a company incorporated in Singapore and is in the business of supplying waste disposal and waste management equipment and apparatus. In 1996 and 1997, the appellant bought equipment from the respondent and made only partial payment.

4 The parties entered into a settlement agreement, to provide for the payment of the outstanding balance, which the appellant failed to adhere to. The appellant had drawn cheques in favour of the respondent but some of these cheques were dishonoured, the last one being dishonoured in June 1998. Towards the end of 2000, the appellant stopped paying altogether despite the fact that there was still an outstanding balance.

5 On 18 April 2002, the respondent's Filipino lawyers made a demand for payment in a letter that stated the outstanding balances due as the total sum of S$670,000 and DM66,376.52. The

appellant was also notified that legal proceedings would be commenced against them if they failed to reply within five days. The appellant's Filipino lawyers replied on 29 April 2002 requesting for a meeting to discuss the settlement of any outstanding debt obligations of the appellant to the respondent. The lawyers also indicated that they would be reviewing the appellant's records to determine the total amount that it had paid to the respondent for the equipment. The next day, the respondent's lawyers rejected the request for a meeting but asked the appellant for its proposals regarding payment of the outstanding amount.

6 The appellant's lawyers replied by a letter dated 23 May 2002 ("the First Letter") which referred to the appellant's "outstanding obligation … to Otto Systems" and that it "is prepared to present to Otto Systems its proposal for payment of its outstanding obligation" which "amounts to the total of S$399,561.03 and DEM251,976.00.". On 5 August 2002, the appellant's lawyers sent the respondent's lawyers a proposed schedule of payments ("the Second Letter"), indicating that the appellant would pay the respondent a total of S$407,061.03 and DM221,738.88. The respondent refused to accept this payment schedule.

7 In October 2002, a joint affidavit was filed by the appellant in proceedings in the Philippines which concerned the respondent's re-filing of a complaint against the appellant for issuing the dishonoured cheques in 1998, restating that the amounts owing to the respondent were, as *per* the First Letter, S$399,561.03 and DM251,976. On 18 November 2002, the respondent presented the appellant with a different schedule based on the amounts of S$407,061.03 and DM251,976. However, the parties did not reach an agreement on these figures either.

Case before trial judge

8 The present action initially commenced in the Singapore Subordinate Courts in June 2004 for the sum of 2m Philippine pesos or its Singapore equivalent, this being the amount in the cheque drawn by the appellant in favour of the respondent on 25 May 1998. The action was later transferred to the Singapore High Court and the respondent amended its statement of claim to include an alternative claim based on the First Letter. The relevant portions of the amended statement of claim are reproduced below:

> 12. Further, in spite of not having adhered to the Settlement Agreement, the Defendants made ad hoc payments to the Plaintiffs in an attempt to settle their outstanding debt with the Plaintiffs. As at 31 December 2000, according to the Defendants' calculations, the sum of S$399,561.03 and DEM251,976.00 remained outstanding. The Defendants had acknowledged their debt to the Plaintiffs through their solicitors letters dated 23 May 2002 and 5 August 2002.
>
> 13. In their solicitors' letter dated 5 August 2002, the Defendants had proposed a payment scheme to repay the outstanding debt. However negotiations broke down and no further payments were made.

9 In response, the appellant amended its defence by inserting the following paragraphs:

> 14 Paragraph[s] 12 and 13 of the Amended Statement of Claim are not admitted.
>
> 14[a] On 18th April 2002 the Plaintiff demanded payment for S$670,000.00 and DEM 66,376.52.
>
> 14[b] The Defendant by their solicitors' letter of 23rd May disputed the sums aforesaid, inter alia, in that the currency conversion rate under the 1997 Agreement between the parties was not applied. The Defendant's preliminary computation was S$399,561.03 and DEM 251,976 which

sums were revised to S$407,061.03 and DEM 221,738.88 by way of the [Defendant's] solicitors' letter of 5 August 2002.

14[c] The Plaintiffs through their solicitors' letter of [18 November 2002] rejected the said letter of 5 August 2002.

14[d] The parties could not agree on any amounts and as such there was no admission to any sum or sums.

14[e] The Plaintiffs in view of the [impasse] aforesaid, re-instituted proceedings in The Philippines without success.

14[f] In any event, the sums of S$407,061.03 and DEM 221,738.88 were covered by arrangement referred to in paragraph 7 of the Amended Statement of Claim and are, accordingly, time barred.

10 The respondent also applied to court under O 33 rr 2 and 5 of the Rules of Court and obtained an order for the trial of a preliminary issue – whether the appellant had, by the First Letter and/or other documents, acknowledged its debt to the respondent. The main argument raised by the appellant before the trial judge at the hearing of the preliminary issue was that the First Letter was a without-prejudice offer to pay the amounts stated therein, and that since the offer was rejected by the respondent, it could not be admitted in evidence as an acknowledgment of a debt.

11 The trial judge rejected this argument and held that since the First Letter was referred to by both parties in their amended pleadings, it was admissible in evidence, and that it was an admission of a debt of S$399,561.03 and DM251,976 owing to the respondent.

Issues on appeal

12 The issues raised by the appellant in this appeal were as follows:

(a) whether the trial judge was correct in admitting the First Letter, which was not marked "without prejudice", in evidence; and

(b) whether the trial judge was correct in finding that the First Letter amounted to a clear admission of the debt.

Was the First Letter written without prejudice, although not so marked?

13 Counsel for the appellant argued that the First Letter was written in the course of negotiations to agree on the amount still owing to the respondents, that it was effectively a counter-offer on the amount the appellant was prepared to pay to the respondent, and that the respondent did not agree to the amount or the schedule of payments. Accordingly, there was no agreement and the First Letter was not admissible as evidence even though it was not marked "without prejudice". Counsel cited *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 ("*Rush & Tompkins*") in support of the principle that the "without prejudice" rule operated to exclude all *bona fide* negotiations even though the label "without prejudice" was not expressly attached to the negotiations or any written document generated during the negotiations.

14 We accepted the principle as stated by counsel for the appellant. The law on the privilege from disclosure attached to without-prejudice communications between parties is settled. In *Mariwu*

Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd [2006] 4 SLR 807 at [24], this court, following the judgment of Lord Hoffmann in *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066 ("*Bradford & Bingley*"), affirmed that "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". The House of Lords in *Bradford & Bingley* applied the *dicta* of Lord Griffiths in *Rush & Tompkins* that the "without prejudice" rule is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than to litigate them to the finish. To achieve that end, parties should not be discouraged by the knowledge that anything said in the course of negotiations may be used to their prejudice in the course of the proceedings: see Oliver LJ in *Cutts v Head* [1984] Ch 290 at 306.

Acknowledgment of debt admissible in evidence, even if made without prejudice

15 In the present case, the First Letter, which was sent by the appellant's Filipino lawyers, did not dispute the existence of the debt but only the amount outstanding. The relevant parts of this letter read:

> In the course of our review of the outstanding account of Greenline Envirotech Phillippines, Inc. ("Greenline") in favor of your client, Otto Systems (S) Pte, Ltd. ("Otto Systems"), we discovered a substantial difference in amount between Greenline's and Otto System's respective accounts of the remaining balance of Greenline's obligation.
>
> Thus, per your letter of 18 April 2002, the outstanding obligation of Greenline to Otto Systems amounts to the total of S$670,000 and DEM66,376.52. On the other hand, based on Greenline's own account, its outstanding obligation to Otto Systems amounts to the total of S$399,562.03 and DEM251,976.00. …
>
> Based on our review of the 1998-2000 payments made by Greenline to Otto Systems, it appears that the latter erroneously used the then prevailing conversion rate of the Peso to Singapore Dollar when it applied the said payments to the outstanding account of Greenline.
>
> …
>
> Greenline is prepared to present to Otto Systems its proposal for payment of its outstanding obligation. However, its proposal for payment is based on its account of the remaining balance of its obligation which is S$399,562.03 and DEM251,976.00.
>
> Thus, before we present the proposal for payment, we would like to receive your client's confirmation of the payments made by Greenline as well as the remaining balance of Greenline's obligation as stated in the attached Summary of Payments.
>
> Rest assured that our client will present its proposal for payment once we receive the requested confirmation from Otto Systems.

It was clear from these statements that the appellants admitted that it owed money to the respondent but not in the amounts demanded, due to the respondent using an erroneous rate of exchange.

16 However, counsel for the appellant argued before the trial judge that, notwithstanding that the First Letter admitted that there was a debt due and owing, so long as the quantum of the debt was in dispute, the First Letter could not have amounted to an admission of debt. If there was no

identifiable sum, there was no acknowledgment of debt. This argument was rejected by the trial judge. In our view, the trial judge was right. Given the clear words of admission of a debt by the appellant, there was no reason why the respondent should not be allowed to rely on the appellant's own admission of the amounts owing to it as at 29 May 2002 for the purpose of establishing it as an acknowledgment of a debt of a lower amount. The respondent had the choice of having to prove a larger sum or electing to accept a lower sum, especially if the cost of proving the larger amount was counter-productive in terms of time or effort.

17 In *Bradford & Bingley* ([14] *supra*), the defendant debtor wrote a letter to the plaintiff creditor which stated "at present he is not in a position to pay the outstanding balance, owed to you" and another letter which stated that the defendant was "willing to pay approximately £500 towards the outstanding amount as a final settlement". The defendant had argued that the letters were protected by "without prejudice" privilege as they were written in the course of negotiations, citing *Rush & Tompkins*. Although all the law lords upheld this principle as affirmed in *Rush & Tompkins,* they also construed the letters as clear acknowledgments of the claimants' claim under s 29(5) of the Limitation Act 1980 (c 58) (UK) (similar to s 26(2) of our Limitation Act (Cap 163, 1996 Rev Ed)). They were therefore faced with two competing policy interests, *viz*, that of not admitting without-prejudice statements made in the course of negotiations and that of upholding acknowledgments of debt. They unanimously agreed that the letters were not subject to the "without prejudice" privilege, but could not agree on the right solution that preserved the "acknowledgment" rule without damaging the "without prejudice" rule. The majority of the law lords (Lord Walker of Gestingthorpe, Lord Brown of Eaton-under-Heywood and Lord Mance) held that the "without prejudice" privilege did not apply to apparently open communications designed only to discuss the repayment of an admitted liability rather than to negotiate a compromise to a disputed liability. Lord Hoffmann was of the view that in so far as the "without prejudice" rule was based on general public policy, it did not apply to the use of a statement as an acknowledgment for the purpose of s 29(5) of the Limitation Act 1980. Lord Hope of Craighead was of the view that the rule did not apply to clear admissions or statements of fact that did not form part of an offer to compromise, and that the letters (in that case), which had not been written in the context of any dispute regarding the debt or any attempt to compromise any such dispute but had contained expressions and unequivocal admissions of the existence of debt, did not attract the privilege.

18 Lord Hoffmann explained the rationale for his solution in these words at [16]:

> The solution … is that the without prejudice rule, so far as it is based upon general policy and not upon some agreement of the parties, does not apply at all the use of a statement as an acknowledgement for the purposes of section 29(5). That … is what everyone thought in *Spencer v Hemmerde* [1922] 2 AC 507. It is in accordance with principle because the main purpose of the rule is to prevent the use of anything said in negotiations as evidence of anything expressly or impliedly admitted: that certain things happened, that the party concerned thought he had a weak case and so forth. But when a statement is used as an acknowledgment for the purposes of section 29(5), it is not being used as *evidence* of anything. The statement is not evidence of an acknowledgment. It *is* the acknowledgment. It may, if admissible for that purpose, also be evidence of an indebtedness when it comes to deciding this question at the trial, but for the purposes of section 29(5) it is not being used such. All that an acknowledgment does under section 29(5) is to allow the creditor to proceed with his case. It lifts the procedural bar on bringing the action. Questions of evidence to prove the debt will arise later.
>
> [emphasis in original]

Lord Hoffmann went on to say, at [18], that this approach "produces a clear rule, easy to apply and

having no side-effects, which preserves the acknowledgment principle without otherwise restricting the scope of the normal without prejudice privilege", but that it was "open to the parties to agree that whatever they say in negotiations will not be capable of being used even as an acknowledgment for the purposes of section 29(5), but in such a case the creditor will be alerted to the fact that the debtor intends to rely on the statute".

19 In our view, the contents of the First Letter clearly fell within the three principles as stated by their lordships in *Bradford & Bingley.* That being the case, it would not be necessary for us, for the purposes of this judgment, to decide which of the formulations of the principle laid down in *Bradford & Bingley* should be followed in terms of achieving the correct balance between the "without prejudice" rule and the "acknowledgment" rule.

Inclusion of First Letter in agreed bundle of documents

20 The respondent did not plead the First Letter as an acknowledgment of debt in its statement of claim. Later, it did so. This led the appellant to amend its defence to plead that the respondent had disputed the sums demanded by the appellant in its letter of 18 April 2002 because it had not applied the correct conversion rate. It was also pleaded that because the parties could not agree on the amounts demanded, there was no admission to any sum or sums. The issue of the First Letter being inadmissible because it was made without prejudice was not pleaded. Following this, the appellant included the First Letter in the agreed bundle of documents in preparation for the trial.

21 In the course of argument before the trial judge on the preliminary issues, counsel argued that the inclusion of the First Letter in the agreed bundle of documents did not mean that it was admissible in evidence, if it was not otherwise admissible on the ground that it was subject to the "without prejudice" privilege as having been written in the course of negotiations that were on-going in the Philippines, citing *Rush & Tompkins* ([13] *supra*). The trial judge rejected this argument and held that since the appellant had pleaded the First Letter as part of its defence, it had waived whatever privilege that might have been attached to it.

22 We agree with the trial judge's decision on this issue. The situation in this case was similar to that in *A-B Chew Investments Pte Ltd v Lim Tjoen Kong* [1989] SLR 790. In that case, the defendant filed an affidavit making reference to some negotiations as part of his defence. The plaintiffs responded with an affidavit disputing the defendant's account of the negotiations. Instead of objecting to the plaintiffs' affidavit on the ground that it referred to without-prejudice negotiations, or applying to strike it out, the defendant filed two further affidavits giving more details about the negotiations without reserving his right to plead that the defendant's account was not admissible in evidence. In those circumstances, this court held that the plaintiffs had waived whatever privilege they might have had.

Cognisance of Philippines law on without-prejudice negotiations

23 Counsel for the appellant had also argued before the trial judge that the First Letter was subject to the law of the Philippines as it was written by the appellant's Filipino lawyers to the respondent's Filipino lawyers, and that under Philippines law, such correspondence was deemed "without prejudice" as under s 27, r 130 of the Philippines Rules of Court, any correspondence entered into to negotiate a settlement was automatically inadmissible in court. The trial judge had declined to take cognisance of the foreign law as it was a question of fact that must be proved in evidence: *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 3 SLR 412 at [77]. In the present case, the law of the Philippines was not specifically pleaded nor proved in evidence by the appellant. The trial judge also held that it was too late in the day for the amendment to be made.

24 Before us, counsel for the appellant raised the same argument and contended that the trial judge should have allowed the appellant to amend its amended defence by striking out all references to the First Letter. We rejected this argument as, from counsel's account of the operation of the rule in the Philippines, the substance of the Philippines law was no different from Singapore law in relation to statements made in the course of negotiations of a disputed claim. If counsel's argument was that the law of the Philippines went further to render inadmissible acknowledgments of debt made in the course of negotiating the amount owing or how and/or when the debt should be paid, it was a question of fact on which he had adduced no evidence to prove it.

25 Finally, we should add that the trial judge also found that there was an admission of debt not only from the First Letter but also from the joint affidavit filed by the appellant in October 2002 (see [7] above). This affidavit carried a statement which indicated that those same figures represented, in the appellant's own accounting of its obligations to the respondent, the remaining balance of its obligations: *Otto* ([1] *supra*) at [20]–[21]. It followed that a conclusion contrary to the decision of the trial judge would not have made any difference to the outcome of this appeal.

Conclusion

26 For the reasons given above, the appeal was dismissed with costs.