Richland Logistics Services Pte Ltd v Biforst Singapore Pte Ltd
[2006] SGHC 137

Case Number : OS 22/2006, RA 83/2006

Decision Date : 31 July 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Siraj Omar and See Chern Yang (Tan Kok Quan Partnership) for the plaintiff; Wendy Leong and Angeline Soh (AsiaLegal LLC) for the defendant

Parties : Richland Logistics Services Pte Ltd — Biforst Singapore Pte Ltd

Civil Procedure – Interrogatories – Application for leave – Whether leave would be granted where the facts suggest conspiracy and accusations not denied by defendant

Civil Procedure – Interrogatories – Application for leave – Whether leave would be granted where dispute governed by arbitration clause

31 July 2006

Lai Siu Chiu J:

The background

1 The plaintiff, Richland Logistics Services Pte Ltd, applied by way of Originating Summons No 22 of 2006 ("the application") for leave to serve pre-action interrogatories on the defendant, Biforst Singapore Pte Ltd. The application was heard and dismissed by the assistant registrar ("AR").

2 The plaintiff appealed against the AR's decision in Registrar's Appeal No 83 of 2006 ("the Appeal"). I heard and allowed the Appeal. Being dissatisfied, the defendant has appealed against my decision in Civil Appeal No 52 of 2006. I now give my reasons for reversing the AR's decision.

The facts

3 The facts leading to the making of the application are set out in the affidavit filed on the plaintiff's behalf by its director, Lim Chwee Kim ("Lim"), on 3 January 2006 ("Lim's affidavit").

4 According to Lim's affidavit, the plaintiff is part of the Richland group of companies and is wholly owned by a public company, Richland Group Limited, which is listed on the stock exchange of Singapore.

5 The plaintiff is a logistics provider and its business, *inter alia*, includes:

(a) ground-handling services at airport terminals covering import and export permit declaration, and transfer of cargo;

(b) in-bound and out-bound transportation to and from airport terminals and seaports;

(c) point-to-point distribution within Singapore;

(d) other supply chain services such as warehousing, inventory management, packing and repacking of goods as well as after-sales service centres.

6 In providing services to its customers, the plaintiff would sometimes outsource part of its activities to third parties. One such third party was a sole-proprietorship known as Ah Kwee Transport ("Ah Kwee") which was appointed in 1999 when the plaintiff was awarded through another party a contract to provide inland transportation and international services to Seagate Technology International ("Seagate"). In 2001, Seagate awarded directly to the plaintiff the inland portion of the contract. The plaintiff in turn engaged Ah Kwee to provide transportation services to transfer cargo between Seagate's factory, Seagate's finished goods hub, the airport and Seagate's clients within Singapore.

7 Ah Kwee Transport Pte Ltd ("AKTPL") was incorporated on 23 September 2004 to take over the business of Ah Kwee. AKTPL's two shareholders are Ang Sze Kwee ("Ang") and his wife Tan Leh Hua ("Ang's wife") holding 80% and 20% respectively of the company's shares.

8 The plaintiff appointed Ah Kwee and subsequently AKTPL (from 15 October 2004) as its service partner under a specific service order ("SSO") in its master plan agreement dated 1 August 2002 ("the Master Agreement"), which expressly stated that Seagate was a core customer of the plaintiff to whom the services were being provided.

9 The plaintiff and Seagate had signed a logistics services provider agreement dated 28 June 2001 which was subsequently renewed on similar terms on 17 June 2004. The plaintiff subcontracted both contracts to Ah Kwee and to AKTPL subsequently.

10 On 3 May 2005, Seagate issued a request for quotation inviting the plaintiff and other logistic service providers to submit quotations for the provision of local trucking services in Singapore for Seagate. The plaintiff submitted a competitive quotation, which Seagate did not accept. The plaintiff subsequently discovered that the contract was awarded to the defendant and was preceded by Seagate's contract for long-haul trucking service along the Singapore-Malaysia-Thailand route (collectively "Seagate's contracts"). The long-haul contract was awarded to the defendant less than a month after its incorporation.

11 The plaintiff was puzzled by Seagate's choice of the defendant over the plaintiff as the defendant was only incorporated on 10 September 2004, which was less than eight months prior to Seagate's request for quotations and the defendant had no track record.

12 From his investigations and inquiries, Lim ascertained that Ang was behind the defendant and had used the defendant to secure Seagate's contracts. The defendant's major shareholder was Koh Han Lee ("Koh") who had been Ah Kwee's and then AKTPL's general manager, since 1999. (I should point out that at the hearing of the appeal, the plaintiff's solicitor exhibited a search he had conducted on the defendant. The results showed that Koh's shareholding was the largest, *viz* 37,500 shares, followed by that of one Ng Kok Seng with 35,000 shares).

13 Lim also discovered that another company, Jetlee Logistics Pte Ltd ("Jetlee"), was incorporated on 23 June 2004 in which Ang, Koh and Ang's wife were directors with Ang and Koh as shareholders; Ang was the majority shareholder. The business activities of Jetlee were identical to the defendant's and its registered office was that of Ah Kwee and AKTPL. Lim learnt that the defendant had subcontracted Seagate's contracts to AKTPL and the fleet of trucks which Ah Kwee and AKTPL previously used to perform the plaintiff's subcontract had been deployed for Seagate's contracts.

14 Lim believed that through Ang and/or Koh, AKTPL was instrumental in the Seagate contracts being given to the defendant. If Lim's belief was correct, then AKTPL had breached cl 12 of the Master Agreement which states:

EXCLUSIVITY & NON-COMPETITION

> [AKTPL] undertakes to provide the Services exclusively for the [plaintiff]. [AKTPL] shall not carry out any business activities that pose any competition with the [plaintiff] during the term of this Agreement and for one (01) year after the termination of this Agreement. [AKTPL] will not directly or indirectly solicit, initiate, accept or engage in any contact of any kind or enter into any transaction with the Customers, or the [plaintiff's] suppliers, staff, distributors, officers, consultants or employees or with any other party having any actual or prospective connection therewith. The [plaintiff] reserves the rights to seek compensation from [AKTPL] for any breach of this undertaking.

15 Consequently, the plaintiff made the application as the 25 interrogatories it sought the court's leave to serve on the defendant would be relevant to issues that were likely to arise in the plaintiff's intended claim against AKTPL; they may show that the defendant was an extension of AKTPL. The interrogatories were necessary as, if the answers showed that the plaintiff did not have a plausible cause of action against AKTPL, the parties would have saved the time and expense involved in court proceedings.

16 Not surprisingly, the application was opposed by the defendant. In the affidavit filed on the defendant's behalf by Koh ("Koh's affidavit") to oppose the application, he deposed that the plaintiff's suspicion and belief that Ang had used the defendant as a vehicle to procure Seagate's contracts was based on information furnished by other logistics providers. Koh stated that the reasons provided by the plaintiff to support the application were misconceived and/or had no merit.

17 Koh claimed it was Seagate who invited the defendant to tender for the Seagate contracts. By then, he was no longer working for Ah Kwee or AKTPL as he had resigned as a driver (and not general manager as the plaintiff alleged) on 1 July 2004. Koh referred to cl 3.17.1 of the SSO in the Master Agreement which, he contended, precluded the plaintiff from suing AKTPL in any event.

18 Clause 3.17.1 of the SSO states:

> Any dispute arising out of or in connection with this Agreement including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (the SIAC Rules) for the time being in force which rules are deemed to be incorporated be reference into this clause.

19 Koh deposed that no useful purpose would be served if the plaintiff's interrogatories were served on the defendant as any dispute between the plaintiff and AKTPL must go for arbitration, including breach of cl 12 of the Master Agreement. Order 26A of the Rules of Court (Cap 332, R 5, 2004 Rev Ed) ("the Rules"), under which the application was made by the plaintiff, allowed a party that intended to initiate court proceedings to determine if he had good grounds for a claim. If the plaintiff felt it had grounds for making a claim against AKTPL, it should have issued a notice of arbitration to AKTPL as required under cl 3.17.1 and not waste time and costs on the application.

20 In any case, Koh deposed that he had been advised by his counsel that to found an action for interference with contractual relations, the plaintiff would first have to prove a breach of the contract which was the subject of such interference. If indeed the plaintiff intended to save time and costs, it should refer the alleged breach of contract by AKTPL to arbitration since the result of such arbitration would give an indication whether the plaintiff had any cause of action against the defendant.

The submissions

21 Before me, the parties relied on two common authorities but for opposing arguments. One authority that counsel cited was *Woh Hup (Pte) Ltd v Lian Teck Construction Pte Ltd* [2005] SGCA 26 (*Woh Hup*'s case) which was an appeal against my decision (see *Lian Teck Construction Pte Ltd v Woh Hup (Private) Ltd* [2005] 1 SLR 266) in granting an application for pre-action discovery.

22 In *Lian Teck Construction Pte Ltd v Woh Hup (Private) Ltd*, the defendants had resisted the plaintiff's application for pre-action discovery (under O 24 r 6(1) of the Rules) on the ground that the parties were bound by an arbitration clause in the letter of award dated 27 July 2002 issued by the defendants to the plaintiff. The defendants' appeal in *Woh Hup*'s case against my decision was dismissed.

23 In the second common authority cited by counsel, *viz Foo Ko Hing v Foo Chee Heng* [2002] 2 SLR 361, Tay Yong Kwang J allowed a registrar's appeal and reversed the order of an assistant registrar in dismissing an application for pre-action interrogatories.

24 Counsel for the defendant also referred to *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39 where the defendant succeeded in having the plaintiff's application for pre-action discovery dismissed by Belinda Ang Saw Ean J.

25 Whilst other cases on similar applications are always useful as guidelines, it should also be borne in mind that the facts in a case may not be identical or similar to the facts in another case so as to warrant a blanket application of the ruling made in the latter to the former.

The decision

26 I should mention at this stage that the plaintiff made a similar application against Seagate. Another assistant registrar dealt with the application against Seagate and withheld his or her decision until the outcome of the application was known. When the plaintiff failed in the application, the application against Seagate for pre-action interrogatories was dismissed. According to counsel for the plaintiff, there was no appeal against that dismissal.

27 I start by referring to O 26A of the Rules that was the basis of the application. The relevant provisions under O 26A r 1 state:

> (1) An application for an order to administer interrogatories before the commencement of proceedings shall be made by originating summons (in Form 7) and the person against whom the order is sought shall be made defendant to the summons.
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> …
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> (3) The summons under paragraph (1) or (2) shall be supported by an affidavit which must —
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> > (*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 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.

28 I turn next to the 25 interrogatories for which the plaintiff sought the court's leave to serve on the defendant. I shall summarise the more salient interrogatories (as amended). These were:

(a) Did the defendant have any relationship with Ah Kwee between 16 September 2004 and 16 December 2004?

(b) Did the defendant have any relationship with AKTPL between 23 September 2004 and 31 July 2005?

(c) How did the defendant learn of Seagate's tender exercise?

(d) Who were the defendant's personnel who were involved in preparing and submitting the defendant's bid?

(e) Were Ang, Ang's wife and/or any other officers of AKTPL involved in the discussions and/or negotiations of the defendant's tender?

(f) What role (if any) did Koh play in the preparation, negotiations and execution of Seagate's long-haul contract?

(g) Were representations made and/or assurances given to Seagate that AKTPL would support the defendant if the long-haul contract was awarded to the defendant?

(h) Was the defendant aware of the existence of the terms and conditions of the Master Agreement?

(i) Did the defendant have any contractual agreements with Ah Kwee before 16 December 2004 and with AKTPL on or after 23 September 2004?

29 I agreed with counsel for the defendant that the plaintiff's reference to Jetlee was a red herring as the company did not feature at all in Seagate's contracts even though Ang and Ang's wife held all the issued shares.

30 I was prompted to allow the appeal and to grant an order in terms of the application because the allegations raised in Lim's affidavit were not denied by Koh. In Koh's affidavit, he merely set out the background to the application, summarised the basis of the application and submitted that the reasons given therefor were without merit and/or misconceived. Koh's only rebuttal of Lim's allegations was to state[note: 1] that he no longer worked for AKTPL, and that he was not the company's general manager as the plaintiff asserted, but only a driver.

31 It appeared from Lim's affidavit (and Koh's affidavit), that Koh, who worked as a driver for AKTPL, became a director and shareholder of the defendant from its inception on 10 September 2004. Koh held 37,500 or 37.5% of the issued shares (100,000) of the defendant. Why would Koh, a driver by occupation, incorporate a company which activities were "other services allied to transport" and "general wholesale trade"? These activities were the exact same objectives of Ah Kwee and AKTPL. Moreover, within seven months of its incorporation, the defendant (which had no track record

whatsoever) was invited (according to Koh) to tender for, and succeeded in securing, Seagate's contracts. The awarding of Seagate's contracts to the defendant made no commercial sense, particularly as Seagate is a multinational company. Why would a multinational company want to award its transportation contracts to a new company when it had dealt with the plaintiff which was part of a listed group of companies since 2001? The plaintiff had a proven track record and apparently had performed the services required satisfactorily or, at the very least, without complaint from Seagate.

32 I agreed with the plaintiff that the facts seemed to suggest a conspiracy between AKTPL and the defendant. In any case, the accusations that appeared in Lim's affidavit were not denied in Koh's affidavit or by the defendant's counsel.

33 I granted the application as I was of the view that the requirements under O 26A r 2 of the Rules had been satisfied by the plaintiff. Order 26A r 2 states:

> 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.

34 The defendant's answers to the interrogatories I had ordered would either confirm the plaintiff's suspicions of AKTPL's and/or Ang's and/or Ang's wife's involvement in the defendant's success in securing the Seagate contracts or dispel such suspicions.

35 I had (as the AR did) rejected the defendant's argument that the application should not be granted because the Master Agreement contained an arbitration clause that would have precluded the plaintiff from suing AKTPL. The exact same argument (which I rejected) was raised by counsel for the defendant when he resisted the plaintiff's application in *Lian Teck Construction Pte Ltd v Woh Hup (Private) Ltd* ([21] *supra*), contending that the court had no jurisdiction to order pre-action discovery when the plaintiff would not have been able to sue the defendant. The argument was rejected in *Woh Hup*'s case ([21] *supra*). There, Lai Kew Chai J, in delivering the judgment on behalf of the Court of Appeal, endorsed my view in *Lian Teck Construction Pte Ltd v Woh Hup (Private) Ltd*, *inter alia*, and held at [32]–[33]:

> We agreed with the respondent and the trial judge that it is not for the court hearing a discovery application to consider whether the arbitration clause applies. As the learned trial judge rightly held ..., it was premature for the court at that juncture to decide if cl 23 [the arbitration clause] should be upheld, as:
>
> > If and when the [respondent] commenced its suit, the [appellants] could take this objection at the appropriate time. … It may well be that the court would refuse a stay of proceedings because the ambit of cl 23 did not cover the termination of the [respondent's] sub-contract …
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> ...
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> It is clear to us that a party to an arbitration agreement may apply for discovery prior to commencing *legal* proceedings, and that the court has jurisdiction to hear and grant the application for pre-*action* discovery. It is trite law that an arbitration clause does not operate as a bar to commencing legal proceedings as parties may not have agreed to oust the court's jurisdiction ... The trial judge thus had the power to grant the respondent's application for pre-

action discovery, notwithstanding the fact that the respondent was party to an arbitration agreement.

[emphasis in original]

36 By the same token, the plaintiff in this case could also apply for pre-action interrogatories, notwithstanding the fact that the Master Agreement had an arbitration clause which may, not necessarily would, preclude the plaintiff from suing AKTPL.

37 I had further rejected the argument of counsel for the defendant that the plaintiff was on a fishing expedition, relying on *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* ([24] *supra*). The basis for the application was not mere suspicion and beliefs on the part of the plaintiff; there were reasonable grounds for suspecting that the defendant and AKPTL and/or Ang and/or Koh had conspired or colluded in the defendant's successful tender for the Seagate contracts.

38 In any event, whatever the outcome of the interrogatories, granting the application would amount to a cost-savings measure. If the defendant's answers proved that the plaintiff's suspicions were unfounded, time and money would have been saved by the plaintiff not pursuing a claim against AKTPL. On the other hand, if the plaintiff's suspicions were proved correct, it could take the appropriate action against AKTPL and/or Ang and/or Koh. The defendant would not be prejudiced in any event as the plaintiff would bear the defendant's costs of answering the interrogatories, pursuant to O 26A r 5 of the Rules. The rule states:

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.

39 For the foregoing reasons, I allowed the appeal and granted the application.

[note: 1] In para 11 of Koh's affidavit.

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