

Chiu Teng Enterprises Pte Ltd v Attorney-General
[2011] SGHC 77

Case Number : Suit No 629 of 2010 (Summons No 901 of 2011)
Decision Date : 31 March 2011
Tribunal/Court : High Court
Coram : Seow Zhixiang AR
Counsel Name(s) : Michael Eu (United Legal Alliance LLC) for the applicant; Shawn Ho (Attorney-General's Chambers) for the respondent.
Parties : Chiu Teng Enterprises Pte Ltd — Attorney-General

Civil Procedure

Evidence

31 March 2011

Judgment reserved.

Seow Zhixiang AR:

1 This is an application for specific discovery.

2 The applicant is the main contractor and occupier of a worksite at Balmoral Crescent. In the main action, the applicant and two other companies are being sued by the estate of a worker who was crushed to death by a metal frame which fell while it was being lifted by a crane. The proximate cause of the accident was the snapping of a steel wire rope carrying the metal frame. The rope was seized by the Workplace Health and Safety Inspectorate of the Ministry of Manpower, who commissioned MATCOR Technology & Services Pte Ltd ("MATCOR") to prepare a report ("the MATCOR report") relating to tests conducted on the rope.

3 The applicant seeks specific discovery of the MATCOR report. The other parties in the main action have written to the applicant to express their support for its position but are not formally interested in this application. The Ministry of Manpower resists the application on the basis of (i) the official communications privilege found in s 126(1) of the Evidence Act (Chapter 97, 1997 Rev Ed) and (ii) litigation privilege. There was no dispute, and I accept, that the MATCOR report is essential to the first defendant's case (and indeed the main action). But that is no answer to a valid assertion of privilege.

Official communications privilege

4 Section 126(1) of the Evidence Act provides that:

Official communications

126. —(1) No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure.

5 The Court of Appeal has held in *Zainal bin Kuning v Chan Sin Mian* [1996] 2 SLR(R) 858 at [32] that, when the s 126(1) official communications privilege is asserted, "it is for the court to decide

whether the communication in question was made to the public officer in official confidence and it is for the officer concerned to decide whether public interests would suffer by the disclosure of the communication". On the facts, the Court of Appeal accepted that the relevant documents were communicated in official confidence and held that the *bona fide* determination of the relevant officers that the public interest would suffer by their disclosure was sufficient to establish the privilege.

6 In the present case, Mr Goh Chin Keong, a senior assistant director of investigations in the Workplace Health and Safety Inspectorate, deposed in support of the Ministry's assertion of the official communications privilege in relation to the MATCOR report, that:

The MATCOR report was commissioned by the Occupational Safety & Health Inspectorate, MOM, so that its Investigating Officers can benefit from the expert advice concerning the cause of the accident and decide where the criminal liability for the accident lay. The MATCOR report forms part of the Investigation Papers, and the MATCOR report was furnished to MOM in official confidence. The MATCOR report is not intended to facilitate the gathering and collation of evidence for the benefit of private litigants in the pursuit of their private interests.

There is a broad public interest in facilitating investigations and having the swift apprehension and punishment of offenders for worksite accidents, in order to maintain public safety. Furthering this public interest requires MATCOR to be forthcoming and candid in its report to the Occupational Safety & Health Inspectorate, MOM. The MATCOR report includes the opinions and comments of the expert which are confidential in nature and made to assist public officers in determining the causal and liability issues for the worksite accident for the purposes of criminal investigations.

The 1st Defendant [i.e. the applicant] was the occupier of the premises when the accident happened, making it a potential accused person. The 2nd and 3rd Defendants, who are the suppliers of the crane and steel wire rope respectively, are also potential accused persons. Disclosure of the MATCOR report is against the public interest as it breaches the confidentiality of the MATCOR report which forms part of the Investigation Papers. For the above reasons, I strongly believe that the public interest would suffer if the MATCOR report commissioned by and furnished to the Occupational Safety & Health Inspectorate, MOM, were to be disclosed in the present matter.

7 Counsel for the applicant did not dispute that the MATCOR report was made in official confidence. Instead, he argued that public interest against disclosure, as stated by Mr Goh, was outweighed by the public interest in the administration of justice, which militates in favour of disclosure. In support of his argument, counsel referred to the decision of the district court in *Re E (guardianship of an infant)* [2003] SGDC 84.

8 Now, I accept that, under s 126(1), the relevant public officer does not have an unfettered discretion to determine that the public interest would suffer by the disclosure of the relevant communications. As the Court of Appeal held in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86], "the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power." Similarly, the Court of Appeal in *Zainal bin Kuning v Chan Sin Mian* (*supra* [5]) was careful to state that the determinations of public interest in that case were made *bona fide*. More generally, I would say that the court can review the legality of a determination of public interest under s 126(1) on the usual grounds known to administrative law. Certiorari will not issue if the proceedings were not made under Order 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), but the court can nevertheless disregard an illegal assertion of public interest.

9 But the argument made by counsel for the applicant does not go towards the legality of Mr Goh's determination. It goes towards the merits of Mr Goh's determination, which are within Mr Goh's discretion. Therefore, unless Mr Goh's determination was irrational in the *Wednesbury* sense, and this is hardly the case, I cannot review the same, but must instead accept it for the purposes of s 126(1).

10 I do not think that *Re E* (*supra* [71]) assists the applicant. In that case, the learned district judge applied the common law balancing test in deciding whether or not to compel Singapore Immigration and Registration to give discovery and answer interrogatories, and concluded that the public interest in maintaining the confidentiality of information pertaining to national defence and internal security outweighed the public interest of the administration of justice in the disclosure of evidence. Unlike in this case, the s 126(1) privilege was not asserted. This is critical, because the s 126(1) privilege does not, as shown above, depend on a balancing test by the court, but on the determination of the relevant public officer. So *Re E* is wholly distinguishable. Also, I should add, with great respect, that the balancing test applied in *Re E* appears to be inconsistent with the s 126(1) privilege and may, to the extent of the inconsistency, have been repealed by virtue of s 2(2) of the Evidence Act.

11 I initially had some doubts as to whether Mr Goh was the correct officer to make the determination that the public interest would suffer by the disclosure of the MATCOR report. Under s 126(1), the officer who makes the determination must be the officer to whom the relevant communication was made. There was nothing in his affidavit to show that the MATCOR report was made to Mr Goh. However, counsel for the Attorney-General pointed out that the MATCOR report was commissioned by the Workplace Health and Safety Inspectorate and made to it, and argued therefore that Mr Goh, as a senior assistant director of the Inspectorate, was a proper officer under s 126(1). I accept this argument. A communication can be made to a group of officers or a single officer. In the case of the former, any officer in the group with the necessary authority can make the relevant determination under s 126(1).

12 I therefore hold that the s 126(1) official communications privilege was validly asserted over the MATCOR report.

Litigation privilege

13 Litigation privilege was examined by the Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] 2 SLR(R) 367. The Court of Appeal held (at [67]) that litigation privilege at common law was envisaged by s 131 of the Evidence Act, and not inconsistent with ss 128 and 131 of the same Act read together. It also set out the two elements of litigation privilege. First, there must be a reasonable prospect of litigation. Secondly, the legal advice must be taken for the dominant purpose of anticipated or contemplated litigation.

14 If I may say so respectfully, the Court of Appeal was right to specify in that litigation privilege in our law is based on ss 128 and 131 of the Evidence Act, for otherwise the privilege would be inconsistent with the Evidence Act, under which evidence is admissible if relevant, unless specifically excepted: *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239.

15 On the facts, Mr Goh deposed that:

I verily believe that the MATCOR report is privileged from disclosure as it is protected by litigation

privilege. As the 1st, 2nd and 3rd Defendants are potential accused persons, the Occupational Safety & Health Inspectorate commissioned MATCOR Technology & Services Pte Ltd to prepare the MATCOR report in reasonable contemplation of criminal proceedings.

16 I have considerable difficulty in seeing how ss 128 and 131, which form the basis of litigation privilege in our law, would apply to the MATCOR report. Now, ss 128 and 131 provide as follows:

Professional communications

128. —(1) No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Confidential communications with legal advisers

131. No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

MACOR is certainly not an advocate or a solicitor for the purposes of s 128, or, unless the term is stretched beyond recognition, a legal professional adviser for the purposes of s 131. Can the two sections be extended beyond their language? I rather doubt so, given the scheme of the Evidence Act, where evidence is admissible if relevant, unless specifically excepted. At any rate, a full analysis would be rather involved and quite unnecessary on the facts, given my finding that the s 126(1) privilege applies to the MATCOR report.

17 I also have considerable difficulty with the proposition, advanced by counsel for the Attorney-General, that litigation privilege, as it is understood in civil proceedings, applies in exactly the same way to criminal proceedings, for which the MATCOR report was commissioned. If this is right then all material made in the course of criminal investigation would be caught by the privilege. This is a very broad proposition, and not supported by precedent or practice. Now, it can be argued that litigation privilege in civil law applies to the discovery of investigative material in civil proceedings but not the disclosure of the same investigative material in criminal proceedings, which would be governed by the rules of criminal procedure. But this would raise larger issues about the nature and scope of litigation privilege and, once again, a full analysis would be rather involved and quite unnecessary.

18 I therefore express no concluded opinion on litigation privilege.

Conclusion

19 I therefore dismiss the application on the ground that Mr Goh had validly asserted the official communications privilege in s 126(1) of the Evidence Act in respect of the MATCOR report.

20 Counsel agreed that the Attorney-General was entitled to costs regardless of the outcome. I so order, and fix costs at \$1,200, including disbursements.