United Project Consultants Pte Ltd v Leong Kwok Onn
[2004] SGHC 276

Case Number : Suit 1081/2003

Decision Date : 10 December 2004

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : Hee Theng Fong and Tay Wee Chong (Hee Theng Fong and Co) for the plaintiff; N Sreenivasan and Valerie Ang (Straits Law Practice LLC) for the defendant

Parties : United Project Consultants Pte Ltd — Leong Kwok Onn

Contract – Breach – Plaintiff liable for tax and penalty imposed by Inland Revenue Authority of Singapore for failing to make proper IR8A form returns – Defendant auditor and tax agent – Plaintiff alleging defendant's failure to discover plaintiff's issuance of incorrect IR8A forms and advise plaintiff of tax consequences – Whether defendant's conduct amounting to breach of contractual duties under contract of retainer – Scope of defendant's contractual duties under contract of retainer

Tort – Negligence – Duty of care – Whether defendant auditor and tax agent owing plaintiff duty to discover issuance of incorrect IR8A forms and advise plaintiff of tax consequences – Whether defendant breaching such duty – Whether defendant's breach causing damage suffered by plaintiff – Whether plaintiff barred from recovering damages by reason of own wrongdoing

10 December 2004 *Judgment reserved.*

Lai Kew Chai J:

1 The plaintiff, a company which provided engineering services, had to pay the Inland Revenue Authority of Singapore ("IRAS") the sum of $1.707m being the tax and penalty imposed by IRAS for the failure on the part of the plaintiff to make proper IR8A form returns at the correct times in respect of the declared fees payable to its directors. The plaintiff had retained a part of the declared fees payable to its directors and had paid the directors a part of the fees. The relevant IR8A forms issued by the plaintiff only declared the fees paid and received by the directors. In the books of the plaintiff, the balance was recognised as a sum owing to the directors. At the same time, the plaintiff claimed the whole of the declared fees, whether paid or retained, as a deductible expense. The effect of this accounting treatment in the relevant years of assessment in question is that the plaintiff was able to pay significantly less income tax. The directors paid tax only for the fees received, but not for the fees which were retained by the company as a sum owing to the directors.

2 In this action, the plaintiff is claiming against the defendant, a certified public accountant, for damages which the plaintiff allegedly suffered by reason of the breaches of contractual duties under the contract of retainer or breaches of like duties in tort. In relation to the quantum of damages, the plaintiff gave credit for interest earned on the retained fees over the period in which tax should have been paid thereon. It estimates such interest to be about $295,000. It therefore claims from the defendant the balance sum of $1,412,000 or, alternatively, damages.

3 There are generally four defences. First, the defendant contends that there was in the circumstances no duty in law of the type pleaded, or in general, for him to discover and consequently advise the plaintiff not to breach the Income Tax Act (Cap 134, 2001 Rev Ed) ("the Act") in relation to the plaintiff's issuance of the IR8A forms. The second defence is that if there was such a duty, there was no breach. Thirdly, it is contended that if there was such a duty and there was a breach or there were breaches of duties, the breach or breaches did not cause the damage. Finally, the

defendant contends that the plaintiff is barred from recovering any damages under the maxim *ex turpi causa non oritur actio*, *ie*, a person who suffers damage at the hands of another, but who himself acted in any unconscionable manner, should be deprived of any remedy which the law might otherwise have provided.

Evidence of the plaintiff

4 Approximately towards the end of 1982 or the beginning of 1983, the plaintiff agreed to retain and employ the defendant, it says, as its accountant to audit its accounts and as its "tax agents". It relies on three documents which set out the contract of retainer. By a letter dated 17 December 1982 the defendant wrote to a firm of accountants intimating that he had been "invited to act as tax agent" for the plaintiff and he requested the firm to let him know whether there were any professional reasons why he should not accept the appointment. Secondly, the plaintiff relies on the fact that the defendant was for the relevant financial years appointed and re-appointed as "auditor" of the company. In that capacity, the defendant had certified that the accounts of the plaintiff were drawn up so as to give a true and fair view of the state of affairs of the plaintiff at the end of the relevant financial year. The third document which the plaintiff relies on is the yearly invoice rendered by the defendant. For example, the invoice dated 7 February 1992 described the nature of the services as "attending to [the plaintiff's] income tax matters including Form C, schedules and computations, s 44 [of the Act] statements and correspondence for the year of assessment 1992".

5 At about the same time, Mr Tan See Pian[1] ("Mr Ken Tan"), the managing director and major shareholder of the plaintiff, also engaged the defendant as his personal tax agent to advise on his own tax matters and to prepare all his personal tax declarations including his Form B personal income tax return.

6 Those two contracts of retainers continued until June 2000.

7 From its inception in 1983, the plaintiff adopted the practice of declaring a sum of directors' fees ("declared fees") every year. In the books of the plaintiff the declared fees appeared as a global sum. Only a portion, which was usually a small portion, was apportioned ("paid fees") by Mr Ken Tan; the balance of the declared fees which were not apportioned ("retained fees") to the directors was retained in the company for rainy days or distribution in future as incentives in recognition of the contribution of deserving directors who were high fee earners.

The accounting treatment

8 The financial year end of the plaintiff has been June each year. The profit and loss account in the audited accounts of the plaintiff classified the entirety of the declared fees as an expense item. In consequence, the profit of the plaintiff was substantially reduced by the amount of the declared fees. In the result, the tax payable by the company was reduced. In the balance sheet, the retained fees accumulated over the years would be classified as an accrual under current liability. However, and here is the source and origin of how the plaintiff ran afoul of the IRAS, the IR8A forms issued by the plaintiff, and signed by a director, would state only the paid fees that were released to the individual directors who, in turn, paid income tax on those fees. According to the evidence, Mr Ken Tan would decide and apportion the amount of retained fees to be paid to each director. He carried out the exercise just before the Chinese New Year.

9 At all material times, Mr Tan Tiong Lei[2] ("Mr Tan"), the director of the plaintiff in charge of finance and administration, knew the tax implications. So did Mr Ken Tan. Both of them were fully

aware that the plaintiff had claimed the benefit of the declared fees as deductible expenses. They also knew that the directors had only declared as income the fees they had been paid and that no income tax was paid by any director for the retained fees which were earning interests for the plaintiff.

The 1992 and 1997 distributions

10 In 1992, the plaintiff decided to make an additional allocation of directors' fees. The plaintiff's accountant, Ms Katherine Yeo ("Ms Yeo")[3] spoke to Ms Chan Sui Chan ("Ms Chan")[4] of the defendant's office and was advised that once the additional amounts to be paid to each director had been decided, such payments should be notionally spread over previous years and retrospective additional IR8A forms should then be prepared by the plaintiff to declare the directors' fees for each of the respective years, even though the fees were not actually being paid in that particular year.

11 The plaintiff provided additional IR8A forms to the directors, who later submitted them to IRAS. Later, the IRAS informed the individual directors how much further taxes were to be paid, and the taxes were accordingly paid. These 1992 distributions from the retained fees ("the 1992 distributions") escaped the imposition of any penalty, which IRAS could have properly imposed.

12 In 1997, Mr Ken Tan decided to make a further distribution of the retained fees. The exercise was carried out in the same way the 1992 distributions were done. The directors again paid the additional income tax without attracting anything untoward from IRAS.

13 The defendant, as the tax agent of Mr Ken Tan, dealt with the additional IR8A forms for him. For the year of assessment 1993, the defendant prepared Mr Ken Tan's personal income tax return (Form B) and filled in the box "Part V – Income Not Previously Reported" the bonus and directors' fees of Mr Ken Tan for the years 1988, 1990 and 1991.

14 In July 1998, the IRAS queried the plaintiff about the directors' fees which had been declared and received for the year of assessment 1997. IRAS also asked whether the fees were shown in the IR8A forms and it sought a copy of the plaintiff's profit and loss accounts. The defendant was asked by the plaintiff to reply to the IRAS. In August 1998 the defendant replied to the IRAS that the total directors' fees of $2.544m had been declared and shown as expenses in the accounts for the year ended 30 June 1996 and that the total amount actually paid out was only $839,500.00.

15 Following additional queries from IRAS, in November 1998, Mr Tan and Ms Yeo had a meeting with the defendant. Pursuant to the defendant's advice, the plaintiff held a meeting on 14 January 1999 to allocate and distribute all retained fees, amounting to some $6,552,839.00 among the four directors, to be related back to the years 1990 to 1997. After the distribution, the plaintiff furnished IRAS with additional IR8A forms for the directors for that period. As noted earlier, IRAS imposed the penalty as it was entitled to do.

Evidence of the defendant

16 The defendant stated in evidence that Mr Ken Tan, who was his former colleague in a trading house, asked him to take care of the plaintiff's audit and income tax returns. On or about 1981, he started the audit work and worked as a tax agent for the plaintiff. At the same time, he was retained as a tax agent for Mr Ken Tan. But the defendant pointed out that he was not the tax consultant of Mr Ken Tan. He categorically stated that he was never the plaintiff's accountant or tax consultant. The plaintiff had its own accountant, Ms Yeo. On the evidence, Ms Yeo prepared the IR8A forms in question which were signed by Mr Ken Tan. The defendant referred to a letter dated 1 March 1983

from the plaintiff informing him that he had been "appointed auditor of [the plaintiff] for the financial year ending 30 June 1983". He replied in writing accepting the appointment.

17 The scope of his work as an auditor and his duties, according to the defendant, are stated in the auditor's report under the Companies Act (Cap 50, 1994 Rev Ed).

18 In relation to the issue of directors' fees, the defendant stated that as far as the audit work was concerned, the plaintiff never informed him or his staff with regard to the division of the directors' fees amongst each of the directors. As such, the amount of the directors' fees was always reflected as a lump sum within the plaintiff's accounts. When asked what the division amongst the directors would be, he was told to assume it would be in equal shares. He was further told that the directors would work out the division among themselves. This was normally done before finalising the audit, as directors' fees were usually declared after the close of the financial year.

19 The defendant explained that since it was not necessary to know the internal distribution for the purposes of the audit report or for the purposes of filling up Form C for the years of assessment 1981 to 1996, the actual division was not pursued by him or his audit staff.

20 For years of assessment 1981 to 1996, there was no section in Form C which required a company to declare the individual amount of directors' fees for each director of the company. It was only in 1997 that a section was provided in Form C requiring the directors' fees for each director to be declared.

21 The defendant reiterated that he had "no idea what had been declared for the directors" (other than Mr Ken Tan). He was not the tax agent for the other directors. The plaintiff only sent him or his staff the IR8A forms for Mr Ken Tan.

22 In relation to the plaintiff's assertion that he had been consulted by it about the issuance of backdated IR8A forms, and his alleged advice that the plaintiff could always backdate whenever it paid the directors out of the retained fees, the defendant denied any such consultation. He also denied giving the alleged advice. He denied that he or his staff had ever advised that the IR8A forms could reflect the directors' fees received by each director nor did they advise that additional IR8A forms could be submitted to IRAS whenever further payments of directors' fees out of the retained fees were made. His position was that if he had been consulted, he would have advised that the IR8A forms must reflect the total amount of the declared fees, and that if it had not been done, additional IR8A forms should be filed to rectify the position.

23 The defendant pointed out a "practical aspect" of the duties of an auditor and a tax agent. His involvement as an auditor and a tax agent took place at different points in time. For example, in the year 1992, he would be auditing the plaintiff's accounts as at June 1992. When it came to tax, he would be doing it only in 1993 for the company and would do the tax returns of each individual director also in 1993. The directors' fees as a company expense and as the directors' income were not looked at at the same time. They could be considered at different years of assessment.

The duties of the defendant

24 The plaintiff asserted that it was an implied term of the contract of retainer that the defendant would discharge his engagement as an accountant, auditor and tax consultant with reasonable skill and care and in particular with the degree of skill, care and diligence to be expected of reasonably competent and prudent accountants, auditors and tax consultants.

25 The plaintiff also asserted specific duties. Of them, the crucial duty is the specific duty to give to the plaintiff such advice as was appropriate concerning the tax implications of the ways in which it treated or distributed the profits from its business, including the ways in which it declared and/or paid directors' remuneration (collectively "remuneration arrangements") and/or, in any event, to warn the plaintiff if it became apparent or should have become apparent to the defendant in the course of performing his services to the plaintiff that there were or might be adverse tax consequences (including the payment of penalties) for the plaintiff as a result of the way in which it made its remuneration arrangements.

26 In my view, it would be unreasonable and unjust to impose on the defendant in all the circumstances the pleaded duty to discover the issuance of the incorrect IR8A forms and consequently the duty to advise the directors of the tax consequences. Mr Ken Tan and Mr Tan of the plaintiff were, in my view, fully aware that the plaintiff was under a duty to issue proper IR8A forms. They decided, entirely on their own, to issue IR8A forms which only disclosed the amounts which were released and paid to each director out of the declared fees. Only Mr Ken Tan decided the apportionment. Only he and Mr Tan knew what was apportioned and paid out. Ms Yeo completed the IR8A forms. It was not possible for the defendant or his audit staff to know whether the plaintiff had reported all the declared fees due and payable to the directors.

No breach by the defendant

27 Even if there was the duty to detect error in the inaccurate IR8A forms and the duty to ensure their accuracy, I am of the view that the defendant did not breach these duties, whether in contract or in tort. The plaintiff, through Mr Ken Tan and Mr Tan, was itself responsible. It decided only to disclose in the IR8A forms the actual amounts received by each director, rather than the sum apportioned to each of them out of the declared fees. No reasonably competent, careful and skilful auditor, including the defendant, could be expected to ferret out what was a tightly-held piece of confidential information. The amount paid to each director was solely decided by Mr Ken Tan. Mr Tan, the other director, also knew. Ms Yeo had to prepare the IR8A forms. So she knew. The defendant was not within the loop. Since the preparation and issue of IR8A forms to each director was done without any reference to the defendant, there was no way for him to know that the aggregate amount declared in all directors' IR8A forms was the same as the total amount of declared fees. He, of course, knew of the amount declared in the IR8A form of Mr Ken Tan in the course of discharging his professional duties as the tax agent. But that alone did not give the full picture.

28 From the inception of the plaintiff, Mr Ken Tan had only declared in the IR8A forms issued the actual amounts paid to each director, be they fees, wages, bonus or other allowances. He treated the retained portion of the declared fees as reserves for the use of the company. He moderated the income of the plaintiff by causing the company to declare the directors' fees. Following the declaration of directors' fees by the company, he would apportion them among the directors in his discretion. In the meantime, he kept the retained portion in the plaintiff's balance sheet.

29 Since the preparation and issue of the IR8A forms were carried out by the internal accountant of the plaintiff and since the audit and issue of the IR8A forms to each director were effected at different times, the defendant was not in breach of the duty to detect the errors in the IR8A forms. I accept the evidence led on behalf of the defendant that it is not part of the duties of an auditor or a tax agent to ensure that the corporate client issued proper IR8A forms which tally with the directors' fees declared. It is the responsibility of the management to ensure that the IR8A forms were properly issued.

Causation

30 Further, the loss of the plaintiff which it seeks to recover from the defendant was caused by its own acts and by its directors. Mr Tan, in cross-examination, admitted that the amount of declared fees was to the full amount of the profit so as to bring down the tax liability of the plaintiff. The plaintiff, he disclosed, would allocate more directors' fees to a year where the income was less. The directors of the plaintiff were obviously conscious of minimising personal income tax liability. He admitted that the plaintiff fixed the amount of directors' fees to make sure the company did not pay much tax. At all material times, Mr Tan knew that the directors were only paying taxes on the fees they had received and that the income tax on each director's portion of the retained fees was evaded. He was disingenuous when he sought to persuade the court that all along he thought tax liability was on a "pay when paid" basis. His personal knowledge and intention must be attributed to the plaintiff company. The plaintiff therefore caused the loss and incurred the penalty by its own deliberate acts.

31 I would quote relevant portions of the cross-examinations of Mr Tan and Mr Ken Tan, which demonstrate that the directors knew what they were doing and that their objective was to minimise tax, taking the benefit of the deductions and, unlawfully, failing to pay tax on their portion of the declared fees:

Cross-examination of Mr Tan:

Q: The amount of declared fees was to the full amount of the profit so as to bring down the tax liability of the company?

A: Yes.

Q: Do you mean that each director would allocate their income based on their tax liability each year?

A: Yes.

Q: You would allocate more to a year where the income was less?

A: Yes.

Q: This way the directors would save on tax?

A: Marginally.

Q: You did not allocate it based on the year it was accumulated?

A: Yes, we had.

Q: Was it based on the year it was accumulated or based on the tax bracket of each director for each particular year?

A: It was based on the year it was accumulated.

Q: Just moments earlier, you said something else. Did you allocate to minimise tax?

A: We tried to pay less tax by looking at the bracket.

Cross-examination of Mr Ken Tan:

Q: What was the purpose of keeping profits low?

A: So that we have more money to give to the individual directors.

Q: Was it to keep company tax low and also to pay directors?

A: Yes.

…

Q: You knew company was not paying tax on what was declared as directors' fees?

A: Yes.

Q: You fix the amount of fees to make sure company did not pay much tax?

A: Yes.

Q: You knew company was not paying tax on directors' fees?

A: Yes.

Q: Since you signed the IR8A forms you also knew that the directors were paying tax only on the paid out portions?

A: Yes.

Bar to recovery

32 Finally, I am also of the view that the plaintiff, in any event and on any view, must be barred from recovery against the defendant by reason of the maxim of *ex turpi causa non oritur actio*.

33 In the light of what had transpired, as set out above, the maxim is entirely applicable in the instant case.

34 Kerr LJ stated in *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1 at 35 as follows:

> The *ex turpi causa* defence ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.

Kerr LJ's analysis is noteworthy for its confirmation that the defence is not nowadays – nor arguably, has ever been – confined to illegal acts on the part of a plaintiff, but also covers acts which, although not illegal, are nevertheless regarded as so socially unacceptable that such a plaintiff should be deprived of a remedy for the wrong he has suffered.

35 It is quite clear that the plaintiff's wrongful acts are directly connected with the penalty imposed on it by IRAS. By this action, it is seeking to recover the penalty which was imposed on it for

breach of the Income Tax Act. The plaintiff's breaches of revenue laws were not the consequence of following any advice from the defendant. It asserts that the defendant was under a duty to stop it from breaching the law and had failed in that duty. I am not inclined to award any remedy to the plaintiff which would relieve it from the known consequences of its actions at the expense of the defendant who could not have detected the breaches and prevented them.

Conclusion

36 The plaintiff's claims against the defendant are accordingly dismissed with costs.

Plaintiff's claims dismissed with costs.

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[1]PW1.

[2]PW3

[3]PW2.

[4]DW3.