Lim Kok Koon v Tan Cheng Yew and Another
[2004] SGHC 101

Case Number : Suit 522/2003

Decision Date : 17 May 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Allan Tan (Sim Mong Teck and Partners) for plaintiff; Vinodh Coomaraswamy and David Chan (Shook Lin and Bok) for second defendant

Parties : Lim Kok Koon — Tan Cheng Yew; Tan JinHwee Eunice and Lim ChooEng

Civil Procedure – Pleadings – Striking out – Application to strike out writ of summons – Whether claim disclosed reasonable cause of action – Order 18 r 19, O 3 r 4 Rules of Court (Cap 322, R 5, 1997 Rev Ed)

Partnership – Partners and third parties – Firm liable for acts of partner – Whether acts of partner in ordinary course of business of partnership – Section 10 Partnership Act (Cap 391, 1994 Rev Ed)

17 May 2004

Lai Siu Chiu J

The facts

1 Tan Cheng Yew ("the first defendant") was at the material time, an advocate and solicitor who had been called to the Singapore Bar on 8 December 1981. He was a litigation partner of Tan JinHwee Eunice & Lim ChooEng ("the second defendant") which law firm he joined on 15 August 2001, together with two partners from his former practice, Tan Cheng Yew & Partners.

2 In late November 2002, Lim Kok Koon ("the plaintiff") consulted the first defendant on an intended reverse takeover ("RTO") by Cybermast Ltd ("the Company") of which he was and still is, a director, President and Chief Executive Officer ("CEO"). Ted Lai is another director of the Company and is its deputy CEO and Chief Operating Officer ("COO"). The Company is listed on the Stock Exchange of Singapore ("SGX"). The plaintiff is also a shareholder and director of two private companies, M & V Holdings (S) Pte Ltd ("M & V") and Greatronic Marketing (S) Pte Ltd ("Greatronic"), subjects of the RTO.

3 At the time, another law firm acted for the Company whilst a third law firm acted for M & V and Greatronic. Despite representations made by these two law firms to the SGX over a period of several months, the SGX did not approve the RTO. The plaintiff felt increasingly exasperated and decided to seek a second opinion on the RTO. It was in that connection that the plaintiff came to consult the first defendant.

4 After the plaintiff's initial consultation with the first defendant, the latter wrote to the plaintiff and Ted Lai on 21 December 2002, using the second defendant's letterhead, to confirm the plaintiff's instructions. Several meetings between the plaintiff and the first defendant followed thereafter, at the office of the second defendant.

5 According to the plaintiff, in one of those meetings, the first defendant advised him that a possible reason for the withholding of approval by the SGX was because they did not know the background of the persons involved in the RTO. To assure the SGX that the transactions involving the Company and the other two companies were above board, the first defendant suggested that the

plaintiff furnish an undertaking (through the second defendant) to the SGX in the sum of $2m. The plaintiff told the first defendant that he did not have enough funds to furnish an undertaking for $2m. The first defendant eventually agreed to an undertaking of $1m.

6 Acting on the first defendant's advice, the plaintiff handed over to the first defendant, on 11 December 2002, two cheques: one cheque drawn on United Overseas Bank Limited dated 10 December 2002 in the amount of US$200,000 ("the UOB cheque") and the other, drawn on the Development Bank of Singapore Ltd dated 12 December 2002 in the amount of $150,000 ("the DBS cheque"). Both cheques were issued in favour of the first, not the second, defendant.

7 On 14 January 2003 the plaintiff handed the first defendant another cheque for US$290,000 ("the third cheque"), again drawn on DBS and issued in the first defendant's favour.

8 When the plaintiff requested for receipts for the UOB and DBS cheques, the first defendant gave an excuse that as it was after office hours, the person charged with issuing receipts had left. However he assured the plaintiff that there was nothing to worry about. On subsequent occasions, when the plaintiff asked him for the receipts, the first defendant gave various excuses. In his affidavit filed on 18 July 2003, the plaintiff deposed that all three cheques were issued in favour of the first defendant at the latter's request. Pending the issuance by the first defendant of receipts for the three cheques, the first defendant executed two Deeds of Trust ("the Trust Deeds") in favour of the plaintiff, dated 11 December 2002 and 24 January 2003 respectively, witnessed by a solicitor employed by the second defendant.

9 The plaintiff's last contact with the first defendant was on or about 15 February 2003. According to an affidavit filed on 19 June 2003 by the managing partner of the second defendant, Tan Jin Hwee ("Tan"), the first defendant did not report for work on 10 February 2003 although he had not applied for leave. Indeed, the first defendant has not turned up at the office of the second defendant since that date. The second defendant terminated the first defendant's partnership with the law firm on 19 February 2003. Both the plaintiff and the second defendant are unaware of the first defendant's present whereabouts. According to the plaintiff, there were press reports on 25 and 26 February 2003 that the first defendant had gone missing.

10 On 17 February 2003, Tan Chau Yee ("TCY"), a litigation partner of the second defendant, informed Tan he had spoken to Ted Lai from the Company. Ted Lai told TCY that $1m had been paid personally to the first defendant and that he (Ted Lai) had attempted, unsuccessfully, to contact the first defendant for some two weeks. Ted Lai alleged the second defendant was supposed to issue a letter of undertaking, according to the representations made to him and the plaintiff by the first defendant.

11 When Tan and TCY looked into the file opened for the Company, they did not find copies of the three cheques, the letter of undertaking or the Trust Deeds. Indeed, there were no documents or letters to any third parties from the first defendant wherein he had identified himself as legal adviser in the RTO. There was nothing in the file to indicate the first and/or second defendant had taken over representation of either the Company, or of M & V and Greatronic, from their existing solicitors. However, the file contained a draft memorandum of understanding ("MOU") apparently prepared by the first defendant, which terms stated the first defendant personally agreed to acquire from the plaintiff and the chairman (Huang Ming Lang), their shareholdings in the Company and would be allotted 20% shares in M & V. There was also correspondence in the file between the first defendant and another law firm on a possible initial public offering ("IPO") in place of an RTO.

12 Tan deposed in his aforesaid affidavit that neither he nor any other solicitor of the second

defendant was aware that the first defendant had opened a file in the Company's name. Tan expressed surprise that the first defendant had opened a file, let alone handled the same on his own, as advising on an RTO was well outside the first defendant's areas of practice and expertise. He deposed that a solicitor advising on an RTO must, in addition to having a good grasp of general company law, be familiar with the Singapore Code on Take-overs and Mergers and certain provisions of the Companies Act (Cap 50, 1994 Rev Ed) on the subject. Technical and complex regulatory issues have to be cleared with the SGX and also possibly with the Securities Industry Council. As it is an area of law involving a complex regulatory regime, there is a great risk for any client to be advised by a lawyer who does not practise in the field. Tan added that the second defendant has never advised on any RTO of the nature the plaintiff consulted the first defendant on, although the law firm is well able to handle IPOs. If the law firm had indeed been consulted by the plaintiff and/or the Company, the matter would have been handled by Tan himself and two other solicitors, who specialise in that area of practice.

13 On Tan's instructions, TCY contacted and obtained from Ted Lai, copies of the UOB and DBS cheques. Copies of the third cheque and the alleged letter of undertaking were not, and were never furnished by Ted Lai or the plaintiff. On 19 February 2003, the plaintiff's present solicitors ("the Solicitors") wrote to the second defendant to advise that they had taken over the matter. The Solicitors forwarded copies of the Trust Deeds and requested, from the second defendant, all documents in the second defendant's file, as well as a cheque to return the plaintiff's payments of $150,000 and US$490,000.

14 On behalf of the second defendant, Tan replied to the Solicitors' letter on 20 February 2003, stating that the alleged payments were not paid into the second defendant's account and that all evidence (including the Trust Deeds) pointed to the fact that the sums of money were paid to the first defendant personally. Consequently, it was a personal matter between the plaintiff and the first defendant. Tan rejected any liability to the plaintiff on the part of the second defendant.

15 The Solicitors disagreed with the stand taken by the second defendant and on 23 May 2003, commenced these proceedings on the plaintiff's behalf.

The pleadings

16 In the statement of claim, the plaintiff, *inter alia*, alleged that the first defendant rendered advice to and received the three sums of money from the plaintiff in the ordinary course of business as a partner of the second defendant. As the moneys handed over by the plaintiff had been dishonestly misappropriated by the first defendant, the second defendant was liable.

17 After entering a memorandum of appearance to the writ of summons by its solicitors, the second defendant applied on 19 June 2003, *vide* Summons in Chambers No 3774 of 2003 ("the Application"), to strike out the writ of summons pursuant to O 18 r 19 and O 3 r 4 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) and, under the inherent jurisdiction of the court, on the grounds that the statement of claim:

(a) disclosed no reasonable cause of action;

(b) was scandalous, frivolous and vexatious and/or;

(c) was an abuse of the process of the court.

18 The Application was heard on 30 July and 1 August 2003 and dismissed with costs by the

learned Deputy Registrar. The second defendant appealed against his decision in Registrar's Appeal No 279 of 2003 ("the Appeal").

The Appeal

19 I heard and allowed the Appeal on 26 August 2003. On 16 September 2003, I heard further arguments at the request of counsel for the second defendant. I then varied the costs order I had made on 26 August 2003 by increasing the quantum thereof.

20 The plaintiff, being dissatisfied, appealed against my decision on 3 October 2003. The second defendant filed a notice of motion (No 121 of 2003) to strike out the plaintiff's notice of appeal, on the ground it was filed out of time. On 23 February 2004, the Court of Appeal heard the second defendant's application. Whilst the appellate court (see *Lim Kok Koon v Tan JinHwee Eunice & Lim ChooEng* [2004] 2 SLR 322) agreed with the second defendant that the plaintiff's notice of appeal was indeed filed out of time (as time against my decision ran from 26 August, *not* 16 September 2003), it nevertheless declined to grant the second defendant's application. Instead, the Court of Appeal granted the plaintiff an extension of time to file his appeal, thus regularising his notice of appeal already filed in Civil Appeal No 106 of 2003.

The submissions

21 Counsel for the second defendant relied on the Trust Deeds, s 10 of the Partnership Act (Cap 391, 1994 Rev Ed) ("the Act") and the House of Lords' decision in *Dubai Aluminium Co Ltd v Salaam* [2003] 1 All ER 97 for his arguments that the first defendant did not act in the ordinary course of business when he received the three cheques or payments from the plaintiff. The first defendant was on a frolic of his own when he accepted and misappropriated the plaintiff's moneys.

22 Counsel referred to the plaintiff's statement of claim. In paras 4, 5, 6 and 7 thereof, the plaintiff had alleged that the first defendant had performed the following acts in the ordinary course of the second defendant's business:

(a) advised the plaintiff that it was necessary for the plaintiff to furnish funds as an undertaking to the SGX;

(b) received the three sums of money from the plaintiff for the undertaking;

(c) dishonestly misappropriated the moneys meant for the undertaking.

23 Counsel drew the court's attention to the fact that it was in his affidavit (not in his pleading) that the plaintiff alleged (in para 13) that he was advised by the first defendant to issue the three cheques in the latter's favour. He noted that the essence of the plaintiff's case was that the first defendant had breached the terms of the express trust he had declared in the plaintiff's favour by the Trust Deeds. However, *Dubai Aluminium Co Ltd* is clear authority that even in the 21st century, it is no part of the ordinary business of a solicitor to act as an express trustee, where the trust is not a "remedial" constructive trust. Consequently, the first defendant's self-appointment as an express trustee is outside the scope of s 10 of the Act and so is any loss occasioned to the plaintiff thereby.

24 Although he also relied on s 10 of the Act, counsel for the plaintiff put forward the opposite submission for his contention that the first defendant's acts were done in the ordinary course of the second defendant's business. Thus, the second defendant was vicariously liable for the first defendant's misappropriation of the plaintiff's moneys.

The decision

25 In arriving at my decision to allow the Appeal, I first took into account the Trust Deeds. The opening paragraph of the first trust deed dated 11 December 2002 states:

> I, Tan Cheng Yew … of 105 Cecil Street #23-00 … hereby declare that I hereby hold United States dollars Two Hundred Thousand and Singapore dollars [One] Hundred and Fifty Thousand ("the monies") as nominee for the said Lim Kok Koon on trust for him, with effect from 11 December 2002.
>
> Now, I, the said Tan Cheng Yew, hereby further declare that:–
>
> 1. I stand possessed of the said monies on trust … for the said Lim Kok Koon …
>
> 2. I undertake to exercise all rights …in accordance with any directions … given to me by the said Lim Kok Koon …
>
> 3. All dividends, bonuses … in respect of the said monies shall be held by me on trust for the said Lim Kok Koon.
>
> 4. If and when required by the said Lim Kok Koon so to do, I will, at the costs and expense of the said Lim Kok Koon, sign and execute all deeds, documents … as he may direct.

26 Similarly, the second trust deed dated 24 January 2003 contained the following paragraph:

> I, Tan Cheng Yew ... of …. hereby declare that I hereby hold monies amounting to United States Dollars 290,000 as nominee for the said Lim Kok Koon with effect from 14 January 2003.

as well as the exact same four sub-clauses in the first trust deed, as set out in [25] above.

27 It is to be noted from the wording of the Trust Deeds, that there was no reference to the second defendant, but to the first defendant by the repetition of the first person pronoun "I" throughout the documents. Neither did the first defendant sign the Trust Deeds on the second defendant's behalf.

28 Next, I refer to s 10 of the Act which states:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

29 I turn now to the decision of the House of Lords in *Dubai Aluminium Co Ltd*. There, the plaintiffs were the victims of a massive fraud whereby they were induced to pay out US$50m to a company, MR, under a bogus consulting agreement. The participants in the fraud included three individuals, S, T and L, who shared in the proceeds taken by MR, under equally bogus sub-agreements. The agreements had been drafted by the senior partner (Mr Amhurst) of two successive firms of solicitors ("the Amhurst firms"), of which S had been a client. The plaintiffs alleged that

Mr Amhurst dishonestly assisted in the fraud, even though he did not benefit from the fraud, apart from comparatively modest amounts paid to his firm by way of fees. In addition to suing Mr Amhurst, the plaintiffs sued the Amhurst firms even though it was common ground that their partners were personally innocent of any wrongdoing. The Amhurst firms brought third party proceedings against S, T, L and MR for contribution under the UK Civil Liability (Contribution) Act 1978, in respect of any sum for which they might be held liable to the plaintiffs.

30 At first instance, Rix J found S, T and L to have been dishonest. At various stages of the trial, all the defendants settled with the plaintiffs, agreeing to pay substantial sums which, in the case of Mr Amhurst and the Amhurst firms, came to $10m. On the contribution claims, Rix J held that in respect of their payment of $10m, the Amhurst firms could receive contribution amounting to a full indemnity from S and T.

31 The Court of Appeal allowed the appeal of S and T and held that the Amhurst firms were not vicariously liable for Mr Amhurst's allegedly wrongful acts. Hence, there was no basis on which the Amhurst firms could obtain contribution from S or T in respect of the firms' payments to the plaintiffs.

32 The House of Lords allowed the appeal against the decision of the Court of Appeal, by the third and fourth defendants, who were the partners of the Amhurst firms, but dismissed the cross-appeals filed by S and T. One of the grounds put forth in the cross-appeal was that the Amhurst firms were not vicariously liable for Mr Amhurst's alleged misconduct as the plaintiffs' cause of action did not fall within s 10 of the UK Partnership Act 1890 (which is *in pari materia* with s 10 of the Act).

33 The House of Lords held (as summarised in the headnote to the judgment at 98):

> (1) A fault-based equitable wrong constituted a 'wrongful act or omission' within the meaning of s 10 of the 1890 Act. There was nothing in the language of that provision to suggest that the phrase 'any wrongful act or omission' was intended to be confined to common law torts. …
>
> (2) It was not a condition of vicarious liability that all the wrongful acts for which a partner or employee was responsible had to have been committed by him in the course of the firm's business or the course of his employment. Rather, vicarious liability would not be imposed unless all the acts or omissions which were necessary to make him personally liable had taken place in the course of the firm's business or the course of his employment. In determining whether they had so taken place, everything depended on the closeness of the connection between the duties which, in broad terms, the partner or employee was authorised to perform and his wrongdoing. In the instant case, the drafting of the agreements had been acts of assistance by the senior partner which, coupled with the alleged dishonesty, had been sufficient in themselves to give rise to equitable liability on his part. Those acts were so closely connected with the acts that he was authorised to do that, for the purposes of the liability of the [Amhurst] firms, they could fairly and properly be regarded as done by him while acting in the ordinary course of their business. …

34 According to Lord Nicholls of Birkenhead and Lord Millett, whether a particular act of a partner is done "in the ordinary course of business" of the partnership, is a question of law. If the act is legally capable of being performed within the ordinary course of the partnership business, the next question of whether the act was so performed is a question of fact.

35 Lord Millett had added, at [133] and [134] of the judgment, (after referring at [131 and [132] to *Mara v Browne* [1896] 1 Ch 199):

> … The courts distinguished between the acts of a solicitor when acting as solicitor to the trustees and acts done by him as an express trustee. The former were within the scope of the ordinary business of a solicitor; the latter were not (see *Re Fryer, Martindale v Picquot* (1857) 3 K & J 317, 69 ER 1129).
>
> For my part, I do not think that these cases can be disposed of by saying that the scope of a solicitor's practice has changed since 1896. … The nineteenth century was the heyday of the family solicitor. Conveyancing and private client business formed the bulk of his work. He could expect to be appointed an executor and trustee of his clients' wills and settlements. This is much less common today. Solicitors' work has become more commercial. Private client business forms a far smaller part of their work than it did; many large firms undertake none at all. … It is part of a solicitor's business to advise whether trust money may lawfully be invested in an overseas hedge fund or used to pay a discretionary beneficiary's school fees. It is still not part of his business to make the decision whether to do so or not. If it was not part of the ordinary business of a solicitor to act as an express trustee in 1857, I do not see how it can be part of it today.

36 Applying the principles enunciated in *Dubai Aluminium Co Ltd*, I accepted the submission of the second defendant that it is not part of the ordinary business of a law firm for its lawyers to act as express trustees. It would be a different matter altogether, if the first defendant had been consulted on the construction of trust instruments which had already been established by the plaintiff, or which the plaintiff intended to set up.

37 As a matter of law, the furnishing of undertakings by solicitors to third parties is part of the ordinary business of a law firm. Solicitors' undertakings are commonly furnished to other lawyers, to opponents in litigation proceedings, to sheriffs, to other court officers and the like. Even then, the funds to enable such undertakings to be issued are first paid into the clients' accounts of the law firm concerned. Factually, it is uncommon for moneys to be paid to a solicitor personally, as in this case.

38 The plaintiff had alleged that his three cheques were issued in the first defendant's favour at the latter's request. That would be consistent with the wording of the Trust Deeds where the first defendant declared he held the moneys personally as trustee for the plaintiff. Applying the test of Lords Nicholls and Millett ([34] *supra*), acting as an express trustee is not legally capable of being performed within the ordinary course of the partnership business of the second defendant.

39 Lord Millett had drawn a clear distinction between lawyers acting as express trustee (which is outside the scope of the ordinary business of lawyers) and situations where the law imposes liability in equity on wrongdoers as a result of which a constructive trust comes into existence by reason of the wrongdoing. Another scenario his Lordship posed was the imposition of a trust on a person who, though not appointed as a trustee, nevertheless takes it upon himself to act as such and to discharge the duties of a trustee on behalf of others, thereby becoming a *trustee de son tort*. These trusts do not arise in our case.

40 In considering whether the first defendant could have accepted the plaintiff's payment personally in the ordinary course of business of a law firm, the court must consider the closeness of the connection between the duties the first defendant was authorised to perform and his wrongdoing. In this regard, I gave the benefit of the doubt to the plaintiff that neither he nor Ted Lai were aware or were told that the first defendant's areas of practice and expertise were limited to litigation, that he could not do corporate work, let alone that of the complex nature required by the plaintiff for the RTO. However, the plaintiff and Ted Lai are CEO and COO respectively, of a public listed company. Their meetings with the first defendant would not be the first occasion either of them had consulted lawyers in their capacities as the Company's top management. They would or should have realised

that making payments personally to a lawyer (albeit a partner) in a law firm is not the norm. It is certainly not something which is done in the ordinary course of the business of a law firm. Indeed, it is something which is quite out of the ordinary; they should therefore have been put on alert.

41 Further, the plaintiff and Ted Lai had already instructed one of the largest law firms in Singapore to act for the Company in the RTO and a third (small) firm to represent M & V and Greatronics. I find it strange that they could think the first defendant could do better for them than what the two law firms had accomplished, with the SGX.

42 In support of its submission that the first defendant acted on a frolic of his own, in the advice he rendered to the plaintiff and in taking the plaintiff's moneys personally, the second defendant had relied on the following facts:

(a) The first defendant gave the plaintiff and Ted Lai commercial, not legal advice, on the benefits of an IPO as opposed to an RTO and how to maximise their returns.

(b) The first defendant diverted the possible IPO work from the plaintiff, from the second defendant's corporate department to another law firm.

(c) The first defendant apparently had a personal interest in the subject matter of the transaction, judging from the draft MOU.

(d) The first defendant had no authority from the second defendant to receive payment meant for the law firm in his own name. It is trite law that an agent cannot authorise himself as acting for his principal. In this case, the plaintiff did not allege that anyone from the second defendant had represented to the plaintiff that the first defendant had the actual or ostensible authority to accept payments from the plaintiff.

(e) The first defendant had no authority from the second defendant to act as express trustee in the ordinary course of the second defendant's legal practice.

Its counsel submitted that the first defendant, in his personal capacity, had a private commercial relationship with the plaintiff. The plaintiff entrusted his moneys to the first defendant in that capacity. The plaintiff should therefore look to the first defendant for the return of his moneys.

43 On the facts, I could not fault the second defendant on the above arguments. Tan had, in his affidavit, deposed that neither the Company nor the plaintiff was the client of the second defendant. This was not challenged by the plaintiff. The fact that a solicitor of the second defendant witnessed the first defendant's execution of the Trust Deeds is not a factor that advances the plaintiff's case.

44 Consequently, it was my view that the second defendant was not liable for the misappropriation by the first defendant of the moneys paid to him by the plaintiff. Accordingly, I allowed the Appeal with costs to the second defendant.

Copyright © Government of Singapore.