PT Kiani Kertas v PT Indorimagas Pratama and Others
[2001] SGHC 330

Case Number : Suit 379/2000/B

Decision Date : 31 October 2001

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Andre Yeap & Adrian Wong (Lee & Lee) for the plaintiffs; Philip Tay (Rajah & Tann) for the second defendant

Parties : PT Kiani Kertas — PT Indorimagas Pratama; Tony Chua Chwee Thiam; Orn Holding (H K) Limited

Judgment

GROUNDS OF DECISIONS

The background

1. PT Kiani Kertas (the plaintiffs) appealed against the decision of the Assistant Registrar given on 2 May 2001, wherein she had granted part of the second defendant's application (in summons-in-chambers no. 525 of 2001/J) by making the following order:

> Part of the Defence of the second defendant and his Counterclaim, relating to the claim that Mr Gerald White on behalf of the plaintiffs had agreed with the second defendant that any documents and information provided by the first and second defendants would not be used against the defendants and the plaintiffs would not take any action against the defendants, be tried first, and all other parts of the Defence and the plaintiffs claim be tried at a subsequent trial and stayed in the meantime.

2. I heard and allowed the plaintiffs' appeal in Registrar's Appeal No. 96 of 2001 (the Appeal) on 24 May 2001; the second defendant has now appealed against my decision (in Civil Appeal No. 600085 of 2001).

The facts

3. According to the pleadings and the affidavits filed by the parties herein, the plaintiffs are a developer and owner of, a pulp mill in East Kalimantan (the project) of which one Jim Endicott (Endicott) was their project director. Another gentleman by the name of Harold Helm (Helm) was the project director of PT Parama Simons, an Indonesian company which was appointed as the plaintiffs' engineer for the project. In 1992, the plaintiffs invited companies to submit tenders as general contractors for construction of the pulp mill, which would be the largest single line pulp mill in South East Asia. The plaintiffs required bids to be submitted as part of a EPC (proposed engineering, procurement and construction) group.

4. A Singapore company by the name of Commonwealth Asia Pacific Constructors Pte Ltd (CAPC) submitted a bid to construct the project. CAPC was incorporated in 1993 by a Canadian company Commonwealth Construction Company (CCC) specifically for the purpose of bidding for the project. Both Endicott and Helm opposed using CAPC for the construction as which result CAPC was not awarded the contract and accordingly informed in May 1994.

5. PT Indorimagas Pratama (the first defendants) are an Indonesian company with which CAPC entered into a joint-venture agreement on 15 October 1993 (the joint venture agreement) to co-operate on the project; CAPC agreed to pay the first defendants a commission, for any sum received for the project. The plaintiffs alleged that the second defendant (who signed the joint-venture agreement on behalf of the first defendants) controls the first defendants as well as ORN Holding (HK) Ltd (the third defendants). The plaintiffs alleged that the purported president of the first defendants one Anna Mariana is the second defendant's secretary. According to searches conducted by the plaintiffs in the Registry of Companies, the second defendant is also a shareholder and director of a Singapore company known as Rimagas Services Pte Ltd; he described himself as the company's executive director.

6. The plaintiffs alleged that in or about June 1994, CAPC, the first and second defendants entered into a conspiracy with Endicott without the plaintiffs' knowledge or consent, CAPC corruptly offered to Endicott a secret commission of US$1m if he did not raise objections to CAPC's bid and the company won the award for the project. On 2 June 1994, a letter was written by the second defendant to CCC on the subject of appointing him as a director of CAPC. In a subsequent letter dated 19 July 1994 to CCC, the second defendant requested a monthly retainer from the former of US$5,000/-.

7. The plaintiffs alleged that a separate conspiracy was entered into between Helm and CAPC, the first and second defendants whereby in exchange for a secret commission of US$1m in the event CAPC was awarded the contract for the project, Helm agreed not to raise objections to CAPC's bid.

8. In October 1994, a second bid was made by CAPC for the construction of the project. Neither Endicott nor Helm raised any objections to this bid. In the event, a contract in the sum of US$102m (the contract) was awarded to CAPC on 20 December 1994. Construction of the project was completed in mid-1997.

9. Pursuant thereto, CAPC (together with the first and the second defendants) paid secret commissions, commencing in January 1995 to Endicott and Helm from monies in the first defendants' bank account maintained in Singapore. To the plaintiffs' knowledge, the sums paid to Endicott and Helm therefrom in the period January 1995 to April 1997, totalled $848,153.87 each. The first defendants retained as their fees 15% of the secret commissions received from CAPC.

10. In or about February or March 1996, CAPC (through its then vice-president Bruce Ferrier [Ferrier]), the first and second defendants entered into a further conspiracy with Endicott. Without the plaintiffs' knowledge or consent, the conspiracy caused the plaintiffs to pay CAPC an extra US$6m above the contract's price (for payment of further secret commissions from CAPC to the first defendants) which were to be divided, equally between Endicott, Ferrier and the first defendants.

11. Sometime in 1996, the first and third defendants together with two (2) Indonesian companies PT Jaya Sumpiles (PTJS) and PT Nirmala Matranusa entered into another conspiracy with Helm without the plaintiffs' knowledge or consent. It was agreed that Helm would accept secret commissions from the two (2) defendants and the said Indonesian companies in exchange for Helm favouring PTJS. Pursuant to the conspiracy, secret commissions were received by the third defendants of at least US$654,017.59 from the said companies out of which the second defendant paid at least US$201,667.09 and US$83,3,381.91 to Endicott and Helm respectively.

12. CAPC was wound-up by the Singapore Court in Companies Winding Up No. 191 of 1998 on 21 August 1998 (by PT MBT Indonesia according to the court's records) at which time it still owed the second defendant a sum of US$631,028.14 under the joint venture agreement.

13. In 1999, CAPC commenced arbitration proceedings in New York (the arbitration) against the plaintiffs in the sum of US$59m for damages and or sums due to CAPC under the contract awarded to them for the project. In the arbitration, the plaintiffs had relied on the secret commissions as a defence while CAPC had claimed that the same were extorted from them by Endicott, Helm and others, that CAPC was the victim of the corruption, not the perpetrator. CAPC also alleged that the plaintiffs were aware of and or their officers facilitated/participated in, the solicitation of bribes by Endicott and Helm. Finally, CAPC contended that in any event they were not awarded the contract for the project because of the bribes. The second defendant however asserted that CAPC secured the contract only because of the substantial lowering in the price of their bid.

14. The plaintiffs alleged they first discovered the secret commissions some time in mid-1999 when told by the second defendant. The second defendant on the other hand, said he had approached Gerry White (GW) who was then the plaintiffs' managing-director (and later the vice-president) to request payment on certain outstanding invoices. It was GW who told the second defendant about the arbitration and that he (GW) was aware about the 'monkey business' involving CAPC, Helm, Endicott. The second defendant claimed that GW offered to help the defendants to recover the outstanding sum of US$631,028.14 due from CAPC in exchange for the defendants' assistance in helping the plaintiffs to prove the 'monkey business'.

15. Although the second defendant was aware of the various commissions paid to Helm and Endicott and others, he claimed he was not the party who agreed to pay those sums, he did not receive any payments and, he did not assist any of them to dissipate the monies nor did he know the fate of those payments.

16. The first and second defendants asserted they were concerned that GW might use against them the information they provided and informed GW accordingly. The second defendant alleged that GW then reassured him that whatever information or documents the two (2) defendants provided would only be used against CAPC in the arbitration and not against them or for other purposes. Relying on these assurances, the first defendant entered into an agreement with the plaintiffs dated 7 October 1999 (the agreement) relating to the information and documents to be provided by the second defendant, on the payments made to various parties. Pursuant thereto, on 20 October 1999, the second defendant swore a statutory declaration (the statutory declaration) in Singapore, setting out his knowledge of events.

17. Subsequently, a dispute arose between the two (2) defendants and GW over a US$10m payment by the plaintiffs to CAPC. Consequently, the two (2) defendants refused to cooperate further with the plaintiffs, resulting in the plaintiffs suing them for and obtaining the documents in, Originating Summons No. 505 of 2000. I should point out that the plaintiffs applied for discovery for proceedings in Vancouver, British Columbia, against Endicott and Helm for recovery of the bribes they had received.

18. The plaintiffs commenced this suit in June 2000, seeking to recover from the defendants jointly and severally, the sums of US$2m, US$420,000 and US$654,017.59 as monies had and received as well as under s 14 of the Prevention of Corruption Act (Cap 241) and, as constructive trustees. There was a claim for damages together with an inquiry into and an account of all secret commissions received by the defendants. The plaintiffs' attempt (in summons in chambers no. 720 of 2000) to obtain summary judgment against the first and second defendant on 10 January 2001 was unsuccessful.

19. One of the pleas raised in the (re-amended) Defence and Counterclaim filed by the second defendant was, that the plaintiffs were not entitled to bring this action; they had breached a

collateral contract made with or an undertaking to, the second defendant, that in exchange for his/the first defendants giving to the plaintiffs information and documents relating to payment of secret commissions by CAPC to Endicott and Helm, the plaintiffs (through GW) would only use the information/documents for the arbitration and not take any action or claim against the defendants. By seeking to use the information and documents (including the statutory declaration) in these proceedings, the plaintiffs had clearly breached the collateral contract/undertaking.

20. The second defendant further denied he was a shareholder or officer of the first defendants but admitted he was a representative of the first defendants in respect of projects in Indonesia including the plaintiffs'. He averred that the payments in question were not bribes or secret commissions.

The application

21. In summon in chambers no. 525 of 2001/J (the application), the second defendant applied inter alia, for the following orders:

(a) the plaintiffs' claim against him be struck out in whole or in part;

(b) further or in the alternative, the plaintiffs' claim against him be stayed pending the final award in the New York arbitration between the plaintiffs and CAPC;

(c) in the alternative, that part of his Defence and Counterclaim relating to the claim that the plaintiffs had agreed that any documents and information he and the first defendants provided would not be used against the defendants and the plaintiffs would not take any action or claim against the defendants, to tried first and, all other parts of the Defence and the plaintiffs' claim be tried at a subsequent trial and stayed in the meantime.

The learned Assistant Registrar only granted prayer (c) against which order the plaintiffs appealed.

22. Before I turn to the Appeal, I need to refer further to the affidavit filed by the second defendant (on 7 March 2001) in support of the application; I shall only refer to the extracts relevant to the Appeal. The second defendant had in his affidavit, defended the joint venture agreement stating it was a common arrangement for many projects in Indonesia. He further contended he only acted as an agent for the other defendants for payments made to Endicott and Helm from the first and third defendants' bank accounts and, it was in that capacity that he knew of the payments. Consequently he argued, the plaintiffs had no legal basis for their claims against him. Further, there was a great possibility of the plaintiffs making a double claim in this suit and in the arbitration.

23. The second defendant contended that the current use by the plaintiffs/GW of the information and documents he had provided was/is a breach of his rights as he would be extremely prejudiced by the continued use of the same against him. Unless his Defence and Counterclaim was tried first, his rights to prevent the use of the information and documents would be illusory as GW/the plaintiffs would have already had use of the documents to claim against him by then.

The arguments

24. In the court below, counsel for the second defendant pointed out that the plaintiffs had not pleaded any actual loss in their claim. He argued that the first defendants were not a contractor of the project; hence if anyone was liable to disgorge the bribes, it would be CAPC who took the US$2m, not the first and or the second defendants. He argued that there could be no conspiracy when the second defendant was told of the scheme after it was agreed.

25. Counsel referred to O 33 r 2 of the Rules of Court and also relied on *Federal Insurance v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 to support his argument that a trial of the preliminary issue would resolve both the claim and counterclaim thereby saving both time and costs.

26. On the other hand, counsel for the plaintiffs pointed out that it would be more cumbersome to try the preliminary issue granted by the court below. A preliminary issue must resolve the entire case and even if the order below was upheld, the plaintiffs could still pursue their claim against the second defendant by means/ways other than the agreement and statutory declaration. He pointed out that in OS 505 of 2000, the same two (2) defendants there and here, did not take the position that the documentation to be provided should only be used in the arbitration proceedings. Further, trial of the preliminary issue would not be appropriate as it involved both questions of law and facts.

27. Counsel also relied on the following extract from the agreement (page 2):-

> Indorimagas [the first defendant] understands that Kiani [the plaintiffs] intends to seek recoupment from CAPC for all amounts paid to Indorimagas, and Indorimagas agrees to provide reasonable cooperation to Kiani with respect to the pending arbitration between Kiani and CAPC and with respect to Kiani's efforts to obtain recoupment from CAPC..Indorimagas understands that its officers, directors and or employees may be required to give testimony in the pending arbitration between Kiani and CAPC, and if necessary, Indorimagas agrees to make such persons available to provide testimony <u>in the arbitration or any proceeding concerning the project</u>.(emphasis added)

for his argument that the agreement clearly contemplated that the documents and information to be furnished by the two (2) defendants may be required for use in proceedings other than the arbitration. If indeed there was the assurance which the second defendant alleged GW gave to him, it would have been incorporated into the agreement.

28. Counsel for the plaintiffs submitted the parol evidence rule would in any event bar either defendant from adducing evidence of any oral agreement, which terms were inconsistent with those in the agreement. Further, the first/second defendants had not produced any documents subsequent to the agreement to support the assurance they claimed the plaintiffs/GW gave them. Finally, a separate trial of the preliminary issue would serve no useful purpose since it would be carried out in the same manner as the trial of the main action namely, witnesses would have to testify on whether or not the alleged assurance was given.

The decision

29. I should first point out that in allowing the Appeal, I had <u>not</u> set aside the order made below but merely varied it as follows:-

> that the part of the Defence and Counterclaim of the second defendant relating to the claim that Mr Gerald White on behalf of the plaintiffs had agreed with the second defendant that any document and information provided by the first and second defendants would not be used against the defendants and the plaintiffs would not take any action or claim against the defendants be tried <u>by the same trial judge who will be deciding the other issues in the case, before the main case proper, in one trial</u> (emphasis added)

30. The only difference between my order and that made by the court below was, that trial of the

other defences raised by the second defendant would not be stayed until after the preliminary issue had been determined but would follow immediately after the trial judge had tried the preliminary issue. The trial judge has a discretion either:

> (i) to make a determination in favour of the second defendant on the preliminary issue and rule that the plaintiffs cannot pursue their claim against either him or the first defendants or,
>
> (ii) not make any ruling at all but direct that the other issues be tried immediately.

The second scenario is likely if the trial judge takes the view that the facts surrounding the preliminary issue are so inextricably linked with the facts relating to the other defences such as to make it impossible to determine the preliminary issue without considering the other defences.

31. I turn now to the case cited by counsel for the second defendant. In *Federal Insurance v Nakano Singapore (Pte) Ltd*, the question for determination by way of a preliminary issue was whether the claim by the sub-contractors on the insurers of the main contractors was time-barred. The insurers had pleaded time-bar in their defence and counterclaim and then applied for an order that the preliminary issue of whether the claim was in fact time-barred be tried. Their application was dismissed by the registrar as well as the judge in chambers on appeal. The insurers then appealed to the Court of Appeal. In dismissing their appeal, the appellate court held:

> (1) Questions of construction of documents are suitable for decision as preliminary points but they may not be so if there are also disputes as to the factual matters affecting the point of construction. It is a question of the degree or magnitude of these preliminary factual issues in each case. In the instant case, there were disputed questions of fact which had first to be resolved before the preliminary point could be tried.
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> (3) As a general rule, the court will not exercise its power to order the trial of a preliminary point of law, whether or not that point involves the prior determination of factual disputes affecting that point, unless that trial of that issue would result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including the counterclaim). It was a matter of discretion for the court to exercise in the circumstances of each case.
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> (4) It was true that if the preliminary points were decided in favour of the appellants they would not have to prove their other defences to the claim, but the appellants also had a counterclaim which was founded on the same averments of fact as the other defences. Therefore, whichever way the preliminary point went, the counterclaim still had to be tried. This meant that relatively little time or expense would have been saved by an order to try the preliminary issue first.

32. Next, I turn my attention to the second defendant's pleadings. Like the appellants in *Federal Insurance v Nakano Singapore (Pte) Ltd*, the second defendant has a counterclaim which is founded

on his defence that there was a collateral contract with the plaintiffs and or undertaking from them that, they would not seek to use the documents/information against him. In his counterclaim, the second defendant inter alia, sought, a declaration that the collateral contract is valid and binding and an injunction to restrain the plaintiff from using any information he/the first defendant disclosed, pursuant to the agreement (including the statutory declaration).

33. In order to prove his counterclaim which was inextricably tied up with his defences, the second defendant would have to adduce oral evidence (there being no supporting documents) to contradict the express terms in the agreement (referred to at para 27 above). This was not a case where he was relying on a document to prove a point of law, rather it was the reverse; he had the more onerous task of disproving the express terms of an agreement. Trying the preliminary issue would not resolve his other defences including the issues of whether there was an implied term and or estoppel, let alone his counterclaim. It would have to be determined on the facts whether the plaintiffs/GW did give the second defendant the assurance he alleged. If a finding is made that such an assurance was given, the question of law to be decided would then be whether the plaintiffs are thereby precluded from suing the first/second defendants. Trial of the preliminary issue involving facts and law would not determine the matter between the parties one way or the other, rather it would result in an unjustified waste of time and an equally unjustified increase in costs (per *Chang Min Tat J in Chan Kum Loong v Hii Sui Eng* [1980] 1 MLJ 313 at p 314).

34. My view is reinforced by O 33 r 2 of the Rules of Court which counsel for the second defendant relied on. It states:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

The order which I made was in the spirit of this Order.

Sgd:

LAI SIU CHIU
JUDGE