

Fact 2006 Pte Ltd v First Alverstone Capital Ltd and another
[2015] SGHCR 5

Case Number : Suit No 1261 of 2014, High Court Summons No 30 of 2015
Decision Date : 30 January 2015
Tribunal/Court : High Court
Coram : Zhuang WenXiong AR
Counsel Name(s) : Tan Chuan Thye SC and Ms Germaine Chia (Stamford Law Corporation) for the plaintiff; Yeo Boon Tat and Ang Wee Jian (MPillay) for the defendants.
Parties : Fact 2006 Pte Ltd — First Alverstone Capital Ltd and another

Civil Procedure – Striking Out Agency – Rights of Agent

30 January 2015

Zhuang WenXiong AR:

1 Who is an “agent”, and what obligations are owed to one who is named an “agent”? “If language is to be a means of communication there must be agreement... in definitions” (L Wittgenstein, *Philosophical Investigations* (trans G E M Anscombe, Basil Blackwell, 3rd Ed, 1958) at para 242). So it is with an agent. An agent is oft defined as one who has the capacity to directly affect the legal relations of his principal *vis-à-vis* third parties (see *eg, Scott and others v Davis* (2000) 204 CLR 333 (“*Scott v Davis*”) at [227]). This neatly encapsulates the core of what, in law, an agent is. That being said, the agency-principal relationship is often entered into by agreement and in doing so, the parties may expressly delineate the respective duties that they owe to each other (*Horace Brenton Kelly v Margot Cooper and another* [1993] 1 AC 205 (“*Kelly v Cooper*”) at 213H–214A). In a contest between a conventional understanding of what an agent is, and an understanding of “agent” that is mutually agreed upon by contracting parties, which is to prevail?

2 The defendants in this suit, First Alverstone Capital (“FACL”) and Gary Loh Hock Chuan (“Gary”), applied to strike out the claim of the plaintiff, Fact 2006 Pte Ltd (“Fact 2006”), on the basis that Fact 2006 was merely an agent and could not thereby sue on a compromise agreement. I rejected the application and I now give the grounds for my decision.

3 A brief digression into the facts is in order. SunMoon Food Company Limited (“SunMoon”) issued some bonds, and owed six million dollars to those bondholders. FACL wanted to get the bondholders to forgive that debt; FACL, Gary, the bondholders and Fact 2006 entered into a compromise agreement named the “FACL-Lenders Agreement” (“the Agreement”). In the Agreement, FACL, Gary, the bondholders and Fact 2006 were collectively defined as the “Parties” while Fact 2006 was referred to as the “Agent”. Under clause 2.2 of the same, FACL undertook to:

- (a) Pay the sum of \$6 million to Fact 2006 or;
- (b) Transfer 6 billion SunMoon shares to Fact 2006 or any other nominated person.

Under clause 4 of the same, Gary gave a personal undertaking that FACL would fulfil clause 2.2. FACL did not perform within the contractually stipulated timeframe. In response, Fact 2006 filed Suit 1261 of 2014.

4 The defendants argued that an agent cannot sue on a contract, and relied chiefly on *Jones and Sladanha v Gurney* [1913] WN 72 ("*Jones and Sladanha*") and *Khemanico Textiles v Gian Singh & Co Ltd* [1963] 1 MLJ 360 ("*Khemanico Textiles*"). The plaintiff took the contrary stance and submitted that an agent may himself be privy to a contract and sue upon it, and relied *inter alia* on *Montgomerie v United Kingdom Mutual Steamship Association Limited* [1891] 1 QB 370 ("*Montgomerie*") and *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 53 ("*Teheran-Europe*"). I agreed with the plaintiff.

5 The agent-principal relationship is often entered into by agreement (ratification and estoppel are the two other ways and are irrelevant to this case); thus the limits to the contours of the relationship stem from the general rules of the law of contract. Contracting parties are free to order their affairs and their relationship *inter se* however they like, subject to the overarching exception that public policy is not to be violated (see *eg Ting Siew May v Boon Lay Choo and another* [2014] 3 SLR 609) and certain prescribed statutory limits (*eg* the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed)). If there is a bare agreement for one to act as, or be, an agent, the parties are ordinarily taken to have meant agent in the ordinary legal sense of the term (*Scott v Davis* at [227]–[228]). More fundamentally, contracts are to be interpreted objectively (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [125]) and it would be odd for contracting parties to use a word and, without contrary indication, intend for it to take on a meaning that is not commonly and publically held.

6 The commonly and publically held legal notion of agent is nevertheless only a starting point. It is entirely possible for one to agree to be an "agent" and yet not be an agent in the full legal sense of the term; all that is essential is that the parties come to an objective landing on what, intensionally or extensionally, an "agent" is to be. P Watts & F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 20th Ed, 2014) acknowledge that "[n]o one has the monopoly on the 'correct' use of this or any other term" (at para 1-003); and in *Kelly v Cooper* it was said that "the rights of the duties of the principal and agent are dependent upon the terms of the contract between them" (at 213H–214A). Thus, and despite the use of the term agent, contracting parties may even agree amongst themselves that the "agent" is not to have the power to affect the legal relations of his "principal" *vis-à-vis* third parties. This directly contradicts commonly held notions of what an agency legally entails.

7 Examples of divergence from the full legal implications of one being an agent are legion. In *Okura & Co Limited v Forsebacka Jernverks Aktiebolag* [1914] 1 KB 715 the "agent", a seller of steel, did not have the general authority to accept orders on behalf of the "principal", a manufacturer of steel, but only submitted orders for steel which were approved by the "principal" on an *ad hoc* basis. Closer to home, the Council for Estate Agencies provides standard terms for estate agents in Singapore which do not create a principal-agency relationship in the true legal sense — the "agent" merely introduces buyers to the seller, and is merely under an obligation to promptly forward all offers to the seller; the "agent" has no authority whatsoever to affect the legal position of the seller, and it is the seller who decides whether he will accept an offer from a buyer ("Form 5 – Exclusive Estate Agency Agreement for the Sale of Residential Property", available at <https://www.cea.gov.sg/cea/content/binary/pdfFiles/Form%205-Exclusive%20Estate%20Agency%20Agreement%20for%20the%20Sale%20of%20Residential%20Property> last accessed on 23 January 2015).

8 If nobody has a monopoly on the "correct" use of "agent"; and if contracting parties possess the ability to adopt an impoverished definition of "agent" that does not entail the power to affect the legal relations of his "principal"; surely it follows, *a fortiori*, that contracting parties are able to grant

an agent the *added* power to sue a third party concurrently with, or even to the exclusion of his principal. Indeed there are cases which state precisely this. *Montgomerie* held that while it is the general rule that, "*prima facie*, at common law the only person who may sue is the principal", nonetheless "in all cases the parties can by their express contract provide... that the agent shall be the party to sue either concurrently with or to the exclusion of the principal" (at 371-72). *Teheran-Europe* did not mention a default rule, but nonetheless said that an agent can conclude a contract on behalf of his principal in one of three ways: only the principal being able to sue; both the principal and agent being able to sue; and only the agent being able to sue (at 59-60).

9 The plaintiff contended that there were two cases which stood for the diametrically opposed proposition that an agent may never sue on a contract. A closer analysis of the cases reveals that they do not. In *Jones and Saldanha*, Jones, who was resident outside of the jurisdiction in Vancouver, had entered into an agreement with Gurney for Gurney to act as his daughter's guardian and provide for her maintenance and education in England. Jones granted a power of attorney to his lawyer, Saldanha, and proceedings were taken out in both their names as co-plaintiffs against Gurney on the basis that Gurney had profited from the arrangement by enrolling Jones's daughter in a cheap boarding school and spending little or no money on her clothing. Saldanha's name was struck out, and the court gave two reasons for this: first, proceedings taken by an attorney ought to be taken in the name of his principal and second, Saldanha's name was added with the obvious purpose of evading the requirement for providing security for costs. In *Khemanico Textiles* the plaintiff company was an indenting agent which contracted on behalf of three Japanese textile suppliers, and sued in its own name for breach of contract when the defendant failed to establish letters of credit in favour of those Japanese suppliers. Clause I of the Conditions of Sale explicitly stated that the orders were placed with the plaintiff "as agents and not as principals" with the buyers further agreeing "not to hold the agents personally liable in respect of this Order or any resulting contract". The court dismissed the plaintiff's claim for two reasons: the plaintiff could not sue on the contract, and in any event the orders were not contracts in the legal sense because certain conditions precedent were not fulfilled.

10 Neither *Jones and Saldanha* nor *Khemanico Textiles* avowed that an agent can never sue on a contract. Indeed *Khemanico Textiles* endorsed the contrary proposition that a person who signs a contract in his own name without qualification is *prima facie* to be deemed a person contracting personally (at 361B). It is also readily apparent that both cases were distinguishable: *Jones and Saldanha* concerned a power of attorney granted to a lawyer; in *Khemanico Textiles* the contract stated that the plaintiff was only an agent which did not assume any personal liability. In contrast the plaintiff in the instant case was explicitly named as a party to the contract, and FACL undertook to either pay \$6 million or transfer 6 billion SunMoon shares to the plaintiff.

11 On the facts of this case as presented thus far it could not be said that the plaintiff's claim discloses no reasonable cause of action, is scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the court. To elaborate, a cause of action meets the threshold of reasonableness if there is some chance of success when only the pleadings are considered, or some question that is fit to be decided at trial (*Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [21] ("*Gabriel Peter*")); is only frivolous or vexatious if the action is either legally or factually unsustainable (*The "Bunga Melati 5"* [2012] 4 SLR 546 at [39]); and is an abuse of process only if *bona fides* are lacking (*Gabriel Peter* at [22]). In the light of the legal proposition that parties may expressly contract for an agent to have the power to sue, and the documentary evidence that the plaintiff was explicitly named in the Agreement and entitled to receive money or shares from FACL, the various mentioned epithets were inapplicable.

12 To sum up the above, while there is some general consensus over what being an agent legally entails, this is only a *prima facie* position that may be varied by contract. Restated, contracting

parties may adopt duties and obligations that are peculiar to themselves, even if they contradict commonly held notions of what being an agent entails. Harking back to the introduction, “agent” need not be held to Wittgensteinian standards of consensus, so long as the parties have contractually agreed to their own objectively discernable criteria.

13 For the above reasons, I dismissed High Court Summons No 30 of 2015. I ordered the defendants to pay the plaintiff costs fixed at \$4,000, all inclusive.

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