Bing Integrated Construction Pte Ltd v Eco Special Waste Management Pte Ltd (Chua Tiong Guan and Another, Third Parties) and Another Suit
[2008] SGHC 25

Case Number : Suit 605/2006, 606/2006

Decision Date : 22 February 2008

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Kelvin Tan (Gabriel Law Corporation) for the defendant/appellant; Pavan Kumar Ratty (P K Ratty & Partners) for plaintiff/respondent; K S Loo (K S Loo & Company) for the Second Third Party/respondent

Parties : Bing Integrated Construction Pte Ltd — Eco Special Waste Management Pte Ltd — Chua Tiong Guan; Chua Chin Giap

Civil Procedure

22 February 2008

Tay Yong Kwang J:

1 This was an appeal by the defendant against the decision of Assistant Registrar Tan Wen Shan ("the AR") refusing the defendant's applications against the plaintiff and the second third party for discovery of documents.

2 The plaintiff commenced these two actions against Eco Special Waste Management Pte Ltd and Eco Resource Recovery Centre Pte Ltd respectively, claiming some $800,000 and some $1.5m against the respective defendants. The two actions were consolidated pursuant to an order of court made on 5 September 2007.

3 The plaintiff's claims relate to work done, services rendered and materials supplied in respect of the construction of two plants in Tuas for the defendants. The first third party, the defendants' then managing director, had informed the defendants' directors that the second third party, his brother, owned a construction company (the plaintiff). The defendants claimed that they appointed the plaintiff as the main contractor for the construction projects on the understanding that the contracts were on a "costs plus" basis. This meant that a fixed amount or percentage would be added to the actual costs of construction as the profit element. The first third party executed, on the defendants' behalf, the contracts with the plaintiff. The projects in question were completed in 1998 and 2000 respectively.

4 Subsequently, the defendants found out that the construction contracts were not on a "costs plus" basis but were actually on a "fixed costs" basis. The defendants' defence in these actions is that they entered into the contracts in the mistaken belief that they were to be on the "costs plus" basis and that the contracts were a result of an unlawful conspiracy between the plaintiff and the third parties. It was also averred that the plaintiff procured the contracts knowing that the first third party was acting in breach of his fiduciary duties in executing the contracts on the defendants' behalf. The defendants therefore counterclaimed for recovery of the money paid to the plaintiff (amounting to more than $7m) or, alternatively, damages to be assessed on a "costs plus" basis. They denied that the amounts claimed by the plaintiff were due and owing.

5 Before the consolidation of these two suits, the defendants took out Summons No. 2946 of 2007 in Suit No. 605 of 2006 and Summons No. 2947 of 2007 in Suit No. 606 of 2006 seeking discovery and production of 19 categories of documents set out in a schedule ("the schedule") to the said summonses. The documents sought included shop drawings, quotations, subcontracts, delivery orders, progress reports, photographs, organisation charts, architect's and engineer's instructions and invoices.

6 In the affidavit in support of the said applications, the defendants' group general manager stated that he had perused the documents disclosed by the plaintiff and the second third party in their lists of documents and found them wholly inadequate. He claimed that the documents sought in the schedule must be in the possession, custody and control of the plaintiff as they related to the plaintiff's business, operations and accounts. He also asserted that the documents requested must be in the possession, custody and control of the second third party as the second third party had removed the documents which were in the defendants' offices when he left the employ of the defendants. He claimed that the documents requested were documents which the defendants would rely on and/or which would support the defendants' case and that they were relevant because they were required to ascertain whether the works were in fact carried out properly and to enable the calculation of the costs of the works on a "costs plus" basis.

7 After hearing the parties' arguments, the AR ruled as follows:

> As I see it, although Defendant has claimed damages in the form of*, inter alia*, the difference between the price payable under the contract as it was executed and the price payable if the contract had been on a "costs plus" basis, the issue of how much was payable on a "costs plus" basis is a secondary issue in that it does not form key plank of either Defendant's case or Plaintiff's case. The costs of construction on a "costs plus" basis would become relevant only if Defendant succeeds in persuading trial court that contract was indeed to have been on that basis. In light of this, I do not think discovery of the documents sought in SUM 2946/07 and SUM 2947/07 is necessary *at this stage* for the fair disposal of these two suits or for saving costs. Where 2nd Third Party is concerned, I also do not regard Defendant as having satisfactorily established that the documents sought are in 2nd Third Party's custody, possession or power. For these reasons, both discovery applications dismissed.

The AR also ordered the defendants to pay costs of $2,200 (inclusive of disbursements) to the plaintiff and costs of $1,900 (inclusive of disbursements) to the second third party.

8 One week after the above decision, the parties attended before the AR again and informed her that they agreed to have the issue of liability tried first and, if it became necessary, the assessment of damages would be conducted at a subsequent hearing. The AR confirmed that her decision (as stated in [7] above) was without prejudice to the defendant's right to take out another application for discovery of the same documents at the assessment of damages stage if the defendants should succeed in their counterclaim.

9 One week after the attendance in [8] above, the defendants filed a notice of appeal against the AR's decision but confined the appeal to only two categories of documents listed as items 3 and 4 in the schedule. These two items were:

> 3 All quotations received from contractors and sub-contractors and suppliers including tenders received from all sub-contractors and suppliers for materials, labour, goods, plant and equipment etc and including the contractors evaluation reports on their selection.

4 Contractors contracts with all sub-contractors and suppliers.

10 Before me, the defendants' counsel acknowledged that the documents sought would not prove the defendants' case by themselves. However, he submitted that if they showed that an item charged to the defendants was much more than its cost, then the defendants would be able to show that the plaintiff intended to profit by a big margin and that if huge profits under the contract could be shown, then the defendants would be able to establish conspiracy. It was argued that the discovery sought was not onerous on the plaintiff as the documents related to 7 or 8 subcontractors only. Although the second third party filed an affidavit to state that the documents were with the plaintiff and not with him, that affidavit was filed only after the defendants had applied to court for discovery of the documents.

11 Order 24 r 5 of the Rules of Court (Cap 322, R 5, 2006 Ed) provides:

> 5(1) Subject to Rule 7, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power, when he parted with it and what has become of it.
>
> (2) An order may be made against a party under this Rule notwithstanding that the party may already have made or been required to make a list of documents or an affidavit under Rule 1.
>
> (3) An application for an order under this Rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this Rule has, or at some time had, in his possession, custody or power, the document, or class of document, specified or described in the application and that it falls within one of the following descriptions:
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> (a) a document on which the party relies or will rely;
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> (b) a document which could –
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case; and
>
> (c) a document which may lead the party seeking discovery of it to a train of inquiry resulting in his obtaining information which may –
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case.
>
> (4) An order under this Rule shall not be made in any cause or matter in respect of any party before an order under Rule 1 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary or desirable.

12 As is clear from r 5(1) set out above, it is subject to r 7, described by the Court of Appeal in *Tan Chin Seng & Ors v Raffles Town Club Pte Ltd* [2002] 3 SLR 345 at [15] as prescribing "an overriding principle". Rule 7 provides:

> 7 On the hearing of an application for an order under Rule 1, 5 or 6, the Court may, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.

13 In *Bayerische Hypo-und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39, Belinda Ang J said (at [37] and [38]):

> 37 … The ultimate test is whether discovery is necessary for disposing fairly of the proceedings or for saving costs. An assertion that the documents are relevant will not be good enough. Equally, an assertion that the documents are necessary because they are relevant will not be enough. Obviously, if a document is not relevant, it cannot be necessary for disposing of the cause or matter. On the other hand, documents may be relevant to a case without being necessary to it. The word used in O 24 r 7 is "necessary" and not "desirable" or "relevant". …
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> 38 The court is, by O 24 r 7, concerned with the discretion to refuse disclosure of a document unless the necessity for disclosure is clearly demonstrated. …

14 One of the key issues at the trial of these proceedings would be the basis of the construction contracts between the plaintiff and the defendants - whether or not they were "costs plus" as alleged by the defendants. The parties have agreed to have the issue of liability determined first. The documents sought may become necessary after liability has been established and the parties proceed to assessment of damages. They are not necessary for the purposes of the trial on the issue of liability.

15 If the defendants wish to show conspiracy by means of the alleged huge profits on the construction contracts, surely they should be able to adduce evidence from some expert sources that the works involved were worth only an amount considerably less than the amount claimed by the plaintiff. It is pertinent to note that the defendants have not even specified what the "plus" in the alleged "costs plus" was meant to be, whether as an absolute amount or as a percentage above the costs. Without that point of reference, how would the profit margins calculated from the documents sought advance their case in conspiracy against the other parties?

16 Where the second third party was concerned, the defendants did not appear to dispute his statement made on affidavit that the documents sought were with the plaintiff and not with him. Although he had previously affirmed a list of documents, that was because of his position in the plaintiff. The defendants therefore should not have proceeded with the application against the second third party before the AR. Having proceeded against him and lost, they now compound the error by including the second third party in this appeal.

17 The AR was therefore justified in holding that the documents sought were not necessary at this stage of the proceedings and in awarding costs to both the plaintiff and the second third party. Accordingly, I dismissed the defendants' appeal and ordered them to pay the plaintiff and the second third party costs of $1,000 each.

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