KPF Quality Foods Sdn Bhd v Stanson Marketing Sdn Bhd & Ors
[2016] MLJU 537

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

GUNALAN A/L MUNIANDY, JC

GUAMAN NO: 22NCVC-1053-08/2012

1 August 2016

J Doshi (Abdullah & Zainudin) for the plaintiff.
*D Paramalingam (**Krish Maniam** & **Co**) for the third defendant.*
Syed Ismit Putra bin Syed Mohd Fuad (Mathews Hun Lachimanan) for the fourth defendant.

Gunalan a/l Muniandy JC:

GROUNDS OF DECISION

[1]These are applications by the 3rd and 4th Defendants in this suit to strike out the Plaintiff's Writ and Statement of Claim ('SOC') against them pursuant to Order 18 rule 19(1)(a) and Order 18 rule 19(1)(a) respectively of the Rules of Court 2012 ('ROC') vide Enclosures 64 & 70 respectively.

Grounds of Application

[2]The 3rd Defendant ('D3') relied on the following grounds in support of her application:

(1) The Plaintiff's SOC does not disclose any reasonable cause of action against D3.

(2) Everything that is pleaded in the SOC is based on the oral evidence given by D3 at the session Court trial in admitting paragraphs 2 and 5 of the Amended SOC ('ASOC').

(3) The sale and purchase agreement ('SPA') is between the Plaintiff and the 1st Defendant ('D1') and does not involve D3.

(4) D3 does not have or owe any fiduciary duty to the Plaintiff. She did not receive any offer for the post of Chief Operating Officer ('COO') from the Plaintiff company.

Neither did she enter into any contract of employment with the Plaintiff whether for the post of COO or any other post.

(5) D3 was not involved in the application and obtaining of credit facilities from Maybank. The application was made and credit facilities were obtained by the former Chief Executive Director of the Plaintiff and the 2nd Defendant with the assistance of the Managing Director.

(6) The Plaintiff failed to provide particulars of purchase orders purportedly issued from the period October 2011 to February 2012 in the value of RM 25,844,650.00.

(7) The Plaintiff failed to plead in its ASOC detailed particulars concerning the moneys purportedly withdrawn from Maybank vide Banker's Acceptance for payment to one AFC and VB.

(8) (8) A criminal charge was preferred against the former CEO of the Plaintiff and D2 at the Kuala Lumpur ('KL') Sessions Court on 02.08.2013. Both of them were charged with the offence of criminal breach of trust involving the funds of the Plaintiff in the sums of RM 16,903,825.00 and RM13,164,955.00 respectively in transactions with Maybank. The criminal action was upon the complaint of the Plaintiff itself. D3 was not charged in the criminal cases which is still ongoing at the Kuala Lumpur Sessions Court.

(9) The Plaintiff has totally failed to provide detailed particulars in the ASOC of the alleged fraud.

(10) This action is scandalous, frivolous and vexatious D3.

(11) The Plaintiff's action is an abuse of the process of the Court.

[3]In the case of D4 in support of this application, she asserted that the Amended SOC does not disclose any reasonable cause of action against D4.

The Law on Striking Out of Pleadings

[4]Striking out of pleadings is governed by Order 18 rule 19(1)(a), (b) and (c) of the Rules of Court, 2012 ('ROC') which provide as follows:

"

19.(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, on the ground that-

(a) It discloses no reasonable cause of action or defence, as the case may be;

(b) It is scandalous, frivolous and vexatious;

(c) .....

(d) It is otherwise an abuse of the process of Court,

And may order the action to be stayed or dismissed or judgment be entered accordingly, as the case may be."

[5]The principles applicable to the exercise of the Court's discretionary power under O. 18 r 19(1), RHC have been lucidly expressed by the Supreme Court in *Bandar Builders Sdn. Bhd. and Ors v. United Malayan Banking Corporation Bhd.* [1993] 3 MLJ 36 where Mohd Dzaiddin, SCJ (later CJ) pronounced that:

"The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd 7* , and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* 8). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence ..."

[6]It is trite law that a claim should not be struck out summarily save in exceptional circumstances where, for instance, it is without any sustainable basis or has no prospect at all of success. The strength or weakness of the claim is not a relevant factor. In the Court of Appeal case of See *Thong and Anor v. Saw Beng Chong* [2013] 3 MLJ 235, Ramly Ali, JCA concluded that:

"The statement of claim is not hopeless, baseless or without any foundation in law. The statement of claim may not be perfect and 'not-so strong' in supporting the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out."

Further that,

"[S]triking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. Just look at the statement of claim. The test to be applied is whether on the face of the

statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see Federal Court decision in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226)."

Finding 3rd Defendant (Enclosure 64)

[7]Several grounds have been raised in support of Enclosure 64. Among the main grounds is that the allegations against the 3rd Defendant ('D3') in the Amended SOC, namely, conspiracy and fraud, are based wholly on oral evidence given by witnesses in a KL Sessions Court criminal trial that was still ongoing at the time the ASOC was filed. A pertinent point is that the criminal trial has concluded and D3 was eventually acquitted of all the charges.

[8]It is the basic contention of D3 that since the criminal trial was still pending at the time the Amended Statement of Claim ('ASOC') was filed, the evidence adduced is not admissible in any other litigation and cannot be pleaded in the civil suit herein as this would amount to sub-judice. As such, that the Plaintiff's action in relying on the evidence in the criminal trial to found the instant action is misguided and wrong. D3 further contends that the cause of action in its entirety is premised upon the evidence from ongoing criminal trial at the time and for this reason, the Amended Writ of Summons and SOC ought to be struck out for being baseless and unsustainable.

[9]In regard to the sub-judice rule, D3 referred, inter alia, to *Bursa Malaysia Securities Bhd. v. Gan Boon Aun* [2009] 2 MLRA where the doctrine was discussed as follows:

"The law in relation to what may be published concerning current legal proceedings is sometimes referred to as the *sub judice* rule. The publications are such they are intended to impede or prejudice the administration of justice which may in turn constitute acts punishable as contempt of court. The true nature of the doctrine itself requires that there have to be established an actus reus and mens rea to cause certain publications which would have a prejudicial effect on the criminal proceedings. In the appeal before us it cannot even be gleaned whether the situation could lead to civil contempt. Hence the court is invited to consider assertions which are speculative."

[10]Having reviewed the authorities on the sub-judice principle / doctrine and the use of the said evidence as pleaded facts in another suit, which is the present action, I hold that the instant cause of action, premised wholly on that evidence, clearly violates the sub-judice rule. There is an element of prejudgment and prejudice in the Plaintiff's pleading with respect to the said evidence which is pleaded as the truth before a judicial determination could be made on its credibility.

[11]Even if the pleading is not sub-judice, as Enclosure 64 is made under O. 18 r. 19 (1) (a) or (b) or (d), ROC, affidavit evidence is admissible to support L. 64 and the evidence needs to be evaluated and considered to determine whether the claim should be struck out on merits under limb (b) or (d).

[12]D3 contends that he was never employed as the Chief Operating Officer ('COO') of the Plaintiff company as alleged and that the Plaintiff's allegations are unsubstantiated. The 3rd Defendant further contends that he does not owe a fiduciary duty to the Plaintiff as he never held the position of the Chief Operating Officer ('COO') or any other position of employment in the Plaintiff's company. Furthermore, that if he had held the position of COO in the Plaintiff's company as alleged, he would have been paid a salary or some form of remuneration which he did not receive.

[13]The crux of the Plaintiff's case against D3 is premised on the assertion that he was at the material time employed as the Chief Operating Officer ('COO') of the Plaintiff which he has in his affidavit in reply ('AIR') categorically denied. The Plaintiff has failed to adduce any documentary evidence whatsoever to substantiate this assertion. No letter of appointment had been given to nor signed by D3 appointing him as the COO of P. Similarly the Plaintiff was unable to produce any documents to prove that D3 held any position in the Plaintiff company at the material time. The Plaintiff was in this regard merely relying on unfounded allegations. As no evidence was adduced that D3 held the post of COO at the material time, he neither had any contractual obligation to the Plaintiff nor did he owe the company any fiduciary duty to act in the latter's best interests and hence, could not be considered to have breached his fiduciary duties as alleged which is a substantial part of the Plaintiff's pleaded case.

[14]As further correctly contended by D3, the unrefuted evidence showed that the sale and purchase transactions were solely between the Plaintiff and the 1st Defendant only as the contracting parties. Neither was there involvement by D3 in the said transactions in any manner on behalf of P. Hence, it was abundantly clear that there was no privity of contract between the Plaintiff and D3 in respect of the impugned transactions which rendered D3 a stranger to the contract. This doctrine was explained by the Court of Appeal in *Boustead Naval Shipyard Sdn. Bhd. v. Dynaforce Corporation Sdn. Bhd.* [2015] 2 MLRA 348 as follows:

> "It is a correct proposition of law to say that in Malaysia, the doctrine of privity is confined to the rule that only a party to a contract may sue on it....

Mohamed Dzaiddin J (later the Chief Justice) rightly said in *Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1987] 1 MLRH 484 at p 486 that, "It is clear that the English doctrine of privity of contract applies to our law of contract

The doctrine of privity of contract is here to stay. In *Murphy And Others v. Bower* [1866] 2 IRCL 506, the court categorically stated that, "no stranger to the consideration can take advantage of a contract, although made for his benefit". Bluntly put, only the parties to the contract have enforceable rights and obligations under the contract.

As an established principle of contract law, the common law doctrine of privity of contract stands for the simple proposition that, "no one but the parties to a contract can be bound by it or entitled under it" (*Greenwood Shopping Plaza Limited v. Robert Walker Beattie and Roy Vincent Pettipas* [1980] 2 SCR 228, at p 229)."

[15]Neither did the Plaintiff produce any evidence of D3's alleged involvement in obtaining credit facilities from Maybank for the Plaintiff to fund the impugned transactions.

[16]Proceeding now to the allegation of fraud against D3, it is abundantly clear that the essential particulars of fraud allegedly committed by D3 have not been strictly pleaded as required by law to sustain a claim based on fraud. This is also in relation to the funds allegedly removed by D3 from Maybank through the Banker's Acceptance and misappropriated to make payments to AFL and VB that led to Plaintiff sustaining a loss more than RM 25 million.

[17]D3 contends that the Plaintiff's failure or omission to particularise the alleged fraud by D in the ASOC is fatal and therefore, is sufficient ground justifying the claim against D3 being struck out. On this point my attention was drawn to the Court of Appeal case of *CIMB Bank Bhd. v. Veeran Ayasamy* [2015] 5 MLRA 602 where it was pronounced as follows:

"Particulars of fraud must be pleaded. A general allegation of fraud, however strong the words used, where there is no statement of circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice: *John Wallingford v. The Directors of the Mutual Society and the Official Liquidator thereof* [1879-80] 5 App Case 685 at pp 697, 701 and 709."

It is pertinent to note that it is the function of pleadings, including particulars, to apprise the opposite party of the case to be met. The following judicial statements outlined the function of pleadings and particulars: "Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it ... they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial ... and they give a

defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court." (See *Dare v. Pulham* [1982] CLR 658 at 664).

...the plaintiff did not provide the particulars in respect of the bank's involvement and how the conspiracy took place. Such vague and general averments of fraud and/or conspiracy did not assist the plaintiff. The 3rd defendant cannot be expected to meet a case upon mere allegations of fraud and/or conspiracy without any definite particulars being furnished...

It is clear that as a general rule, the more serious the allegations of misconduct (fraud and/or conspiracy in the instant appeal), the greater is the need for the particulars to be given which explain the basis for the allegation..."

[18]For the foregoing reasons, I uphold D3's contention that, based on established principles, the essential allegations in the ASOC against D3 have been shown to be without basis and plainly unsubstantiated. Hence, the entire claim is misconceived and unsustainable in law and fact.

[19]When a claim is found to be obviously unsustainable as in this instance it is considered an abuse of the process of the Court. In *Zaina Abidin Hamid and Ors. v. Kerajaan Malaysia & Ors.* [2009] CLJ 683 the Supreme Court decided as follows:

"The term "an abuse of the process of the court" under O. 18 r. 19(1)(d) (Singapore), which is in pari materia with our O. 18 r. 19(1)(d), has been given a wide interpretation by the courts and includes considerations of public policy and the interests of justice. It signifies that the process of the court must be used *bona fide* and properly and must not be abused: *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin* [1988] 1 SLR 374 at p 384, CA Singapore.

The categories of abuse of process are never closed and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case: *Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651 CA.

Illustrations of abuse of process include the following:

(1) The plaintiff knowing that he never had a cause of action in the first place, and yet proceeded with his action in order to extort a relief he was never entitled to: *Grainger v. Hill* [1838] 4 Bing NC 212: p. 271B-C;

(1) It is only in plain and obvious cases that recourse should be had to the summary process under this rule and summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it "obviously unsustainable";

> Where a litigant brings an action to protect his rights, the use of remedies afforded to him by the law cannot be an abuse of the court's process:"

[20]With respect to the case D4, she relies wholly on limb (a) of O18 r19(1) ROC and as such, no affidavit evidence is admissible.

[21]The claim against D4 is essentially for conspiracy with D2, D3 and D5 to defraud and misappropriate moneys belonging to the Plaintiff by forgery of documents that led to fraudulent transactions against the Plaintiff. (see paragraph 28 of the ASOC). Relief claimed is for a declaration as per prayer 11.2 of the ASOC.

[22]Firstly, the ASOC has clearly failed to disclose the necessary particulars of the alleged conspiracy to defraud and misappropriate perpetrated by D3 together with the other Defendants contrary to the mandatory requirements of O.18 r. 12 ROC. Paragraph 32 of the ASOC when read together with paragraphs 11 and 31, plainly shows that no reference has been made to D4 and no particulars of fraud have been specifically pleaded against her.

[23]Pursuant to O. 18 r. 12, ROC, every pleading shall contain the necessary particulars of any claim, defence or other matters pleaded, including, without prejudice to the generality of the foregoing words, particulars of any misrepresentation, **fraud**, breach of trust, willful default or undue influence on which the party pleading relies. An attempt was made by the Plaintiff via paragraph 32 of the ASOC to provide the above necessary particulars. However, considering the language of paragraph 32, it is plain that paragraph 32 ought to be read together with paragraphs 11 and 31 of the Amended Statement of Claim. For ease of reference paragraph 32 is reproduced below:-

> ";;;32. Akibat kelanggaran tugas-tugas dan kewajipan **seperti mana dinyatakan di perenggan 11 dan 31 di atas Defendan Kedua hingga Defendan Kelima telah masing-masing menyalahgunakan kedudukan mereka untuk mencipta rekod-rekod palsu dan melakukan fraud terhadap Plaintif** bagi tujuan utama untuk menyalahgunakan dana Plaintif (termasuk kemudahan kewangan Plaintif dengan Maybank) dengan niat tunggal atau pra-dominan untuk menjejaskan kepentingan Plaintif.."

[24]It is obvious that both paragraphs 11 and 31 do not make any reference to the 4th

Defendant and neither are any particulars of fraud pleaded against the 4th Defendant in the said paragraphs. In these paragraphs read together the narrative concerns D1, D2 and D3 only without any reference made to any involvement or participation by D4.

[25]In the above premises, it was correctly contended by D4 that the Plaintiff's allegation pertaining to the fraud purportedly committed by the D4 is obviously unsustainable and bound to fail. In support of this argument, reference was made to the trite law principle that particulars of fraud must be pleaded failing which the claim would fail as was held by the Court of Appeal in *Wong Yew Kwan v. Wong Yu Ke & Anor* [2009] 2 MLJ 672 as follows:-

> "...The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, **it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of** *Malayan Banking Bhd v Lim Tee Yong* [1994] 4 CLJ 558 **it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded. In** *Lee Kim Luang v Lee Shiah Yee* [1988] 1 CLJ 619;; [1988] 1 CLJ (Rep) 717 **the High Court held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in** O 18 r 8(1) of the RHC**. It is not to take the other party by surprise. In fact Lord Dening MR in** *Associated Leisure Ltd & Ors v Associated Newspapers Ltd* [1970] 2 QB 450 **said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it**..."

[See also Federal Court in *Zung Zang Wood Products Sdn. Bhd. & Ors. v Kwan Chee Hung Sdn. Bhd. & Ors.* [2014] 2 MLJ 799]

[26]Secondly, the particulars of breach of fiduciary duty as pleaded and particularized do not make any reference to the 4th Defendant which is crystal clear from the words of paragraph 31. It is trite law that the relationship that gives rise to the purported fiduciary duties must be specifically pleaded with precision, failing which the claim based on a said breach of this nature would fail.

[27]A perusal of para 34 of the ASOC would show that the reliefs claimed against D4 are confined to the allegation of conspiracy with D1 and D2 to breach their duties to the Plaintiff. The relevant part of paragraph 34 states the following:

> "...II. Terhadap Defendan Kedua hingga Defendan Defendan Kelima
>
> 1. ...

2. Satu deklarasi bahawa Defendan Ketiga dan Keempat telah **bersubahat** dengan Defendan Pertama dan Kedua untuk melanggar tugasnya kepada Plaintif.

3. **Kerugian dan kerosakan yang akan dinilai bagi pelanggaran fidusiari** kepada Plaintif.

4. ..."

[28]It is explicit from the totality of the averments in the ASOC that no allegation of any conspiracy committed by D4 with D1 and D2 is made which means that there is no basis whatsoever for the declaration sought above.

[29]Neither has the ASOC conformed with the mandatory requirement for the elements of conspiracy to be specifically pleaded. It is settled law that the elements of conspiracy must be set out in the statement of claim as held in *Datuk Haji Ishak bin Ismail v. Kenanga Investment Bank Berhad & Ors.* [2012] 7 MLJ 840 as follows:

"...These are general allegations of conspiracy in the statement of claim. The plaintiff failed to plead particulars showing:

(a) That there was an **agreement between two or more persons**;

(b) The agreement was for the **purpose of injuring the plaintiff**; and

(c) The **acts done in execution of the agreement which resulted in injuring the plaintiff..."**

[30]Hence, D4 was correct in submitting that the Plaintiff has failed to show to this Court on the face of the Amended Statement of Claim that the relief sought and claim made against the 4th Defendant are sustainable.

[31]The importance of establishing a fiduciary relationship to sustain a claim for breach of fiduciary duty was stated succinctly by the Court of Appeal in the case of *Alcatel Lucent (M) Sdn. Bhd. (formerly known as Alcatel Network Systems (M) Sdn. Bhd. v. Solid Investments Ltd and another appeal* [2012] 4 MLJ 72 (Tab 8 of the DBOA) where it was held that:-

"...[20] We are of the view; that there was no fiduciary relationship between the appellant and the respondent established in the present case. **Where a party alleges the breach of duty arising from any given relation, it must be incumbent on him to specify with precision what is the relation from which the duty arises**. Pennycuick J in *Selangor United Rubber Estates Ltd v Cradock and Others* [1965] 1 Ch 896 stated:

where a plaintiff alleges that the defendant is in breach of duty, **he ought to specify at the very start the relation under which**

> **the duty arises in order that the defendant may set his course accordingly**; and at any rate in very many cases it must be embarrassing to the defendant to plead to an allegation of breach of duty without having the relation under which the duty arises precisely specified..."

[32]Thirdly, the ASOC does not disclose any contractual nexus between the Plaintiff and D4 as D4 was then an employee of a different legal entity, namely, Silver Bird Corporation Berhad, and could not have exerted any control over the finance, accounts, and decisions of the Plaintiff in respect of the impugned transactions.

[33]This fact is borne out by the Plaintiff's own admission as per paragraph 6 of the ASOC as follows:

> "...6. Defendan Keempat adalah seorang individu dengan alamat penyampaian di No. 33, Jalan USJ 9/3 N, 47620 Subang Jaya, Selangor dan adalah Pengurus Besar Akaun dan Kewangan di Silver Bird Group Bhd..."

[34]In the absence of any contractual nexus as alluded to the Plaintiff's claim against D4 as per the particulars pleaded is without any basis in fact or law. This proposition finds support in the judgment of Abdul Malik, J in *Ng. Kian Chong & Ors. v. Saw Seng Kee* [1994] 3 MLRH 30 where the learned Judge held:

> "The allegations of misrepresentation, fraud and negligence allegedly perpetrated by the appellants/defendants must be read in the context of the contractual nexus between the appellants/defendants and the respondent/plaintiff. In the absence of the contractual nexus between parties, these allegations fall flat to the ground. These allegations can be said to be ill-founded and totally misconceived. For the above reasons, the appellants/defendants have succeeded in discharging the burden of showing to this Court that the wrong parties were cited by the respondent/plaintiff; that there was no contract between the appellants/defendants and the respondent/plaintiff and, finally, that the cause of action was obviously bad and almost incontestably bad..."

[35]For the aforesaid reasons, I am in full agreement with D4's contention that the ASOC has manifestly failed to disclose a reasonable cause of action and is obviously unsustainable against D4 without any prospect of success should the matter proceed to trial.

[36]On the foregoing grounds, I concluded that the Writ and SOC against D3 and D4 ought to be struck out summarily under O. 18, r. 19(1), ROC and accordingly allowed

Enclosures 64 and 70 with costs.

[37]Costs of RM 6,000.00 to Defendant 3) and RM 4,000.00 to Defendant 4) were ordered to be paid within 2 weeks by the Plaintiff.

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