Kim Hok Yung and Others v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, Third Party)
[2000] SGHC 134

Case Number : Suit 1676/1999, 1830/1999

Decision Date : 08 July 2000

Tribunal/Court : High Court

Coram : Choo Han Teck JC

Counsel Name(s) : Woo Tchi Chu, Lim Sin and Julia Yeo (Robert WH Wang & Woo) for the plaintiffs/respondents; Ashok Kumar and Marcus Yip (Allen & Gledhill) for CCRB/ appelplants

Parties : Kim Hok Yung — Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank) — Lee Mon Sun

Civil Procedure – Pleadings – Striking out – Allegation of fraudulent misrepresentation – Alternative plea of innocent misrepresentation – Whether sufficient particulars of fraud set out – Whether alternative plea of innocent misrepresentation applicable to pleading of fraud – s 2(1) Misrepresentation Act (Cap 390)

Civil Procedure – Striking out – Whether claim frivolous or vexatious – Whether claim intrinsically weak hopeless case

: The three plaintiffs were former employees of Barclays Capital Securities Asia Ltd (`Barclays`). The first plaintiff was employed at Barclays` office in Singapore as the Director of Derivatives. The second and third plaintiffs were employed by Barclays` Hong Kong office as the Assistant Director of Derivatives, and Associate Director of Equity Derivative Sales respectively. The defendants are an off-shore bank operating in Singapore. Initially, two separate suits were commenced by the plaintiffs against the defendants, but the suits were subsequently consolidated. The claim by the plaintiffs is for damages for fraudulent misrepresentation and alternatively under s 2(1) of the Misrepresentation Act (Cap 390) (innocent misrepresentation). The defendants applied to strike out the consolidated statement of claim under O 18 r 19 of the Rules of Court. Mr Ashok Kumar appearing for the defendants relied on all four grounds of this rule, namely, that the claim:

(a) discloses no reasonable cause of action;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trial of the action; and

(d) is an abuse of the process of the court.

The consolidated statement of claim is 64 pages long, much of which was devoted to the recital of representations allegedly made by or on behalf of the defendants. The plaintiffs say that all those representations were false and made with the knowledge that they were false or without a reasonable belief that they were true.

The plaintiffs` claim is that sometime in November 1997 the defendants intimated to them that they (the defendants) have taken steps to establish an investment banking business in the Asia-Pacific region and the expertise of the plaintiffs were required to participate in this business. The plaintiffs say that in order to induce them to leave their jobs at Barclays the defendants made the representations set out in the statement of claim. It is only necessary to set out a few of them to appreciate the nature and character of the representations. For convenience I shall only refer to the

first five representations as pleaded at page three of the amended consolidated statement of claim:

> *(1) that the defendants had decided and had begun implementing a plan to establish in the immediate future in Asia, including Japan and Australasia, ie Australia and New Zealand (`the Asia-Pacific Region`), and investment banking business in the true and commonly understood sense of the word within the banking and financial industry, ie the engagement in capital markets business in equities and/or fixed income securities, with sales and trading in these securities and their derivatives supporting these capital market activities (`True Investment Banking Business`);*
>
> *(2) that a credit and equity derivatives sales and trading business including arbitrage trading would be an important component of the defendants` aforesaid True Investment Banking Business in the Asia-Pacific Region;*
>
> *(3) that the credit and equity derivatives sales and trading business, including arbitrage trading, of the defendants in the Asia-Pacific Region would be conducted and coordinated through a formal consolidated desk of traders, marketers and support staff (`the Desk`);*
>
> *(4) that the Desk would have ultimate and exclusive authority, management and control over all of the Defendants` sales and trading of equity and credit derivatives, including arbitrage trading, in the Asia-Pacific Region;*
>
> *(5) that the defendants were fully committed to the plan of establishing in the Asia-Pacific Region a True Investment Banking Business in general, and a credit and equity derivatives sales and trading business, including arbitrage trading, and hence the Desk, in particular; and had, as an indication of their commitment to this plan, already budgeted and allocated a sum of United States Dollars (`USD`) 80 million over three years for systems development and staff recruitment for the Asia-Pacific Region to establish the Desk along with the other investment banking lines of businesses;*

Mr Kumar`s first complaint was that the statement of claim fails to set out particulars of the fraudulent intention on the part of the defendants. He drew my attention to the unreported case of ***Tan Boon Hock v Aero Supplies Systems Engineering Pte Ltd*** (Suit 2151/90) in which the elements necessary to maintain an action in the tort of deceit were enumerated by the learned judge LP Thean JA; one of the said elements being the requirement to set out particulars of the alleged fraudulent intent. The gist of Mr Kumar`s argument was that it is a weak voice that cries fraud without uttering details of the fraudulent design. As a matter of principle I agree with him entirely. A false statement is not necessarily a fraudulent statement in the context of fraudulent misrepresentation. There are innocuous reasons why a person might have made a statement that turns out to be untrue. A fraudulent misrepresentation is a representation made by a person knowing that it was false or so recklessly uncaring as to whether it was true or not. So Mr Kumar submitted that the plaintiffs ought to state the details and basis sufficient to pin the tag of fraud on the representations alleged to have been made by or on the defendants` behalf.

The plaintiffs` case was argued by Miss Yeo (assisted by Mr Lim), and, on the second day of arguments, by Mr Woo. Miss Yeo submitted that the statement of claim adequately provided all

necessary details. The only relevant part reads as follows:

> *7 All the representations to the first plaintiff were made by the defendants, their aforementioned servants and/or agents:*
>
> *(a) knowing that they were false,*
>
> *(b) without any belief in their truth,*
>
> *(c) recklessly, without care as to whether they were true or false.*

The question that must be asked is this: Would the defendants know what case it is that they have to meet from this pleading? They may be fully aware that the allegations must be challenged, but what would they say to the crucial part that accuses them of having made those representations fraudulently? If they are to be given a fair chance of refuting that element details of the alleged fraudulent intent must be provided. In the context of this case, I would expect, for example, a statement setting out the defendants` knowledge of some specific fact or facts, or the existence of some specific fact or circumstances which were clearly contradictory and inconsistent with the representations made by them. Otherwise, the pleading is no more than a bare accusation that the defendants intended to deceive. The pleading of a cause of action founded on the tort of deceit must give full particulars of the basis for the averment or else it must be struck out. The requirement of full particulars is not an invitation to the plaintiffs to plead evidence. Counsel settling the pleadings must exercise their professional expertise in separating facts which found the action and evidence proving those facts.

Counsel for the plaintiffs argued that even if they did not set out the particulars of fraud, it was sufficient if they prove that the representations made by the defendants were untrue and that they (the defendants) had no reasonable ground to believe that they were true. Counsel presented this argument on the basis that the plaintiffs are relying on s 2(1) of the Misrepresentation Act as their alternative claim. This provision provides a remedy in a contractual claim and must not be confused with a cause of action in tort. A claim founded on the Misrepresentation Act is an action in contract. In that regard, the plaintiffs need only plead the facts establishing the contract, the representations that induced them into contracting with the defendants, and that the representations were not true, but this approach cannot be applied to the pleading of an action in deceit which is an entirely different cause of action. Thus, if they do not provide sufficient particulars to support a claim based on deceit or negligence (they have not pleaded negligence as a cause of action here), that part of their claim must be struck out, but they may still proceed with their alternative claim under s 2(1) of the Misrepresentation Act if their pleading adequately sets out that claim. Therefore, I think that counsel for the plaintiffs was wrong in submitting that the inadequate pleading in tort is saved by the alternative plea under s 2(1).

For the reasons above, I am of the view that the plaintiffs have not set out sufficient particulars of the fraudulent intention and their claim based on this cause of action must be struck out on this ground alone. There is another ground upon which this cause of action ought to be struck out, namely, that the pleadings were frivolous and vexatious. That is also the ground which Mr Kumar relies on in respect of the plaintiffs` alternative cause of action under s 2(1) of the Misrepresentation Act, and I shall therefore deal with them together.

In determining whether the action is frivolous or vexatious, the court is obliged to look at the

pleadings and evidence but it is not the objective of the court to conduct a mini-trial based on the affidavits, or embark upon `a minute and protracted examination of the documents and facts of the case, to see if the plaintiffs have a cause of action` (see **Wenlock v Moloney** [1965] 2 All ER 871[1965] 1 WLR 1238. In this case, I need only consider some brief and simple undisputed facts.

All three plaintiffs signed contracts of employment with the defendants. The contracts were signed at different dates and, apart from some individual differences, the terms were essentially the same. The first and third plaintiffs signed their contracts with the defendants on 9 February and 28 April 1998 respectively. They resigned from Barclays on 11 February and 11 May 1998 respectively. It is not known when the second defendant resigned from Barclays, but his contract with the defendants was also signed on 28 April 1998. All three contracts provide the following term:

> *Should the [defendants] decide to withdraw from active involvement in Investment Banking or should your employment be terminated by the Bank other than by reason of your resignation or gross misconduct within the first three years of your commencing employment with the Bank then you shall be compensated for the outstanding portion of your first three years` salary and guaranteed bonus payments.*

In the case of the first plaintiff, his salary was $290,000. Under his contract he was given $800,000 as a `joining bonus`, and $875,000 guaranteed bonus. He conceded that upon termination he was paid off in full as contractually stipulated, including the balance of his first three years` salary. However, he claimed in his affidavit that these payments were `in mitigation of [his] damages`. He further averred that he was `advised that his claims based on fraud and the tort of deceit exceed any damages based on any contractual claim`. The second and third plaintiffs received similar payments although in lesser amounts as their salaries were lower than that of the first plaintiff. The third plaintiff was also paid compensation for unused annual leave, and a special payment for two months of housing after his termination.

The following termination clause is provided in the contracts: `Either [the defendants] or you may terminate employment for any reason (apart from gross misconduct in which case no notice is required) by giving the other party three months` notice in writing. The [defendants] reserves the right to pay you three months` salary-in-lieu of notice`. It is not disputed that proper notices of termination were issued to all three plaintiffs.

The plaintiffs were recruited by the defendants to help them set up, operate and carry on the business of investment banking. Mr Woo conceded that the job descriptions in the respective contracts are accurate descriptions. I turn now to the nature of the alleged representations. It can hardly be disputed that the alleged representations such as those that I have set out above are subsidiary to the scope of the employment. If the investment business does not exist or cease to exist, the matters set out in the representations will have no meaningful existence. That being the case, one need only look at the term concerning the cessation of business. It was plainly and clearly written that the defendants could and might withdraw from active involvement in Investment Banking so long as they compensate the plaintiffs by payment of the money agreed under the respective contracts. The plaintiffs` misunderstanding of this critical term of the contract as reflected in the first plaintiff`s affidavit of 4 July 2000 explains why this action is so utterly misconceived. I refer to para 24 of the said affidavit:

> *To our mind and in the light of all the representations made by [the defendants], the clause meant exactly that - that [the defendants] may later decide to withdraw from its Investment Banking in the Asia-Pacific region. Surely*

> *this clause envisages that [the defendants] had already begun its Investment Banking business and had set up the Desk for Structured Products on Securities. The clause was entirely consistent with the various representations made to us and therefore did not alarm us.`*

Furthermore, the contracts provided that either party was at liberty to terminate the employment with three months` notice. It must be patently clear to the plaintiffs that whether the representations were true or false the core of the matter is the commitment of the defendants to the investment banking business. It is not the plaintiffs` case that the defendants had misled the plaintiffs into believing that they (the defendants) would keep the business going for any specific length of time. Under the terms, they were entitled to change their minds the day after the contract if they wished, so long as the plaintiffs are fully compensated as agreed in the contracts. The plaintiffs` apparent failure to appreciate the express and unambiguous terms of the contract is reflected in para 21 of the first plaintiff`s affidavit of 4 July 2000 where he sets out why the plaintiffs were induced into signing the contracts:

> *If not for [the defendants`] representations that they were committed and had begun implementing plans for the establishment of an Investment Banking business in Asia-Pacific with the Structured Products on Securities being an important component and we would head and form the Desk trading in the Structured Products on Securities, we would not have left our successful careers in Barclays to join [the defendants] with its uncertain future.*

Indeed, the plaintiffs themselves were entitled to terminate the contract if they felt that the defendants had done nothing from the very start to get the investment banking business going (or if they themselves wished to leave for better things), but they did not do so. It was not stated in the affidavits, but counsel for the plaintiffs, Mr Lim, explained that the reason was that if the plaintiffs resigned within the first three years of employment they would not be entitled to the bonus payments. If that is so, they have affirmed the contracts. But this is not a crucial point. The fundamental question is, whether the plaintiffs read, understood and signed their respective contracts of employment? The answer, by concession, is in the affirmative. Then it must be asked, would anyone be induced by promises that great things lay in store for him in the proposed employment if the employer is contractually entitled to cease business and/or terminate his employment? I think that this question must be answered objectively, and the answer in this case must be that although they find the representations sufficiently attractive to engender the hope that they will be true, the plaintiffs entered into the contracts fully aware that those representations were not promises, and that any expectation founded on those representations may be dashed by the stroke of a pen; as it so transpired. Therefore, the plaintiffs` case that they were induced by those representations is, in my view, unsustainable. I find it mildly surprising therefore, to learn from Mr Woo that the plaintiffs have asked for six weeks for trial, with an estimated 54 witnesses.

In the course of his arguments Mr Woo referred to the affidavit of the first plaintiff of 4 July 2000 in which he sets out an electronic mail message dated 16 June 1998 from Mr Theo Kocken, a senior executive in the defendants` head office in Holland to the managing director of the defendants` Asian business. Mr Woo submitted that this message shows that the defendants had no intention of setting up the `Structure Finance and Arbitrage Desk` (which under his contract the first plaintiff was to be the managing director). Reading the message (set out in para 27 of the affidavit) the obvious point was that it acknowledged that a group of skilled and experienced traders have joined the defendants and will be focussing on a new kind of business that may bring value and profits to the company. But

Mr Kocken went on to say, essentially, that the defendants were not ready for this business. He accepted that the `front office might be hired in large quantities, but the back office is far from fit for the job`. Mr Kocken`s note which the plaintiffs rely on shows that the decision not to carry on with the investment business was a commercial one. But I must add that under the terms of the contract, the defendants could have made that decision on a whim and a fancy, and would still be entitled to terminate the plaintiffs` employment so long as they pay up what the contracts have provided.

Having explored the matters above, I revert to the key issue, namely, ought the plaintiffs` claim be struck out as being frivolous and vexatious. The general principle is that however weak a plaintiff`s case may appear, he is entitled to his day in court. He pays for any misplaced confidence in his case by the award of costs. Thus, generally, the courts may permit seemingly weak cases to proceed to trial so that a plaintiff is not unfairly treated by being shut out before he has presented his evidence. By the same token, it is also unfair to compel a defendant to expend not only money but time and effort in defending an obviously unmeritorious case. Thus, before a court strikes out a claim on the ground that it is frivolous or vexatious it must satisfy itself that the claim is obviously unsustainable, or that it amounts to an abuse of the process of court; of the latter, it has long been recognised that hopeless litigation or claims that are `doomed to fail` fall into the category.

Having regard to the incontrovertible fact that the plaintiffs signed their employment contracts fully aware of the term that the contract may be terminated with three months` notice and that the defendants were not obliged to pursue the investment banking business, it is difficult to appreciate how the plaintiffs could be induced by the pleaded representations. It seems to me that the plaintiffs` case is so intrinsically weak that it must be condemned as a hopeless case. The following description by Nathan J in ***Connell v NCSC*** 15 ACLR 75, aptly applies to the instant case: `The forlorn nature of the plaintiff`s claim is apparent on the documents. Nothing could breathe life into it`. Mr Woo referred me to the case of **Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit** [2000] 1 SLR 517 for the proposition that a court should not strike out a case if the defect or deficiency in pleading could be cured by way of amendment. This proposition has no relevance here as the plaintiffs stand by their pleadings and counsel have not indicated that any amendment is required. For these reasons, I am of the view that the plaintiffs` case must be struck out as frivolous and vexatious.

Accordingly, I allow the defendants` appeal and order that the plaintiffs` claims be struck out. I will hear the question of costs on a later date.

Outcome:

Appeal allowed.