Merbok MDF Sdn Bhd v Shuhaiza bt Shuib and Others [2007] MLJU 367

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

Kang Hwee Gee, J

GUAMAN NO D8-22-977-2005

17 May 2007

Case Summary

PARTNERSHIP — Liabilities of partners — Ordinary course of business — Undertaking by one partner of firm pursuant to preparation of consultancy agreement — Claim that consultancy agreement was illegal and not part of partnerships ordinary course of business — Whether undertaking enforceable against all partners

LEGAL PROFESSION — Solicitors — Stakeholders — Liability of partnership and partners if money was retained pursuant to agreement that was purportedly a sham

Cik Shanti Morgan, SY Liew (Shearn Delamore & Co) bagi pihak Plaintif

Encik ***David Gurupatham*** (***David Gurupatham*** & Koay) bagi pihak Defendan Pertama

Encik Rajadevan (Rajadevan & Associates) bagi pihak Defendan Kedua

This is my oral judgment: (ex-tempore)

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar in disallowing the plaintiff's application for summary judgment under Order 14 of the Rules of the High Court 1980.

The plaintiff's claim against the firm of Shuhaiza & Partners of which the 1st and 2nd defendants are partners, is for the return of the sum RM1 million which the firm was holding as stakeholder pending the execution of an agreement.

The plaintiff had entered into a consultancy agreement by which the 3rd defendant consultant to assist the plaintiff to secure an agreement for the sale of rubber trees on 30,000 acres of land belonging to a corporation called KESEDAR.

The clause relevant to this application is Clause 4(b)(i) which read as follows:

> "a sum of RM1,000,000 (Ringgit Malaysian One Million Only (the **"First Advance"**) not later then fourteen (14) Business Days after the date of the due execution of the Direct Agreement; in that connection, Merbok shall, no later than two (2) Business Days from the date of execution of this Agreement (by the party who signs last) deposit or procure the deposit with Messrs. Shuhaiza & Partners, Advocates and Solicitors, of Suite 20.06 Plaza 138, Jalan Ampang, 50450 Kuala Lumpur (the **"Stakeholders"**) of the sum of RM1,000,000 (Ringgit Malaysian One Million Only) as stakeholders together with a letter in substantially the form of the draft annexed hereto as **"Appendix "A"** (the **"Letter of Instructions"**) subject to the issue by the Stakeholders and delivery to Merbok and Messrs Shook Lin & Bok, Advocates & Solicitors of 20th Floor, Bangunan AmGroup, 50200 Kuala Lumpur of a letter in substantially the form of the draft annexed hereto as **"Appendix**

> **"B"** (the **"Stakeholders Letter"**) no later than three (3) Business Days prior thereto or simultaneously therewith; In the event that the Direct Agreement is not executed and a copy thereof delivered to the Stakeholders by Merbok on or before 15 September, 2004 or such later date as the Second Party and Merbok may agree to in writing, the Second Party shall and hereby irrevocably and unconditionally agrees and undertakes to refund and/or procure the refund and payment to Merbok of Stakeholders Money within three (3) days of such date;"

Pursuant to the agreement the plaintiff paid to M/s Shuhaiza & Partners (1st and 2nd defendants) the sum of RM1 million. As security the said firm of M/s Shuhaiza & Partners gave an undertaking in the following form:

> "... to refund the stakeholders money to Merbok if the receipt of the direct agreement does not occur on or before 15.9.2004 or such later date as Merbok may notify us in writing of the same and such refund shall be made within 3 days from the date thereof."

The Cut-Off Date as defined in Clause 5 to be 15.9.2004, was extended twice by consent of the parties that is to say to 6.10.2004 and further to 7.11.2004.

The 3rddefendant failed to secure the contract to purchase the rubber trees from KESEDAR by 7.11.2004.

The plaintiff contends that the firm of Shuhaiza & Partners must now return the sum which it holds as stakeholder under the agreement to the plaintiff. Hence this application for summary judgment.

In this appeal the plaintiff is not proceeding against the 3rd defendant and it is not disputed that the money had been received by the firm of Shuhaiza & Partners.

The application is opposed by the 1st and 2nd defendants.

The application is opposed on the following grounds:

By the 1stdefendant:

1. The consultancy agreement itself is illegal in so far as the agreement in reality was an agreement to offer and receive a bribe to procur an agreement with KESEDAR to purchase the rubber trees.
2. The 3rd defendant has no expertise in this area.
3. The 3rd defendant is the husband of a legal assistant in the firm of Shuhaiza & Partners. This legal assistant purportedly is the one who signed the letter on behalf of the firm. The 1st defendant had disbursed the sum of half million ringgit to one Zakaria bin M. Abdul Razak as a bribe to secure the direct agreement between the plaintiff and KESEDAR. As evidence of this payment see the 2nd defendant's affidavit in reply (Enclosure 50) wherein the 2nd defendant has stated that he had in his possession a voucher issued by the firm to Zakaria bin M Abdul Razak who had signed it for one Dato' Ramli of KESEDAR. This is exhibited in the 2nd defendant's affidavit in reply in the form of a voucher (Exhibit "AMR-2".
4. No police report was filed by the plaintiff until six months. The police report was lodged by the plaintiff approximately a year after the event.
5. The 2nd affidavit of the plaintiff confirms at paragraph 4 that the letter of undertaking that the plaintiff is relying on against the 1st and 2nd defendants was in fact given even before the agreement was made. Hence the plaintiff cannot rely on the letter of undertaking as a cause of action to enforce the undertaking.

By the 2nd defendant:

1. The law firm of Shuhaiza & Partners at the material times had two partners – one was the 1st defendant and the other the 2nd defendant.
2. The 1st defendant was in charge of the main office in Kuala Lumpur whereas the 2nd defendant was in charge of the branch office in Petaling Jaya.
3. The 2nd defendant had no knowledge of the matters complained of by the plaintiff until he was served with a writ in this action.

4. The monies that were paid by the plaintiff went into the account of the Kuala Lumpur office to which only the 1st defendant was a signatory to the firm's bank account.

5. The 2nd defendant played no part in the execution of any of the consultancy agreement and the letter of undertaking.

6. In order to find 2nd defendant liable it must be shown that 2nd defendant is not protected under Section 12 of the Partnership Act 1960 which read as follows:

> **"12. Liability of firm for wrongs.**
>
> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

7. The plaintiff must show that the 1st defendant was "acting in the ordinary course of the business of the law firm." Here it is the contention that the 1st defendant was not acting in the course of the business of the law firm for the following reason:

   a) the consultancy agreement is an illegal agreement and is a sham. It is disguised as a consultancy agreement but is in fact a mode to facilitate the payment of a bribe. This is stated in the affidavit of the 3rd defendant confirming that his name had been used by the 1st defendant and it was the 1st defendant who was a party to the agreement with the plaintiff.

   Submits: It is not in the ordinary course of the business of the law firm to enter into a consultancy agreement to broker the purchase of rubber trees. What the 1st defendant did is to enter into a contract in her personal capacity with the plaintiff using the name of the 3rd defendant. This does not make the 2nd defendant liable under Section 12 of the Partnership Act.

   The only basis on which the 2nd defendant is sued in this action is because he was a partner in the firm of which branch he was not managing.

   The letter of undertaking itself was signed by a lawyer who is the wife of the 3rd defendant who was in fact a legal assistant in the law firm of Shuhaiza & Partners. The legal assistant has no authority to sign the letter of undertaking for the firm actual, implied, ostensible or otherwise. This is because it is not in the ordinary course of the business of the law firm to broker the purchase of rubber trees and if this is not so then there could not be any authority on the part of the legal assistant to sign the letter of undertaking.

   The 1st defendant herself had sworn a statutory declaration that the 2nd defendant had no knowledge of the transaction occurring at her branch in Kuala Lumpur and that the 1st defendant had on her own accord withdrew the money the 1 million dollars deposited by the plaintiff.

Reply:

1. The 2nd defendant states he has no knowledge about the entire matter. He then contends that the stakeholders money was not paid in the ordinary course of the business of the law firm. Hence he is not liable as a partner pursuant to Section 12 of the Partnership Act. The plaintiff contends that the contemporaneous documents show otherwise as follows:

   i The money was deposited in the ordinary course of the business of the law firm. See Exhibit "ARW-2" Enclosure 46 which is the stakeholder undertaking. It is clear on the face of the undertaking that the monies were paid to the law firm to hold as stakeholder pending the outcome of the event and not to broker the purchase of rubber trees. The job of the law firm here was to draft the consultancy agreement and to hold the consultancy payment as a stakeholder and to pay out the sum to the consultant (3rd defendant) if the deal went through and to return the said sum to the plaintiff if it did not. It is not disputed that the deal did not go through.

   ii The statutory declaration by the 1st defendant does not support the contention of the 2nd defendant that the stakeholders money was to broker the purchase of rubber trees and was not in the ordinary course of the business of the law firm. See Exhibit "AMR-3" (the said affidavit) which read as follows:

2. "I am an Advocate & Solicitor of the High Court of Malaya and practicing at Kuala Lumpur under the name and style of Messrs Shuhaiza & Partners, Advocates & Solicitors of No 81 A, 1st Floor, Jalan Bangsar, 59200 Kuala Lumpur.
3. The facts deposed to herein are within my personal knowledge.
4. I have on the 06-07-2004 acknowledge receipt of the sum of RM1 Million on behalf of Messrs Shuhaiza & Partners from Merbok Sdn Bhd.
5. I then deposited the said sum of RM1 Million into the Bank Islam Client's A/C No: 14153010010080 of Messrs Shuhaiza & Partners.
6. I admit on withdrawing and disbursing the said sum of RM1 Million on various occasions.
7. I also admit that my Partner Alan Michael Rozario had no knowledge of the sum deposited and was not even a signatory to the said account.
8. I further admit that I have on various occasion withdrew and used money from the various client's account belonging to Messrs Shuhaiza & Partners which my Partner has no knowledge of and not a signatory.
9. I hereby admit that I am solely responsible for all the withdrawal of all the Client's Account and that Mr Alan Michael Rozario has no knowledge whatsoever in all the above transaction."

Note: No where is it mentioned that the money she accepted was for a brokering transaction by her.

iii The official receipt from Suhaiza and Partners acknowledging receipt of RM1 million from the plaintiff Merbok says "Stakeholder money pursuant to Clause 4b(i) of the Consultancy Agreement" which is consistent with Clause 4b(i) of the Consultancy Agreement. See Exhibit "ARW-3" page 17 Enclosure 46.

In any case there is no evidence to the contrary except for averment on affidavit after the fact which ordinarily in a trial will be disregarded.

2. The 2nd defendant further contends the legal assistant had no authority to sign the letter of undertaking because it was not in the ordinary course of a business in the law firm. By reason of 1 above this submission will not hold water as it is clear that the work was undertaken in the course of the legal firm business.
3. On the point of illegality as contended by 1st defendant:

   i No evidence of illegality.

   ii It is in any event irrelevant because the illegality is stated to be in respect of the consultancy agreement where the bribe was alleged to be offered. Plaintiff is not seeking to enforce the consultancy agreement but to obtain refund of money of which the firm of Suhaiza and Partners was holding as stakeholder.

   iii In any event these are monies had and received by the 1st and 2nd defendants and must be returned on the grounds of total failure of consideration rendering the contract between the plaintiff and the 3rd defendant unperformed.

FINDINGS AND DECISION

The following core issues are readily identifiable in this suit:

1. Whether the plaintiff had entered into an illegal consultancy agreement with the consultant (the 3rd defendant) prepared by the firm of Shuhaiza & Partners?
2. Whether the act of the 1st defendant partner of the firm of Shuhaiza & Partners in drawing the agreement and holding the money as the stakeholder was an act in the ordinary course of business of the firm?

In order to successfully defend the plaintiff's application to sign final judgment under Order 14 it is incumbent upon the defendants to show that these issues are triable.

Having heard the submission of the parties my findings and judgment are as follows:

1. The plaintiff had entered into a perfectly legal agreement with the 3rd defendant. There is nothing illegal to employ another to secure a contract with the third party and to pay him a fee if he could successfully secure it – much like a housing agent procuring a sale of a house to a buyer.
2. In determining whether the act of the firm was done in the course of the business of the firm one need not look behind what the first defendant and the 3rd defendant had in mind when they entered into the consultancy agreement. Intention is irrelevant – for even "the devil knows not what the mind thinks". All that one would have to judge is whether the agreement prepared by the 1st defendant was on the face of it done in the course of the business of the firm. There could be no doubt that the preparation of an agreement was within the course of the business of the legal firm of Shuhaiza & Partners.
3. It follows therefore that the defendants' submission that the act of the 1st defendant partner having been performed with an ulterior motive of being bribed to an official of KESEDAR is irrelevant.
4. By failing to return the money retained by the firm as stakeholder the 1st and 2nd defendants as partners of the firm were in breach of the undertaking to do so. The plaintiff is therefore entitled to its return.
5. A partner in a firm is jointly and severally liable for the act of the other executed in the course of their vocation that they had undertaken to pursue.

There is no triable issue in the plaintiff's claim that ought to go for trial.

The appeal is allowed with costs. The defendants must repay the sum claimed within a month.

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