

CASE UPDATE

14 August 2019

IMPOSITION OF CONDITIONS FOR LEAVE TO DEFEND A SUMMARY JUDGMENT APPLICATION

Akfel Commodities Turkey Holding Anonim Sirketi v Townsend, Adam [2019] SGCA 43

SUMMARY

The Court of Appeal recently provided clarification on the instances where courts would impose conditions on a defendant for defending the summary judgment application commenced by a plaintiff.

Drew & Napier Director **Gerui Lim** and Senior Associate **Wesley Chan** successfully represented Adam Townsend in this appeal.

BACKGROUND

Since 2009, Mr Adam Townsend ("Townsend") was providing consultancy services to a group of companies known as the Akfel Group. Akfel Commodities Turkey Holding Anonim Sirketi ("Akfel") is the main holding company for the Akfel Group's operations in Turkey. Townsend would receive monthly retainer fees, bonuses and was reimbursed for his expenses.

Townsend claimed that around 14 March 2016, an oral agreement was reached between himself and Mehmet Fatih Baltaci ("MFB"), the Chairman, Director and majority shareholder of Akfel Singapore, which fully owned Akfel. This oral agreement was later incorporated into a written Consultancy Agreement which was executed between Townsend and Akfel.

The Consultancy Agreement provided that Townsend would provide consultancy services to the Akfel Group and would be paid €45,000 per month each quarter, and be reimbursed for his reasonable expenses.

The Consultancy Agreement was to commence on 1 August 2016 and run for five years unless terminated as provided for by the terms of the Agreement or by Akfel giving at least 24 months' written notice. If Akfel terminated the Consultancy Agreement without cause, Akfel was to pay Townsend liquidated damages equal to 24 months of his retainer.

On 17 December 2016, Townsend issued Akfel an invoice for his retainer fees for the preceding quarter. Akfel failed to pay on this invoice. On 16 March 2017, Akel, through its lawyers, sent Townsend a termination letter, claiming that the Consultancy Agreement was "collusive and legally invalid".

In April 2017, Townsend commenced proceedings against Akfel, claiming liquidated damages, his retainer fee for the months of September 2016 to March 2017, and reimbursements of reasonable expenses.

Townsend claimed that Akfel had breached the Consultancy Agreement by terminating it on 16 March 2017.

Akfel's defence was that the Consultancy Agreement was a sham contract as it was intended to operate as a device through which Townsend would be compensated for agreeing to act as an intermediary of MFB and his brother ("Brothers") in furtherance of a scheme whereby the Brothers would attempt to exercise control over the affairs of Akfel and the Akfel Group while at the same time concealing their involvement in the scheme.

Akel also averred that the Consultancy Agreement was concluded in furtherance of an illegal venture, designed to circumvent the consequences under Turkish law in respect of the Brothers' suspected involvement with certain terrorist groups.

Townsend's application for summary judgement was granted by the Assistant Registrar.

The High Court heard Akfel's appeal against the Assistant Registrar's decision and granted Akfel leave to defend on condition that it furnished security of \$2m within six weeks ("Condition").

Dissatisfied with the Condition imposed by the High Court, Akfel appealed to the Court of Appeal, seeking a revocation of the Condition.

COURT OF APPEAL'S DECISION

The Court of Appeal upheld the High Court's decision to grant Akfel conditional leave to defend.

Legal principles governing the grant of summary judgments

It is well established that the power to grant a summary judgment application applies only to cases where there is without a doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow a defendant to defend for mere purposes of delay. Where there is an issue or question in the dispute which ought to be tried, or where there ought to be a trial for some other reason, leave to defend should be granted. Such leave may be conditional or unconditional.

Conditional or unconditional leave to defend?

The Court of Appeal held that the approach to addressing whether summary judgment should be granted is a single composite exercise, depending on the overall picture which emerges to the court after taking into account factual assertions made by the plaintiff and not disputed by the defendant.

If the judge is satisfied that the plaintiff has shown a *prima facie* case for judgment but is also satisfied that the defendant has demonstrated a fair case for defence, reasonable grounds for setting up a defence or a fair probability of a *bona fide* defence, unconditional leave to defend should be granted.

However, where what the defendant has shown does not amount to a fair probability of a *bona fide* defence, but only that the defence raised is not hopeless, the court may impose conditional leave to defend.

The Court of Appeal also held that the discretion given to the courts to determine whether to grant unconditional or conditional leave to defend is wide and each case has to be decided on its own facts.

Application to the facts

The Court of Appeal found that the High Court had not erred in exercising discretion in imposing the Condition.

The Court of Appeal stated that the overarching character of Akfel's defence was its lack of evidence, and all that the show cause affidavit raised were mere suspicions. In particular, the reasoning which Akfel relied upon for both of its defences of sham and illegality rested on a mere conspiracy theory which was circuitous in reasoning.

The High Court judge was therefore correct in placing weight on the fact that Akfel had not adduced any evidence to show a common intention to mislead, such as evidence from its employees who had interacted with Townsend.

The High Court judge was also correct in taking into account the discrepancy in documents filed by Akfel where signatures on the Consultancy Agreement were curiously removed without proper explanation. While Akfel claimed that the terms of the Consultancy Agreement were not strictly followed, the Court of Appeal held that even if it was shown that Townsend did not perform exactly in accordance with the terms, that might not indicate a sham.

Finally, the Court of Appeal stated that it did not see anything peculiar about the fact that parties had put an oral agreement into writing after some time, particularly when there were significant changes to the terms. Consideration also had to be given to the political situation then prevailing in Turkey and the fact that the Brothers wanted to protect their interest. That Townsend was prepared to act for the Akfel Group and drove a hard bargain did not *per se* render the Consultancy Agreement a sham.

Comments

Defendants who are trying to survive a summary judgment application will often come up with as many disputed factual allegations as possible so that the case will be sent to trial. This type of short-term strategy can be very frustrating for plaintiffs with meritorious claims. While the natural temptation is to enter the fray and tussle with the defendant on every point, this can make the case

look more complicated and end up being counterproductive.

To maximise the chances of obtaining summary judgment or an order for conditional leave, it is critical to identify which are the key facts that are *legally relevant* to the pleaded causes of action and defences. Clear and focused arguments should be presented to the Court on those key issues.

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