**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2016] SGCA 38**

Civil Appeal No 203 of 2015

Between

**MANAGEMENT CORPORATION STRATA TITLE PLAN NO 3322**

… *Appellant*

And

**MER VUE DEVELOPMENTS PTE LTD**

… *Respondent*

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# GROUNDS OF DECISION

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[Civil Procedure] — [Pleadings] — [Amendment]
[Civil Procedure] — [Limitation]
[Limitation of Actions] — [Particular Causes of Action] — [Contract]

# Management Corporation Strata Title Plan No 3322
# v
# Mer Vue Developments Pte Ltd

**[2016] SGCA 38**

Court of Appeal — Civil Appeal No 203 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Steven Chong J
6 May 2016

13 June 2016

**Chao Hick Tin JA (delivering the grounds of decision of the court):**

1 It is well-established that the law generally does not permit the joinder of new parties, or the addition of new causes of action to an existing suit, if at the time of the application, the relevant limitation period has expired in relation to the claim of the new party or the new cause of action. This procedural prohibition is important because it prevents parties from circumventing the statute of limitations. If a joinder of party, or an amendment to introduce a new cause of action, is allowed, the party or the new cause of action will be treated as being part of the underlying action instituted prior to the expiry of the limitation period, thereby circumventing the limitation defence. The present appeal arose from a contractual claim brought by the management corporation of a condominium against the developer for building defects in the condominium's common property. The management corporation was entitled to bring the action by virtue of (a) the underlying contractual

claims belonging to each subsidiary proprietor it represented; and (b) s 85 of the Building Maintenance and Strata Management Act (Cap 30C, 2008 Rev Ed) ("BMSMA"), which empowers the management corporation to take proceedings on behalf of the subsidiary proprietors who authorise it to do so in respect of those building defects.

2 The development involved in the present proceedings was "The Seaview", located along Amber Road ("the Condominium"). Its management corporation ("the MCST") instituted the action on behalf of only 30 subsidiary proprietors. The issue in this appeal was whether the MCST should be allowed to amend its pleadings to add 113 other subsidiary proprietors to the list of subsidiary proprietors it represented in the action for breach of contract *after* the limitation period of the contractual claim had expired. The MCST argued that the amendment neither added new parties to the proceedings (given that the MCST was the only plaintiff to the action under s 85 of the BMSMA), nor did it add a new cause of action (given that the additional subsidiary proprietors were simply asserting the same contractual rights and breaches which had been pleaded). We could not agree with this submission. It was clear to us that allowing the amendment would have the effect of allowing the additional subsidiary proprietors to prosecute their claims for breach of contract against the developer even though the claim was time barred at that point in time. The appeal raised novel questions about how the procedural rules governing the joinder of parties and amendment of pleadings applied in the unique context of an action brought by a management corporation under s 85 of the BMSMA. It also highlighted the importance of upholding substance over form, even in the application of procedural rules. After hearing the parties, we dismissed the appeal and disallowed the amendment. We now explain our decision in detail.

**Factual background**

3 The Condominium was completed in 2008, with six 22-storey residential blocks of apartments, and having a total of 546 residential units. In this appeal, the appellant was the MCST and the respondent, the developer of the Condominium ("the Developer").

4 In Suit No 563 of 2011 ("S 563/2011"), the MCST brought proceedings against a number of defendants, including the Developer, for building defects in the common property of the Condominium. One of the MCST's grounds for claiming relief against the Developer was that, by virtue of the building defects in the common property, the Developer was in breach of the sale and purchase agreement ("SPA") which it entered into with each original purchaser of a unit in the Condominium.[1] We shall refer to this as the "contractual cause of action".

5 Initially, in Schedule 1 of the further and better particulars ("F&BPs") dated 31 October 2011, the MCST only set out the names of the 30 subsidiary proprietors which it represented in the contractual cause of action.[2] Almost four years later, on 30 June 2015, the MCST filed Summons No 3193 of 2015 ("SUM 3193/2015") to amend the F&BPs to add a further 113 subsidiary proprietors to Schedule 1 ("the Proposed Amendment"). By this time, the limitation period of the contractual cause of action had expired (see [9] and [10] below). The terms of the SPAs entered into between the Developer and the various subsidiary proprietors were largely identical, save for the identity of the purchaser, the unit in question and the contract price.

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[1] Statement of Claim (Amendment No 3) at paras 22–34, ACB II at tab 1

[2] Appellant's Core Bundle vol II ("ACB II") at tab 2

6 The MCST's main reason for pursuing the Proposed Amendment was that, as this court held in *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 ("*Seasons Park*") at [29], the eventual damages awarded by the court "would abate corresponding to the ratio that the collective share value of the units owned by subsidiary proprietors of the units on whose behalf the action was taken bore against the total share value of all the units in the development".[3] Hence, the Proposed Amendment would, if the contractual cause of action succeeded, significantly increase the damages recoverable by the MCST against the Developer.

**The decision below**

7 At first instance, the assistant registrar disallowed the Proposed Amendment. On appeal to the High Court, the judge ("the Judge") dismissed the appeal and affirmed the decision to disallow the Proposed Amendment. The grounds of the Judge's decision have been reported as *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd and others (King Wan Construction Pte Ltd and others, third parties)* [2016] SGHC 28 ("the GD").

8 The first issue which the Judge had to deal with was whether SUM 3193/2015 was an application to *join new parties* under O 15 r 6 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court") rather than an application for an amendment of pleadings. Rejecting the Developer's submission that SUM 3193/2015 was an attempt to add an additional 113 subsidiary proprietors as parties to S 563/2011, and finding that SUM

[3] Appellant's case at para 14

3193/2015 was correctly brought as an application to amend pleadings, the Judge held:

> (a) The "parties" envisaged in O 15 r 6 were those whose names were reflected in the originating process (*ie*, the writ or originating summons); the names of the subsidiary proprietors were not reflected in the originating process (the GD at [14]).
>
> (b) When a management corporation brought an action on behalf of its subsidiary proprietors, the management corporation itself, rather than the subsidiary proprietors, was the party before the court (the GD at [15]).

The Judge went on to hold that even if the Proposed Amendment amounted to adding new parties, it should not be allowed under O 15 r 6 as limitation had set in in relation to the contractual claim of the new parties (the GD at [16])

9 The Judge then moved to consider whether he had the power to grant the Proposed Amendment under O 20 r 5 of the Rules of Court, and if so, whether he should exercise his discretion to do so. Finding that the contractual claims of the new parties were time barred at the time SUM 3193/2015 was filed (the GD at [35] and [39]), the Judge held that he had *no power* to grant the amendment:

> (a) First, he held that O 20 r 5 operated in two distinct ways depending on whether the relevant limitation period had expired: (a) where limitation had *not* set in, amendments could be allowed under O 20 r 5(1); *but* (b) where the limitation period *had expired*, O 20 r 5(1) had *no application* and the court could *only* grant leave to amend the

pleadings *if* the amendments fell strictly under the three situations in O 20 rr 5(3)–(5) read with r 5(2) (the GD at [18]).

(b) Given that the limitation period had expired in this case, the court had no discretion to allow an amendment under O 20 r 5(1) and could only allow the amendment if the amendment could be brought under O 20 rr 5(3)–(5) read with r 5(2) (the GD at [41]).

(c) The Proposed Amendment did not fall under any of the three exclusive situations set out in O 20 rr 5(3), 5(4) or 5(5) (the GD at [41]). Specifically, the Judge observed that the Proposed Amendment did not seek to add or substitute a new cause of action pursuant to O 20 r 5(5).

**The appeal**

10 The Judge's finding that the contractual cause of action was time-barred at the time SUM 3193/2015 was filed, *ie*, on 30 June 2015 (see [9] above), was not challenged on appeal. The arguments on appeal centred on the following two issues:

(a) whether SUM 3193/2015 amounted to an application to join new parties to S 563/2011; and

(b) whether the Proposed Amendment should be allowed under O 20 r 5.

11 It should be noted that although both parties did address the joinder of parties issue in their submissions,[4] there was no cross-appeal by the Developer

[4] Appellant's case at paras 15 to 27; Respondent's case at paras 18–40

against the determination of the Judge that SUM 3193/2015 did not amount to an application for the joining of new parties. While this was not raised by the parties, we would add for completeness that arguably, in light of the analysis in *Lim Eng Hock Peter v Lin Jian Wei and another and another appeal* [2010] 4 SLR 331 at [26]–[28] (affirmed in *Chiam Heng Hsien (on his own behalf and as partner of Mitre Hotel Proprietors) v Chiam Heng Chow (executor of the estate of Chiam Toh Say, deceased) and others* [2015] 4 SLR 180 at [100]–[101]), the Developer could not alternatively rely on O 57 r 9A(5) of the Rules of Court to challenge the Judge's decision on the joinder of parties issue. Be that as it may, given that extensive arguments on the joinder of parties issue were made by both parties, and given also that no procedural objection was taken by the MCST in this regard, we deemed it appropriate to express our views on the issue.

**Preliminary issue: characterising the application**

12 Before discussing the two main issues that arose in this appeal, it is appropriate for us to address the preliminary question of how SUM 3193/2015 should be characterised. The parties appeared to have approached the present case on the basis that SUM 3193/2015 was *either* an application to join new parties under O 15 r 6, *or* an application for an amendment of pleadings under O 20 r 5.[5] In our view, these are not *necessarily* mutually exclusive provisions. In most instances, that would probably be the case. But in a special situation like the present, it is possible for a set of proposed amendments to engage both these procedural provisions insofar as the amendment constituted both a joinder of new parties and an amendment of pleadings. Indeed, as will be seen

[5] Respondent's case at para 41

from our discussion below, we found that the Proposed Amendment did engage *both* O 15 r 6 and O 20 r 5.

13 The consequential question which we needed to address was how these two provisions should be construed when they both apply. Is it sufficient for an amendment which engages both provisions to satisfy the requirements under either O 15 r 6 or O 20 r 5, or must the requirements under *both* provisions be satisfied for the amendment to be allowed? Whether the provisions are permissive or mandatory is crucial. In our view, insofar as O 15 r 6 and O 20 r 5 *require* the satisfaction of certain *mandatory* conditions before new parties may be joined or a particular amendment to the pleadings may be made, these must *all* be satisfied before the proposed amendment may be allowed.

14 We found support for this interpretation of the two rules in the language of the provisions itself. O 20 r 5(1) states:

> 5.—(1) *Subject to Order 15, Rules 6, 6A, 7 and 8* and this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. [emphasis added]

From the italicised portion above, it is clear that first, the drafters of the rules clearly contemplated that there may be instances where O 20 r 5 and O 15 r 6 overlap in application. Next, it is clear that the drafters intended to subject the *general and more expansive* power to allow amendment of pleadings in O 20 r 5(1) to the more *restrictive* rules in O 15 r 6 insofar as they are both engaged.

15 We would add that while the power to grant an amendment under O 20 rr 5(2)–(5) is not *expressly* subject to O 15 r 6, that must clearly be implied.

Order 15 r 6 sets out the broad principle on which the court would allow the addition of a new party or order that a named party cease to be such a party. Nothing there touches on the question of limitation. In contrast, O 20 rr 5(2)–(5) were specifically intended to regulate certain amendments which have limitation implications, and was not intended to override other relevant provisions of the Rules of Court. It therefore flows that the court would not allow an amendment which amounts to joining a new party, even if it satisfies the relevant requirements in O 20 rr 5(2)–(5) but not the conditions spelt out in O 15 r 6(2)(*b*)(i) or (ii). Similarly, an amendment that engages and satisfies O 15 r 6, but does not satisfy the requirements in O 20 rr 5(2)–(5) (if applicable), should also not be allowed. In short, all the applicable rules must be applied harmoniously, bearing in mind the object of each rule. That said, we did not think that there is anything in O 20 r 5 which is incompatible with O 15 r 6.

16 Having concluded that O 15 r 6 and O 20 r 5 may *both* be engaged on the facts, we shall start by discussing whether what was applied for in SUM 3193/2015 amounted to an attempt to join new parties such that O 15 r 6 was engaged.

**Joinder of parties**

17 The party named on the writ in S 563/2011 was the MCST. Under s 85(1)(*a*) of the BMSMA, the MCST may bring the contractual cause of action against the Developer "as if it were the subsidiary proprietors":

> 85.—(1) Where all or some of the subsidiary proprietors of the lots in a parcel comprised in a strata title plan are jointly entitled to take —
>
> > (*a*) proceedings for or with respect to the common property in that parcel *against any person* or are liable to have such proceedings taken against them jointly;
>
> …

> *the proceedings may be taken by or against the management corporation* in the case of paragraph (a) ... *as if it were the subsidiary proprietors of the lots concerned.*
>
> [emphasis added]

18 It was established in *Seasons Park* at [18], however, that the MCST "must specify on which of the subsidiary proprietors' behalf is the action in contract instituted". Although the provision discussed in *Seasons Park* was not s 85 of the BMSMA, but was its predecessor, s 116 of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed), the observations in *Seasons Park* are applicable to s 85 of the BMSMA as the two provisions are materially the same. As mentioned above at [5], the MCST initially named only 30 subsidiary proprietors in its F&BPs. In SUM 3193/2015, it then applied to include an additional 113 subsidiary proprietors. The heart of the issue on appeal was thus whether the proposed inclusion of an additional 113 subsidiary proprietors was in reality an application to join 113 new claimants such that O 15 r 6 was engaged, even if the MCST remained the only named party on the writ. As the Judge rightly noted (the GD at [16]), the rule on joinder of parties in O 15 r 6(2) is "subject to limitation" and should not be applied to "override the limitation period" (*Abdul Gaffer bin Fathil v Chua Kwang Yong* [1994] 3 SLR(R) 1056 ("*Abdul Gaffer*") at [16]). The court would not allow the joinder of a claimant as a party if the relevant limitation period of that claim has expired at the time of the application. Therefore, if the Proposed Amendment did constitute a joinder of new parties, it would not be permitted because limitation had set in in relation to the claims of the 113 subsidiary proprietors at the time SUM 3193/2015 was filed.

19 We found that, in substance, the Proposed Amendment did constitute a joinder of 113 new parties. As a matter of procedure and form, s 85 of the BMSMA permitted the MCST to take proceedings "as if it were the subsidiary

proprietors" and to appear as the only party (whether as plaintiff or defendant) on the writ. The purpose of s 85 is clear: it is a "procedural provision to facilitate action by a large number of subsidiary proprietors" (*Seasons Park* at [18]). The same point was previously made in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal* [1995] 3 SLR(R) 653 ("*Ocean Front*") at [17] in relation to s 116 of the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed), which preceded, and is identical to, the provision discussed in *Seasons Park*:

> … the purpose of our s 116 is clear: it is to enable the management corporation to bring an action on behalf of all or some of the subsidiary proprietors, as the case may be, and also to enable a third party to bring an action against the management corporation as representing all or some of the subsidiary proprietors. As between, on the one hand, all or some of the subsidiary proprietors, as the case may be, and, on the other hand, a third party, *the management corporation is interposed so that as a matter of convenience it would not be necessary for all or some of the subsidiary proprietors concerned to be joined* in suing a third party, and, conversely, it would not be necessary for the third party to sue and name all the subsidiary proprietors concerned. … [emphasis added]

20 In other words, the section creates a legal fiction (that the management corporation is the subsidiary proprietors in question) for the limited procedural purpose of enabling proceedings involving a large number of subsidiary proprietors to be taken by or against the management corporation. The reason for this temporary legal fiction is procedural convenience. The section does not change the fact that (a) the cause of action in relation to each SPA vests in each of the subsidiary proprietors in question, not the management corporation, and (b) any eventual judgment binds and/or benefits the subsidiary proprietors rather than the management corporation (see *Seasons Park* at [18]).

21 In this regard, a comparison between actions commenced by a management corporation under s 85 and those under s 24(2) of the BMSMA is instructive. Under s 85, it is the *subsidiary proprietors* (and not the management corporation) who are entitled to take the proceedings in question or who are liable to have proceedings taken against them. Section 85 operates by creating the fiction that the management corporation is the subsidiary proprietors, and hence allows the management corporation to take proceedings "... as if it were the subsidiary proprietors of the lots concerned". As this court pointed out in *Seasons Park* at [18], s 85 "does not confer upon the management corporation any cause of action". The subsidiary proprietors thus remain, in substance, the parties entitled to prosecute the action. The MCST only has standing to commence the writ because it is treated by this statutory provision "as if it were the subsidiary proprietors".

22 In contrast, s 24(2) of the BMSMA contemplates a range of proceedings in which the management corporation is *itself* the party to the proceedings, in both substance and form. Section 24(2) states:

> (2) A management corporation for a strata title plan may —
>
> (*a*) sue and be sued on any contract made by it;
>
> (*b*) sue and be sued in respect of any matter affecting the common property;
>
> (*c*) sue in respect of any loss or damage suffered by the management corporation arising out of a contract or otherwise; and
>
> (*d*) be sued in respect of any matter connected with the parcel for which the subsidiary proprietors are jointly liable.

It is clear that in these contemplated proceedings, unlike proceedings brought under s 85 of the BMSMA, the management corporation is the bearer of rights and obligations, and sues and or is sued as a legal person in its own right. It is

the management corporation's interests, rather than the subsidiary proprietors' interests, which are at stake in s 24 proceedings. While it may be argued that any distinction between the management corporation and the subsidiary proprietors is artificial because the management corporation is in substance constituted by subsidiary proprietors, the law nevertheless views them as separate legal entities given that the management corporation has a separate legal personality under statute (see s 24 of the BMSMA and s 10A of the Land Titles (Strata) Act (Cap 158, 2009 Rev Ed)).

23 Thus, for actions under s 85 of the BMSMA, it was clear to us that the *subsidiary proprietors* were the substantive parties to the action, and that adding subsidiary proprietors to the action necessarily entailed the joining of new parties. Indeed, the previous decisions of this court have been unwaveringly clear that the substantive parties to an action brought by a management corporation under s 85 of the BMSMA or its predecessors are the subsidiary proprietors rather than the management corporation itself (see *Seasons Park* at [18] and *Ocean Front* at [17]). Any other outcome would be giving effect to form over substance.

24 The MCST, however, argued that even if the subsidiary proprietors were in a sense the substantive parties to the action, O 15 r 6 was only engaged when parties were added *to the writ*. This was because (a) O 15 r 8 envisaged that an amendment under O 15 r 6 must entail an amendment to the writ; and (b) persons represented in a representative action were not deemed parties to the proceedings. This was also the reasoning relied upon by the Judge (see the GD at [14]–[15]).

25 On the first argument, we agreed that in the general course of things, where a new party was joined under O 15 r 6, the writ would normally have to

be amended to add the name of the new party. Indeed, O 15 r 8 was drafted with this paradigm situation in mind. Section 85 of the BMSMA, however, departs from this paradigm situation and creates an anomalous situation in which the MCST was the named party on the writ because it was treated "as if it were the subsidiary proprietors" for the sake of procedural convenience. In the circumstances, we were of the view that it would not be correct to read O 15 r 6 in the literal sense without regard to the special situation created under s 85 of the BMSMA. The objects and spirit of s 85 of the BMSMA, as well as O 15 r 6, must be borne in mind. There is nothing in s 85 which suggests that the procedural device it brings into being was also intended to allow the circumvention of the Limitation Act (Cap 163, 1996 Rev Ed). The F&BPs furnished by a party are undoubtedly part of its pleadings and that party is bound by it. In view of the special procedural device created under s 85 of the BMSMA, amending the F&BPs by adding new names of subsidiary proprietors (*ie*, what the Proposed Amendment sought to do) not only amounted to an amendment of the pleadings, but also in substance amounted to an adding of new claimants (the former aspect of the Proposed Amendment is further examined below). In short, O 15 r 6 should be interpreted with a measure of common sense and justice. To do otherwise would be to take a blinkered view of things.

26 On the second argument, we agreed with the Developer that an action commenced by the MCST under s 85 of the BMSMA was fundamentally different in nature from a representative action brought under O 15 r 12. Under O 15 r 12(1), the representative(s) must "have the *same interest* in [the] proceedings" [emphasis added] as the represented. The MCST, not being itself vested with any contractual claim, could not be said to have the *same interest*

in S 563/2011 as the subsidiary proprietors. The related case law cited by the MCST on representative actions was thus inapplicable.

27 In any event, we would add that even under O 15 r 12, the class of persons represented must be defined with sufficient clarity (Jeffrey Pinsler SC, *Singapore Court Practice 2014* vol 1 (LexisNexis, 2014) at para 15/12/6). In *Markt & Co, Limited v Knight Steamship Company, Limited* [1910] 2 KB 1021 at 1034, the English Court of Appeal held that "it is essential in the case of representative actions that the class on behalf of which the relief is sought should be defined in the writ". This was done in *Koh Chong Chiah and others v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 ("*Koh Chong Chiah*") for example, where the representative plaintiff had properly listed the 202 represented persons in the statement of claim (see *Koh Chong Chiah* at [2]). In our judgment, similar concerns about circumventing the limitation defence would arise if a party sought to add further represented parties in a representative action after the expiry of the relevant limitation period. Therefore, even if we accepted the parallel drawn between a s 85 BMSMA action and an action commenced under O 15 r 12, it would not assist the MCST.

28 To conclude, we found that adding 113 subsidiary proprietors to the F&BPs would amount to joining new parties to S 563/2011. To hold otherwise would be to unduly fixate on the form of the writ, without giving due regard to the substance of the Proposed Amendment. Rules of procedure have to be interpreted and applied in light of their underlying principles and objectives. In our view, there was no reason to limit the scope of O 15 r 6 such that the adding of new subsidiary proprietors to S 563/2011 would not fall under its purview.

**Amendment of pleadings**

29 While we found that SUM 3193/2015 was an application to join new parties to S 563/2011, it was also, in our view, an application for an amendment of pleadings given that the F&BPs were undeniably part of the pleadings. We shall now elaborate.

***Legislative framework of O 20 r 5***

30 We start by examining the legislative framework of O 20 r 5 and how it operates when the relevant limitation period has expired. While this court has considered this issue on several occasions previously, there are some clarifications which need to be made.

31 O 20 r 5(1) sets out the court's general power to grant parties leave to amend their pleadings at any stage of the proceedings. While we have at [14] already set out this rule, we will, for ease of reference, do it again:

> 5.—(1) Subject to Order 15, Rules 6, 6A, 7 and 8 and this Rule, *the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading*, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct. [emphasis added]

32 O 20 rr 5(2)–(5) deal specifically with certain types of amendments to pleadings after the expiry of the relevant period of limitation:

> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made *after any relevant period of limitation current at the date of issue of the writ has expired*, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (3) An *amendment to correct the name of a party* may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be

> corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.
>
> (4) An *amendment to alter the capacity in which a party sues* (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.
>
> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to *add or substitute a new cause of action* if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.
>
> [emphasis added]

33 Several observations may be made about O 20 rr 5(2)–(5):

(a) The "relevant limitation period" in this context refers to the limitation period applicable as at the date of the writ to the cause of action to which the amendment relates.

(b) O 20 r 5(2) is only engaged if at the time the application for the amendment is made, the cause of action to which the amendments relate would have been time-barred by the limitation period which applied as at the date of the writ. Except in the situations mentioned in rr 5(3)–(5), an amendment introducing a cause of action or adding a new party would generally not be allowed after the expiry of the relevant limitation period. This is because when such an amendment is allowed, it would operate retrospectively as if it were made at the date of the writ.

> (c) O 20 rr 5(3)–(5) only expressly permit, *under limited circumstances*, three categories of amendments after the relevant limitation period has expired: (a) an amendment to correct the name of a party; (b) an amendment to alter the capacity in which a party sues; and (c) an amendment to add or substitute a new cause of action based on facts already pleaded.

34 A question of construction arises as to whether O 20 r 5 permits any *other* type of amendment after the relevant limitation period has expired. In particular, when, if at all, can amendments be allowed pursuant to the court's broad powers in O 20 r 5(1) *if* the relevant limitation period has expired? Citing this court's past decision in *Lim Yong Swan v Lim Jee Tee and another* [1992] 3 SLR(R) 940 ("*Lim Yong Swan*"), the Judge's answer to this question was an unequivocal one – amendments can *never* be made under O 20 r 5(1) after limitation has set in (at [18] of the GD):

> … Where limitation has not set in, amendments may be made under O 20 r 5(1) generally. On the other hand, the court can only grant leave to amend after the limitation period has expired if the amendments fall *strictly* under any of the three situations in O 20 rr 5(3), 5(4) or 5(5) read with r 5(2). Outside of the three situations, the court has no general power to amend when the defence of limitation would be available to the defendant. … [emphasis in original]

35 In considering this question, we found it useful to consider a few of our past decisions on this issue. One of the earliest decisions from this court on O 20 r 5 is *The "Virginia Rhea"* [1983-1984] SLR(R) 639 ("*The Virginia Rhea*"). The plaintiff attempted to include bill of lading "KKS33" on the endorsement of the *in rem* writ. It was contended by the defendant that this amendment to the *in rem* writ was impermissible because the cause of action under bill of lading "KKS33" was time-barred. The Court of Appeal agreed and disallowed the amendment on the basis that the amendment introduced a

new cause of action which did not arise out of the same facts or substantially the same facts as the existing causes of action. In doing so, the court observed at [5] that "if an applicant has from the beginning formulated his writ which, though defective in some respect, falls within any of the circumstances set out in paras (3), (4) or (5) of O 20 r 5, no question of depriving any defence of time bar arises". Thus, the decision established that the court need not consider the deprivation of the time bar defence *if* the requirements in O 20 r 5(3), 5(4) or 5(5) were satisfied. It did not, however, comment on how O 20 r 5 operated in relation to *other types of amendments* sought to be made after the expiry of the relevant limitation period.

36 This court had another opportunity to consider O 20 r 5 in *Lim Yong Swan*. There, the respondents withdrew from a transaction to buy certain immoveable properties and commenced an action to recover the deposit they had paid to the appellant. They applied to amend their statement of claim to include two new time-barred causes of action for the recovery of the deposit. The court first commented generally on the legislative scheme in O 20 r 5 (at [12]):

> The clear words of the rule set out two distinct schemes of practice for the amendment of writs and pleadings: where the relevant limitation period has expired and where it has not. …

Following the case of *Weldon v Neal* (1887) 19 QBD 394 ("*Weldon v Neal*"), the court observed that O 20 r 5(1) was not to be interpreted "so widely as to deprive a litigant of an accrued right of limitation" (at [14]). However, the wording of O 20 rr 5(2)–(5) "evinces an intention to depart from the rule in *Weldon v Neal* ... and to allow amendments after the expiry of any relevant period of limitation current at the date of issue of the writ in the circumstances spelt out in paras (3) to (5)" (at [15]).

37 In short, the decision in *Lim Yong Swan* identified two clear "distinct schemes of practice", depending on whether there was prejudice to an accrued right of limitation. If there was *no* such prejudice, the court may exercise its general power in O 20 r 5(1) to allow the amendment. If, however, the amendment *does* deprive a litigant of an accrued right of limitation, O 20 r 5(1) is inapplicable and the court may only allow the amendment under the statutory exceptions in O 20 rr 5(2)–(5). Indeed, the court in *Lim Yong Swan* helpfully identified the common thread underlying O 20 rr 5(3), 5(4), and 5(5) which justified the statutory exception therein (at [19]):

> What is common in all three paragraphs is this. For an application to come within any of the paragraphs, there must already be asserted in the writ or the pleading a set of allegations which, in spite of the expiry of the limitation period, reasonably identify the party suing or sued, which is capable of conveying the capacity of the party to sue or which permits the addition or substitution of another cause of action. In other words, *the matters of identity, capacity or cause of action are already asserted or implied, from the inception of the writ or the filing of the pleading and it is merely a matter of correction to make explicit what is implicit.* [emphasis added]

38 The above holding in *Lim Yong Swan* was affirmed in *Abdul Gaffer*. In the latter case, the respondent had suffered injuries in a car accident while driving his employer's vehicle. He sued his employer but not the appellant, the driver of the vehicle that crashed into him. Subsequently, after the action had become time barred, the respondent successfully applied to add the appellant as a second defendant to the proceedings. Judgment in default of appearance was entered against the appellant but the appellant applied to set aside the default judgment on the ground that the claim against him was time barred at the time he was joined as a defendant.

39 In considering the framework under O 20 r 5, the court in *Abdul Gaffer* affirmed *Lim Yong Swan* and held that that "the court can only grant leave to amend after limitation period has expired if the cause comes within the three situations mentioned in rr 5(3), 5(4) and 5(5)" (*Abdul Gaffer* at [12]). It was further observed that "[t]here is no general power to grant leave to amend where limitation has intervened" (*Abdul Gaffer* at [13]). On the facts, the court reasoned that since the case "clearly did not come within r 5(3), 5(4) or 5(5)" (*Abdul Gaffer* at [14]), the court could *not* grant leave to amend the pleadings when limitation had set in.

40 Finally, we come to this court's recent decision in *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 ("*Multistar (CA)*"). The plaintiff subcontractor sued the defendant contractor for monies it claimed were still owing to it under the subcontract. After trial and the close of written submissions, the plaintiff filed an application to amend its statement of claim. The first set of amendments sought to clarify the factual background of the claim by amending certain material facts which were expressly pleaded and adding certain details to the body of the statement of claim, while the second added four alternative claims for relief which appeared new to the statement of claim. While the court ultimately found that it had no jurisdiction to hear the appeal (*Multistar (CA)* at [57]), it made several observations on the legislative framework of O 20 r 5.

41 In its judgment, the court stated that "a different legislative regime [was] in place to deal with amendment applications which involved the defence of limitation – thus the provisions in O 20 rr 5(2), 5(3), 5(4) and 5(5)" (*Multistar (CA)* at [60]). A plausible reason for this was that such amendments deprived the defendant of his right to raise the limitation defence, which was a prejudice that costs alone could not remedy (*Multistar (CA)* at [60]). The court

found ample support for the two legislative regimes it identified from the provisions in O 20 r 5 (*Multistar (CA)* at [61] and [66]):

> 61 The effect of the phrase "subject to … this Rule" is that the court no longer has the power and discretion to allow an amendment under O 20 r 5(1) if the proposed amendment engages O 20 r 5(2). Order 20 r 5(2) is engaged if, in relation to the proposed amended claim, limitation at that point in time has set in.
>
> …
>
> 66 … O 20 r 5(1) does not give the court an unfettered discretion. It was plain to us that the term "subject to … this Rule" signalled the draftsman's intent for O 20 rr 5(2)–5(5) to cut down the scope of the general discretion under O 20 r 5(1) in circumstances where limitation has set in. …

Thus, the court affirmed the interpretation of O 20 r 5 given in *Lim Yong Swan*, as summarised at [37] above.

42 To sum up, based on the language of O 20 r 5 as well as the authorities cited above, we were of the view that O 20 r 5 operated in the following way:

(a) If an amendment is applied for after the expiry of the relevant limitation period, *and* if the defendant has an accrued right of limitation which would be prejudiced by allowing the amendment, O 20 r 5(1) would be of no application and the amendment can only be allowed under O 20 rr 5(2)–(5).

(b) If, however, allowing the amendment would not prejudice the defendant's limitation defence, the amendment may be allowed under O 20 r 5(1).

43 In particular, we should clarify that *not all amendments brought after the relevant limitation period has expired would prejudice the defendant's limitation defence*. Amendments such as those made in *Multistar (CA)*, which

serve merely to clarify or bring to the fore facts which have already been pleaded, engage O 20 r 5(1) notwithstanding the fact that the relevant limitation period has expired. This was why we took the view in *Multistar (CA)* (albeit, in *obiter*) that the judge was correct to allow the relevant amendments under O 20 r 5(1) even though the relevant limitation period had expired (*Multistar (CA)* at [69]). Whether allowing an amendment would prejudice the other party's limitation defence is a question of fact that can only be answered on a case by case basis, depending on what has already been pleaded. This is the critical threshold question determining whether O 20 r 5(1) or O 20 r 5(2) is engaged.

44 We would add that in our view, there are likely to be few amendments which prejudice the other party's limitation defence, but which do not fall within one of the three categories of amendments mentioned in O 20 rr 5(3)–(5) (*ie*, an amendment to correct the name of a party, an amendment to alter the capacity in which a party sues, or an amendment to add or substitute a new cause of action based on facts already pleaded). We do not, however, foreclose the possibility that there could be amendments falling in that category and if they are applied for after the relevant limitation period has expired, the court should not grant the application.

45 Given our conclusions above, we found that the Judge had erred in *immediately* concluding that O 20 r 5(1) could have no application once he determined that the relevant limitation period had expired. The critical question was not whether the relevant limitation period had expired, but whether *allowing the Proposed Amendment would cause any prejudice to the Developer's limitation defence*. The Judge should have gone one step further to consider whether the Proposed Amendment would prejudice the Developer's right to raise the limitation defence.

46 That said, we acknowledge that the Judge's interpretation of O 20 r 5 could have been brought about by what was said in *Lim Yong Swan*, where the court held that the "two distinct schemes of practice" were distinguished based on "whether the relevant limitation period [had] expired" (*Lim Yong Swan* at [12]). These words, however, must be read in context. At [14] of *Lim Yong Swan*, the court expressly stated that in its view, O 20 r 5(1) was not wide enough to grant the court the power to "deprive a litigant of an accrued right of limitation". The court then went on to cite and discuss the prohibition in *Weldon v Neal* (at 395) against amendments which would have "allow[ed] the plaintiff to take advantage of her former writ to defeat the statute [of limitations] and tak[e] away an existing right from the defendant" (*Lim Yong Swan* at [14] and [15]). Clearly, the focus of the decision was on *whether an accrued right of limitation was defeated*, and not simply on whether the relevant limitation period had expired. Thus, notwithstanding the express words in [12] of *Lim Yong Swan*, we found that in fact, the key distinction drawn in that case was ultimately between the situation where there was prejudice to the defendant's limitation defence, and the situation where there was no such prejudice (see [37] above). Indeed, this was the distinction we drew between the two legislative regimes under O 20 r 5 in *Multistar (CA)* as well.

47 We should add that distinguishing the two legislative regimes under O 20 r 5 based on *whether the relevant limitation period has expired* would lead to the absurd outcome that even amendments to clarify pleadings (such as those sought in *Multistar (CA)*) would *automatically* be disallowed after the relevant limitation period has expired (given that they are unlikely to fall within O 20 rr 5(3)–(5)). In our judgment, this would not accord with the underlying purpose for narrowing the court's discretion after the relevant

limitation period has expired. As we mentioned at [1] above, the reason for the general prohibition against amendments after the relevant limitation period has expired is to ensure that the other party's right to raise the limitation defence is not prejudiced by the amendment. Where no such prejudice would be caused by the amendment, there is *no reason* why the more restrictive regime under O 20 rr 5(2)–(5) should displace the court's general power in O 20 r 5(1). The critical question is therefore whether the amendment causes prejudice to the defendant's limitation defence. If no such prejudice is caused, O 20 r 5(1) applies *even if* the relevant limitation period may have expired.

48 To conclude, we summarise the operation of O 20 r 5 in a case where a question of limitation could arise, as follows:

(a) First, it must be determined whether the amendment, if allowed, would prejudice the other party's limitation defence. As mentioned at [43] above, this is a question of fact that can only be answered on a case by case basis. A key consideration in this regard is whether the amendment *effectively* allows the plaintiff to prosecute a claim which would otherwise have been time-barred if it were brought under a new writ. Courts should have regard not only to the form, but also to the practical effect of the amendment.

(b) If it is determined that the amendment would *not* prejudice the other party's limitation defence, the court should then consider whether it would be just to allow the amendment under O 20 r 5(1).

(c) On the other hand, if it is determined that the amendment *would* prejudice the other party's limitation defence, the court can only allow the amendment under O 20 rr 5(2)–(5). The court must first consider whether the amendment falls within one of the three categories

mentioned in O 20 rr 5(3)–(5) (*ie*, whether the amendment is an amendment to correct the name of a party, to alter the capacity in which a party sues, or to add or substitute a new cause of action based on facts already pleaded). If it does, the amendment may *only* be allowed if the requirements in the applicable paragraph are satisfied and if the court deems it just to allow the amendment. If it does not, the amendment must be disallowed.

***Whether O 20 r 5(1) or O 20 rr 5(2)–(5) applied in this case***

49 In the present case, we found that the Proposed Amendment would, if allowed, *clearly prejudice* the Developer's limitation defence. We briefly state the reasons for our finding:

(a) First, as mentioned at [2] above, allowing the Proposed Amendment would have effectively enabled the additional 113 subsidiary proprietors to prosecute their claims for breach of contract against the Developer even though their claims would otherwise have been time barred if pursued under a fresh writ.

(b) Second, we observed that the claim for damages against the Developer under the contractual cause of action would increase substantially if the Proposed Amendment were allowed. According to the MCST's own calculations, it would only be able to claim 5% of the assessed damages without the Proposed Amendment. With the Proposed Amendment, however, it could claim up to 25% of the damages assessed.[6] This was because there were altogether 546 units, of varying dimensions, in the whole development.

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[6] Appellant's case at para 40(e)

50 This was therefore not a case where the court should apply O 20 r 5(1); instead, the applicable provisions were O 20 rr 5(2)–(5). We would add that while we disagreed with the Judge's reasoning on this issue, the Judge was ultimately correct to conclude that he had "no power and discretion to allow [the Proposed Amendment] under O 20 r 5(1)" (the GD at [41]). The Proposed Amendment had to fall within and satisfy the requirements in O 20 r 5(3), 5(4) or 5(5) if it were to be allowed.

***Whether the Proposed Amendment could be allowed under O 20 rr 5(2)–(5)***

51 It was clear that the Proposed Amendment did not involve correcting the name of a party (r 5(3)) or altering the capacity in which a party sued (r 5(4)). The only plausible provision under which the Proposed Amendment could be allowed was O 20 r 5(5) read with r 5(2).

*Bringing the Proposed Amendment under O 20 r 5(5)*

52 The Judge found that the Proposed Amendment did *not* add a new cause of action under O 20 r 5(5) (the GD at [22]):

> O 20 r 5(5) covers situations where an *existing* plaintiff adds or substitutes new causes of action, and does not cover situations where a plaintiff seeks to represent more persons. In the present case, the existing "party" in the action would be the Plaintiff representing the already-named 30 subsidiary proprietors. An amendment to add 113 new subsidiary proprietors to be represented by the Plaintiff does not fall within the scope of O 20 r 5(5); ***such an amendment does not demonstrate the addition or substitution of new causes of action on behalf of the presently represented 30 subsidiary proprietors***. The Court of Appeal held in *Abdul Gaffer* at [14] that O 20 r 5(5) only applies to where a new cause of action is proposed by an existing plaintiff against an existing defendant, and not where a new defendant is proposed to be added to an existing action. Similarly, ***adding more represented persons is something quite different from what is contemplated in O 20 r 5(5).*** [emphasis in original in italics; emphasis added in bold italics]

53 In short, the Judge found that O 20 r 5(5) only permitted the addition or substitution of new causes of action by the existing plaintiff(s) against the *existing defendant(s)*. It could not cover the Proposed Amendment, which entailed the addition of 113 new subsidiary proprietors to the suit, as claimants. In this regard, we found it instructive to briefly consider *Abdul Gaffer*, the main authority which the Judge relied on in reaching his conclusion.

54 In *Abdul Gaffer*, the amendment related to adding a new defendant to the suit (see [38] above for a fuller exposition of the facts). The court held that O 20 r 5(5) did not apply to that situation (*Abdul Gaffer* at [14]):

> … Rule 5(5) only applies where a new cause of action is proposed against an existing defendant. *It cannot apply to the situation where a new defendant is proposed to be added to an existing action*; that is something quite different from what is contemplated in r 5(5). … [emphasis added]

55 We agreed with *Abdul Gaffer* and with the Judge that O 20 r 5(5) only permitted the addition of a new cause of action brought by an *existing claimant* against an *existing defendant* on facts which were already pleaded. A proposed amendment to the pleadings which involved the joining of either a new plaintiff or a new defendant could not be brought under O 20 r 5(5). This accorded with the observation in *Lim Yong Swan* at [19] that the amendments permitted under O 20 rr 5(3)–(5) were all "merely a matter of correction to make explicit what is implicit" (see [37] above). The introduction of an *entirely new party* can on no account be considered merely making "explicit what is implicit".

56 Therefore, given our finding that the Proposed Amendment did effectively entail the joining of new parties, it could not be allowed under O 20 r 5(5). We would also add that even if we had agreed with the Judge that *no*

*new parties* were joined, we would still have found that the Proposed Amendment could not be allowed under O 20 r 5(5) because it would have introduced new causes of action which did not arise from the same or substantially the same facts as the existing contractual cause of action.

57 The contractual cause of action was premised on the individual contracts (SPAs) between each of the 30 subsidiary proprietors and the Developer.[7] In attempting to introduce the 113 new subsidiary proprietors, the MCST was essentially asserting that a *further 113 SPAs* were breached. While the terms of the relevant SPAs were substantially identical, they were nevertheless still *legally separate contracts* involving different contracting parties, different units in the Condominium, and different sale prices. In our judgment, this clearly constituted adding new causes of action in contract based on the 113 new SPAs. In line with the decision in *Multistar (CA)* at [34] as to what would constitute a "cause of action", it was clear that each distinct SPA was an integral part of the "essential factual material" underlying each subsidiary proprietor's distinct contractual claim against the Developer. The fact that each of these new SPAs was largely identical to the 30 SPAs of the 30 subsidiary proprietors which the MCST was already acting for did not detract from that conclusion. In our judgment, each claim based on a separate SPA was a separate cause of action.

58 Indeed, it is useful to refer to *Seasons Park*, the case which stands for the proposition that damages abate based on the number of subsidiary proprietors the MCST represents. At [29], the court held:

> *… It is a basic principle of contract law that before one party may sue another for breach of contract, the first party must*

[7] Statement of Claim (Amendment No 3) at para 22, Appellant's Core Bundle Vol II at p11

> *show that there is a contract between them*. Because of this principle, this court had, in [*MCST Plan No 1938 v Goodview Properties Pte Ltd* [2000] 3 SLR(R) 250], held that the management corporation, pursuant to s 116 of the [Land Titles (Strata) Act], *could only sue on behalf of those subsidiary proprietors who had direct sale and purchase contracts with the developer and claim, in respect of defects to the common property, a proportionate part of the damages suffered*. In other words, the damages awarded to the management corporation would abate corresponding to the ratio that the collective share value of the units owned by subsidiary proprietors of the units on whose behalf the action was taken bore against the total share value of all the units in the development. [emphasis added]

From this, it is clear that the rationale for awarding damages based on the number of subsidiary proprietors represented is that with the involvement of more subsidiary proprietors in the action, the number of SPAs sued upon increases. The underlying premise is that each subsidiary proprietor has a cause of action in contract on the basis of his separate SPA and correspondingly, a proportionate right to damages based on his share of the common property.

59 We also found the court's decision in *The Virginia Rhea* instructive because of the factual similarities between that case and the present. In *The Virginia Rhea*, the court held that adding a new bill of lading to the writ amounted to introducing a new cause of action under a separate contract, which was impermissible after the expiry of the relevant limitation period. The court observed at [11] that it was "not unmindful that the amendment only sought to introduce a contract of carriage which was made for the *same voyage* by the *same vessel* and that the bill of lading bore the *same date*" [emphasis added]. Yet, despite the fact that the new bill of lading was identical in many respects to those bills which were clearly the subject of the action, the court still found that a new cause of action was introduced.

60 Further, the court in *The Virginia Rhea* also held that despite the similarities in the bills of lading, it "could not be said that [the claim based on the new bill of lading] had arisen out of the *same facts or substantially the same facts* as a cause of action in respect of which relief has already been claimed by the appellants" [emphasis added] (at [11]). Importantly, the court held that the mention of a number of existing contracts "could *not* necessarily imply that there could be *another claim* of the appellants under or in respect of another contract of carriage under another bill of lading which need not be identified" [emphasis added] (at [11]).

61 We agreed with this holding and considered that a similar conclusion was justified in this case. The fact that the new SPAs were *substantially identical* to the existing ones did not detract from the conclusion that (a) new causes of action in contract were introduced; and (b) those new causes of action, premised on different (albeit similar) contracts, did not arise "out of the same facts or substantially the same facts" as the existing contractual cause of action. Therefore, this provided an alternative ground for concluding that the Proposed Amendment could not be allowed under O 20 r 5(5).

**Conclusion**

62 In conclusion, we found that the Proposed Amendment engaged both O 15 r 6 and O 20 r 5, but could not satisfy the requirements for the joining of new parties or for the amendment of pleadings after the expiry of the relevant limitation period. It is worth mentioning that this outcome accorded with the holding in *Seasons Park* at [27] that while leave to amend pleadings to include the additional subsidiary proprietors to a s 85 BMSMA action should normally be granted, this was subject to the important qualifier that *limitation must not*

*have set in*. Therefore, for the reasons given above, we dismissed Civil Appeal No 203 of 2015. Costs were awarded to the Developer.

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|---|---|---|
| Chao Hick Tin<br>Judge of Appeal | Andrew Phang Boon Leong<br>Judge of Appeal | Steven Chong<br>Judge |

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