

Tang Chay Seng v Tung Yang Wee Arthur
[2010] SGHC 229

Case Number : Suit No 953 of 2008 (Summons No 969 of 2010)
Decision Date : 10 August 2010
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : Deepak Natverlal (Yong Koh & Partners) for the plaintiff; Defendant, in person.
Parties : Tang Chay Seng — Tung Yang Wee Arthur

Civil Procedure – Pleadings

10 August 2010

Tan Lee Meng J:

1 This application was made shortly after the end of the trial involving a dispute between the plaintiff, Mr Tang Chay Seng ("TCS"), and his nephew, the defendant, Mr Tung Yang Wee, Arthur ("Arthur"). The dispute was over an alleged breach of the former's registered trade marks by the latter and allegations of passing off. Arthur applied to amend his pleadings. I allowed the application and set out below the reasons for my decision.

2 TCS, who operated a pork noodle stall known as "Hill Street Tai Hwa Pork Noodles" at Apt Blk 465 Crawford Lane #01-12, Singapore 190465, was the registered proprietor of two trade marks in relation to his business. His trade marks included the words Hill Street Tai Hwa Pork Noodle, Chinese characters (namely "吊橋頭" and "大華豬肉粿條麵") as well as graphic depictions of a suspension bridge and a bowl of noodles with chopsticks. Arthur's pork noodle stall at VivoCity Food Court (the "VivoCity Stall") used a signboard with the Chinese characters "老大華", as well as Korean and Japanese characters not found in TCS's trade marks. Furthermore, Arthur's sign had no English words and no depiction of either a suspension bridge or a bowl of noodles with chopsticks. Arthur, who appeared in person, pleaded that he had not infringed TCS's trade marks and that he was not liable for passing off.

3 During the trial, Arthur applied for leave to amend his Defence and Counterclaim in two ways. First, he sought to plead that TCS had consented to his use of the sign "老大華" for the VivoCity Stall. The reason for this amendment was obvious. Under s 27(1) of the Trade Marks Act (Cap 332, 2005 Rev Ed) ("the Act"), a trade mark is infringed only if a mark is used without the consent of its registered proprietor.

4 Secondly, as one of the issues in the passing off action concerned Arthur's of TCS's culinary awards in an advertisement in the *Lianhe Zaobao* on 5 November 2008, Arthur sought to amend his Defence to assert that TCS had consented to the use by him of the culinary awards.

5 As Arthur did not file an affidavit in support of his application to amend his Defence and Counterclaim, the hearing of the application to amend his pleadings was adjourned until he had filed the said affidavit. The amendment application was therefore heard on 8 April 2010, after the trial had been completed.

6 In his affidavit in support of his application Arthur stated at paras 3, 4 and 7 as follows:

3 I am a layman and have no training in the legal field.

4 I realise now that my Defence and Counterclaim had been too brief As a layman, I just realised that my explanation was inadequate in the foresaid document and I failed to show how evidence submitted to this Honourable Court is relevant....

7 The amendment that I sought is also consistent with the content of my [affidavit of evidence-in-chief] dated 20th January 2010. Even though amendment is coming in at a late stage, Mr Deepak Natverlal had the opportunity to cross-examine me on these amendments during trial. Therefore, the plaintiff will not be prejudiced since Mr Deepak had been afforded a sufficient opportunity to address the substance of the amendment.

Whether the application should be allowed

7 O 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) provides as follows:

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.

8 Whether an amendment to pleadings should be allowed is a matter of discretion for the trial judge. The approach that courts should take with respect to amendment of pleadings was outlined by the Court of Appeal in *Wright Norman and another v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640, at [6] as follows:

It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, unless the amendment would cause injustice or injury to the opposing party which could not be compensated by costs or otherwise: see *Cropper v Smith* (1884) 26 Ch D 700; *Tildesley v Harper* (1878) 10 Ch D 393. This is so even though the omission was caused by carelessness or the application for amendment was made very late in the day: *per* Brett MR in *Clarapede & Co v Commercial Union Association* [1883] 32 WR 262 at 263.

9 The Court of Appeal added at [23] that the most important question the court must ask itself is whether or not the ends of justice are served by allowing the proposed amendments.

10 It does not always follow that an amendment should be allowed where the other party can be compensated with costs. In *Ketteman v Hansel Properties Ltd* [1987] AC 189 ("*Ketteman*") Lord Griffiths, who pointed out, at 220, that "justice cannot always be measured in terms of money" explained as follows:

[A] judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other.

11 The courts have been careful to differentiate between an amendment that merely clarifies an issue in dispute and one that raises a totally different issue at too late a stage. As Lords Griffiths said in *Ketteman*, at 220, "to allow an amendment before a trial begins is quite different from allowing it at

the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.”

12 *Ketteman* has been applied in a number of cases in Singapore: see *Sin Leng Industries Pte Ltd v Ong Chai Teck and others* [2006] 2 SLR(R) 235, *Lam Soon Oil and Soap Manufacturing Sdn Bhd and another v Whang Tar Choung and another* [2001] 3 SLR(R) 451 and *Hong Leong Finance Ltd v Famco (S) Pte Ltd and others* [1992] 2 SLR(R) 224.

13 The present case was rather different from the situation envisaged in *Ketteman*. Here, although the trial had been completed, no new evidence was required in relation to the proposed amendment to introduce the defence of consent to the use of an allegedly infringing trade mark. The facts pertaining to the proposed defence of consent were fully stated in Arthur’s affidavit of evidence-in-chief (“AEIC”). In his AEIC, Arthur stated that TCS had given his consent to the use of “老大華” by him for the VivoCity Stall when he and his father met TCS on 31 July 2008. Furthermore, Arthur referred to a congratulatory message that had accompanied a pot of flowers sent by TCS to him when he started the VivoCity Stall. He pointed out that TCS’s congratulatory message, which was addressed to “老大華”, had included the words “May your business prosper”. Thus, Arthur asserted that TCS did not mind the use by him of “老大華”.

14 TCS’s counsel, Mr Deepak Natverlal (“Mr Natverlal”), cross-examined Arthur on his assertions that TCS had consented to his use of the name “老大華”. Arthur’s father, Mr Tung Chye Hong, was also cross-examined on the issue of consent. Apart from questioning Arthur on TCS’s alleged consent to the use of the name “老大華” for the VivoCity Stall, Mr Natverlal also cross-examined Arthur on TCS’s congratulatory message.

15 TCS was also given an opportunity to address the issue of the congratulatory message. He was cross-examined by Arthur on the message and during the trial, his counsel reiterated that his position was that despite the congratulatory message, he had not consented to the use by Arthur of the sign “老大華”.

16 As for whether TCS had consented to Arthur’s use of his culinary awards to advertise the VivoCity Stall, Arthur claimed in his AEIC that he had had TCS’s “general consent” to use the said awards. He stated in his AEIC at paras 69, 71, 73, 74 and 81 that:

69 At the same time when passing me the original certificates, my uncle did not see the point about keeping them as he said that

“die already also cannot bring along”

...

71 He was of the opinion that his sons (being disinterested in his noodle business) could not care less about the certificates. He wanted me to have them because he knew I treasured them.

...

73 He told me to put them to good use.

74 He said that if they were used, at least these certificates and awards could keep him alive in the memory of the general public.

...

81 I understood from this discussion with my uncle that I may use the certificates to develop the family's pork noodle business so that it does not die out after him.

17 As the issue of consent had been outlined in Arthur's AEIC and ventilated at the trial, to allow Arthur to amend his pleadings to include the issue of consent would have enabled the real issues between the parties to be tried without causing any injustice or injury to TCS which could not be compensated by costs. As the ends of justice would have been served by allowing the proposed amendments, I allowed Arthur's application and awarded costs to TCS.

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