Lion City Holdings Pte Ltd (in liquidation) v Jumabhoy Asad and Others
[2004] SGHC 130

Case Number : Suit 450/2002, RA 134/2004, 139/2004

Decision Date : 16 June 2004

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Chan Kia Pheng and Shaun Koh (Khattar Wong and Partners) for plaintiff; Harpreet Singh Nehal and Chew Kiat Jinn (Drew and Napier LLC) for first defendant; Edmund Kronenburg (Tan Peng Chin LLC) for second and third defendants

Parties : Lion City Holdings Pte Ltd (in liquidation) — Jumabhoy Asad; Jumabhoy Ameerali; Jumabhoy Iqbal

Civil Procedure – Writ of summons – Whether leave to amend generally endorsed writ by adding new cause of action should be granted – New cause of action time barred – Order 20 r 5(5) of the Rules of Court (Cap 332, R 5, 2004 Rev Ed)

16 June 2004

Choo Han Teck J:

1 This suit was filed by the liquidators of the plaintiff, Lion City Holdings Pte Ltd, against three of its former directors. The writ when filed on 18 April 2002 was filed as a generally endorsed writ. No statement of claim was filed until 18 May 2004. The endorsement on the writ merely stated as follows:

> The Plaintiff's claims are as follows:-
>
> (a) Claim against the Defendants for breaches of fiduciary duties owed to the Plaintiff;
>
> (b) An account of all profits made by Defendants as a result of the breaches of fiduciary duty;
>
> (c) Damages to be assessed against the Defendants;
>
> (d) Costs; and
>
> (e) Such further relief as this Honourable Court may deem fit.

2 The plaintiff applied to amend the writ to include a claim based on a breach of the duties of care. The application was allowed by the assistant registrar and consequently the plaintiff filed its statement of claim on 18 May 2004. The defendants appealed against the order granting leave to the plaintiff to amend the writ because by the amendment the plaintiff was able to present a claim that would otherwise be time barred. This was not disputed but the plaintiff's contention was that the cause of action based on the breach of a duty of care arose from the same or substantially the same facts.

3 It will be useful to set out the context for a better understanding of the issue in dispute in these appeals. The courts will not normally allow a claim to be amended if the amendment produces a new cause of action that would have been defeated by a limitation defence. This is encapsulated in a passage in the judgment of Lord Esher in *Weldon v Neal* (1887) 19 QBD 394 at 395:

> We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

L P Thean JA in *Chan Mui Eng v Chua Chu Huwe* [1994] 1 SLR 375 concurred with the even stronger view of Scrutton LJ in *Mabro v Eagle, Star and British Dominions Insurance Company, Limited* [1932] 1 KB 485 at 487 where Scrutton LJ held:

> In my experience the Court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence.

4 Counsel for the plaintiff relied on O 20 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) which provides an exception that ameliorates the harshness to the rulings above. Order 20 provides as follows:

> **Amendment of writ without leave (O 20, r 1)**
>
> 1.—(1) Subject to paragraph (3), the plaintiff may, without the leave of the Court, amend the writ once at any time before the pleadings in the action begun by the writ are deemed to be closed.
>
> (2) Where a writ is amended under this Rule after service thereof, then, unless the Court otherwise directs on an application made ex parte, the amended writ must be served on each defendant to the action.
>
> (3) This Rule shall not apply in relation to an amendment which consists of —
>
> (a) the addition, omission or substitution of a party to the action or an alteration of the capacity in which a party to the action sues or is sued;
>
> (b) the addition or substitution of a new cause of action; or
>
> (c) (without prejudice to Rule 3(1)) an amendment of the statement of claim (if any) endorsed on the writ,
>
> unless the amendment is made before service of the writ on any party to the action.
>
> **Amendment of appearance (O 20, r 2)**
>
> 2. A defendant may not amend his memorandum of appearance without the leave of the Court.
>
> **Amendment of pleadings without leave (O 20, r 3)**

3.—(1) A party may, without the leave of the Court, amend any pleading of his once at any time before the pleadings are deemed to be closed and, where he does so, he must serve the amended pleading on the opposite party.

(2) Where an amended statement of claim is served on a defendant —

(a) the defendant, if he has already served a defence on the plaintiff, may amend his defence;

(b) the period for service of his defence or amended defence, as the case may be, shall be either the period fixed under these Rules for service of his defence or a period of 14 days after the amended statement of claim is served on him, whichever expires later.

(3) Where an amended defence is served on the plaintiff by a defendant —

(a) the plaintiff, if he has already served a reply on that defendant, may amend his reply; and

(b) the period for service of his reply or amended reply, as the case may be, shall be 14 days after the amended defence is served on him.

(4) In paragraphs (2) and (3) references to a defence and a reply include references to a counterclaim and a defence to counterclaim respectively.

(5) Where an amended counterclaim is served by a defendant on a party (other than the plaintiff) against whom the counterclaim is made, paragraph (2) shall apply as if the counterclaim were a statement of claim and as if the party by whom the counterclaim is made were the plaintiff and the party against whom it is made a defendant.

(6) Where a party has pleaded to a pleading which is subsequently amended and served on him under paragraph (1), then, if that party does not amend his pleading under paragraphs (1) to (5), he shall be taken to rely on it in answer to the amended pleading, and Order 18, Rule 14 (2), shall have effect in such a case as if the amended pleading had been served at the time when that pleading, before its amendment under paragraph (1), was served.

Application for disallowance of amendment made without leave (O 20, r 4)

4.—(1) Within 14 days after the service on a party of a writ amended under Rule 1(1) or of a pleading amended under Rule 3(1), that party may apply to the Court to disallow the amendment.

(2) Where the Court hearing an application under this Rule is satisfied that if an application for leave to make the amendment in question had been made under Rule 5 at the date when the amendment was made under Rule 1(1) or Rule 3(1) leave to make the amendment or part of the amendment would have been refused, it shall order the amendment or that part to be struck out.

(3) Any order made on an application under this Rule may be made on such terms as to costs or otherwise as the Court thinks just.

Amendment of writ or pleading with leave (O 20, r 5)

> 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.
>
> (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.

The way O 20 was to be applied was considered by the Court of Appeal in *Lim Yong Swan v Lim Jee Tee* [1993] 1 SLR 500. Noting the intention to depart from *Weldon v Neal*, the court held at 506, [19]:

> 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.

Further on at 508, [28], the court summarised the purport and application of O 20 r 5 as follows:

> A party seeking to amend under O 20 r 5(5) must therefore show:
>
> > (a) that the new cause of action arises out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, and
> >
> > (b) if the court thinks it is just to grant leave to make the amendment.

5 The above two conditions were clearly meant to be read conjunctively otherwise the first condition would be limp as it would be subsumed under the word "just" in the second condition. As to the first condition the court approved the test in *Steamship Mutual Underwriting Association Ltd v*

Trollope & Colls (City) Ltd (1986) 33 BLR 77, that is to say, "whether there is a sufficient overlap between the facts supporting the existing claim and those supporting the new claim" (*per* Yong Pung How CJ at 508, [29]).

6 Reverting to the present appeals before me, I find that I am unable to apply the first condition because there were no facts upon which I can determine whether there was an "overlap" between those facts and those in which the new cause of action was intended to be pleaded. A generally endorsed writ without a statement of claim provided insufficient material to work with. The claim for breach of fiduciary duty is an allegation, not a statement of fact. Furthermore, the plaintiff has not convinced me that even the second condition could be satisfied. The writ was filed, on its admission, merely as a "protective writ" in 2002. That is to say that at that time the plaintiff had not made up its mind whether it ought to pursue its claim in court. The position remained unchanged for two years when the writ was renewed three times. As counsel for the defendants pointed out, it was only four years after the plaintiff company was wound up (24 March 2000) and two years after the bare writ was filed, that the plaintiff decided to pursue its action against the defendants. I am of the view that the plaintiff had taken too long to decide on the present course of action. In such circumstances, I do not think that it would be right to allow the amendment and deprive the defendants of a limitation defence.

Defendants' appeals allowed.