IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 141

Suit No 1204 of 2019 (Summons No 4362 of 2020)

Between

Symphony Ventures Pte Ltd

… Plaintiff

And

DNB Bank ASA, Singapore Branch

… Defendant

GROUNDS OF DECISION

[Civil Procedure] — [Pleadings] — [Amendment]

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Symphony Ventures Pte Ltd
v
DNB Bank ASA, Singapore Branch

[2020] SGHC 141

General Division of the High Court — Suit No 1204 of 2019 (Summons No 4362 of 2020)
Aedit Abdullah J
2 February, 12 March 2021

17 June 2021

Aedit Abdullah J:

Introduction

1 The plaintiff has appealed against my decision refusing leave to amend its Statement of Claim ("SOC"). I found that the amendments added new causes of action which did not arise out of facts previously alleged, and if allowed, would prejudice the defendant's defence under the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act").

Background

2 In the present proceedings, the plaintiff sought against the defendant bank damages arising out of alleged negligence, negligent or fraudulent misrepresentations, dishonest assistance and knowing receipt in respect of a supposed breach of a *Quistclose* trust, and a conspiracy to injure the plaintiff by

lawful or unlawful means involving the defendant and others, including one Mr Andreas Aamodt Kilde ("Mr Kilde").[1]

3 These present proceedings took place against the background of the defendant having acted on behalf of a number of corporate entities, including Traxiar Drilling Partners II Pte Ltd ("Traxiar") and Treatmil Holdings Limited ("Treatmil"), to obtain expressions of interest from possible lenders, including the plaintiff, for a bridging loan for the purchase of an oil rig (the "Rig").[2] The various sentries were under the control of one Mr Dag Dvergsten ("Mr Dvergsten").[3] The plaintiff and Traxiar entered into a term loan agreement (the "Term Loan Agreement") under which moneys were made available to Traxiar so that Traxiar could pay the deposit for the Rig and other related expenses.[4] Treatmil, the parent company of Traxiar,[5] stood as the guarantor of this loan.[6] Traxiar defaulted on repayment.[7]

4 In earlier proceedings, the liquidators of Traxiar had pursued a claim of fraudulent trading under s 340 Companies Act (Cap 50, 2006 Rev Ed), among others, against Mr Dvergsten. I dismissed this claim, issuing my decision in *Traxiar Drilling Partners II Pte Ltd (in liquidation) v Dvergsten, Dag Oivind* [2019] 4 SLR 433 (the "*Traxiar* Decision") on 23 January 2018. In particular, the *Traxiar* Decision found that the loan moneys had been procured from the

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1 Statement of Claim dated 21 November 2019 ("Original SOC") at paras 24–26, 29, 31.

2 Defendant's Written Submissions ("DWS") at para 5.

3 Original SOC at para 7; Plaintiff's Written Submissions ("PWS") at para 13.1.13.

4 Original SOC at paras 3–4; Agreed Bundle of Documents ("ABOD") at p 748 (Clause 2.2).

5 Proposed ASOC at p 21 and para 12.2.

6 ABOD at p 745 (Preamble).

7 Original SOC at paras 14–15.

plaintiff with the intention to fund the purchase of the Rig, and not for the purpose of allowing Mr Dvergsten to siphon those funds: see *Traxiar* Decision at [125]. An appeal was filed but not pursued.

5 Subsequently, a US decision in *Rocky Point Lending LLC v Rocky Point International LLC and others* (13 May 2019, State of Wisconsin, Circuit Court, Waukesha County) (United States) (the "US Decision") was issued on 13 May 2019, finding that Mr Dvergsten intended to use the loan moneys from the plaintiff for his own personal purposes, rather than to purchase the Rig.[8] The plaintiff placed great reliance on the US Decision in its submissions before me.[9]

The Decision

6 The court in determining whether amendments are to be allowed, must bear in mind accrued rights, including a defendant's defence under the Limitation Act, and cannot liberally override these rights. I found that the amendments objected to by the defendant introduced new causes of action. These could not be tacked on to what was originally pleaded as mere explanations, as they aimed to give the plaintiff new bases or grounds for reliefs that had to be supported by new material facts. These new causes of action would be time-barred under ss 6(1)(*a*) and 24A(3)(*a*) of the Limitation Act, and allowing these amendments would prejudice the defendant's Limitation Act defence. Section 29 of the Limitation Act did not assist the plaintiff because, among other reasons, it had not been made out that Mr Dvergsten's fraud could be laid at the door of the defendant or its agent. The US Decision rendered on

8 ABOD at pp 1211–1233 (see in particular, p 1221 at para 27).

9 See PWS at paras 2.14, 2.16, 2.31, and 9.4.

13 May 2019 was to my mind irrelevant, and in any event, the finding in the US Decision would be contrary to the *Traxiar* Decision, which still stands.

Analysis

7 The plaintiff's SOC was filed on 21 November 2019.[10] On 8 October 2020, it filed HC/SUM 4362/2020 seeking leave to amend its SOC.[11]

8 In particular, the plaintiff sought to introduce the following broad allegations, which were objected to by the defendant:[12]

(a) The first amendment objected to by the defendant was as follows (the "First Amendment"):

(i) The defendant, as the arranger of the "end" or "take-out" finance, owed the plaintiff a duty of care which arose out of, *inter alia*, a previous course of dealing in 2010 and 2011 which created a special relationship between the plaintiff and the defendant, and the defendant's exclusive dealing with the plaintiff on behalf of Mr Dvergsten and his various entities.[13] For context, the "end" or "take-out" finance referred to the raising of moneys through bonds on the Norwegian debt market to finance the balance purchase price of the Rig.[14]

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10 Original SOC at p 13.

11 HC/SUM 4362/2020.

12 DWS at paras 8 and 14–15.

13 Proposed Amended Statement of Claim ("Proposed ASOC") at paras 4, 10.1, 10.11(1) and 10.11(2).

14 Proposed ASOC at para 3.

(ii) This duty of care was breached when the defendant failed to supervise the deposit placed,[15] failed to report to the plaintiff on the acquisition of the Rig,[16] facilitated Traxiar's money laundering,[17] failed to make reports to the Monetary Authority of Singapore,[18] and was put on notice of Mr Dvergsten's fraudulent scheme.[19]

(b) Negligent or fraudulent misrepresentations were given by the defendant to the plaintiff in respect of (i) the refundability of the deposit, and (ii) the defendant's involvement in the "end" or "take-out" finance for the acquisition of the Rig (the "Second Amendment").[20]

(c) The defendant was unjustly enriched from a transaction where there was a total failure of consideration and illegality (the "Third Amendment").[21]

(d) There was a conspiracy involving Mr Kilde, Mr Dvergsten, entities related to Mr Dvergsten and Ms Savannah Khanna (the "Fourth Amendment"), for which the defendant was vicariously liable for since Mr Kilde, as an employee of the defendant,

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15 Proposed ASOC at paras 10.12 and 10.13.

16 Proposed ASOC at para 10.13.

17 Proposed ASOC at para 9.1(7).

18 Proposed ASOC at para 9.1(7).

19 Proposed ASOC at para 9.1(3).

20 Proposed ASOC at paras 10.5(1), 10.5(2), 45(a)(i) and 45(a)(ii).

21 Proposed ASOC at para 6.

committed this wrong in the course of acts authorised by the defendant.[22]

Permissibility of amendments under O 20 r 5 of the ROC

The law on amendments under O 20 r 5 of the ROC

9 The power to allow an amendment after the close of pleadings is conferred on the court under O 20 r 5(1) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("ROC"), which also allows the court to impose terms and other orders:

> **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.

On the other hand, O 20 r 5(2) of the ROC specifies that if an application for leave to amend is made after any relevant period of limitation, the court may grant leave if the application falls within O 20 rr 5(3), (4) or (5) ROC, and the court considers it just to do so.

10 The critical threshold question determining whether O 20 rr 5(1) or 5(2) of the ROC is engaged, is not whether the relevant limitation period has expired, but whether allowing the amendment would cause any prejudice to the other party's limitation defence; if no such prejudice would be caused, O 20 r 5(1) of the ROC applies even if the relevant limitation period may have expired: *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 4 SLR 351 ("*Mer Vue*") at [43], [45] and [47].

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22 Proposed ASOC at paras 8, 49 and 50.

11 If O 20 r 5(2) of the ROC is engaged, *ie*, the amendment would prejudice the other party's limitation defence, the court can only allow the amendment under O 20 rr 5(2)–5(5) ROC: *Mer Vue* at [48(c)]. Rule 5(5) specifies that an amendment may be permitted under r 5(2) even if it were to add or substitute a new cause of action, if that new cause of action arises out of the same facts or substantially the same facts as a cause of action already claimed.

12 The upshot of these is that an amendment is allowed, even if it were to bring a new cause of action to the prejudice of the defendant's accrued right of limitation, if such a cause of action arises out of the same or substantially the same facts and if the court considers it just to allow that amendment: *Mer Vue* at [48(c)]. If, however, the amendment introduces a new cause of action arising out of newly alleged facts, then the amendment would not fall within O 20 r 5(5) of the ROC and leave would not be granted: see *Lim Yong Swan v Lim Jee Tee and another* [1992] 3 SLR(R) 940 ("*Lim Yong Swan*") at [1] and [38]. In principle, it would be rare indeed for it to be just to allow such amendments.

Prejudice to the defendant's limitation defence

13 As to whether the defendant has a limitation defence in the first place, I accepted that the court only needs to be satisfied that there is a reasonably arguable case that the limitation period has expired. Once the limitation defence is made out by the defendant on the surface, the burden of persuasion would then be on the claimant to show that the defence of limitation is not reasonably arguable: *Geocon Piling & Engineering Pte Ltd (in compulsory liquidation) v Multistar Holdings Ltd (formerly known as Multi-Con Systems Ltd) and another suit* [2015] 3 SLR 1213 at [134]. If there is a reasonably arguable case that the limitation period has expired, the question then arises as to whether allowing the plaintiff's amendments would prejudice the defendant's limitation defence.

(1) Whether the defendant has a limitation defence

14 I was satisfied that the defendant had made out a *prima facie* limitation defence. The general six-year limitation period would have been applicable to the plaintiff's proposed amendments. The time bar for the plaintiff's new claims in tort and unjust enrichment started running by 8 July 2014 and 24 December 2013 respectively, which meant that the limitation period would have expired by the time this court considered the proposed amendments.

15 As argued by the defendant,[23] the plaintiff's new tortious claims are subject to a limitation period of six years, starting from the date on which the cause of action accrued, *ie*, the date on which damage occurred: s 24A(3)(*a*) of the Limitation Act; *IPP Financial Advisers Pte Ltd v Saimee bin Jumaat and another appeal* [2020] 2 SLR 272 at [44] and [46]. I agreed with the defendant that the clock would have started on the time bar for the plaintiff's tortious claims by 8 July 2014,[24] as it was then that the plaintiff suffered damage. On 2 July 2014, the plaintiff notified Traxiar of various events of default and declared that all amounts outstanding were immediately due and payable pursuant to Clause 15.3 of the Term Loan Agreement.[25] This went unsatisfied, and the plaintiff had to send a statutory demand on 8 July 2014 in respect of the outstanding sums.[26] Hence, it was clear that by 8 July 2014, Traxiar had failed to repay the plaintiff in breach of its obligation to make immediate repayment, and the plaintiff could not recover the loan moneys it had advanced under the

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23 DWS at para 22.

24 DWS at para 22.

25 ABOD at pp 758–759 (in particular, clauses 15.2 and 15.3(a)(ii)) and pp 1129–1131 (in particular, paras 8–9).

26 ABOD at p 1108, para 9 and pp 1133–1134 (in particular, para 3).

Term Loan Agreement, which the plaintiff would not have entered into if not for the defendant's tortious conduct.[27]

16 As for the plaintiff's unjust enrichment claim on the grounds that there had been a total failure of consideration in respect of the advisory fee received by the defendant,[28] I accepted that the six-year limitation period under s 6(1)(*a*) of the Limitation Act applied: see *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 at [41] and *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 1 SLR(R) 856 at [27]. I also accepted that this would have accrued by 24 December 2013, when the defendant invoiced Dag and/or Treatmil for the advisory fee.[29]

17 The burden of persuasion thus lay on the plaintiff to show that the defence of limitation was not reasonably arguable. In this regard, the plaintiff sought to invoke s 29 of the Limitation Act, arguing that Mr Dvergsten's fraud was only discovered on any of the following dates: (a) 13 May 2019 when the US Decision was rendered in respect of a claim against Mr Dvergsten, (b) 10 August 2017 when some additional documents were discovered, or (c) at the very earliest (which was not conceded by the defendant), on 23 September 2015 when Traxiar's liquidator commenced action against Mr Dvergsten for fraud.[30]

18 Section 29(1) of the Limitation Act reads:

> **29.**—(1) Where, in the case of any action for which a period of limitation is prescribed by this Act —

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27 Proposed ASOC at para 46.

28 Proposed ASOC at para 6.

29 Proposed ASOC at para 44.

30 PWS at paras 2.14, 2.16, 2.31, 2.32, 2.38, 9.2 and 9.4; PSS at paras 22–23.

> (*a*) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent;
>
> (*b*) the right of action is concealed by the fraud of any such (a person as aforesaid; or
>
> (*c*) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.

19 A question therefore was whether the limitation period actually started running at a later date, as the plaintiff contended. Under s 29(1) of the Limitation Act, the limitation period is postponed where the action is based on fraud, the right of action is concealed by fraud, or the action is for relief from the consequences of a mistake: time only runs from the point when the fraud or mistake is discovered, or could with reasonable diligence have been discovered.

20 Under the Limitation Act, the plaintiff's new allegations concerning fraudulent misrepresentations by the defendant would be governed by s 29(1)(*a*), whilst s 29(1)(*b*) would govern the plaintiff's new allegations regarding negligence, negligent misrepresentation, unjust enrichment and lawful or unlawful means conspiracy.

(A) WHETHER THERE WAS FRAUD BY THE DEFENDANT OR ITS AGENT

21 The plaintiff argued that the relevant limitation period only started to run when Mr Dvergsten's fraud was uncovered, because its claims against the defendant arose from the discovery of Mr Dvergsten's fraud.[31] The fraud relied upon by the plaintiff was largely that of Mr Dvergsten: there was no allegation of fraud by the defendant itself, save for a claim in fraudulent misrepresentation.

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[31] PWS at paras 2.15–2.16; PSS at paras 37, 47, 50 and 55.

22 The plaintiff's case that time should start running upon the discovery of Mr Dvergsten's fraud was misconceived. I accepted the defendant's arguments that for s 29(1) of the Limitation Act to operate, the fraud must be brought home to the defendant, either directly or through liability for the actions of its agent. There was nothing of that nature here which would point to Mr Dvergsten being an agent of the defendant. Even as regards the plaintiff's claim in conspiracy in the original SOC, Mr Dvergsten was a separate member of that alleged conspiracy from the defendant.[32] The defendant also denied that Mr Dvergsten was its agent, and pointed out that Mr Dvergsten is a distinct person from the defendant.[33]

23 That said, the plaintiff, in its written submissions, claimed that the defendant had concealed rights of action against itself.[34] However, concealment on its own was insufficient: the concealment must be fraudulent. The fraud required for s 29(1)(*b*) of the Limitation Act is not limited to the common law sense of fraud or deceit, but the defendant must have at least committed a deliberate act of concealment, or knowingly or recklessly committed a wrongdoing in secret without telling the aggrieved party: *Chua Teck Chew Robert v Goh Eng Wah* [2009] 4 SLR(R) 716 ("*Chua Teck Chew Robert*") at [27]. In so far as the defendant or its agents were concerned, nothing of that nature was brought to my attention. Identifying the close relationships that Mr Kilde, the defendant's employee, shared with Mr Dvergsten and Traxiar, did not come anywhere close to satisfying the plaintiff's burden of persuasion that rights of action against the defendant had been fraudulently concealed by the defendant or its agent.

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32 Original SOC at para 29.

33 DWS at para 29.

34 PSS at paras 43–44 and 46.

24 Thus, for a large chunk of the plaintiff's new claims (*ie*, negligence, negligent misrepresentation, unjust enrichment and lawful or unlawful means conspiracy), it would be sufficient to dispose the reliance on the fraud exception to the running of the time bar since they do not implicate the defendant or its agent in any fraudulent concealment.

25 There was only one new allegation that implicated the defendant in fraud, *ie*, fraudulent misrepresentations given by the defendant in respect of (a) the refundability of the deposit, and (b) the defendant's involvement in the "end" or "take-out" finance. However, as the next section will show, these fraudulent misrepresentations, if any, could have been discovered by the plaintiff with reasonable diligence by July 2014. It was thus not necessary to come to a view on whether the defendant did make such fraudulent misrepresentations.

(B) WHEN THE FRAUD COULD BE DISCOVERED WITH REASONABLE DILIGENCE

26 I found that the plaintiff's new claims of fraudulent misrepresentations against the defendant could have been discovered with reasonable diligence by July 2014.

27 On the plaintiff's own pleaded case, the falsity of these newly alleged representations was intimately connected to Mr Dvergsten's fraud, such that the discovery of the latter would mean the discovery of the former. Regarding the first representation in respect of the refundability of the deposit, the plaintiff averred that this was false because Mr Dvergsten had stolen the loan moneys.[35] The second representation was that the defendant would raise the "end" or "take-out" finance between 8 days and 2 weeks after the option to buy the Rig

[35] Proposed ASOC at para 45(a)(i).

was in place.[36] The plaintiff averred that this was false because nothing concrete was done to secure the "end" or "take-out" finance.[37] The alleged falsity of this representation was closely connected to Mr Dvergsten's fraud. Had Mr Dvergsten misappropriated the loan monies and caused the deposit for the Rig to remain unpaid, there would hardly be an acquisition for which "end" or "take-out" finance needed to be raised. It followed that the discovery of Mr Dvergsten's fraud would naturally lead to the realisation that no concrete steps had been taken to secure "end" or "take-out" finance.

28 Indeed, it was the plaintiff's own case that all of its causes of action against the defendant, including fraudulent misrepresentation, only came about upon the discovery of Mr Dvergsten's fraud.[38] As I found that Mr Dvergsten's fraud could be discovered with reasonable diligence by July 2014, I found that the defendant's fraud could be discovered with reasonable diligence by July 2014 as well.

29 Before moving on to the discussion on why Mr Dvergsten's and the defendant's fraud could be discovered with reasonable diligence by July 2014, I will first deal with the plaintiff's arguments that fraud was discovered only on 13 May 2019 or, at the very earliest, only on 23 September 2015.[39]

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36 Proposed ASOC at paras 10.5(2) and 12.17.

37 Proposed ASOC at para 45(a)(ii).

38 PWS at paras 2.15–2.16; PSS at paras 37, 47, 50 and 55.

39 PWS at paras 2.14, 2.16, 2.31, 2.32, 9.2 and 9.4.

(I) THE US DECISION

30 The plaintiff argued that Mr Dvergsten's fraud was only uncovered from the US Decision issued on 13 May 2019.[40] This argument could not succeed for a number of reasons.

31 Firstly, what matters is when the facts underlying the fraud were discovered, or could have been discovered with reasonable diligence of the plaintiff. The US Decision was thus irrelevant. The time at which a foreign judicial determination is made cannot amount to discovery of fraud. If an allegation is made in those proceedings that fraud occurred, what matters is the time at which the facts supporting those allegations came to be known.

32 Secondly, as argued by the defendants,[41] the US Decision cannot be relied upon to contradict a Singapore decision. I had, in the earlier *Traxiar* Decision at [115]–[127], concluded that the allegations of fraud were not made out on the evidence before me. In particular, the *Traxiar* Decision found that the loan moneys had been procured with the intention to fund the purchase of the Rig, and not for the purpose of allowing Mr Dvergsten to siphon those funds: see *Traxiar* Decision at [125]. The plaintiff in this present case, however, sought to rely on the finding in the US Decision that Mr Dvergsten intended to use the loan moneys from the plaintiff for his own personal purposes, rather than to purchase the Rig.[42] The plaintiff's reliance on portions of the US Decision which contradicted my findings in the *Traxiar* Decision, was an abuse of process. While the defendant invoked the extended *res judicata* doctrine in *Henderson v*

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40 PWS at paras 2.31 and 9.4.

41 DWS at para 42.

42 PWS at paras 2.14, 2.16, 2.30(b) and 2.31; ABOD at p 1221, exhibiting the US Decision at para 27.

Henderson (the "*Henderson* doctrine"),[43] it is in any event an abuse of process to rely on a finding of a foreign court that is inconsistent with a local decision. It is a collateral attack. On its merits, the US Decision cannot override a Singapore decision, whether mine or anyone else's.

33 During the hearing, the plaintiff, when questioned on the legitimacy of relying on the US Decision in light of its inconsistency with the *Traxiar* Decision, cited the case of *Takhar v Gracefield Developments Ltd and others* [2020] AC 450. However, this English decision did not assist the plaintiff at all.

34 I would also note briefly that there might be issues with the defendant's invocation of the *Henderson* doctrine: the defendant cited *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 and *Lim Geok Lin Andy v Yap Jin Meng Bryan and another appeal* [2017] 2 SLR 760 for the proposition that the *Henderson* doctrine is not limited to re-litigation between the same parties.[44] It might be that those cases do stand for such a broad proposition, but it was not necessary for me in the present case to determine that issue.

35 I also noted that the US Decision was, in any event, rendered on a default basis.[45] Thus, even if the US Decision was somehow relevant to when the fraud was discovered and the plaintiff's reliance on it was not an abuse of process or a collateral attack, the US Decision should be accorded less weight than a decision issued after a full trial.

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43 DWS at para 42.

44 DWS at para 43(a).

45 ABOD at p 1217, exhibiting the US Decision.

36 Really, the plaintiff's primary motivation for bringing in these amendments in the present case, was that Traxiar chose not to appeal the *Traxiar* Decision. Traxiar could have applied to appeal out of time and perhaps sought to adduce new evidence in the appeal. Leaving aside the possible operation of the *Henderson* doctrine, the plaintiff for its part was not bound and could have pursued its claim at an earlier juncture.

(II) FILING OF THE STATEMENT OF CLAIM IN THE TRAXIAR CASE

37 The filing of the statement of claim in the *Traxiar* case was similarly not the date on which the underlying facts of the fraud was found out. What mattered was when the plaintiff came to know of the underlying facts, and the plaintiff here must have known of these facts earlier than the date of filing of the statement of claim in the *Traxiar* case.

38 I accepted that the information underlying Traxiar's claim (in the *Traxiar* case) must have come from the plaintiff before that claim was filed on 23 September 2015.[46] Information was put before the court in that case concerning: (a) correspondence involving Traxiar, Mr Dvergsten and the plaintiff, (b) actions by the plaintiff and (c) adduced evidence involving one Mr Subramaniam, a representative of the plaintiff: *Traxiar* Decision at [15]–[16]. These correspondences and actions took place in 2014. The burden of persuasion at least lay upon the plaintiff to show that despite all these, it did not know of the alleged fraud. This, it did not do: there was insufficient explanation coming from the plaintiff.

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[46] ABOD at p 1078 (para 29); ABOD at p 1651 (para 19(b)).

(III) DISCOVERY WITH REASONABLE DILIGENCE BY JULY 2014

39 I found that Mr Dvergsten's fraud, and by extension, the defendant's fraud, could be discovered with reasonable diligence by July 2014. What mattered was not whether the plaintiff did know of fraud, but whether it could have discovered it, with reasonable diligence, at that point.

40 Reasonable diligence is not the doing of everything possible, but the doing of that which, under ordinary circumstances and with regard to expense and difficulty, could be reasonably required: *Chua Teck Chew Robert* at [29]. What constitutes reasonable diligence depends on all the circumstances of the case: *Chua Teck Chew Robert* at [33]. As submitted by the defendant,[47] the plaintiff has the burden of proving that it could not have discovered the fraud without taking exceptional and unreasonable measures: *Lim Siew Bee v Lim Boh Chuan and another* [2014] SGHC 41 at [131]; *Horner v Allison and another* [2014] EWCA Civ 117 at [16].

41 I accepted that facts, which would have put the plaintiff on notice of Mr Dvergsten's fraudulent conduct, first surfaced in September 2013 when Traxiar showed some urgency in trying to get hold of the loan. The plaintiff averred that this showed that the defendant was put on notice of Mr Dvergsten's fraudulent conduct,[48] but as rebutted by the defendant,[49] the urgency also put the plaintiff on notice as well as the plaintiff was party to the very same communications.[50]

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47 DWS at para 61.

48 Proposed ASOC at para 12.6.

49 DWS at para 62.

50 ABOD at pp 1118–1119 (paras 40–44) and pp 1531–1533.

42 Alternatively, as argued by the defendant,[51] notice would also have been triggered in April 2014, when there were indications that the sale of the Rig to Traxiar had fallen through. On 17 April 2014, a news article reported that the owner of the Rig was "looking to sell" the Rig. Email correspondence dated 21 April 2014 showed that the plaintiff tried to get information from Mr Dvergsten regarding this news article.[52]

43 This led to investigations commenced by the plaintiff between May and June 2014, whereby the plaintiff sought information relating to how the loan was utilised. The plaintiff's multiple requests for information were largely met with limited and unsatisfactory responses from Mr Dvergsten.[53] Crucially, it was revealed to the plaintiff, on 17 June 2014, that Traxiar had defaulted in making payment for the deposit for the Rig.[54] This, coupled with Mr Dvergsten's lack of candour in the disclosure of documents and information pertaining to the acquisition of the Rig, certainly raised alarm bells as to the whereabouts of the plaintiff's loan moneys, which had been advanced to Traxiar for the purpose of financing the deposit and other related expenses.[55]

44 Furthermore, information which only the plaintiff would be privy to was provided to Amstel Exploitatie BV ("Amstel"), an indirect shareholder of the Traxiar,[56] in or before September 2014. This prompted Amstel to launch a separate suit that month against Mr Dvergsten, with claims which overlapped

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51 DWS at paras 65.

52 ABOD at pp 1556–1557.

53 ABOD at pp 1120–1121 (paras 46(b) and 46(c)), pp 1539–1540 (para 20) and pp 1564–1579.

54 ABOD at pp 1567–1568.

55 ABOD at p 748 (Clause 2.2).

56 ABOD at p 1617 (para 4).

with those in the *Traxiar* case and the present case.[57] In particular, Amstel claimed that Mr Dvergsten committed fraud on Traxiar by misapplying the loan proceeds under the Term Loan Agreement for his own collateral purpose.[58]

45 I accepted that all of these showed that by mid-June 2014, it was more probable than not that the plaintiff had sufficient facts or allegations before it that would have called for further investigations. Reasonable investigations in these circumstances would require more than just sending letters or emails to Mr Dvergsten or Traxiar asking them to disclose information on how the loan moneys had been applied, as this had already proven futile during the plaintiff's email exchange with Mr Dvergsten in June 2014.[59] This, along with the fact that a large amount was at stake for the plaintiff, would make it reasonable in the circumstances for the plaintiff to undertake more effective actions to uncover the whereabouts of the loan moneys.

46 In any event, the plaintiff was only a short step away from uncovering that it was Mr Dvergsten who had misappropriated the loan moneys. After all, the plaintiff had already known by mid-June 2014 that the loan moneys had not been used to pay the deposit for the Rig, and that Mr Dvergsten had been concealing material information from the plaintiff.[60] If reasonable investigations had been undertaken by the plaintiff, Mr Dvergsten's fraud could have been uncovered by July 2014.

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57 ABOD at pp 1122–1125 (para 50) and pp 1627–1636 (paras 25–35).

58 ABOD at pp 1627–1630 (paras 25–29).

59 ABOD at pp 1120–1121 (paras 46(b) and 46(c)), pp 1539–1540 (para 20) and pp 1564–1579.

60 ABOD at pp 1564–1579.

47 In this regard, the plaintiff had the burden of showing that it could not have discovered Mr Dvergsten's fraud without taking exceptional and unreasonable measures. The plaintiff, however, simply maintained that it did not have any knowledge of fraud, until it discovered Mr Dvergsten's fraud upon the receipt of some documents on 10 August 2017 or the rendering of the US decision on 13 May 2019.[61] These were not sufficient to rebut the inference that reasonable investigations, which could have led to the discovery of the fraud by July 2014, could have been conducted. Hence, the plaintiff did not discharge its burden of persuasion. In view of the facts before the plaintiff by mid-June 2014, I found that that the plaintiff could, with reasonable diligence, have uncovered Mr Dvergsten's fraud by July 2014.

48 As explained at [27]–[28], the way the plaintiff had put forward its case was such that the discovery of Mr Dvergsten's fraud would mean that the defendant's fraud, if any, would have been discovered too. Accordingly, I found that with reasonable diligence, the defendant's fraud, if any, could be discovered by July 2014.

(2) Whether the amendments prejudiced the defendant's limitation defence

49 Not all amendments brought after the expiration of the limitation period would prejudice the defendant's limitation defence. Whether allowing an amendment would prejudice the other party's limitation defence is a question of fact: the key consideration is whether the practical effect of allowing the amendment is to allow a claim which would otherwise have been time-barred if it were brought under a new writ (*Mer Vue* at [43] and [48(a)]).

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61 PSS at paras 37–41.

50 I was satisfied that the amendments in question, if allowed, would prejudice the defendant's limitation defence. The plaintiff's amendments did not seek to clarify or bring to the fore facts which were already pleaded; rather, they sought to bring in new causes of action (see below at [54]–[58]) which, if raised in a fresh suit, would be defeated by a limitation defence. These amendments would thus only be permitted if they fell within O 20 rr 5(3)-5(5), the most relevant being r 5(5), which I will now turn to.

Whether new causes of action based on new facts were introduced

51 A cause of action refers to the essential factual material that supports a claim. The selection of material facts to define the cause of action must be made at the highest level of abstraction, to the exclusion of further instances or better particulars: *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 ("*Multistar CA*") at [34] and [45]–[46], citing *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400 at 405 and *Savings and Investment Bank Ltd v Fincken* [2001] All ER (D) 70 at [30]. Identifying whether a new cause of action has been introduced, requires the essential facts in the existing pleadings to be compared with the essential facts in the proposed amended statement of claim: *Smith v Henniker-Major & Co (a firm)* [2003] Ch 182 ("*Smith*") at [96]; *Philips Pension Trustees Ltd and another v Aon Hewitt Ltd and another* [2015] EWHC 1768 (Ch) ("*Philips*") at [29].

52 If the amendment does introduce a new cause of action, that cause of action must arise out of the same or substantially the same facts as those already pleaded in order to fall within O 20 r 5(5). The test is whether there is a sufficient overlap between the facts supporting the existing claim and those supporting the new claim (*Lim Yong Swan* at [29]). The inquiry here is not just limited to the consideration of essential facts (*Smith* at [96]; *Philips* at [27]). The primary

objective of the restrictions on amendment is to ensure that the defendant is not unfairly deprived of its time bar defence: *Lim Yong Swan* at [27]; *The "Virginia Rhea"* [1983-1984] SLR(R) 639 at [5].

53 The defendant argued that new causes of action had been introduced.[62] The plaintiff, for its part, contended that the amendments were just adding facts within existing causes of action, rather than adding new causes of action altogether.[63]

54 I found that the amendments did introduce new causes of action, which did not arise out of the same or substantially the same facts. The averments in the amendments alleged matters which did not fall within even a generous reading of the original claims. They brought up causes of action which were not previously covered at all, and thus must be considered "new" for the purposes of O 20 r 5(5) ROC.

55 It was clear that the proposed amended statement of claim was predicated on essential facts not found in the original pleadings. The First Amendment sought to introduce a new duty of care on the defendant as the arranger of the "end" and/or "take-out" finance.[64] This was distinct from the original duty of care pleaded which only implicated the defendant in its capacity as the arranger of the Term Loan.[65] This new duty of care also arose from essential facts which were not present in the original pleadings. The alleged acts and omissions which constituted breaches of this new duty of care, were also

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62 DWS at para 14.

63 PWS at pp 31–44.

64 Proposed ASOC at para 10.11.

65 Original SOC at paras 26b and 26c.

very distinct from those originally pleaded.[66] The Second Amendment brought in additional misrepresentations in respect of subject matters which were very different from the subject matters underlying the original misrepresentations.[67] As for the Third Amendment, nothing in the original pleadings touched on the essential facts supporting a claim in unjust enrichment. Finally, the Fourth Amendment averred an additional conspiracy, involving additional parties who were not even parties to the original conspiracy claim.[68]

56 The plaintiff claimed that some of the words found in its proposed amendments were mentioned in its existing pleadings, such as its Reply (Amendment No. 2) and various Further And Better Particulars,[69] but this did not assist its case since the words found in those other pleadings were used in wholly different contexts.

57 It was not enough that there might have been causes of action in negligence, misrepresentation and conspiracy previously. Introducing new essential facts that fall within the "labels" originally pleaded, still amounts to the addition of new causes of action: see *Letang v Cooper* [1965] 1 QB 232 at 242G–243F per Diplock LJ.

58 I therefore accepted the arguments of the defendant that these amendments were based on causes of action that were not within the original pleadings, and amounted to new causes of action.

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66 Original SOC at paras 26b and 26c; Proposed ASOC at paras 9.1(3), 9.1(7), 10.12 and 10.13.

67 Original SOC at para 26a; Proposed ASOC at paras 10.5(1), 10.5(2), 45(a)(i) and 45(a)(ii).

68 Original SOC at para 29; Proposed ASOC at paras 49 and 50.

69 PWS at para 12.2; PSS at paras 14 and 16.

59 These new causes of action did not fall within the confines of O 20 r 5(5) ROC: given how drastically different the new essential facts were from those found in the original pleadings, these new causes of action had to draw much of their support from specific factual allegations which were not at all contained in the original claim. They certainly did not arise out of the same or substantially the same facts as the original causes of action already pleaded.

Whether it was just to allow the amendments

60 What is just, has been laid out in case law. The consideration of whether it would be just to grant leave required a weighing of the applying party's need to amend and the prejudice to the opposing party's interests: *Lim Yong Swan* at [31]. The fact that a time bar is applicable would not of itself mean that an amendment should not be permitted; but it is still one of the factors that can be taken into account: *Lim Yong Swan* at [30].

61 Given all the above, it would not be just to allow the amendments. Aside from going through the other listed requirements in O 20 rr 5(2) and 5(5) of the ROC and claiming that no prejudice would be occasioned to the defendant save for the fact that it would be deprived of its limitation defence,[70] the plaintiff did not make out any other reason why refusing leave to amend would cause it (*ie*, the plaintiff) injustice. Without a clear reason why any injustice caused to the plaintiff should outweigh the defendant's accrued right of limitation, I did not think that it is just to grant the plaintiff leave to make these amendments.

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[70] PWS at pp 10–15, 31–44 and paras 18.6–18.9.

No reasonable causes of action

62 The defendant further complained that no reasonable cause of action was disclosed by some of these proposed amendments. Where the proposed amendment does not disclose any reasonable basis, and is thus liable to be struck out pursuant to O 18 r 19(1) ROC, no amendment will be allowed.[71] As to the plaintiff's new claim in unjust enrichment on the grounds that there had been a total failure of consideration (*ie*, total failure of basis), the defendant argued that there was no basis for the transaction that the plaintiff could point to as having failed. The transaction success fee was paid to the defendant by Mr Dvergsten or Treatmil directly. No contractual relationship existed between the plaintiff and the defendant.[72] The defendant also took issue with the plaintiff's new allegation of "knowing dealing", which was alleged alongside dishonest assistance or knowing receipt, claiming that "knowing dealing" is not a recognised cause of action.[73] Finally, with regards to the plaintiff's new claim for the lost profit of US$ 3 million, the defendant argued that such a claim was baseless and not recognised at law.[74] In response, the plaintiff argued that its claim for lost profit is a recognised measure of damage in tort where there is pure economic loss.[75]

63 I accepted the defendant's argument that the proposed amendments have to disclose a reasonable cause of action before they can be allowed. Just as how leave to amend a defence should not be granted where the amendment raises no reasonable defence to the claim, the same applies to applications for leave to

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71 DWS at para 104.

72 DWS at paras 92–96 and 106.

73 DWS at paras 107–109.

74 DWS at paras 110–111.

75 PSS at paras 70–72.

amend a statement of claim: *Lim Yong Swan* at [43]. This proposition of law is uncontroversial: the plaintiff's amendments have to disclose a reasonable cause of action, otherwise there is no point in allowing the amendments only to see them struck down subsequently. To clarify, this is an additional ground of objection, separate from O 20 r 5(5) ROC: see *Lim Yong Swan* at [40] and [43].

64 The plaintiff's new claim for the lost profit of US$ 3 million, which was the profit the plaintiff could have earned if the loan arrangement had been successful and the defendant had not been negligent,[76] was legally unsustainable. It is trite that there is no loss claimable on an expectation basis in tort. Damages in tort are compensatory in nature, in that it places the claimant back into the position in which he would have been, if the tort had not been committed: *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [28]. The plaintiff's case was that it would not have entered into the Term Loan Agreement if the misrepresentations and breaches of duty had not occurred.[77] Accordingly, the plaintiff's claim for profits which it would have earned had the loan transaction been completed successfully,[78] was in effect a claim for expectation damages that was contrary to the compensation principle. If the plaintiff desired to claim damages beyond the amount awarded on a compensatory basis, its proper recourse lay outside the law of torts, such as a claim in unjust enrichment.

65 However, the way in which the plaintiff had pleaded its new claim in unjust enrichment disclosed no reasonable cause of action. This new claim, in respect of the US$750,000 advisory fee received by the defendant, was

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76 Proposed ASOC at para 10.14.

77 Original SOC at para 27; Proposed ASOC at para 46.

78 Proposed ASOC at para 10.14.

predicated on a total failure of consideration (*ie*, failure of basis). For there to be a failure of basis, there must first be an identifiable basis on which the money is paid. "Basis" refers to either (a) the performance of a counter-promise or (b) a non-promissory contingent condition (*ie*, an expected event or state of affairs which neither party is responsible for bringing about). Crucially, this basis must be jointly understood by parties to the transfer: *Simpson Marine (SEA) Pte Ltd v Jiacipto Jiaravanon* [2019] 1 SLR 696 at [49]. In this regard, it is generally plausible for a direct transfer from one party to another to implicate some form of basis for the transfer, that is jointly understood by both parties. However, on the plaintiff's own case, there was no direct transfer between the plaintiff and defendant: the US$750,000 in advisory fees that the defendant received, was paid by Mr Dvergsten and/or Treatmil out of the US$6 million loan that the plaintiff had advanced to Traxiar.[79] Such indirect transfer of moneys through third parties, which are separate legal entities not in any agency relationship with one another, would not generally involve a basis that is jointly understood. This is especially so in the present case where each party involved in the flow of money had a different role in the loan transaction, and hence possess a different motivation for the transfer and/or receipt of money: the plaintiff stood in the position as a lender, Traxiar and Treatmil were the borrower and guarantor respectively, and the defendant was the arranger of the loan. The transfers interposed between the plaintiff's advancement of the loan moneys and the defendant's eventual receipt of any part of that sum in the form of advisory fee, would each be predicated on a different "basis" between the respective transferor and transferee. Accordingly, the reasons for the plaintiff's payment of moneys and the defendant's receipt of any part of that sum would be different.

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[79] Proposed ASOC at paras 5, 6, 10.11(4) and 44.

Nothing in the plaintiff's arguments or amendments raised any viable exception to this requirement for a jointly understood "basis" of transfer.

66 As regards the "knowing dealing" amendment, while the defendant was correct that there is no recognised cause of action founded on "knowing dealing", it was, I considered, clear in the context,[80] that the plaintiff was raising an issue of interference with property, as covered by dishonest assistance and knowing receipt. While the "knowing dealing" averment should be struck out, the claims arising from interference with property, as a whole, should be left intact.

Breach of Supreme Court Practice Directions

67 The defendant took issue with the failure of the plaintiff to comply with the Supreme Court Practice Directions.[81] As it was, an opportunity was given to the plaintiff to rectify this issue, so I did not consider this matter further, except in the consideration of costs.

Joinder of Mr Kilde as the second defendant

68 Mr Kilde, which the plaintiff sought to join as an additional defendant,[82] did not participate in these proceedings. As the defendant took no position on the plaintiff's application to join Mr Kilde as a second defendant,[83] I saw no reason to deny the plaintiff's application for joinder. That said, I observed that some of the claims as against Mr Kilde in the revised Statement of Claim

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80 See Proposed ASOC at para 9.1(5).

81 DWS at paras 112–118.

82 HC/SUM 4362/2020, prayer 2.

83 DWS at para 3.

(Amendment No. 1) might still be time-barred,[84] despite my directions to the plaintiff to reconsider its pleaded case and ensure that its claims against Mr Kilde were not time-barred.[85] However, as there were no arguments before me either way, I made no finding on this issue and proceeded to allow the plaintiff's application for joinder,[86] but did not approve the inclusion of claims against Mr Kilde which had been disallowed as against the defendant.[87]

Costs

69 I ordered the plaintiff to pay costs of S$22,000 to the first defendant.[88]

Conclusion

70 Having considered the various areas tabulated by the parties, I had to come to the conclusion that the defendant's objections had to be upheld, and the objected amendments refused. The plaintiff sought to introduce new, time-barred causes of action which did not arise out of the same facts or substantially the same facts as what had already been pleaded. Drastically different facts had to be alleged to support these new causes of action. The plaintiff had thus failed to make out a basis for the objected amendments to be allowed against the defendant.

71 Leave to amend was granted for those amendments that were not found to have run foul of the limitation period and which were not objected to by the

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84 See Statement of Claim (Amendment No. 1) dated 15 March 2021.

85 Notes of Evidence 2 February 2021 at p 7 lines 21–27.

86 Notes of Evidence 12 March 2021 at p 2, lines 4–5.

87 Notes of Evidence 2 February 2021 at p 7 line 29 – p 8 line 2.

88 Notes of Evidence 12 March 2021 at p 3, lines 17–21.

defendant.[89] Directions were previously given for the filing of the amendments that were allowed, as well as other consequential directions.[90] While the revised Statement of Claim (Amendment No. 1) was filed on 15 March 2021, the other consequential directions have been held in abeyance pending the appeal.

Aedit Abdullah
Judge of the High Court

Khan Nazim and Kunal Haresh Mirpuri (UniLegal LLC) for the plaintiff;
Sim Jek Sok Disa, Chan Wei Xuan Timothy and Ou Wai Hung Shaun (Rajah & Tann Singapore LLP) for the defendant.

89 Notes of Evidence 12 March 2021 at p 2, lines 1–2.

90 Notes of Evidence 12 March 2021 at p 2, lines 7–9.