

Wee Soon Kim Anthony v UBS AG (No 2)
[2003] SGHC 125

Case Number : Suit 834/2001, SIC 2632/2003
Decision Date : 06 June 2003
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Lim Chor Pee (Lim Chor Pee & Partners) for the Plaintiff; M Rani (Lim Chor Pee & Partners) for the Plaintiff; Hri Kumar (Drew & Napier LLC) for the Defendant
Parties : Wee Soon Kim Anthony — UBS AG (No 2)

Civil Procedure – Pleadings – Amendment – Amendment of Statement of Claim in course of trial – Responsibility of counsel with emphasis on efficient conduct and disposal of cases

Civil Procedure – Pleadings – Amendment – Plaintiff seeking to amend Statement of Claim in course of trial – Whether new facts were raised and time would be saved – Whether defendant would be put at a disadvantage

1 I refused an application by the plaintiff Anthony Wee Soon Kim to amend his statement of claim in this action for the fourth time. He is appealing against my order.

Background

2 The plaintiff was a client of the defendant bank UBS AG. He made foreign exchange transactions in Malaysian ringgits and American dollars through the defendant and participated in the Dynamic Floor Fund managed by it. He was unhappy with the services rendered by the defendant and its employees in these transactions which resulted in losses. When his complaints were not resolved to his satisfaction, he sued the bank.

3 The action was filed on 4 July 2001 and has come on for hearing between 26 February 2002 and 15 March 2002. The plaintiff was in the course of giving his evidence. The action is fixed for further hearing again from 23 June 2003 to 1 August 2003.

4 After the completion of the first tranche of hearing, counsel for the plaintiff Ms Engeline Teh SC discharged herself from acting further for him. Two applications were made to admit Queen's Counsel to act in her place, but both applications were refused. Mr Lim Chor Pee now acts for the plaintiff.

5 On 6 May 2003 the plaintiff applied to amend his statement of claim following the previous amendments made on 11 September 2001, 31 January 2002 and 28 February 2002.

6 An affidavit was sworn by Mr Lim in support of the application. He deposed that

6. All the documentary evidence relating to the transactions are now before the Court. The proposed amendments are based entirely on the available evidence. In essence, the issues before the Court in our submission would be based on the inference to be drawn from the documentary evidence and the legal interpretation to be put to it.

7. Therefore, in my respectful submission, *the proposed Fourth Amended Statement of Claim will shorten the trial as no new facts or documents will be involved.* (Emphasis added)

8. In summary, the issues which have now been pleaded are as follows:-

(a) Whether the Defendant has assumed the role of the Plaintiff's financial investment adviser?

(b) If so, when did the Defendant assume such a role?

(c) If the Defendant had assumed the role of the Plaintiff's financial investment adviser, did the Defendant become a fiduciary of the Plaintiff?

(d) If so, was the Defendant in breach of its fiduciary duties?

(e) Alternatively, had the Defendant committed professional negligence in advising the Plaintiff in connection with his Ringgit portfolio?

(f) If there was a breach of fiduciary duty or there is professional negligence, what are the damages sustained by the Plaintiff?

9. Several paragraphs in the existing Statement of Claim have been deleted and replaced with new paragraphs to make the narration more coherent and factual.

7 Mr Lim also submitted that the trial will be shortened if the amendments are allowed because the plaintiff would not be proceeding with the allegations of fraudulent and negligent misrepresentation and collateral contract raised by him, and will rely on breach of fiduciary duties and negligence.

8 The proposed amendments seek to delete large portions of the existing statement of claim and bring in substantial new portions. Mr Hri Kumar, counsel for the defendant prepared a table which set out the parts of the existing statement of claim affected by the proposed amendments, as well as the new amendments introduced by the proposed amendments.

9 The table showed changes in the facts alleged by the plaintiff, facts not raised before, and new breaches of fiduciary duties. New fiduciary duties are pleaded in addition to the duty "not to allow itself to be in a position in which its personal interests conflicted with the Plaintiff's interests" currently pleaded. Mr Lim did not take issue with the table or Mr Hri Kumar's analysis of the proposed amendments.

10 Mr Lim was wrong in saying that there are no new facts raised in the proposed amendments because clearly there are. The plaintiff will have to adduce evidence on the fiduciary duties and breaches alleged in the proposed amendments. There is no basis to suppose that there will be a saving of time. Time will be incurred to prove the alleged duties arose and to show that they were breached. He may also take time to explain his decision not to proceed with the allegations of negligent or fraudulent misrepresentations which were essential parts of his case up to now.

11 In support of the application Mr Lim cited *Mahan Singh v Government of Malaysia* [1973] 2 MLJ 149 and *Dr S Underwood v Ong Ah Long* [1986] 2 MLJ 246. The first case referred to two old English decisions on the amendment of pleadings, namely *Tildesley v Harper* 10 Ch D 386 and *Clarapede & Co v Commercial Union Association* 32 WR 263 where the courts held that amendments would be allowed if the other side can be compensated by costs.

12 In *Dr Underwood's case* the Privy Council held that the plaintiff's amendment of his statement of claim on the first day of trial which was "altogether lacking in specification and utterly inappropriate in

form to give fair notice of the evidence" was allowed. However the Privy Council did not endorse the trial judge's decision to give leave to amend without comment. The plaintiff was fortunate that there was a very substantial period of delay between the first and second day of the trial and further delay thereafter, which allowed the defendant to undertake the further investigation to answer the plaintiff's claim. These special circumstances do not exist in the present case.

My decision

13 If the application to amend is allowed the defendant will be entitled to amend its defence. It can seek further and better particulars to the new allegations pleaded and seek further discovery if necessary. There is no suggestion that it has forfeited any defence that may have been available to it if the amendments were made sooner, or that it is now handicapped in putting its defence because of the unavailability or loss of witnesses or documents. These are factors which favour an application but other matter must also be taken into account.

14 The whole circumstances of the plaintiff and the conduct of his case must be taken into consideration. He was an active lawyer and litigant prior to his recent retirement. He has engaged and consulted local and English counsel before he filed his action. He has had every opportunity to put his case as he and his advisors saw it.

15 From his original statement of claim filed on 4 July 2001, he has alleged that the defendant owed him fiduciary duties but failed to discharge them. Mr Mark Goh Aik Leng who acted for him after Ms Teh and before Mr Lim deposed an affidavit filed on 2 October 2002 in Originating Motion No. 22 of 2002 in support of an application to admit Queens Counsel, and identified "the scope of the fiduciary duty owed by the Defendant to the Plaintiff as private bankers" as one of the issues to be determined by the court.

16 No reason was given why this application was held back for over 13 months since the last hearing, till 7 weeks before hearing is due to resume.

17 Litigation practice has changed since *Tildesley* and *Clarapede* were decided. The judges of today

... must weigh in the balance ... the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

(per Lord Griffiths, *Ketteman v Hansel Properties Ltd* [1987] 1 AC 198 @ 220.)

18 Litigants must be aware that with increased emphasis on the efficient conduct and disposal of cases, they must be responsible in the way they conduct their cases. The fact that a litigant is able to pay costs and a proposed amendment will not cause irreparable prejudice to its adversary will not ensure that an application to amend will be granted.

19 The plaintiff did not explain his very late application to make the substantial amendments. If the amendments are allowed, there will be need for further particulars to the matters pleaded, and for further evidence on the duties of private bankers to their clients and whether any of such duties have been breached. All these will render the resumption and completion of the hearing of the case

between 23 June and 1 August 2003 unlikely.

20 The plaintiff did not persuade me that this is a proper case for further leave to amend the statement of claim at this stage for new facts and issues to be raised. I did not give him leave to amend to withdraw the claims of misrepresentation and collateral agreement as he may regard the proposed amendments to be a package, and the withdrawals to be made only if the additions are allowed. If the plaintiff nevertheless wishes not to proceed with any part of his case, he has only to inform the court and the defendant of his decision in clear terms.

21 I therefore dismissed the plaintiff's application and ordered that he pays the costs of the application. Mr Hri Kumar asked that costs be fixed at \$5000. Mr Lim expressed no views on the matter. I felt that \$5000 was reasonable in view of the lateness and scope of the proposed amendments, the work involved in opposing the application, and I ordered that sum to be paid.

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