Lam Soon Oil and Soap Manufacturing Sdn Bhd and Another v Whang Tar Choung and Another
[2001] SGHC 316

Case Number : Suit 974/2000, SIC 2097/2001

Decision Date : 17 October 2001

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Davinder Singh SC, Philip Jeyaretnam, Harpreet Singh Nehal, Jamie Yip and Tan Kok Peng (Helen Yeo & Partners) for the plaintiffs; Kenneth Tan SC and Kevin Kwek (Kenneth Tan Partnership) for the defendants

Parties : Lam Soon Oil and Soap Manufacturing Sdn Bhd; Another — Whang Tar Choung; Another

Civil Procedure – Pleadings – Amendment – Application for leave to amend defence on first day of trial – Defendant seeking to raise issues of time bar and laches – Same issues pleaded in earlier Malaysian suit – Whether leave should be granted – Relevant factors – Whether undue delay exists – Whether prejudice to other party

: The first defendant, Whang Tar Choung (`WTC`), has certain trade marks registered in his name (`the trade marks`). On 15 November 2000 he assigned the trade marks to the second defendant, Forward Supreme Sdn Bhd (`Forward Supreme`). The first plaintiff, Lam Soon Oil and Soap Manufacturing Sdn Bhd (`LSOS`) and the second plaintiff, Lam Soon (M) Bhd (`LSMB`) claim that WTC was holding those trade marks on trust for them and seek, through this action to obtain their transfer to LSMB.

On 5 September 2001, the first day of the trial, Mr Kenneth Tan, counsel for the defendants applied on behalf of WTC to amend his defence. I adjourned the hearing of his application until the following day to enable counsel for the plaintiffs, Mr Davinder Singh, to consider it as he had no prior notice of it. On 7 September, after hearing submissions on both sides, I allowed Mr Tan`s application in respect of one paragraph but dismissed it in respect of the other two paragraphs. On 3 October 2001, WTC appealed against my decision to the extent that it dismisses his application to amend his defence and I now give my written grounds of decision.

Interlocutory stage

It is necessary to set out the manner in which this action has progressed at the interlocutory stage, at least in respect of the material events. The plaintiffs filed the writ along with their joint statement of claim on 17 November 2000. On the same day they applied for and obtained an interim injunction to forbid the defendants from transferring or otherwise disposing of the trade marks until after the trial of the action.

On 12 December 2000, in SIC 1447/2000, WTC applied for the action to be stayed or dismissed on the ground of forum non conveniens, alternatively that it was an abuse of the process of the court. WTC`s ground was that Malaysia was the proper and more convenient forum for the resolution of this dispute. Also he alleged that the plaintiffs had commenced a similar action in Malaysia which had been dismissed on 25 October 2000 for want of prosecution. The plaintiffs had not appealed against that order and the present action was therefore an abuse of the process of the court.

WTC`s application was heard by Selvam J. On 15 March the judge dismissed it with costs and ordered the defendants to file their defence within three weeks. On 30 March 2001, WTC filed an application to stay proceedings pending an appeal (which was yet to be filed) against that order. However, the stay application was dismissed on 20 April, and WTC withdrew his appeal against the order of Selvam J shortly thereafter.

Meanwhile discovery and other applications were proceeded with. There were two subsequent amendments to the statement of claim, on 21 November 2000 and 5 March 2001. In the event WTC and Forward Supreme filed their separate defences on 5 April 2001.

On 20 August 2001 the defendants applied to vacate the trial dates fixed for 3-21 September 2001 on four grounds:

(1) that the plaintiffs had taken out committal proceedings against WTC in respect of an alleged breach of certain undertakings he had given to the court in proceedings related to the present action;

(2) that one of the directors of Forward Supreme, a material witness for the defendants, was due to give birth during the period fixed for the trial;

(3) that the plaintiffs had given late discovery of some documents and were proposing to call additional witnesses; and

(4) that the defendants wished to call an expert witness on the valuation of the trade marks.

It appears that this application was heard by the Registrar on 22 August. He re-fixed the trial dates to 5-21 September. The defendants immediately lodged an urgent appeal. This was heard that very afternoon by Lai Siu Chiu J. She dismissed it after securing an undertaking from the plaintiffs that they would not proceed with the committal proceedings until after the trial.

The affidavits of evidence-in-chief were exchanged on 31 August 2001.

Amendment application

The plaintiffs` case is that although the trade marks were registered in WTC`s name, he had held them as trustee for them. There are various grounds upon which the plaintiffs base this assertion, but it is not necessary for me to go into the details. WTC`s defence is that the trade marks belonged to him beneficially and he had never held them on trust for either plaintiff. He contended that the plaintiffs, who had been using those trade marks in Malaysia, did so under a licence granted by him. I should state that this description gives only the bare essentials of the pleadings. There had been a tussle between WTC and his brother, Whang Tar Liang (`WTL`) in relation to the Singapore holding company of the plaintiffs, Lam Soon Cannery Pte Ltd (`LSC`). In CWU 321/99, WTL had petitioned to wind up LSC which was mostly owned by WTC and WTL and their nominees. The parties eventually settled the matter after protracted negotiations. However, they disagree as to one of the terms of that settlement which concerns the trade marks. Therefore a large part of the statement of claim and the defence of WTC dealt with those negotiations. But I need not go into the details here save to say that the statement of claim ran into 18 pages with 23 paragraphs while the defence of WTC ran into 29 pages with 64 paragraphs.

The trial started at 10am on 5 September 2001. Just before that on the same morning, WTC`s

solicitors filed this application for leave to amend the defence. The application was placed before me to be dealt with before commencement of the trial. Naturally WTC`s solicitors had not yet managed to serve the SIC on the plaintiffs` solicitors. Mr Davinder did not object to this but asked for the trial to be stood down to take instructions from his clients. I adjourned the hearing to 11am. When it resumed, Mr Davinder requested further time to consider the application, in particular in respect of the law. However, he was prepared to proceed with the plaintiffs` opening statement and work on his submissions for this application overnight. This would enable the court hearing time to be fully utilised. In the event the trial commenced, but at Mr Tan`s insistence, without prejudice to WTC`s position that the application was made before the start of the trial.

The hearing of this application continued on 6 September. At the end of it, I granted Mr Tan`s application to file an affidavit in support of two paragraphs of the proposed amendments. This was done on 7 September with the filing of an affidavit by WTC`s son, Whang Sun Tze (`WST`).

WTC`s application was for leave to amend his defence by adding four paragraphs. Mr Tan characterised them as follows:

> (1) Paragraph 47, to plead that even if there was an implied contract, the plaintiffs are out of time by operation of s 6(1)(a) of the Limitation Act (Cap 163, 1996 Ed). As I had allowed this amendment, it is therefore not the subject of the appeal and I need not deal with it.
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> (2) Paragraph 57, to plead that even if WTC had held the trade marks on trust, by his refusal to execute a deed of assignment in 1987, he was in breach of trust at the time. Therefore the cause of action ran from that date, and is now time-barred pursuant to s 22(2) of the Limitation Act, if it were a constructive remedial trust.
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> (3) Paragraph 58, to plead, in case s 21(1)(b) of the Limitation Act is applicable, the defence of laches.
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> (4) Paragraph 59, to plead res judicata in that the issues of time bar and laches have been conclusively determined in the Malaysian proceedings. However, on 7 September Mr Tan withdrew the application in respect of this paragraph and again, I need not deal with it.

I set out below the additional paras 47, 57 and 58 that WTC applied to add to his defence:

> *47. Further and/or in the alternative, with respect to paragraph 10 read with paragraphs 12 and 14 of the Re-amended Statement of Claim, to the extent that the Plaintiffs allege an implied contract existed between the 2nd Plaintiffs and the 1st Defendant, which in any event is denied, any cause of action therefrom would have accrued by February/March 1987 when the 1st Defendant did not accede to the requests to execute the Deed of Assignment assigning the Trademarks to the 2nd Plaintiff. The 1st Defendant contends that the Plaintiffs are time barred pursuant to Section 6 of the Limitation Act (Cap 163).*
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> *Particulars*
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> *a. In 1986, WTL executed a Deed of Assignment purporting to assign to the 2nd Plaintiffs Trademarks registered in the name of the 1st Defendant. The 2nd Plaintiffs` application to register the said Trademarks in the Malaysian Trade Marks Registry was rejected on the basis that the Trademarks were registered in the name of the 1st Defendant.*
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> *b. By way of a letter dated 23 December 1986 from Adnan Sundra & Low to the 2nd Plaintiffs, the 2nd Plaintiffs were informed by their then solicitors that the application to register the Trademarks in their name was rejected because the Trademarks were registered in the name of the 1st*

Defendant.

c. Adnan Sundra & Low apparently prepared a fresh Deed of Assignment to be executed by the 1st Defendants. The fresh Deed of Assignment was apparently forwarded to the 2nd Plaintiffs together with Adnan Sundra & Low`s letter of 23 December 1986.

d. In a memo dated 3 March 1987 from Vivian Thian to Tan Kit Heng, Vivian Thian informed Tan Kit Heng that the fresh Deed of Assignment was forwarded to the 1st Defendant in January 1987 and the 1st Defendant was requested to execute the Deed of Assignment. The 1st Defendant however did not accede to the request to execute the Deed of Assignment.

57. Further and/or in the alternative, with respect to paragraphs 11, 15, 16, and/or 17 of the Re-amended Statement of Claim, to the extent that the Plaintiffs alleged that the 1st Defendant is in breach of trust, which is in any event denied, any cause of action therefrom would have accrued by February/March 1987 when the 1st Defendant did not accede to the request to execute the Deed of Assignment assigning the Trademarks to the 2nd Plaintiff. The 1st Defendant contends that the Plaintiffs are time barred pursuant to Section 22(2) of the Limitation Act (Cap 163).

Particulars

a. The 1st Defendant repeats the particulars enumerated at paragraph 47 herein.

58. Further and/or in the alternative, despite the Plaintiffs being fully aware of the facts relied on in paragraphs 10 to 17 of the Re-amended Statement of Claim, and being fully aware that by February/March 1987 the 1st Defendant did not accede to the Plaintiffs` requests to execute a Deed of Assignment assigning the Trademarks registered in his name to the 2nd Plaintiffs, the Plaintiffs are nevertheless guilty of prolonged, inordinate and inexcusable delay in prosecuting their claim and seeking the relief claimed herein and the Plaintiffs acquiesced in the matters complained of, and/or by their conduct rendered it inequitable for the Plaintiffs to commence this action and/or caused prejudice to the 1st Defendant. In the premises, the Plaintiffs are barred by laches from claiming the alleged or any relief/reliefs against the 1st Defendant and/or it is inequitable and unjust to grant the Plaintiffs the alleged or any relief/reliefs.

Particulars

a. The 1st Defendant repeats the particulars enumerated in paragraph 47 herein.

b. By February/March 1987, the Plaintiffs were well aware that the 1st Defendant did not accede to the Plaintiffs` request to execute the Deed of Assignment.

c. Notwithstanding the above, the Plaintiffs did not take any steps to assert their alleged beneficial interest in the Trademarks, until September 1999 when the 2nd Plaintiffs commenced the Malaysian Action which was struck off for want of prosecution on 25 October 2000.

d. The 1st Defendant is presently 80 years of age. The facts averred to in paragraphs 10 to 17 of the Re-amended Statement of Claim occurred 17 years ago. Due to the long lapse in time, the 1st Defendant`s memory of the events surrounding those events would have significantly deteriorated. It would thus be prejudicial for the 1st Defendant to now defend himself against allegations of events that occurred so long ago when there are no good reasons why the Plaintiffs did not assert any alleged rights at an earlier time.

In his supporting affidavit, WST explained that the reason for the late application was principally due to the fact that the defendants had changed solicitors in July 2001, and to the pandemonium caused by WTL`s parallel committal application against WTC. In respect of the change of solicitors, WST said this at para 3 of his affidavit:

> *In July 2001, my father and Forward Supreme were considering changing lawyers in the instant suit. In particular, Chong Boon Leong the partner in charge of the instant suit was likely to become a witness ...*

However, Mr Davinder pointed out that while it may be true that the change of solicitors was effected sometime in late July (notice of change of solicitors was filed on 3 September 2001), WST had studiously avoided saying when Mr Chong had advised him of the need to change solicitors. Mr Davinder said that as early as 1 March 2001, at the hearing before Selvam J on forum non conveniens, the plaintiffs had argued that one reason that Singapore was the more appropriate forum was because lawyers from Messrs Rajah & Tann (Mr Chong`s firm) would have to give evidence in this suit. By March 2001 at the latest, WTC should have been advised of this.

WST also deposed that after the parties exchanged affidavits evidence-in-chief on 31 August 2001, they discovered that one of the plaintiffs` witnesses, Thian Yew Fong (`Thian`) had deposed that on several occasions in 1987 she had requested WTC to sign an assignment in respect of the trade marks but he had refused to do so. WST said that this was consistent with WTC`s affidavit evidence-in-chief where he said that he did not recall being approached to transfer the trade marks and in any event would not have agreed to it. WST said that on 3 September his counsel told him that he was considering amending WTC`s defence along the lines of the present application. To this Mr Davinder said that in CWU 321/99 which was taken out as far back as 1999, WTL had deposed that WTC had consistently failed, refused or neglected to transfer the trade marks despite his requests. Therefore WTC`s solicitors ought to have taken up this point at the outset.

More telling is the following fact. In October 1999 LSMB commenced an action in the Kuala Lumpur High Court against WTC, LSC and LSOS in respect of the trade marks. At the time LSC was controlled by WTC and parties aligned with him. WTC`s defence in that suit was filed in January 2000. It contains the following paragraphs (WTC being the first defendant and LSC being the second defendant):

> *27. Further or in the alternative the 1st Defendant will contend that the Plaintiff`s alleged cause or causes of action herein did not arise within the time limited under the Limitations Act 1953 and is therefore barred.*
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> *28. Further or in the alternative the 1st Defendant will contend that although the Plaintiff was at all material times fully aware of the facts relied on in the Statement of Claim, the Plaintiff was nevertheless guilty of prolonged, inordinate and inexcusable delay in bringing this action and seeking the relief claimed herein and the Plaintiff thereby cause or permitted the 1st Defendant to believe as in fact the 2nd Defendant (**sic**) did believe that the Plaintiff did not intend to make the claim herein or any claim against the 1st Defendant and the 1st Defendant has thereby been prejudiced.*
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> *28.1 By reason of the matters aforesaid the Plaintiff by its conduct waived its right (if any which is denied) to claim the alleged or any relief against the 1st Defendant and it is inequitable and unjust to grant the Plaintiff the*

alleged or any relief.

29. Further or in the alternative the 1st Defendant contend that by reason of the matters aforesaid and in the circumstances the Plaintiff is estopped from seeking any of the alleged remedies or relief sought herein.

Similar paragraphs appear in the defence filed by LSC. Furthermore, in an affidavit filed in February 2000 to oppose LSMB`s application for injunction in the Kuala Lumpur suit, WTC had raised issues of laches and time bar. WTC was clearly aware of the issues of limitation and laches as far back as January 2000. It was his deliberate choice in the present proceedings not to proceed on those grounds until the start of trial. There is also evidence to suggest that his previous solicitors also knew, independently of WTC, that those defences had been pleaded in the Kuala Lumpur suit. In CWU 321/99, Fong Kok Keong, a director of one of the respondents, TC Whang & Co Pte Ltd, deposed an affidavit on 24 January 2000 in which he exhibited the defence of LSC in the Kuala Lumpur suit. And the solicitors acting for that respondent are none other than Messrs Rajah & Tann. Therefore WTC`s solicitors must have been aware at a much earlier stage that such matters had been raised in the Malaysian suit.

Mr Davinder opposed the application on two grounds:

(1) The proposed amendments do not disclose good defences. In respect of the proposed para 57, there was no evidence of refusal in 1987. In any event, in the case of breach of trust, there is a continuing duty to perform. The right to sue arising from the 1987 breach may be time-barred, but a beneficiary has a continuing right to demand the trustee to act in accordance with the trust. Mr Davinder said that he was instructed that if WTC had pleaded this at the outset, the plaintiffs would have pleaded fraud so as to avail themselves of s 21(1)(a). He informed the court that his instructions were that his clients had actually instructed their instructing solicitor to plead fraud but the latter had advised that in view of the strength of the other evidence and the difficulties with fraud, they should not do so. However, his clients have since instructed that if WTC raises question of s 22, then they would apply to amend SOC to plead fraud.

(2) The amendments will prejudice the plaintiffs. The parties had proceeded on the assumption that, in respect of the issue of repudiation, what had transpired before 15 September 2000 was irrelevant. If the amendments were allowed, new evidence as to events in 1984 and 1987 would have to be adduced and instructions would have to be taken on conversations in 1990 between WTL and WTC. Furthermore, additional evidence would be needed as to why the defence of laches was not available.

White Book Ketteman Ketteman The primary basis for my decision is the need to ensure a fair trial of the action. The following factors are material to that decision:

(1) As a general rule, a party is allowed to make any amendment to his pleadings that is reasonably necessary for the due presentation of his case on costs provided there has been no undue delay on his part and no prejudice to the vested right of the other party - see para 20/0/2. This is to enable consideration of the real questions in controversy between the parties.

(2) However, this must be balanced against the need to ensure that the trial proceeds without undue delay. The present policy of the courts is to ensure that actions are brought to trial and disposed of speedily, subject to justice being done to the parties. In the present case to allow the amendments would not only have meant that the present trial dates, 13 hearing days, would have to be vacated, but also a prolonged interlocutory process as the plaintiffs would be pleading fraud. In the particular the circumstances of this case, with the protagonists WTC and WTL in such advanced age, further delays could very well prejudice the fair trial of the matter. Indeed, WTC himself had said that he was 80 years of age and his memory had significantly deteriorated.

(3) `There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time` - per Lord Griffiths in **Ketteman v Hansel Properties** [1987] AC 189[1988] 1 All ER 38 at 62. Although in `s case, the application to amend was made at the end of the trial, nevertheless the point remains that the impact of these two types of amendments are quite different and would therefore be treated differently.

(4) The issues of time bar and laches had been pleaded by WTC in the Kuala Lumpur suit and he had even filed an affidavit there alleging those matters. He chose to sit on his hands and made no such allegations in the present action until the first day of trial. I have no doubt that there was undue delay on the part of WTC. WST seems to suggest that the omission was caused by his previous solicitors. If this is alleged I need only to cite from the speech of Lord Griffiths in `s case ([1987] AC 189 at 219-220; [1988] 1 All ER 38 at 61-62):

> *... if a defence of limitation is not pleaded because the defendant`s lawyers have overlooked the defence the defendant should ordinarily expect to bear the consequences of that carelessness and look to his lawyers for compensation if he is so minded.*
>
> *...*
>
> *Another factor that a judge must weigh in the balance is 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 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.*

(5) Delay in the disposition of this suit would cause prejudice to the plaintiffs in that there is uncertainty as to whether they should continue to develop the trade marks further.

In view of the factors enumerated above, in particular the fact that WTC had pleaded the same matters in January 2000 in the Kuala Lumpur suit, the prolongation of the trial that would be caused if the amendments were allowed and the prejudice that would be caused in view of the advanced ages of the protagonists, I was of the view that the application should be refused in respect of proposed paras 57 and 58. On the question of costs, in view of the extensive arguments made, and particularly the fact that the plaintiffs` solicitors had to work urgently to prepare their submissions while the trial proceeded without substantial pause, I ordered costs to be paid by WTC to the plaintiffs (in one set) as follows:

(1) costs of application fixed at $30,000; and

(2) costs occasioned by the amendment to be taxed.

Outcome:

Application allowed in part.