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

[2023] SGHC 223

Suit No 572 of 2021 (Summons No 669 of 2023)

Between

Riviera Co., Ltd.

… *Plaintiff*

And

Toshio Masui

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Pleadings — Amendment]

TABLE OF CONTENTS

INTRODUCTION 1

FACTS 2

THE PARTIES 2

BACKGROUND TO THE DISPUTE 2

PROCEDURAL HISTORY 2

APPLICABLE LAW 6

REASONS FOR MY DECISION 8

CONCLUSION 11

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Riviera Co, Ltd
v
Toshio Masui

[2023] SGHC 223

General Division of the High Court — Suit No 572 of 2021 (Summons No 669 of 2023)
Philip Jeyaretnam J
3 July 2023

16 August 2023

Philip Jeyaretnam J:

Introduction

1 Applying to amend one's defence is often important to ensure that the real issues in controversy between the parties are determined, especially if the process of litigation, including discovery, brings to light new facts. However, it may sometimes be little more than a belated attempt to prolong litigation and postpone judgment. The latter was the case here, and I dismissed the defendant's application to amend to introduce a new defence filed *after* the plaintiff had succeeded via a combination of a trial on preliminary issues and a striking out application in defeating the defendant's pleaded defences to the plaintiff's action herein. It was plain to me that the proposed amendment was as unsustainable as, and in large measure a paraphrasing of, its already struck out defence.

2 On 28 July 2023, the defendant appealed against my dismissal of his application to amend, and these grounds of decision explain why I dismissed it.

Facts

The parties

3 The plaintiff is Riviera Co, Ltd, a Japanese company. On 1 April 2021, the plaintiff succeeded to all the rights and obligations of another Japanese company, Aoi Corporation, by what is known as an absorption merger. Aoi Corporation bought, sold and leased real estate and also brokered real estate transactions. The defendant is a Toshio Masui, a Japanese national. I will refer to the parties respectively as Riviera Co and Mr Masui. Mr Masui is the founder and representative of Orange Grove Capital Management Pte Ltd, a real estate company incorporated in Singapore ("Orange Grove Capital").

Background to the dispute

4 This action was for the enforcement of a foreign final and binding monetary judgment granted by the Tokyo District Court on 6 February 2020 and upheld by the Tokyo High Court on 22 October 2020. Mr Masui did not appeal further. The Tokyo District Court judgment was granted in respect of a loan agreement dated 16 January 2015 ("the Loan Agreement").

Procedural history

5 This action was commenced on 1 July 2021. There were two amendments made by Riviera Co in respect of its name. Mr Masui raised two defences. One was that under Japanese law certain formal notice and certification requirements had not been met and hence the Tokyo judgments were not enforceable by Riviera Co ("the first defence"). The second was that

Version No 1: 16 Aug 2023 (12:51 hrs)

the Tokyo District Court judgment had been procured by fraud and/or its enforcement would be contrary to public policy ("the second defence").

6 On 30 January 2023, I heard the trial of the first defence as a preliminary issue. Experts in Japanese law testified and were cross-examined. I ruled in favour of Riviera Co. On the same day, I heard Riviera Co's application to strike out the second defence, and I again ruled in Riviera Co's favour. There was no appeal from my decision.

7 In striking out the second defence, I recorded the following:

> I strike out paragraph 15 of the Defence (Amendment No 2) on the ground that the allegations relied on are contrary to the facts found in the decisions of the Tokyo Courts. Further, the defendant has withdrawn his allegation that the judgment was obtained by fraud. Insofar as the defendant has contended that the judgment is contrary to the public policy of Singapore because it enforces a contract that was a fraud upon MAS even though a valid contract this is not what is pleaded in paragraph 15. What is pleaded is that the judgment is contrary to public policy because the contract it enforces was obtained by misrepresentation etc a defence which was rejected by the Tokyo courts.
>
> The defendant has indicated he wishes to file an application to amend the defence to insert *a defence of deception of MAS by himself and the plaintiff* and this course of action is not precluded by my order striking out paragraph 15 as it stands. If he wishes to file such an application he should do so within a time to be limited, for the fixing of which I will hear defendant's counsel shortly. Thereafter, directions may be given for the further conduct of proceedings so as to bring them to an end.
>
> [emphasis added]

8 Thus, at the hearing on 30 January 2023, I was ready to enter judgment against Mr Masui pursuant to Rules of Court O 18 r 19(1) (2014 Rev Ed), and would do so unless Mr Masui filed an application to amend within the time granted to him and in due course obtained leave to amend. After hearing

Version No 1: 16 Aug 2023 (12:51 hrs)

counsel, I directed that any amendment application be filed by 20 February 2023. I later extended this to 13 March 2023, when this amendment application was filed. The new defence had two limbs:

(a) the underlying cause of action was to enforce a contract to deceive the Monetary Authority of Singapore ("MAS"); and

(b) the underlying cause of action was to enforce a contract which was not unlawful per se but entered into with the object of committing an illegal act.

9 The proposed amendment read in full as follows:

> The Defendant avers that the enforcement of the Judgment should not be allowed as its underlying cause of action was to enforce a contract which is contrary to the public policy of Singapore. The underlying cause of action in the Judgment was to enforce a contract to deceive public authorities. Alternatively, the underlying cause of action in the Judgment was to enforce a contract which was not unlawful per se but entered with the object of committing an illegal act.
>
> **Particulars**
>
> (a) Around early 2015, Aoi Corporation was working with Orange Grove on a project called "Project Qualia", which was a resort development project centred on Japanese-themed luxury membership hotels.
>
> (b) Aoi Corporation had substantial control over Orange Grove as Aoi Corporation was the primary financier for Orange Grove and Project Qualia. Aoi Corporation effectively controlled the board of directors of Orange Grove. At the time, Orange Grove had three directors – the Defendant, one Mr Go Okazaki ("**Mr Okazaki**") and Mr Watanabe Kobayashi (a representative from Aoi Corporation). In most board decisions, Mr Okazaki deferred to Aoi Corporations as Aoi Corporation was the primary financier for Orange Grove.
>
> (c) Around January 2015, Orange Grove was advised by its lawyers and the MAS that a capital injection of S$3,500,000 would be required to meet the Base Capital

Version No 1: 16 Aug 2023 (12:51 hrs)

requirement of S$250,000 for a CMS License, and that Orange Grove would be required to maintain a Base Capital of S$250,000 at all times.

(d) The alleged Loan Agreement was orchestrated by Aoi Corporation as part of a series of related transactions (including an injection JPY320,000,000 by Aoi Corporation into Orange Grove in January 2015) to deceive the Monetary Authority of Singapore ("**MAS**") that there would be sufficient assets to meet and maintain a base capital requirement of S$250,000 imposed by MAS in order for Orange Grove to obtain a capital markets services license ("**CMS License**") from the MAS.

(e) However, Aoi Corporation never intended for Orange Grove to maintain the Base Capital of S$250,000 required by MAS, and caused Orange Grove to give deceptive statements to the MAS stating that Orange Grove would maintain the Base Capital of S$250,000 required by MAS.

(f) This is an offence under Section 92 of the Securities and Futures Act 2001 as Aoi Corporation caused Orange Grove to give false and/or misleading statements that Orange Grove would maintain the Base Capital of S$250,000 required by MAS.

(g) This is also an offence under Section 97C of the Securities and Futures Act 2001 as Aoi Corporation knew that the arrangements related to the alleged Loan Agreement were insufficient for Orange Grove to meet its obligation of maintaining the Base Capital of S$250,000 required by MAS.

(h) Orange Grove in fact breached its obligation to maintain the Base Capital in March 2015. In March 2015, Orange Grove's base capital fell to S$17,022, and Orange Grove failed to satisfy the base capital and financial resources requirements prescribed under the Securities and Futures (Financial and Margin requirements for Holders of Capital Markets Services Licences) Regulations.

10 The proposed amendment differed from that foreshadowed on 30 January 2023 in that Mr Masui did not aver that he too was a party to the alleged deception of MAS. Instead, all blame was placed on Aoi Corporation, who was alleged to have effective control over Orange Grove Capital even

Version No 1: 16 Aug 2023 (12:51 hrs)

though it nominated only one member of the board, a board which comprised two others including Mr Masui. The proposed amendment avers knowledge and intention only on Aoi Corporation's part: see particulars (e) and (g).

Applicable law

11 This application was made under O 20 r 5 of the Rules of Court (2014 Rev Ed), which is the edition of the Rules of Court applicable to this matter. That provision gives the court the discretion to "at any stage of the proceedings allow… any party to amend his pleading, on such terms as to costs or otherwise as may be just…".

12 After my decision in this matter, Goh Yihan JC released his judgment in a matter under the Rules of Court 2021 concerning an application to amend sought after entry of summary judgment in the case of *Wang Piao v Lee Wee Ching* [2023] SGHC 216. In that judgment, he undertook a comprehensive survey of the case law, and at [40] formulated the following three stage framework:

> (a) First, the court should determine the stage of proceedings at which the amendments are sought. This would affect how the general principles apply. More broadly, the later an application is made, the stronger would be the grounds required to justify it.
>
> (b) Second, the court should consider whether the amendments sought would enable the real question or issue in controversy between the parties to be determined. It is relevant to consider whether the application is made in good faith, and whether the proposed amendments are material.
>
> (c) Third, the court should consider whether it is just to allow the amendments, by assessing, *eg*, whether the amendments would cause any prejudice to the other party which cannot be compensated in costs, and whether the applying party is effectively asking for a second bite of the cherry.

13 At [41(b)], Goh JC amplified materiality as follows:

Version No 1: 16 Aug 2023 (12:51 hrs)

> … When considering whether the proposed amendments are material, the applying party must establish that there is a fair or reasonable probability that the pleadings disclose a *bona fide* defence.

14 Goh JC's judgment provides a helpful overview and synthesis of the case law. I would add to his identification of the inverse relationship between stage of proceedings and the court's readiness to grant amendments the following gloss. This inverse relationship is explained by the operation of two complementary factors, one concerning the public interest in fair access to justice and the other the balance to be struck between the private interests of the parties. Fair access to justice means that litigants should not be punished for mistakes in their pleadings and should be given the opportunity to amend them where the other party can be compensated for any prejudice by an award of costs and grant of additional time or other consequential directions. But at the same time, judicial resources are scarce, which means that litigants should exercise reasonable diligence and bring forward their cases or defences at the appropriate stage of proceedings. As for the balance of private interests, the inconvenience and strain on the other party caused by an amendment worsens the later an amendment is sought. When an amendment is sought only after the original claim or defence has proved unsustainable, then the party seeking the amendment has a considerable burden of explanation concerning why it was not sought earlier.

15 Returning to the question of materiality, "leave to amend a defence should not be granted where the amendment raises no reasonable defence to the claim": *per* the Court of Appeal in *Lim Yong Swan v Lim Jee Tee and another* [1992] 3 SLR(R) 940 at [43].

Version No 1: 16 Aug 2023 (12:51 hrs)

Reasons for my decision

16 This application to amend was brought after trial of Mr Masui's first defence as a preliminary issue and after striking out of his second defence. It was filed about 21 months after the proceedings in Singapore began, about 40 months after the Tokyo District Court judgment and about eight years after the original transaction. The significance of this was that Mr Masui had had ample time to consider together with his advisers what his defences to liability might be, and that his delay in making the application raised the question of whether he was choosing to raise defences in a piecemeal fashion for purposes of delay. This in turn raised the question of his *bona fides*. Mr Masui provided no proper explanation for his delay. Allowing an amendment at this late stage would undoubtedly prejudice Riviera Co, who as a foreign judgment creditor has been entitled to the fruits of its judgment for more than three years.

17 Given the lateness of the application, and the lack of proper explanation for the delay, as well as the prejudice to Riviera Co, I considered it all the more important to scrutinise the viability of the proposed defence closely.

18 In my judgment, the proposed amendment failed to raise any reasonable defence. This was first because on its face it did not implicate or impugn the Loan Agreement itself. It did not plead that the Loan Agreement was a sham drawn up to deceive MAS or that the loan was not in fact made. Rather it made allegations concerning Aoi Corporation's motivations and intentions in respect of maintaining the base capital requirement of S$250,000. These allegations raised at most a collateral matter which it would be for MAS to investigate and consider whether any offence was committed by Riviera Co under s 97C of the Securities and Futures Act 2001 (2020 Rev Ed) ("Securities and Futures

Version No 1: 16 Aug 2023 (12:51 hrs)

Act 2001"). Mr Masui's counsel candidly confirmed that MAS has taken no action.

19 Secondly, even if the proposed amendment had averred that the Loan Agreement was a sham or the loan not made, such an averment would be precluded by the findings of the Tokyo District Court which are binding on parties (Mr Masui having given up on or failed in any defence that its judgment was procured by fraud). The Tokyo District Court had already held that the Loan Agreement was entered into and the loan disbursed (albeit with the flow of funds being directly to Orange Grove Capital), and its judgment was upheld by the Tokyo High Court. The Tokyo High Court also held that the Loan Agreement was "valid and its intent was not falsely expressed".[1] It followed from these findings that the Loan Agreement itself was not "a contract to deceive public authorities".

20 Turning to the alternative ground that it was a lawful contract entered into with the object of committing an illegal act, there was no clear pleading of how the entry into the Loan Agreement and the disbursement of the loan would be tied to the commission of an illegal act. Logically, there was no link. The Loan Agreement stood in the background rather than as part of any scheme to deceive, even if there was such a scheme. Even if the plaintiff "knew that the arrangements related to the alleged Loan Agreement were insufficient for Orange Grove [Capital] to meet its obligation of maintaining the Base Capital of S$250,000 required by MAS" this did not mean that the Loan Agreement had the object of causing Orange Grove Capital to fail to meet the capital requirement or of disguising Orange Grove Capital's failure to meet the capital requirements.

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1 Yasuhiro Watanabe's 1st Affidavit dated 27 September 2021 at Exhibit "YW-7", p 89.

Version No 1: 16 Aug 2023 (12:51 hrs)

21 This analysis was strengthened by Mr Masui's change of position since the hearing on 30 January 2023. Contrary to what was suggested he would do at that hearing, the proposed amendment did not include any averment that Mr Masui shared the object of causing or disguising Orange Grove Capital's failure to meet capital requirements. This means that at the time when he received the loan, Mr Masui must be taken to have understood his obligations under the Loan Agreement, including to repay the loan at the end of its term.

22 Counsel for Mr Masui cited the Court of Appeal decision in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363, at [35], describing the "broad and general category of contracts illegal at common law comprising contracts which are not unlawful *per se* but entered into with the object of committing an illegal act. This category depends on the intention of one or both of the contracting parties to break the law at the time the contract was made" [emphasis in original omitted].

23 The illegal act was pleaded to be that Aoi Corporation "caused Orange Grove [Capital] to give deceptive statements to the MAS stating that Orange Grove [Capital] would maintain the Base Capital of S$250,000 required by MAS" in breach of Section 92 of the Securities and Futures Act 2001. This section concerns false or misleading statements in connection with applications for the grant or variation of a capital markets services licence ("CMS Licence").

24 Mr Masui's own evidence was that the funds under the Loan Agreement were paid directly by Aoi Corporation to Orange Grove Capital as a capital injection in order to obtain the CMS Licence. Orange Grove Capital then used the funds from the capital injection to repay liabilities it owed to Aoi

Version No 1: 16 Aug 2023 (12:51 hrs)

Corporation.[2] This could not be said to have been an illegal object of the entry into the Loan Agreement. Indeed, shareholders' injecting equity which is then used to pay off liabilities of the company is a commonplace method of improving a company's liquidity and solvency.

25 A further point was that Mr Masui's original plea by his second defence included the contention that the Loan Agreement was "illegal and unenforceable". This plea was struck out by me on 30 January 2023 as being unsustainable. I agreed with Riviera Co's counsel that much of the proposed amendment was a paraphrase of Mr Masui's second defence and unsustainable for the same reasons.

Conclusion

26 While I did not consider the application to amend as in itself an abuse of process, I concluded that it was a last-gasp grasping at a straw that was insufficient to keep the defence afloat.

27 For these reasons, I dismissed Mr Masui's application to amend his defence and proceeded to enter judgment as foreshadowed on 30 January 2023.

Philip Jeyaretnam
Judge of the High Court

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2 Toshio Masui's 3rd Affidavit dated 19 September 2022, paras 16, 20 and 21.

Version No 1: 16 Aug 2023 (12:51 hrs)

Tan May Lian, Felicia and Goh Enchi, Jeanne (TSMP Law Corporation) for the plaintiff;
Eoon Zizhen, Benedict (Wen Zizhen) and Daren Kim Chang Jin (Oon & Bazul LLP) for the defendant.

Version No 1: 16 Aug 2023 (12:51 hrs)