IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1997] SGCA 46

CA 23/1997

Between

Teo Han Tong

… *Appellant*

And

Tecta Pacific (S) Pte Ltd (in members' voluntary liquidation)

… *Respondent*

GROUNDS OF DECISION

Civil Procedure — Pleadings — Amendment

Version No 1: 20 Nov 2026 (00:35 hrs)

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Teo Han Tong v Tecta Pacific (S) Pte Ltd (in members' voluntary liquidation)

[1997] SGCA 46

CA 23/1997
Karthigesu JA; L P Thean JA
28 October 1997

Judgment:

KARTHIGESU JA

(delivering the grounds of judgment of the court): This was an appeal against the grant of leave to amend the defence. We allowed the appeal at the end of the hearing for the reasons which follow.

2. **The facts**

The appellant claimed a sum of US$4,925,628.11 and interest thereon as against the respondents in a statement of claim filed on 24 July 1996. The American Express Bank Ltd (the Bank) had established an irrevocable letter of credit on 12 May 1994 in favour of a company called Sigma Inc for the account of the respondents. According to the appellant, he had agreed to indemnify the Bank at the respondents` requests made orally to him by Low Ngee Kiat and Leow Joon Tong both of the respondents. The letter of credit was duly issued by the

Bank under which a sum of US$4,737,000 was paid out. As at September 1995, a sum of US$4,925,628.11 was due to the Bank.

3.The respondents made no payment towards the sum due to the Bank under the letter of credit. The Bank thereafter deducted the same sum from the appellant`s account with the Bank under the terms of the indemnity. The appellant in turn demanded payment from the respondents by his solicitors` letter dated 1 April 1996 but the respondents failed to make payment of any part of the amount due.

4.In the respondents` defence filed on 14 August 1996, they denied that the letter of credit facility was for their account or benefit. Rather, the respondents` Low Ngee Kiat and Leow Joon Tong were requested by Teh Soon Seng, the appellant`s son, to apply for the letter of credit facility from the Bank in the respondents` name. The purpose of the facility was to finance a transaction initiated by Teh Soon Seng for his own benefit or that of companies in which he had an interest and involving the company, Sigma Inc. As such, the credit facility granted by the Bank was not for the respondents` benefit. The respondents averred that the Bank had never granted any facility to the respondents for their own use.

5.The respondents further denied that they had requested the appellant to indemnify the Bank. It was the Bank which had requested the indemnity from the appellant since the appellant or his son Teh Soon Seng or both had instructed the Bank to grant a letter of credit facility upon the respondents` application, despite the fact that the respondents had no account with the Bank. The respondents` defence is that they had merely lent their name to the transaction at the request of Teh Soon Seng. As such, they were not liable to any party for the facility given by the Bank to finance the transaction. They further alleged

that no demand was ever made by the Bank on the respondents for payment of sums due under the letter of credit facility. The only exception was a demand for the sum of US$1,246,099.51 which, they were later notified by the Bank, had been discharged by the appellant under the letter of credit facility.

6.The respondents are in members` voluntary liquidation. Pursuant to r 91 of the Companies (Winding-Up) Rules, they had placed advertisements on 15 December 1995 to invite all creditors to prove their debts or claims against the respondents by 15 January 1996. The appellant failed to lodge a proof of debt by 15 January 1996 and the respondents sought to amend their defence to include a further or alternative plea that the appellant has no reasonable cause of action against the respondents by reason of such failure.

7.The proposed amendments to the defence were as follows:

> 12 Further or in the alternative the defendants (ie the respondents) say that by way of advertisements inserted in the edition of the ***Business Times*** dated 15 December 1995 and in the edition of the ***Government Gazette*** dated 15 December 1995, the liquidators of the defendants gave requisite notice pursuant to the Companies Act and the Companies (Winding Up) Rules to all creditors of the defendants to prove their debts or claims.
>
> 13 By the said advertisements all creditors were required to prove their debt or claims by 15 January 1996, which the Plaintiff (ie the appellant) failed to do. Pursuant to r 91 of the Companies (Winding Up) Rules the plaintiff is excluded from the benefit of any distribution and the defendants therefore say that the plaintiff has no or no reasonable cause of action against the defendants.

8. **The decision below**

The application to amend the defence in this respect was disallowed by the assistant registrar but was allowed, on appeal, by the learned judicial commissioner. The judicial commissioner was of the view that the proposed amendments raised both issues of facts and law by reason of the interpretation of rule 91(1) of the Companies (Winding Up) Rules; the appellant`s reference to the contents of the advertisements relied upon; the implication and bearing of other rules in the Companies (Winding Up) Rules and the fact that no distribution had been made by the liquidators up to the hearing of the application. On that premise, he held that the efficacy of the matters pleaded in the proposed amendments were best left to the trial judge to determine.

9. **The appeal**

The only issue before us in this appeal was whether the proposed amendments of the respondents were useless and raised no reasonable defence such that leave should not be granted for the same.

10. **The law**

In an application for leave to amend pleadings, the court will always look at the materiality of the proposed amendment. Leave will not be given to amend a defence by adding a plea which was no answer to the claim. Neither will an inconsistent or useless amendment be allowed. In the case of **Jeyaretnam Joshua Benjamin v Lee Kuan Yew** [1990] 2 MLJ 65 [1990] SLR 38 , Wee Chong Jin CJ stated at p 65D (MLJ) and p 39 (SLR) that:

> *in a contested interlocutory application for leave to amend pleadings, the principles to be applied are the same as if the application before the court had been an application to strike out the amended pleadings. The question involved is the same. The*

> *test is whether the part to be added by amendment ought to be struck out as disclosing no reasonable defence to the claim.*

This approach was also endorsed in the later case of **Lim Yong Swan v Lim Jee Tee & Anor** [1993] 1 SLR 500 at p 511B.

11.In applying this test, it is well established that it must be patently clear that there is no reasonable cause of action or defence. The Malaysian Supreme Court declared in **Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd** [1993] 3 MLJ 37 at p 43H that the claim or defence has to be `obviously unsustainable` to justify an application to strike out. In **Wright Norman v Oversea-Chinese Banking Corp Ltd** [1994] 1 SLR 513 , this court took a similar view at p 524H that unless it can be clearly shown that a defence is unsustainable, the pleading should be allowed to remain.

12. **The proposed defence**

The proposed defence is that the appellant has no reasonable cause of action due to the operation of r 91 of the Companies (Winding Up) Rules. This, inter alia, states that:

> *the liquidator in any winding up may from time to time fix a day on or before which the creditors of the company are to prove their debts or claims, or be excluded from the benefit of any distribution made before the debts are proved*

13.The respondents argue that by the operation of r 91, a creditor who failed to prove within time is completely excluded from any distribution. He therefore has no cause of action against the company before dissolution which could be satisfied out of the assets of the company. For this, they relied on **Butler & Anor v Broadhead & Ors** [1975] Ch 97 which involved a similarly phrased r 106 of the English Companies (Winding Up) Rules.

14.In our opinion, the respondents have misconstrued ***Butler v Broadhead*** . The court in ***Butler v Broadhead*** merely held that where the assets of the company had been distributed and the company dissolved before the plaintiffs realised that they had a claim, the plaintiffs cannot follow the corporate assets into the hands of the contributories. Lord Templeman made it clear at p 110D that creditors who failed to prove within time were only excluded from the benefit of any distribution made before they proved. The particular facts of the case, however, meant that the plaintiffs were excluded from the benefit of any distribution since all distributions were made before they proved their claim.

15.The respondents` contention that a creditor who failed to prove within time is completely excluded from any distribution, whether before or after the dissolution of the company, is therefore far too wide. If the company has yet to be dissolved and there are still distributions to be made, the plain reading of the English r 106 and our r 91 is that the failure on the part of a creditor to file proof of debt within the time frame stipulated by the liquidator will only result in his exclusion from any distribution ***made before the debts are proved*** (emphasis mine). It does not extinguish his claim.

16.We were persuaded to adopt the above interpretation by various authorities. The power of the liquidator to fix a date for proof is a power delegated by r 91 under s 288(e) of the Companies Act (Cap 50, 1994 Ed). Its origin lies in s 283(1) of the Companies Act which is identical with s 247(1) of the Companies Act 1961 in the various states of Australia:

> *The court may fix a date on or before which creditors are to prove their debts or claims or after which they will be excluded from the benefit of any distribution made before those debts are proved.*

17.According to Walter Woon and Andrew Hicks in ***The Companies Act of Singapore - An Annotation*** (1994), failure to prove within the time stipulated by the court excludes the creditor from the benefit of that dividend but does not exclude him from proving later and benefitting from subsequent dividends. A similar interpretation is adopted with regard to the Australian provision. Wallace and Young noted in **Australian Company Law and Practice** [1965] at p 703 that, with regard to s 247(1), so long as there are funds available, a creditor may prove at any time before the company is actually dissolved but as regards dividends already paid they shall not be disturbed.

18.The same interpretation has been adopted by various courts. In **Robert Dickey v RH Ballantine (liquidator of Anglian Insurance Company)** [1939] AIR 783, Lord Keith gave the following interpretation with regard to a similarly worded s 210 of the Companies Act 1929 at p 785:

> *it is not intended that creditors who lodge claims with the liquidator out of time are to be entirely excluded from any distribution of the company`s assets. All that the section says is that they are to be excluded from the benefit of any distribution made before their debts are proved. I think the natural inference is that, as regards any distribution that the liquidator may make after their debts have been proved, they are to participate in that distribution.*

19.The wide acceptance of this interpretation was noted by Lush J in **Commonwealth of Australia v Duncan** [1981] 5 ACLR 737 where he pointed out at p 740 that it was undisputed that the effect of s 247 of the Australian Companies Act does not shut out a creditor who does not prove by the due date, but only excludes him from the benefit of any distribution made before he proves.

20.In the local case of **Vasudevan v ICAB Pte Ltd** [1987] 2 MLJ 563 [1987] SLR 201 , although the liquidator did not receive any claim relating to the plaintiff`s action, Chan Sek Keong JC, as he then was, declared the dissolution of the company to be void and granted leave to the plaintiff to continue proceedings against the company. The learned judicial commissioner also affirmed that the duty of the liquidator is not confined to merely advertising for creditors. The liquidator has a duty to invite proof of claims from creditors of whose existence he knows, even if they have not responded to an advertisement for claims. This suggestion that a creditor`s claim is not extinguished by the failure to file proof even if the company had already been dissolved supports the view that r 91 does not extinguish a claim by reason of such failure.

21.The appellant`s case is further supported by the scheme of the Companies (Winding Up) Rules. Form 49 deals with the notice to creditors of the intention to declare a dividend. It invites creditors to lodge their proof of debt by a certain date failing which they would be excluded from that particular dividend. Form 50, on the other hand, relates to the intention to declare a final dividend. It is instructive in that it explicitly informs creditors that their claims will be expunged on the failure to file by this later date.

22.It is therefore clear that if the creditor`s claim were to be extinguished by the failure to file his proof of debt, it would only be arguable in the event of a final distribution and/or dissolution. With regard to other interim distributions, the failure to do so would only exclude the creditor from that particular dividend. As such, the respondents` proposed defence that r 91 has the effect of excluding the plaintiff from the benefit of any distribution is obviously unsustainable. The respondents argue that the question of any distribution(s) made by the liquidators of the company after 15 January 1996 and to date are matters of

evidence which need not be pleaded. In our opinion, these are material facts which must be pleaded.

23.In the circumstances, we were of the opinion that the proposed amendments disclose no reasonable defence such that leave should not be granted. We therefore allowed the appeal.

Karthigesu JA
L P Thean JA

Sim Bock Eng (Wong Partnership) for the appellant
Gan Kam Yuin (Bih Li & Lee) for the respondents

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