IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1999] SGHC 38

Suit 403/1994, SIC 6807/1998, SIC 6886/1998

Between

Haco Far East Pte Ltd

… Plaintiff

And

Ong Heh Lai Francis

… Defendant

GROUNDS OF DECISION

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

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Haco Far East Pte Ltd v Ong Heh Lai Francis

[1999] SGHC 38

Suit 403/1994, SIC 6807/1998, SIC 6886/1998
Judith Prakash J
08 February 1999

Judgment:

GROUNDS OF JUDGMENT

Background

1. This action was brought by the plaintiff company against its former director and employee, the defendant, for damages and other reliefs arising out of his breach of fiduciary duty while in its employ.

2. I heard the action and found for the plaintiff. In the statement of claim the plaintiff had asked, inter alia, for the following reliefs:

> '(1) Damages to be assessed as a result of the Defendant's breaches under paragraphs 8, 12 to 15 of the Statement of Claim. (2) An account of the profit made by the Defendant through his companies in Amerfab System or Amerfab Pte Ltd in the sale of drum plants, Blue Valley flangers, Strippit machines and plate rolls. (3) Payment of all sums found due to the Plaintiff on taking the account at (2) above. …'

In awarding judgment for the plaintiff, I took the view that the first relief was the main relief due to it as it should be compensated for the damages caused by

the defendant's breach of his duties to it. This would encompass all loss sustained by reason of the diversion of its business. Secondly, it was difficult to make an order in terms of the second relief as, although I believed that the businesses Amerfab Pte Ltd and Amerfab System ('the Amerfab companies') belonged to the defendant, he did not appear as a registered shareholder and it would be impossible to show what profits he personally made as a result of the activities which he carried out under the name of those companies. Accordingly, the order that I made was that the defendant was to pay the plaintiff such amount as should be found due for damages in respect of prayer 1 only of the statement of claim to be assessed with interest thereon and costs to be taxed if not agreed.

3. My decision was made on 10 November 1997. The plaintiff subsequently initiated the proceedings for assessment of the damages it had sustained. In September 1998, the defendant filed an application (SIC 6807 of 1998) whereby he asked for a further order that pursuant to the order of court that I had made on 10 November 1997, the plaintiff was entitled to damages to be assessed only in respect of the items mentioned in para 15 of the statement of claim. A few days later, the plaintiff filed an application vide SIC 6886 of 1998 for leave to amend the statement of claim. Both applications were fixed for hearing before me on the same day. Since to some extent the defendant's application depended on the outcome of the plaintiff's application, I dealt with the plaintiff's summons first.

Proposed amendments to the statement of claim

4. The draft amended statement of claim which the plaintiff attached to its application indicated that the main amendments which the plaintiff wished to make were to paras 8, 9, 11, 14 and 15 of that pleading. The amendments are

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too long to be reproduced in full so only the broad outlines will be indicated here.

(i)

Para 8

5. In the original statement of claim, para 7 stated that the defendant through his controlling interest in Amerfab System and Amerfab Pte Ltd competed in the same business as the plaintiff and for the plaintiff's business. This averment was followed by eight sub-paragraphs of particulars of the competitive activity carried on by the defendant through the Amerfab companies. Para 8 of the statement of claim went on to state:

> 'By reason of the aforesaid, the Plaintiff sustained damage and loss. Particulars of loss are partially pleaded herein and full particulars will be furnished after discovery and interrogatories.'

There were no particulars set out below the original para 8. By its proposed amendment to para 8 the plaintiff wished to set out 11 sub-paragraphs of particulars of business lost by the plaintiff because of competing activities of the defendant under the umbrella of the Amerfab companies which had resulted in business which would otherwise have gone to the plaintiff being diverted to these companies. Among these particulars, were allegations of dealings by the Amerfab companies in relation to Blue Valley flangers and Strippit products which had previously been handled by the plaintiff. It should be noted that the proposed sub-paras 8.1, 8.2, 8.4 and 8.6 were not entirely new but had appeared in the original statement of claim as particulars to para 9 thereof. Additionally, the proposed para 8.5 was a modification and extension of para 9.5 of the original statement of claim which was an assertion that the Amerfab companies

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had supplied about 20 Strippit machines and made a profit of $50,000 from each when it was also the plaintiff's business to deal in such machines.

(ii) Para 9

6. In the original statement of claim, para 9 read:

> 'As the managing director of the Plaintiff, the Defendant is duty bound not to place himself in a position of conflict of interests. The Defendant's companies, Amerfab System and Amerfab Pte Ltd competed in the same business as the Plaintiff and competed for the Plaintiff's business. The Defendant while in control of Amerfab System and Amerfab Pte Ltd, transacted business through Amerfab System and Amerfab Pte Ltd with 3rd parties, which business was the business of the Plaintiff, and took away the Plaintiff's business.'

The main body of the paragraph as quoted above was retained in the proposed amended statement of claim. The changes proposed related to the particulars. In the original pleading, there were six sub-paragraphs of particulars appended to para 15. In the proposed amended pleading, all these particulars were deleted and the only statement on particulars was 'As per paragraph 8 above'.

(iii) Para 11

7. Para 11 has to be read in conjunction with para 10. Para 10 contained an averment that none of the transactions and dealings of the Amerfab companies were disclosed to the plaintiff's board of directors and that the defendant when in control of these companies had diverted transactions to them thereby depriving the plaintiff from making the profits. In so doing, the defendant had improperly used his position as the plaintiff's managing director to divert what would otherwise have been the plaintiff's business to his own companies. Para 11 went on to state that by reason of the aforesaid, the plaintiff had sustained loss and damage and that particulars of loss were partially pleaded therein and

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full particulars would be furnished after discovery and interrogatories. There were three sub-paragraphs of particulars relating to profits which the Amerfab companies had allegedly made from dealings which should have gone to the plaintiff. These sub-paragraphs involved the sums of $400,000, $250,000 and $1,000,000 respectively.

8. The proposed amended para 11 made no change to the body of the pleading. The changes were all to the particulars. Instead of describing the amounts there as being 'profits' from one transaction or another, the plaintiff clarified the position by describing these amounts as 'lost profit'. Sub-para 11.1 was changed only by the addition of the word 'lost' before profit but in sub-paras 11.2 and 11.3 apart from this change there were also changes to the amounts claimed which became $281,000 (instead of $250,000) and $2,295,668 (instead of $1,000,000). The plaintiff also added five more sub-paragraphs describing lost profits. The result was that the amount of loss particularised under para 11 increased from $1,650,000 to $3,284,276.

(iv) Para 14

9. Para 13 of the original pleading asserted that the defendant had breached his duties in that he misapplied the plaintiff's assets and/or used for the wrong purpose the powers which the plaintiff had delegated to him. Para 14 was entitled 'Particulars' and contained five sub-paragraphs detailing the manner in which the defendant had abused his powers and misapplied the plaintiff's assets. By the proposed pleading, the plaintiff sought to amend sub-para 14.5 and add three additional sub-paragraphs to be numbered para 14.6, 14.7 and 14.8. The proposed para 14.6 dealt with an invoice for $26,000 which Amerfab Pte Ltd had rendered the plaintiff and which the plaintiff now asserted there was no

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basis for. Paras 14.7 and 14.8 related to alleged misdirections of the plaintiff's funds to Amerfab Pte Ltd.

(v) Para 15

10. This paragraph in the original pleading was a further assertion that the plaintiff had sustained loss and damage by reason of the matters set out in the pleading (no particular paragraph was specified) and it was further stated that particulars of loss were partially pleaded therein and full particulars would be furnished after discovery and interrogatories. There were three and a half pages of particulars following this paragraph. In effect they were particulars of the breach pleaded under para 13. The proposed amendments were all to the particulars. Basically they related to a change in the way in which the plaintiff calculated its loss. Some of the original items of claim were deleted while others were elaborated.

(vi) Prayer 1

11. The plaintiff wished to amend prayer 1 of the original pleading by inserting the words 'as pleaded above' so that it would read:

> '(1) Damages to be assessed as a result of the Defendant's breaches as pleaded above under paragraphs 8, 12 to 15 of the Statement of Claim.'

(vii) Ruling on the amendments

12. I allowed the plaintiff to make the proposed amendments to the statement of claim except in relation to the proposed amendments to para 14.5 and to prayer 1. The effect of allowing these amendments was to make the defendant's

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application in SIC 6807 of 1998 irrelevant. I therefore made no order in that application. The defendant has appealed against both these rulings.

Reasons for the application

13. The reasons why the plaintiff had made the application for amendment were explained by an affidavit made by Patrick Maene, their main witness at the trial and the person who had succeeded to the defendant's position as managing director of the plaintiff company. Mr Maene had undertaken the investigations that led to the action.

14. Mr Maene averred that in order to proceed with the assessment of damages the parties underwent a discovery exercise in 1998. The plaintiff was seeking substantial discovery from the defendant since the bulk of the documents in respect of the quantum of the damages would, from their nature, be in the possession, custody or power of the defendant either in his personal capacity or as the alter ego of the Amerfab companies. The ability of the plaintiff to obtain documents had also been eroded by the defendant's action in destroying documents when he left the plaintiff's office. The defendant, however, failed to give proper discovery and the plaintiff applied for further discovery against the defendant. This application was heard on 19 August 1998 and an order was made against the defendant. As at 7 September 1998 when Mr Maene's affidavit was filed, the defendant had failed to comply with the August order.

15. In the meantime, Mr Maene had been carrying out further investigations into the case. He had made trips to Thailand, Indonesia and Malaysia to obtain information and documents from the plaintiff's offices, agents and customers there. He had also traced and interviewed former employees of the plaintiff and gone through documents in the plaintiff's custody to try and trace dubious

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transactions effected by the defendant. As a result of his investigations he had found several other transactions which had arisen from the breach by the defendant of his duty to the plaintiff.

16. Mr Maene explained that as it had become obvious that the defendant did not wish to fulfil his legal obligations and provide proper discovery enabling the plaintiff to identify further particulars of his breaches, he had instructed the plaintiff's solicitors to proceed to amend the statement of claim to give these particulars. The plaintiff had waited until September 1998 to make these amendments as its officers were hoping that they would be able to include the results of any discovery given by the defendant. That hope had now been proved baseless, so the application had been proceeded with. Mr Maene averred that the amendments had been necessitated by the defendant's failure to comply with his legal obligations to give proper and timely discovery and that it referred to matters that the defendant was fully aware of as he was intimately connected with them.

The decision

17. The court's power under O 20 r 8(1) to allow an amendment of any document in an action is very wide and in appropriate circumstances this power may be exercised even after judgment, whether final or interlocutory, has been awarded. As the White Book (1999 ed) states at para 20/8/14, it was made clear more than a hundred years ago that after an interlocutory judgment or decree in an admiralty action which determines liability but leaves damages to be assessed, the court still has power to amend the claim on the writ. If the writ can be amended so can the statement of claim. Further, this principle must apply to all cases in which interlocutory judgment has been entered and not only to admiralty matters.

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18. It was pointed out in relation to particulars, however, that an application to amend or add to particulars, if made a reasonable time before the trial, would generally be allowed on terms, unless the other party to the action would be seriously prejudiced by such amendment but that such an amendment would not be allowed if it was sought thereby to introduce a new cause of action. Further, leave to amend particulars at the trial is, as a rule, refused. See the White Book (1999 ed) para 18/12/66. If this rule applied to the present application, it would be a non-starter. The context here was, however, different. The trial with which the amendments were concerned was not the trial of the substantive allegations of breach of duty but the assessment of the damages sustained by reason of those breaches. That assessment had not yet been held. I did not consider, therefore, that the rule against amendment of particulars at the trial or thereafter applied to the present application.

19. The main reason for the amendments was to particularise the damages that the plaintiff was seeking to recover. They did not deal with the issue of liability but went to the quantum of damages. I had already held at the conclusion of the trial of the main action that the defendant had acted in breach of his duty to the plaintiff. My findings on this point as set out in paras 82 and 83 of my judgment were as follows:

> '82. The evidence before me was that the defendant had operated AmerFab System and AmerFab PL in competition with the plaintiff company and had used the plaintiff's facilities and staff for the competing businesses. I also considered that it was probable that the defendant had diverted not only Strippit's business but other businesses away from the plaintiff and towards the AmerFab companies. I found it significant that the defendant's two brothers did not become directors of AmerFab PL until after he had resigned from the plaintiff company. Before that the only directors were Mrs Ong, who was basically a secretary and who was used to working for the defendant, and one Madam Helen Pow who was probably a nominee and had nothing to do with AmerFab PL's office as she was not mentioned in any of the staff circulars. The most commercially

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> experienced man in the offices which AmerFab occupied (and even though notionally he was sitting in the plaintiff's office) was the defendant. He was the one with the contacts and knowledge of the trade and he must have been the one with whom not only the staff of the AmerFab companies but also their customers and suppliers dealt. I inferred further that the defendant was not only running the AmerFab businesses but also that he had procured the establishment of both of them but had been careful, in view of his prior experience with Hua Leng, to ensure that his name appeared nowhere in the official documentation. AmerFab was the defendant's alter ego and not simply a poor relative he helped out from time to time. 83. The defendant had acted in breach of his fiduciary duty and dishonestly. He had no right to be involved in AmerFab in any way and not even to the limited extent which he was forced to admit. Even that limited involvement would have been wrongful. If the plaintiff had been more vigilant at the time of dismissing him it would probably have been able to recover far more in the way of documents in support of its case. However, the evidence that was produced together with the defendant's own lies and incredible explanations was sufficient to establish the plaintiff's case.'

There were two parts to the particulars which the plaintiff sought to add to the statement of claim. One type of particulars were those that gave further examples of the defendant's actions in carrying on the competing business and diverting transactions from the plaintiff and the other type of particulars were those under para 15 which more exactly defined the losses the plaintiff had incurred by the misuse of its facilities and staff. It appeared to me that these were all matters which were in the defendant's knowledge and which he should have disclosed during the process of discovery for the assessment. If he had not done so but the plaintiff had been able to find out the details of these matters through its additional investigations, it should be entitled to add these details to the claim.

20. Further, it had always been clearly indicated in the statement of claim that the particulars as pleaded would be supplemented as and when new information came to light. The defendant had done his best to obstruct the plaintiff in this

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process. He had destroyed documents to prevent them falling into the hands of the plaintiff and had failed to honour his obligations to give proper discovery.

21. The defendant, by way of an affidavit filed in answer to the application, gave various reasons why the amendments should not be allowed. Most of these were not pressed in oral argument before me. I will deal therefore only with the more salient points and those that were emphasised during the course of the hearing.

22. The defendant pointed out that the amendments were made four years and six months after the statement of claim was first filed and ten months after interlocutory judgment had been granted. This point would have been valid had the defendant co-operated fully in the plaintiff's efforts to ascertain exactly what he had done and what business the Amerfab companies had carried on. No co-operation was received not only before the trial when he was disputing liability but thereafter when his responsibilities had been made quite clear. As the defendant left it entirely to the plaintiff to try and discover what had gone on I did not think he had any right to complain about the length of time it took the plaintiff to make the necessary discoveries. In any case, the amendments were being made before evidence was received and arguments heard during the assessment process.

23. The defendant contended that the amendments included items that came within the scope of prayer 2 of the statement of claim and pointed out that there had been no appeal in respect of this prayer. That argument, however, pre-supposed that prayer 2 had been dismissed which was wrong. No order had been made in respect of prayer 2 since as I stated above, the order under prayer 1 was wide enough to encompass any damages which the plaintiff had sustained in relation to those matters specifically mentioned in prayer 2.

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24. The defendant also pointed out that when an amendment to a pleading is made, that amendment would take effect not from the date on which it was made but from the date of the original document which it amends. (See White Book para 20/5-8/2) He argued that if the amendments went back to the date of the original statement of claim it would alter the basis of the trial. That might have been so if the amendments proposed had related to the cause of action. The nature of the amendments in this case, however, did not have that effect since they did not change the cause of action but simply listed additional instances of the defendant's breach which had caused loss to the plaintiff.

25. I realised that it was unusual to allow amendments to be made to a statement of claim after interlocutory judgment on that claim had been awarded. In the peculiar circumstances of this case where the defendant, the person in charge of the plaintiff and entrusted with the proper running of its business, flagrantly disregarded his obligations and instead, using the plaintiff's staff and facilities, dishonestly competed with the plaintiff for his own benefit and refused thereafter to make proper disclosure of what he had done, I considered it only just to grant the plaintiff's application. The defendant had done his best to conceal his wrongdoing and its consequences and the plaintiff, having managed to painfully obtain some information about this, should be permitted to put the additional information before the court so that there would be as full a picture as possible before the judge conducting the assessment.

JUDITH PRAKASH

JUDGE

SINGAPORE

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Date: 8 February, 1999

Judith Prakash J

S Surenthiraraj (Harry Elias & Partners) for the plaintiff
P Suppiah with Elengoven Krishnan (P Suppiah & Co) for the defendant

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