Sun Fook Kong Construction Ltd (formerly known as Sung Foo Kee, Ltd) v Housing and Development Board
[2004] SGHC 69

Case Number : Suit 485/2003/Z, SIC 5356/2003, 5998/2003

Decision Date : 07 April 2004

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Oommen Mathew (Haq and Selvam) for plaintiff; Andre Maniam and Elly Tham (Wong Partnership) for defendant

Parties : Sun Fook Kong Construction Ltd (formerly known as Sung Foo Kee, Ltd) — Housing and Development Board

Building and Construction Law – Building and construction contracts – Novation – Whether there had been valid novation at law.

Building and Construction Law – Building and construction related contracts – Bonds – Endorsement on bonds reflecting novation of main contract – Whether endorsement required plaintiff's consent or signature when plaintiff no longer a party to the main contract – Whether plaintiff had locus standi to make any claims in respect of defendant's call on the bonds.

Building and Construction Law – Building and construction related contracts – Bonds – Whether defendant entitled to look to any or all of security bonds furnished by contractor for payment of sums due under any contract entered into with same contractor.

Civil Procedure – Parties – Joinder – Application to add new plaintiffs to action – Application outside limitation period – Lack of consent of party to be added as plaintiff – Whether joinder proper – ss 6(1)(a) & 6(7) of the Limitation Act (Cap 163, 1996 Rev Ed) – O 15 r 4 Rules of Court (Cap 322, R5, 2004 Rev Ed).

Civil Procedure – Pleadings – Amendment – Application for leave to amend writ and statement of claim – Application outside limitation period – Whether amendment should be allowed – ss 6(1)(a) & 6(7) of the Limitation Act (Cap 163, 1996 Rev Ed) – O 20 r 5 Rules of Court (Cap 322, R5, 2004 Rev Ed).

7 April 2004

Lai Siu Chiu J:

The background

1 Sung Foo Kee, Limited, now known as Sun Fook Kong Construction Ltd (the plaintiff), was registered (in June 1999) as the Singapore branch of a Hong Kong based company known as Sun Fook Kong Holdings Limited ("the parent company"). On 2 July 1990, Sung Foo Kee Construction (Singapore) Pte Ltd was incorporated as a wholly-owned subsidiary of the plaintiff; the company subsequently changed its name to Winhouse Construction Pte Ltd ("Winhouse"). The Housing and Development Board (the defendant) is a body corporate with perpetual succession, established under s 3 of the Housing and Development Act (Cap 129, 1997 Rev Ed). The main task of the defendant is to provide low cost public housing for Singaporeans, by what are commonly known as HDB flats. Like the parent company, Winhouse is also a construction company.

2 In 1991–1992, the plaintiff entered into three contracts ("the SFK contracts") with the defendant for the construction of HDB flats; one project was in Pasir Ris whilst the other two were in

Tampines. The plaintiff provided to the defendant security bonds issued by American Home Assurance Company ("AHA") for the SFK contracts, dated 31 October 1991, 26 June 1992 and 2 July 1992 respectively ("the SFK bonds"); the SFK bonds were issued pursuant to cl 14(2), in lieu of cash deposits required under cl 14(1), of the General Conditions of Contract applicable to the SFK contracts. The SFK bonds have a total value of $3,534,550.

3 On 29 February 1992, through its solicitors, the plaintiff requested the defendant's agreement for Winhouse to take over the SFK contracts. By its letter dated 18 June 1993 to the plaintiff, the defendant gave its approval for the assignment of all rights and liabilities under the SFK contracts to Winhouse and requested the execution of the novation deed enclosed therewith. Following therefrom, the SFK bonds were amended on 2 July 1993 by AHA so that Winhouse was substituted as the name of the "Contractor" in place of the plaintiff with effect from 26 May 1993. The endorsement on the SFK bonds reads:

> It is hereby declared & agreed that with effect from 26th May 1993, the Name of the contractor of this Security Bond is amended to read as:-
>
> Sung Foo Kee Construction (Singapore) Pte Ltd
>
> All other terms and conditions of the Policy remain unchanged.
>
> ISSUED at Singapore on July 2, 1993.

Winhouse forwarded AHA's endorsements on the SFK bonds to the defendant by its letter dated 9 July 1993. This was followed by the plaintiff's letter dated 12 July 1993 to the defendant returning the novation deed which had been duly executed by itself and Winhouse, under their respective common seals. The defendant executed the deed of novation which was then dated 16 August 1993 ("the Deed"). In consequence thereof, the SFK contracts were thenceforth between Winhouse and the defendant.

4 The relevant clauses in the Deed are the following:

> 1 The Company [Winhouse] hereby unconditionally accepts and assumes with immediate effect all the rights, duties and liabilities of the Contractor [the plaintiff] under the Contracts [the SFK contracts] and undertakes in place of the Contractor to be bound thereby in every respect. Without prejudice to the generality of the foregoing, the Company undertakes to be responsible to HDB [the defendant] for all and any defects in the works arising out of the acts and/or omissions of the Contractor and to rectify the same.
>
> 2 The Contractor shall notwithstanding the agreement between themselves and the Company continue to be fully responsible and liable for the complete due and proper performance of the Contracts and fully indemnify HDB for the complete due and proper performance of the contract and against all actions, proceedings, claims, demands, costs, damages, penalties and expenses whatsoever under or in respect of the Contracts and this Deed.

5 Separately, Winhouse had its own contract no A/192/93 ("the Winhouse contract") with the defendant to construct HDB flats at Woodlands, for which it furnished a security bond of $1,680,000 dated 11 May 1993 ("the Winhouse bond"), also issued by AHA. In addition, Winhouse had entered into four other construction contracts with the defendant between 1993 and 1995, for which security bonds were also furnished, again issued by AHA; these contracts were valued in excess of $22m.

6 Winhouse faced financial difficulties in 1996 and could not complete the four construction contracts referred to in the above paragraph. Winhouse was placed under judicial management on 5 January 1996 and was subsequently wound up in Companies Winding Up No 93 of 1996 ("the CWU") on or about 17 May 1996. This was followed by Hong Kong & Shanghai Bank's appointment of a receiver and manager over the company's assets on 1 July 1996. The defendant filed its Proof of Provisional Debt in the CWU on 23 August 1996 in the sum of $22,778,711.29.

7 On 26 February 1997, the defendant wrote to AHA giving notice of the termination of the SFK and the Winhouse contracts (due to the inability of Winhouse to fulfil its contractual obligations) and that the defendant would shortly be making a formal call for payment of the full amount of the SFK and Winhouse bonds. I should mention at this juncture that the SFK and Winhouse bonds contained the exact same terms.

8 On 13 March 1997, the parent company wrote to the defendant contending that neither the parent company, nor the plaintiff nor Winhouse, could be liable on the SFK bonds as the same were furnished by the plaintiff who was no longer the contracting party on the SFK contracts whilst Winhouse did not execute the SFK bonds.

9 On 13 May 1997, the defendant formally demanded payment (by 27 May 1997) of $5,214,550 from AHA on the SFK and the Winhouse bonds. On 30 May 1997, AHA forwarded four cheques to the defendant totalling $5,214,550 in compliance with the defendant's call on the four security bonds. The plaintiff has since indemnified AHA for the payments made.

10 Four years later, on 31 May 2001, the plaintiff commenced proceedings in Originating Summons No 6000768 of 2001 ("the OS") for pre-action discovery in respect of the SFK contracts, to determine whether it had a good cause of action against the defendant. The defendant filed an affidavit to dispute the OS, as a result of which the plaintiff did not pursue the application.

11 On 13 June 2001, the defendant filed a revised Proof of Debt in the CWU in the sum of $20,659,791.29.

12 Six years to the date the defendant made a call on the four security bonds, the plaintiff commenced this suit, on 13 May 2003, disputing the defendant's call on the SFK bonds for the SFK contracts and on the Winhouse bond for the Winhouse contract. The plaintiff prayed for a declaration that the defendant was not entitled to call for payment on all or any of the security bonds.

The applications

13 On 25 August 2003, the defendant applied to court by way of Summons in Chambers No 5356 of 2003 ("the defendant's application") for, *inter alia*, the following orders:

> 1 Pursuant to Order 18 Rule 19, Order 14 Rule 12 of the Rules of Court and/or the inherent jurisdiction of the Court, the Plaintiff's claims be struck out and the action be dismissed.
>
> 2 Alternatively, pursuant to Order 33 Rules 2 and 5 of the Rules of Court and/or the inherent jurisdiction of the Court:
>
> a. The following questions or issues be tried as preliminary issues before the

trial of the action, namely:

i. Whether the Plaintiff, no longer being a party to the SFK Bonds, has a right to make any claim in respect of the Defendant's call on the SFK Bonds.

ii. Whether the Plaintiff, who was never a party to the [Winhouse contract or bond], has a right to make any claim in respect of the Defendant's call on the Winhouse Bond;

iii. Whether the time for making a demand on the SFK bonds had expired at the time of the Defendant's call on 13 May 1997, as contended by the Plaintiff.

iv. Whether clause 3 of the SFK and Winhouse Bonds only allows the Defendant to call on the respective Bonds in satisfaction of monies due from the Contractor to the Defendant under other contracts "arising out of or relating to the same building project", as contended by the Plaintiff.

b. Until the determination of the aforesaid preliminary issues, all further proceedings in the action be stayed.

14 On 22 September 2003, the plaintiff applied to court by way of Summons in Chambers No 5998 of 2003 ("the plaintiff's application") for, *inter alia*, the following orders that:

1. Sun Fook Kong Holdings Limited … and [AHA] be added as 2nd and 3rd Plaintiffs respectively in this action;

2. The [existing] Plaintiff be granted leave to amend the Writ of Summons and Statement of Claim dated 13 May 2003 in the manner ... shown in the copy annexed hereto.

3. The Defendant do serve on the Plaintiff … further and better particulars of the Defence [as specified].

15 Both the defendant's and the plaintiff's applications came up for hearing before me. I dealt with the defendant's application first, answered prayers 2(a)(i), (ii) and (iv) thereof in the negative and instead of staying it, I dismissed the plaintiff's action under prayer 2(b). Consequent thereon, I dismissed the plaintiff's application. The plaintiff has now appealed (in Civil Appeal No 7 of 2004) against my decisions in both applications.

The proceedings

16 By the time the defendant's application was filed, pleadings had closed or were deemed to have been closed as the plaintiff had (on 25 June 2003) filed its Reply. The plaintiff's application first came up for hearing before Senior Assistant Registrar Toh Han Li ("SAR Toh") on 24 September 2003. SAR Toh struck out para 14(a) of the statement of claim. The plaintiff's allegation in para 14(a) of its claim (after referring in para 13 to the defendant's call on the SFK and Winhouse bonds on 13 May 1997) states:

14. That demand was not permitted by the terms of SFK Bonds and/or the Winhouse Bond and/or was an unlawful or improper call on those bonds because:

(a) In relation to the SFK Bonds the time for making a demand had expired

pursuant to clause 6 thereof.

17 In my view, para 14(a) of the plaintiff's claim was rightly struck out as it was clearly unsustainable in view of cl 6 of the SFK bonds, which states:

> This bond shall take effect from the date hereof and shall remain in full force and effect until:
>
> (a) the expiry of three months from the date of issuance by [the defendant] of the Final Account; or
>
> (b) the expiry of three months from the date of issuance by [the defendant] of the Maintenance Certificate for the said Contract.

and para 14 of the Defence (filed on 12 June 2003), which pleaded:

> Neither the Final Account nor the Maintenance Certificate had been issued for any of the SFK Contracts when the Defendant called on the SFK Bonds on 13 May 1997. Accordingly, the SFK Bonds had not expired when they were called on.

which assertion, although not admitted in the Reply, was not challenged either by the defendant.

18 SAR Toh had ruled that he could not deal with the defendant's application under O 14 r 12 of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the Rules") as r 14 thereof stipulates that an application for summary judgment cannot be filed more than 14 days after the pleadings in the action are deemed to be closed. As stated earlier, pleadings closed on 25 June 2003. Hence, the defendant's application was filed outside the time limit. However, SAR Toh was of the view that it was appropriate for a judge in chambers to deal with the defendant's application under O 33 of the Rules, together with the plaintiff's application; hence the hearings before me.

The submissions

19 Counsel for the plaintiff attempted, unsuccessfully, to persuade me to deal with the plaintiff's application first. I declined as I was of the view that disposing of the defendant's application first may well determine whether it was necessary to hear the plaintiff's application. As it turned out, the latter was unnecessary.

20 Counsel for the defendant referred to cl 3 in the SFK and Winhouse bonds and submitted that based on the court's interpretation of the exact same clause in *Chip Hua Poly-Construction Pte Ltd v Housing and Development Board* [1997] 2 SLR 797, the plaintiff's claim was unsustainable and should be dismissed.

21 Clause 3 of the SFK and Winhouse bonds is worded as follows:

> The BOARD [the defendant] may demand payment of a sum or sums under this BOND in satisfaction of monies due from the CONTRACTOR [the plaintiff] to the Board under the provisions of any other Contract made between the CONTRACTOR and the BOARD. The BOARD shall not in connection with a demand whether made under the said CONTRACT or under any other contract be required to prove either a breach of contract or duty or damages arising from such breach.

22 In *Chip Hua*, the plaintiff was the sole contractor in relation to the defendant's construction project at Jurong West ("the Jurong West contract"). It was also joint contractor with another company called Hock Heng Trading and Construction Pte Ltd ("Hock Heng") in respect of five other projects for the defendant ("the five contracts"). Pursuant to the Jurong West contract, the plaintiff furnished the defendant with a security bond ("the Jurong West bond") which terms included the above cl 3. In relation to the five contracts, the plaintiff and Hock Heng provided the defendant with five additional security bonds. As work under the five contracts did not proceed to the defendant's satisfaction, the defendant called on, and was paid under, the five security bonds provided for the five contracts. The plaintiff applied to court to restrain the defendant from calling on the Jurong West bond; the court refused to grant the injunction.

23 The plaintiff's appeal against the judge's refusal to grant the injunction was allowed (see report at [1998] 2 SLR 35). The Court of Appeal held that under cl 3, the defendant was entitled to demand payment to satisfy moneys due from the plaintiff under the Jurong West contract or any other contract made between the plaintiff and the defendant. However, the phrase "any other contract" in cl 3 did not include a contract made between the plaintiff and Hock Heng on the one hand and the defendant on the other. Accordingly, the defendant was not entitled to call upon the Jurong West bond to satisfy the joint liability due from the plaintiff under the joint contracts made between the plaintiff, Hock Heng and the defendant. L P Thean JA opined (at [13]) that the terms of the bond should be construed, where the words are clear, within the four corners and in the context of that instrument.

24 The plaintiff's submission focused on the word "Contractor" in the endorsement by AHA on the SFK and Winhouse bonds. Its counsel argued that the endorsement was only a statement by AHA that the name of the contractor in the bond was amended to read as Winhouse. It did not amount to a novation at law but only added Winhouse as another "Contractor" to the bond, and did not remove the plaintiff therefrom. Consequently, (as pleaded in para 5 of the statement of claim) the effect of the Deed was to make the plaintiff and Winhouse jointly and severally liable to the defendant for the performance of the SFK contracts. Counsel argued that if the endorsement was intended to remove the plaintiff as the "Contractor", then the document was a nullity as the endorsement was neither signed by nor made on behalf of the plaintiff. He submitted that the endorsement must be read with the security bonds as well as the Deed, placing reliance in particular on cl 2 of the Deed. The clause states:

> The Contractor [the plaintiff] shall notwithstanding the agreement between themselves and the Company [Winhouse] continue to be fully responsible and liable for the complete due and proper performance of the [SFK] Contracts and fully indemnify HDB [the defendant] for the complete due and proper performance of the contract and against all actions, proceedings, claims, demands, costs, damages, penalties and expenses whatsoever under or in respect of the Contracts and this Deed.

25 Counsel for the defendant countered that the plaintiff's interpretation of cl 2 of the Deed was misconceived. The effect of the clause was not to retain the plaintiff as a joint contractor with Winhouse. Rather, the clause meant that notwithstanding the novation of the SFK contracts to Winhouse, the defendant still held the plaintiff liable for the due and proper performance of the SFK contracts and the plaintiff provided an indemnify to that effect. Counsel argued that even if the Deed was taken into consideration, it did not make the plaintiff and Winhouse the "Contractor" as, after novation, it was Winhouse that became the Contractor, not the plaintiff. Further, the plaintiff's argument contradicted its solicitors' letter dated 29 February 1992 requesting the defendant's consent to allow Winhouse to take over all the plaintiff's operations.

26 The defendant pointed out that in *Chip Hua*, Thean JA had specifically declined to interpret the security bond in dispute by looking at the underlying contract. In *Bocotra Construction Pte Ltd v Attorney-General (No 2)* [1995] 2 SLR 733, Karthigesu JA expressed the same view.

The decision

27 I had said to counsel for the plaintiff that accepting his interpretation of the Deed and the endorsement by AHA on the SFK bonds went against the meaning and effect of a novation at law. It would be appropriate at this juncture to look at the meaning of novation. Counsel for the defendant had referred the court to the following extracts from *Chitty on Contracts* (28th Ed, 1999) vol 1 at paras 20–084, 20–086 and 23–031:

> 20-084 There is no doubt that with the consent of *both* contracting parties all contracts of any kind may be transferred, and the term "novation" has been introduced from Roman law to describe this species of transfer. Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained: in this necessity for consent lies the most important difference between novation and assignment.
>
> 20-086 It should, however, be noted that the effect of a novation is not to assign or transfer a right or liability, but rather to extinguish the original contract and replace it by another.
>
> 23-031 Novation is a generic term which signifies "that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract." In particular, however, it denotes the rescission of one contract and the substitution of another in which the same acts are to be performed by different parties.

28 The plaintiff's interpretation also went against the clear wording of Recital 6 in the Deed which states:

> The Contractor [the plaintiff] has requested to be released and discharged of its rights, duties and obligations under the [SFK] Contracts, such rights, duties and obligations to be assumed by the Company [Winhouse] in place of the Contractor, and HDB [the defendant] has agreed to this request on the terms and conditions hereinafter set out.

and cl 3 thereof which states:

> HDB hereby accepts the liability and undertaking of the Company upon the Contracts *in place of the liability and undertaking of the Contractor* and agrees to be bound by the terms and provisions of the Contracts as if the Company were named therein as the Contractor [emphasis added].

Consequently, the plaintiff's argument that that it was still a party to the SFK contracts despite the Deed is untenable.

29 I disagreed with the plaintiff's contention that the endorsement by AHA issued on 2 July 1993 only added Winhouse as a name to, but did not remove its name from, the SFK bonds. Plaintiff's

counsel had pointed out that it was the defendant who had requested the AHA endorsements as, Winhouse's letter dated 9 July 1993 to the defendant forwarding the same stated: "As requested please find enclosed …". I rejected as completely without merit counsel's novel argument that the endorsements were a nullity because they were not signed by or made on behalf of the plaintiff. It bears repeating that the plaintiff had dropped out completely from the contractual scene once the SFK contracts were novated to Winhouse. Neither its consent nor its signature to the endorsements was required as it was no longer a party to either the SFK contracts or bonds. The only consent required would be that of the defendant and which was obviously given.

30 As for cl 3 of the Deed, I followed the Court of Appeal's interpretation of the clause in *Chip Hua Poly-Coating Construction Pte Ltd v Housing and Development Board*. I also accepted the defendant's submission on the meaning of cl 2 thereof. As long as the contractor is the same, regardless of the number of projects or contracts the former has with the defendant, the defendant is entitled to look to *any or all* the security bonds, which the contractor furnished to the defendant, for payment of *any sums* due from the contractor under *any contract*. The plaintiff's contention (that the defendant's calls on the security bonds are restricted to moneys owed on other contracts in the same project) does not make sense and would render cl 3 of the Deed meaningless. In any event, the defendant (by the affidavit of Yeo Chee Shiang filed on 14 October 2003) had stated that for every project, the defendant would only enter into one contract with the main contractor, refuting the contrary claim made by the plaintiff's director Chan Kin-Chung ("Chan") in this regard. Chan had claimed in his affidavit filed on 22 September 2003 (para 5), that when the scope of a particular project is enlarged, or the project is in stages, there would be more than one contract for the entire project. I should add that the two cases cited by counsel for the plaintiff, *ie*, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and *The Fina Samco* [1995] 2 Lloyd's Rep 344 on the interpretation of clauses in contracts, are not on point.

31 Chan had also stated that the plaintiff's claim was by way of subrogation. Even then, I cannot see how it can assist the plaintiff, as subrogated rights have to be exercised in the name of the insured, *ie* Winhouse. If the converse was true and AHA had not been indemnified on its payments to the defendant, AHA would have had to sue Winhouse and not the plaintiff for recovery of $5,214,550, unless the plaintiff can prove (which it has not) that it gave the indemnity to AHA.

32 In relation to the Winhouse contract and bond, the plaintiff was not the contracting party to begin with. Without privity of contract, the plaintiff has no *locus standi* to mount this action against the defendant. Yet, the reliefs prayed for in the statement of claim included a declaration that the defendant was not entitled to call on the Winhouse bond and a claim for refund of the sum paid thereunder of $1,680,000. Indeed, even in the plaintiff's application, it did not apply to add Winhouse as a fourth plaintiff to the action, for which leave of court is required in any event under s 262(3) of the Companies Act (Cap 50, 1994 Rev Ed), in view of the company's liquidation.

33 In para 21 of the defence, the defendant pleaded that the plaintiff had done a *volte-face*. Apparently, in the OS proceedings, Chan had filed an affidavit on 31 May 2001 in which he deposed that the plaintiff was only disputing the defendant's call on the SFK bonds, not the Winhouse bond. Yet the plaintiff had sued on the Winhouse bond. The defendant relied on Chan's admission for its plea that the plaintiff's claim on the Winhouse bond was frivolous, vexatious and an abuse of process. Although I would not go so far as to characterise Chan's statement on oath as an admission at law, it does suggest the ambivalent stand taken by the plaintiff as well as its lack of *bona fides* in pursuing this action.

34 Consequently, it was my view that:

(a) the plaintiff, no longer being a party to the SFK bonds, had no right to make any claim in respect of the defendant's calls thereon;

(b) the plaintiff, not being a party to the Winhouse contract or Winhouse bond, had no right to make any claim in respect of the defendant's call on the Winhouse bond; and

(c) cl 3 of the SFK and Winhouse bonds did not restrict the defendant to calling on the bonds for payment to satisfy moneys due from Winhouse to the defendant under other contracts "arising out of or relating to the same building project" as the plaintiff had contended.

Accordingly, I granted the defendant's application by answering the questions in prayers 2(a)(i), (ii) and (iv) in the negative and dismissed the plaintiff's action under prayer 2(b), even though the defendant had only applied to stay the proceedings. In the light of my decision, it served no purpose to allow the plaintiff's claim to remain a "live" action since it was clearly unsustainable.

The plaintiff's application

35 I turn next to the plaintiff's application. I must emphasise that my granting of the defendant's application did not prompt my dismissal of the plaintiff's application. Even if the defendant had not filed or had failed in its application, I would still have dismissed the plaintiff's application, as different considerations were involved.

36 Earlier at [32], I had made certain observations on the plaintiff's statement of claim. In addition thereto, I shall now explain why its proposed amendments to add two parties as plaintiffs to the action could not be granted. AHA could not in any event be added as the third plaintiff to these proceedings as, according to counsel for the plaintiff, AHA did not give its consent. Consequently, AHA would have to be added as defendant to the action.

37 As for joining the parent company as the second plaintiff to the action, quite apart from its lack of *locus standi* as it was not a party to any of the four bonds in question, it was far too late in the day. Whatever claims it had were time barred in any event. It is to be remembered that the defendant called on the SFK bonds on 13 May 1997 and payment was made by AHA on 30 May 1997. According to para 16 of the statement of claim, AHA was indemnified for its payments on 20 June 1997. Taking that date as the date when the cause of action accrued, the six-year time bar under s 6(1)(a) of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act") came into effect on 21 June 2003. An action for a declaration (which is an equitable relief) is also time barred six years from the date of accrual, under s 6(7) of the Act.

38 On the principles relating to amendment of pleadings where claims are time barred, I turn now to an authority cited by counsel for the defendant. In *Chan Mui Eng v Chua Chu Huwe* [1994] 1 SLR 375, the plaintiffs purported to amend the writ and statement of claim to the effect that the second defendants were in breach of trust, after close of pleadings. The application was dismissed by L P Thean JA as, on the date of the application for leave to amend, the statutory period of limitation had irretrievably expired. Thean JA further held that leave should not be granted because if such amendments were allowed, they would have retrospective effect from the date of the writ and would deprive the second defendants of a defence at law. I would point out that the plaintiffs' appeal to the Court of Appeal on Thean JA's ruling was dismissed (on 27 May 1994).

39 In the defence filed on 12 June 2003, the defendant had pleaded the Act (in paras 8 and 32) in relation to the Deed and endorsements on the SFK bonds and the defendant's letter dated

26 February 1997. The plaintiff should have been alerted thereby to the issue of time bar. No reasons or explanations were given in Chan's affidavit filed for the plaintiff's application to explain the delay in making the application for joinder of parties and amendments, to the pleadings.

40 The original statement of claim pleaded (in para 17) that the defendant had been unjustly enriched in the amounts it obtained on its calls on the four security bonds and that the plaintiff was entitled to restitution of the sums received. In the amendments it proposed to its pleadings (para 2 of the plaintiff's application), the plaintiff did not attempt to change para 17 (except that it would be renumbered para 19 and the words "from the third plaintiff [AHA]" would be added). Counsel for the defendant had pointed out (quite correctly), that the original para 17 or proposed para 19 of the statement of claim was untenable. In equity, the principle of restitution is only available to the paying party *ie* AHA, but AHA did not wish to be added as co-plaintiff to the action. Moreover, AHA's claim, if any, was time barred on 31 May 2003, that date being six years after it had paid the defendant on 30 May 1997.

41 It seemed to me that the plaintiff's application, if granted, would cause grave injustice to the defendant who would thereby be deprived of the substantive defence of time bar, quite apart from the fact that the existing plaintiff and the proposed second plaintiff had no *locus standi* to begin with. Accordingly, I dismissed the plaintiff's application with costs to the defendant.

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