IN THE APPELLATE DIVISION OF THE HIGH COURT
OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(A) 16

Civil Appeal No 40 of 2021

Between

Symphony Ventures Pte Ltd

… *Appellant*

And

DNB Bank ASA, Singapore Branch

… *Respondent*

In the matter of Suit No 1204 of 2019 ((Summons No 4362 of 2020)

Between

Symphony Ventures Pte Ltd

… *Plaintiff*

And

DNB Bank ASA, Singapore Branch

… *Defendant*

EX TEMPORE JUDGMENT

[Civil Procedure] — [Pleadings] — [Amendment]

Symphony Ventures Pte Ltd
v
DNB Bank ASA, Singapore Branch

[2021] SGHC(A) 16

Appellate Division of the High Court — Civil Appeal No 40 of 2021
Belinda Ang Saw Ean JAD and Woo Bih Li JAD
1 November 2021

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Woo Bih Li JAD (delivering the judgment of the court *ex tempore*):

1 The appellant is a lender under a loan arrangement made on 23 December with 2013 with Traxiar Drilling Partners II Pte Ltd ("Traxiar"). Treatmil Holdings Limited ("Treatmil") was the guarantor. The loan was arranged by the respondent who earned a fee for its services. Three individuals feature prominently in this action:

(a) Dag Oivind Dvergsten ("Dag"). He controlled Traxiar and Treatmil.

(b) Savannah Christine Khanna ("Savannah"), a co-director with Dag in Traxiar.

(c) Andreas Aamodt Kilde ("Kilde"), an employee of the respondent who was involved in the discussions pertaining to the loan.

2 The appellant had applied to amend the Statement of Claim ("SOC") in this action quite extensively and the respondent had opposed some of the proposed amendments which the judge categorised as the First, Second, Third and Fourth Amendments. The judge did not allow those categories because they were time barred and introduced new causes of action which were based on facts which were not substantially the same as those already pleaded.

3 Under O 20 r 5(1) of the Rules of Court (2014 Rev Ed), a court may at any stage of the proceedings allow a plaintiff to amend his pleading. However, this is subject to r 5 itself. Rule 5(2) states that where an application for leave to make an amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

4 For present purposes, paragraph (5) is the relevant one. It provides that an amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the applicant.

5 The judge was of the view that in so far as the four categories of amendment would introduce new claims in tort and unjust enrichment, the time to start an action was from 8 July 2014 and 24 December 2013 respectively. As the limitation period is six years for each of these causes of action, they expired on 8 July 2020 and 24 December 2019 respectively. Insofar as the appellant was attributing fraud to the respondent, the judge was of the view that the fraud could

have been discovered by the appellant with reasonable diligence by July 2014. The relevant limitation period would then have expired in July 2020.

6 The SOC was filed on 21 November 2019. The application to amend the SOC was filed on 8 October 2020.

7 It follows that if the judge were right that each of the categories of amendment introduced a new cause of action and the time to start action began to run from 8 July 2014 and 24 December 2013 respectively, they would have been time-barred by 8 October 2020. Likewise, insofar as a cause of action was based on the respondent's fraud, the limitation period would have begun to run from July 2014 and thus any such cause of action would also have been time-barred by 8 October 2020. The other relevant question would be whether they are based on the same facts or substantially the same facts already pleaded.

8 Although the appellant disagrees with the judge's view on the various starting dates to commence an action, we see no reason at this stage to disagree with the judge except to say that perhaps the relevant commencement date for the cause of action for unjust enrichment is not so much the date of the invoice which the respondent had sent for its fee but the date when it received payment, which was on or about 23 or 24 December 2013. In any event, such a commencement date would still attract the time-bar mentioned by the judge.

9 As for the question of whether each of the categories of amendments introduced a new cause of action, the appellant argues that the Fourth Amendment is not a new cause of action. It pertains to a plea of conspiracy between the respondent through Kilde (who is the proposed and included second defendant) with Savannah and Dag. The appellant submits that this cause of action was already pleaded. However, by the Fourth Amendment, it wanted to

flesh out its already pleaded cause of action to show that the US$6m sum which was lent by the appellant to Traxiar under the loan arrangement was never intended to be used as a deposit to purchase an oil rig called the "Somnath" (in accordance with the express purpose of the loan arrangement) but rather to pay for the construction costs of a house owned by Dag or his company in Rocky Point, Wisconsin, USA ("the Rocky Point House").

10 However, the judge was of the view that the Fourth Amendment introduced a new cause of action because it averred an additional conspiracy involving related entities of Dag who were not even parties to the original conspiracy claim.

11 After considering the terms of that amendment, we agree with the judge. The appellant was not simply saying that the respondent had conspired with Dag and Savannah and that Dag used his related entities to implement the conspiracy. The appellant was alleging that the respondent had also conspired with the related entities.

12 For completeness, we also address some observations of the judge. As mentioned, the appellant was relying on evidence obtained from the USA Action. We leave aside the question whether the attempted use of such evidence is a breach of the *Riddick* principle as that is not an issue before us. However, the appellant was also trying to rely on the USA Action which apparently decided that Dag had acted fraudulently in the use of the loan moneys contrary to the finding in the 1st Action. The judge took the view, in respect of the application to amend in the current action, that the appellant's reliance on the decision in the USA Action was a collateral attack on the decision in the 1st

Action. It seems to us that this was only a provisional view expressed by the judge bearing in mind that he was hearing an interlocutory application.

13 The Third Amendment is to introduce a claim by the appellant for unjust enrichment against the respondent. In short, the appellant claims the US$750,000 fee earned by the respondent on the basis that the consideration for the transaction has totally failed and the transaction is tainted with illegality. It also pleads the fraud of Dag.

14 The appellant admits that this is a new cause of action but submits that it is based on substantially the same facts as had already been pleaded. However, the judge disagreed. The judge also accepted the respondent's argument that the transaction had not failed and the fee was paid not by the appellant but by Dag or Treatmil. There was no contractual relationship between the appellant and the respondent.

15 Thus, aside from the question whether the new cause of action was based on the same facts, there was also the question whether there was a reasonable cause of action. The appellant does not dispute that there must be a reasonable cause of action but did not initially address this point. Instead, it sought to rely on the breach of a *Quistclose* trust and conspiracy which it alleged it had already pleaded.

16 It seems to us that the appellant was conflating its arguments. In so far as it was relying on a failure of consideration to plead unjust enrichment, the judge was correct to accept the respondent's argument that (a) there was no contract between the present parties, (b) the respondent did not receive payment from the appellant and (c) the transaction had been carried out in so far as the loan had been disbursed by the appellant. Whether or not there was a *Quistclose*

trust where Traxiar (and Dag) was obliged to use the money for a specific purpose or a conspiracy was a separate matter. The allegation that the transaction was tainted with illegality was a new material allegation.

17 As for the First Amendment, the judge was of the view that the appellant was introducing new facts to make a claim for negligence which resulted in a new cause of action being pleaded. It was not sufficient for the appellant to argue that negligence was already pleaded. The underlying facts already pleaded were different.

18 We note that the appellant had originally pleaded that the respondent had arranged the loan. With the First Amendment, the appellant was alleging that there was a special relationship between the appellant and the respondent arising from a previous course of dealing that somehow gave rise to a duty on the part of the respondent to supervise the deposit so as to ensure that it was used for its intended purpose under the loan agreement. Coupled with this duty was an allegation of an alleged representation by the respondent to the appellant that it would be arranging the "End" or "Take Out" finance which included a second deposit of US$15m and the balance of US$185m for the purchase price. The appellant alleged that this representation led it to enter into the loan agreement.

19 In our view, both of these allegations introduced by the First Amendment raised new causes of action based on new material allegations. It was one thing to say that the respondent had arranged the loan. It was another to say that it had also positively made the representation that it would also arrange the "End" or "Take Out" finance. Furthermore, the assertion that the

respondent was under a duty to supervise the use of the loan because of the abovementioned special relationship was also a new material allegation.

20 In so far as the Second Amendment was concerned, the appellant was alleging that there was a specific representation from the respondent's officers that the US$6m loan as an initial deposit would be refundable if the transaction (*ie*, the loan agreement) did not go through and that this representation was false. However, the loan agreement did go through in that the agreement was signed and the loan was disbursed.

21 The judge was of the view that this specific representation raised a new cause of action which was based on a new material allegation even though it was raised with the same background facts. We are of the same view.

22 Accordingly, we agree with the judge that the new causes of action introduced by the First and Second Amendments were based on new material allegations and should not be allowed.

23 There is one other matter. The appellant sought to introduce a claim for US$3m being the alleged loss of its profit from the loan agreement as a result of the allegations sought to be introduced by the First Amendment. The claim for the US$3m was a new cause of action based on new material allegations. Thus, this new claim ought accordingly to be rejected. In any case, we agree with the judge's rejection of this amendment on the basis that it was legally unsustainable. The claim was in tort in respect of the loss the appellant suffered from the loan agreement as a result of the respondent's negligence. At the same time, however, the appellant was claiming that it would not have entered into the loan agreement if the representations it intended to rely on had not been made by the respondent. Therefore, it could not maintain a claim for loss of

profit on a transaction which it says it would have avoided. The appellant's reliance on *East v Maurer* [1991] 1 WLR 461 did not assist it. There, the plaintiff was claiming for loss of profit from a separate and distinct transaction if the disputed transaction had not been entered into. Indeed, the appellant argued that whether it could have earned US$3m if it had deployed its funds to another transaction was a matter to be established at trial. However, that was not the basis of its proposed amendment.

24 In the circumstances, the entire appeal is dismissed.

25 Having regard to the parties' costs submissions, we order the appellant to pay the costs of the appeal to the respondent fixed at $20,000 all in. The usual consequential orders apply.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Nazim Khan, Kuan Chu Ching Connie and Kunal Haresh Mirpuri
(UniLegal LLC) for the appellant;
Sim Jek Sok Disa, Cheong Tian Ci Torsten and Ou Wai Hung Shaun
(Rajah & Tann Singapore LLP) for the respondent.