

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 188

Suit 7195/1985

Between

Multi-Pak Singapore Pte Ltd
(in receivership)

... Plaintiff

And

Intraco Ltd

... Defendant

GROUND S OF DECISION

Civil Procedure — Pleadings — Amendment; Civil Procedure — Pleadings;
Words and Phrases

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**Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd
and Others**

[1992] SGHC 188

Suit 7195/1985
G P Selvam JC
09 July 1992

1 The background

2 This decision relates to certain questions in connection with the plaintiffs' pleadings.

3 First the background. In January 1985 the plaintiffs were placed under receivership by their debenture holders, Arab Bank Ltd. The debenture was dated 5 September 1984. The receivers found that the plaintiffs had issued a cheque dated 6 June 1984 in favour of Intraco Ltd for \$2,371,079.62 and that it had been paid into the account of Intraco Ltd on 21 June 1984.

4 The plaintiffs on 21 July 1985 issued a writ indorsed with a statement of claim against Intraco claiming the amount as money lent or money held on a resulting trust for the plaintiffs.

5 Intraco filed a defence on 13 August 1985. According to this, the plaintiffs had entered into a written agreement on 24 May 1984 by which Intraco assigned to the plaintiffs a debt of \$2,545,897.83 due to Intraco from City

Carton Co Pte Ltd and Box Pak (S) Pte Ltd (‘the debtor companies’). The payment of \$2,371,079.62 by the plaintiffs was consideration for the assignment of the debt.

6 On 22 October 1986 the plaintiffs amended the writ with leave of court by adding Peter Ng and David Ng as the second and third defendants and Pattinson Temple as the fourth defendant. The second and third defendants were directors in the plaintiffs as well as the debtor companies. The fourth defendant was the financial controller of the three companies.

7 The statement of claim was also amended by leave of the court to assert that the payment of \$2,371,079.62 to Intraco was a misapplication of the plaintiffs’ funds in that the debtor companies were insolvent and the assignment conferred no benefit to the plaintiffs. It was stated that the directors in making the payment did not act honestly and diligently in the discharge of their duties as directors. It was further alleged that Intraco was aware of the misapplication and the breach of duties. On the basis of the alleged misapplication, the plaintiffs said that Intraco was liable for the tort of conspiracy and the equitable relief of constructive trust. The original claim based on loan and resulting trust was left unimpaired. The plaintiffs further stated that the assignment document dated 24 May 1984 did not exist in 1984 and came into existence after the issue of the writ. This allegation was based on the ground that the receivers did not find it among the plaintiffs’ papers and that it was stamped only in 1986.

8 The defendants, other than Intraco, were not served and accordingly they are not before the court. Nothing has been said about the financial position of the plaintiffs in 1984 when the cheque was issued or the source from which the plaintiffs had obtained the moneys.

9 By an amended defence filed in February 1987 and particulars supplied, Intraco stated that on 21 June 1984 Intraco issued two cheques dated 5 June 1984, one day earlier to the date on the plaintiffs' cheque. One was for \$2m in respect of subscription of shares allotted by the plaintiffs to Intraco on 28 May 1984 and the sum of \$371,079.62 was a loan to the plaintiffs.

10 On 26 April 1988 orders were made for mutual discovery within 30 days and inspection within 30 days of the service of the lists and for the action to be set down for trial within 30 days. The action was set down within time. There was more than three years' delay in giving discovery. The plaintiffs gave discovery on 29 October 1991 and the defendants on 14 November 1991. The court went into vacation on 2 December 1991. The case was coming for trial in January 1992.

11 **Voluntary particulars**

12 On 6 December 1991 the plaintiffs' solicitors wrote to Intraco's solicitors a letter which included the following:

*Further, please note that we will also at the same time be making an application to amend our statement of claim to add two claims. The first is for relief based on the ground that the scheme that was entered into in May/June 1984 had the effect that Multipak was wrongfully rendering financial assistance to Intraco for the purchase of Multipak's shares. All the facts being relied on for this action have already been pleaded. It is only the conclusion of law that is new. In this connection, we wish to inform you that the primary authority we are relying on is **Belmont Finance Corp v Williams Furniture Ltd (No 2)** [1980] 1 All ER 393.*

13 The second claim is an alternative claim for the par value of the Multipak shares. Our case here is that because the cash payments were illusory in nature, the real consideration for the shares was the assignment of the City Carton

receivables which were in fact worthless. The primary cases relied on here are the following:

- (i) ***The Ooregum Gold Mining Co of India v Ropes & Wulsoth*** [1892] AC 125;
- (ii) ***Re Wragg Ltd*** [1897] 1 Ch 796;
- (iii) ***Re James Pitkin & Co*** [1916] WN 112.

14 On 14 December 1991 the plaintiffs' solicitors sent a further letter to the defendants' solicitors stating, inter alia, the following:

Having considered this matter further, we have decided not to pursue the claim for payment of subscriptions at this time. Needless to say, the liquidator of the company may pursue this claim at a later date.

15 With reference to our clients' claim based on a constructive trust arising from the scheme to unlawfully provide financial assistance, we note that the essential facts and elements of this claim have been pleaded in para 10 of the statement of claim. We are in addition willing to provide voluntary particulars under para 10. A draft of these particulars is enclosed.

16 Please let us hear from you at once as to whether this course of action is likely to be challenged by you. If so, an application can be filed at once and be fixed for hearing on 19 December 1991 together with our application for further and better discoveries.

17 The particulars enclosed were as follows:

Under para 10

(1) The sale of the debts of City Carton and Box Pak by Intraco to the plaintiffs was undertaken as part of and contemporaneously with the allotment of the said shares to

Intraco as part of a scheme whereby Intraco would unlawfully receive financial assistance from the plaintiffs to purchase 20,000 shares in the plaintiff company ('the said shares') in contravention of s 76 of the Companies Act (Cap 185, 1985 Ed) as it was then enacted.

(2) The said debts of City Carton and Box Pak were sold at a substantial overvalue as these debts were known by Intraco to be irrecoverable and had largely been written off by Intraco as bad debts.

(3) By selling these debts at an overvalue, Intraco received from the plaintiffs the sum of \$2,371,079.62 which sum was paid back to the plaintiffs to finance the subscription by Intraco for the said shares.

(4) The said debts were purchased by the plaintiffs without regard to the plaintiffs' commercial interests and were so purchased as part of a scheme to put Intraco in the position of acquiring the said shares without undertaking any real financial outlay and by simply assigning the said debts to the plaintiffs.

18 As there was no response to the letter from Intraco, the voluntary particulars were filed on 19 December 1991 during court vacation.

19 When the action came for trial on 6 January 1992 the defendants objected to the voluntary particulars being part of the plaintiffs' pleadings and submitted that they introduced a new claim outside the limitation period.

20 The plaintiffs responded saying that Intraco had waived the right to object to the voluntary particulars and relied on the following commentary in the **White Book** at p 316:

Voluntary particulars

Notwithstanding the clear ruling that a party is not entitled to add anything to particulars already served, a useful practice has grown up and is being more extensively used for a party to serve what are called 'voluntary particulars', which are further and better particulars of a pleading served without a request, still less an order of the court, being made. The practice is intended to show the readiness of the party concerned to inform the opposite

party of the material facts he intends to rely upon, to narrow the issues, to prevent surprises, and to reduce costs. This practice is, perhaps indirectly, recognized by the rules, see O 34 r 3(2). These voluntary particulars must comply with the form of particulars as regulated by para (7), and their placing in the bundles for the purposes of lodging documents when setting down (see O 34 r 3(2)).

21 If no objection is taken by the opposite party to the service of such particulars, they will presumably stand as part of the pleadings in the action; but if objection is taken, the party concerned must apply for leave to serve the particulars under an order of the court. Clearly the device of `voluntary particulars` must not be used unilaterally to amend or add to particulars or vary the case of a party, in a way which the court would not sanction.

22 In ***Pleadings Principles and Practice*** by Jacob and Goldrein, at p 179, the following passage appears:

Voluntary particulars

When it sometimes happens that a party who, in compliance with a request or an order, has given all the particulars then within his knowledge, subsequently discovers new matter which he desires to add to the particulars already served so as to enable him to prove them at the trial.

How

(a) **The safer course** is to apply for leave to serve further particulars. Without such leave he has strictly no right to add anything to those already served and by which he is bound.

(b) **Alternative** If, however, further particulars are served without an order and are accepted by the opposite party, they will supersede or supplement the original particulars. The irregularity is waived by receiving the fresh particulars and continuing the proceedings in the action without making any objection.

(c) **Tactics** Serve the voluntary particulars under cover of a letter stating that if no objection is expressed within 21 days, the irregularity will be deemed to have been waived.

23 In my view, even as a general rule the failure to object to the filing of voluntary particulars per se cannot amount to a waiver. The procedure is not found in the Rules of the Supreme Court 1970 (‘the Rules’) and except in certain exceptional circumstances, for example where they would constitute an estoppel, a mere failure to respond cannot amount to a waiver.

24 Order 18 r 5 of the Rules reads as follows: ‘Pleadings shall not be served during the Court Vacation except with the leave of the Court or with the consent of all the parties to the action.’

25 Furthermore, as particulars are part of pleadings, a party wishing to include them must, except where an amendment without leave is permitted by the Rules, obtain leave to add them. Lopez LJ in **Spedding v Fitzpatrick** [1888] 38 Ch D 410 said:

‘The plaintiffs’ devise of filing voluntary particulars was an attempt to circumvent the above rules. I therefore declare that the voluntary particulars were not part of the plaintiffs’ pleaded case.’

26 I therefore ruled that the introduction of voluntary particulars by the plaintiffs was unauthorized and declared that they were not part of the plaintiffs’ pleadings.

27 Next, the plaintiffs argued that their case constituted by the voluntary particulars was already part of their pleaded case and accordingly they were entitled to lead evidence and cross-examination on them. In any event, said the plaintiffs, even if the voluntary particulars introduced a new cause of action, it was based on the same or substantially the same facts which had been pleaded. They relied on O 20 r 5(2) and (5) of the Rules and applied for leave to effect an amendment. I shall now examine these arguments.

28 Purpose of pleadings

29 By O 18 r 7 a party is required to set out in his pleading all material facts on which he relies for his claim or defence. Order 18 r 15(1) provides that a statement of claim must state specifically the relief or remedy which the plaintiffs claim. The object of these rules is two-fold:

(a) to ensure that the plaintiffs have a legally sustainable claim and thereby eliminate frivolous and baseless actions; and

(b) to inform the opponent in advance of the case he has to meet when the case comes on for trial so that justice can be done to both sides expeditiously and smoothly. It is a requirement of essential justice that an opponent is given adequate opportunity to prepare and present his view of the cause. *“In my opinion”, said Cotton LJ in Philipps v Philipps [1878] 4 QBD 127 at p 139, “it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial”. Lord Normand in Esso Petroleum Co Ltd v Southport Corp [1956] AC 218 [at p 238] said: “The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.”*

30 A failure on the part of a pleader to conform to the above pleading rules may invite one or more of the following consequences:

(i) Application by the opponent to strike out the pleading on the ground that it discloses no reasonable cause of action or defence, as the case maybe. Scott LJ in **Bruce v Odhams Press Ltd** [1936] 1 KB 697 said at p 712: *“If any one “material” fact is omitted, the statement of claim is bad; it is “demurrable” in the old phraseology, and in the new is liable to be “struck out”*”.

(ii) The party in default may be precluded from presenting a case, leading evidence or cross-examining the opponents’ witnesses on the point omitted from the pleadings: see **Belmont**

Finance Corp Ltd v Williams Furniture Co (No 1). [1979] Ch 250 Brett LJ in **Philipps v Philipps** [1878] 4 QBD 127 at p 133 said: *‘ If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings .’* See further **Regina Fur Co Ltd v Bossom** [1958] 2 Lloyd’s Rep 425 at p 428 where Lord Evershed said: *‘ I think that a defendant is entitled to say, by way of defence, the onus remains throughout upon plaintiffs to establish the case they are alleging. Where such is the form of pleading, it is not only not obligatory upon the defendants but it is not even permissible for them to proceed to put forward some affirmative case which they have not pleaded or alleged; and it is not, therefore, right that they should, by cross-examination of the plaintiffs or otherwise, suggest such an affirmative case .’* On the basis of these principles, in **Bills v Roe** [1968] 1 WLR 925 cross-examination by the plaintiff to suggest insobriety on the part of the defendant was disallowed where the only allegation of negligence in the statement of claim was driving too fast and not keeping a look-out.

(iii) A court may not make a finding or give a decision based on facts not pleaded and a finding or decision so made will be set aside (see **Esso Petroleum Co Ltd v Southport Corp**, [1956] AC 218 **Panding v London Brick Co** [1971] 10 KIR 207 and **Lloyde v West Midlands Gas Board** [1971] 1 WLR 749).

31 It was abundantly clear to me that the plaintiffs’ case based on a breach of statutory duty under s 76 of the Companies Act (Cap 50, 1990 Ed) (‘the Act’) which prohibits the giving by a company of financial assistance for the purpose of or in connection with the acquisition of its own shares was not included in the pleadings. It would not be within the legitimate expectation of Intraco that the plaintiffs would rely on such a breach. They did not plead positively or prepare to meet such a case. None of the particulars relating to purchase of shares in the plaintiffs referred to s 76 of the Act and Intraco’s knowledge of a breach of that section. I therefore came to the clear conclusion that the plaintiffs were precluded from presenting a case based on s 76 of the Act.

32 **Amendment after limitation period**

33 The material part of O 20 or 5 reads as follows:

(2) Where an application to the Court for leave to make the amendment mentioned in paragraph (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.

(5) 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 in the action by the party applying for leave to make the amendment.

34 For a proper understanding of the above provision, it is necessary first to state the rule of practice established in **Weldon v Neal** :¹⁰ The law will not allow the Limitation Act to be circumvented by the device of introducing a fresh claim by amendment of the pleadings in a pending action. It would be unjust to deprive the defendant of an accrued statutory defence by such amendment.

35 Secondly, it is necessary to state the meaning and content of the term `cause of action`. It may mean one thing for one purpose and something different for another. The meaning depends on the context in which it is used.

36 A cause of action has been defined as the facts which the plaintiff must prove in order to get a decision in his favour. This definition stresses the factual aspect of the claim; namely, all material facts the plaintiff must establish. It is this concept which is envisaged by O 18 r 7 which requires the pleading to `contain and contain only the material facts on which a party pleading relies for

his claim`. Scott LJ in **Bruce v Odhams Press Ltd** [1936] 1 KB 697 at p 712 said that `the word "material" means necessary for the purpose of formulating a complete cause of action; and if anyone "material" fact is omitted, the statement of claim is bad`. The words `same facts` or `substantially the same facts` in O 20 r 5(5), in my view, refer to the factual situation of the case.

37 The expression `cause of action` may also mean the legal basis which entitles the plaintiff to succeed. This basis may be found in the common law or equitable principles or statutory provisions. For historical reasons, the term `cause of action` in this sense became a convenient label for the various `forms of action`. Diplock LJ in **Letang v Cooper** [1965] 1 QB 232 at pp 242-243 said:

*A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. Historically, the means by which the remedy was obtained varied with the nature of the factual situation and cause of action were divided into categories according to the `form of action` by which the remedy was obtained in the particular kind of factual situation which constituted the cause of action. But that is legal history, not current law. If A, by failing to exercise reasonable care, inflicts direct personal injury upon B, those facts constitute a cause of action on the part of B against A for damages in respect of such personal injuries. The remedy for this cause of action could, before 1873, have been obtained by alternative forms of action, namely, originally either trespass vi et armis or trespass on the case, later either trespass to the person or negligence: (see Bullen & Leake, **Precedents of Pleading** (3rd Ed, 1869). Certain procedural consequences, the importance of which diminished considerably after the Common Law Procedure Act 1852, flowed from the plaintiff's pleader's choice of the form of action used. The Judicature Act 1873, abolished forms of action. It did not affect causes of action; so it was convenient for lawyers and legislators to continue to use, to describe the various categories of factual situations which entitled one person to obtain from the court a remedy against another, the names of the various `forms of action` by which formerly the remedy appropriate to the particular category of factual situation was obtained. But it is essential to realize that when, since 1873, the name of a form of action is used to identify a cause of action, it is used as a convenient and succinct description of a particular category of*

factual situation which entitles one person to obtain from the court a remedy against another person. To forget this will indeed encourage the old forms of action to rule us from their graves.

38 Order 18 r 15(1) uses the more appropriate terminology: `relief or remedy which the plaintiff claims` instead of `cause of action` in the historical sense. It was pointed out by Buckley LJ in **Belmont Finance Corp Ltd v Williams Furniture** [1979] Ch 250 at p 266 that in O 20 r 5(5) `the Rules of Committee must have been using the expression "cause of action" as referring to a type of relief claimed rather than the pleaded facts`. Order 20 r 5(5) therefore uses the term in the historical sense to refer to the relief or remedy which the plaintiff seeks. This construction is supported by the feature that the earlier part of the paragraph makes reference to the factual situation of the case.

39 On the basis of the analysis therefore, if all the material facts have been pleaded to constitute a cause of action in the factual sense of the term, the plaintiff will be allowed under O 20 r 5(5) to amend his statement of claim to add a cause of action in the historical sense by pleading an additional or alternate relief or remedy.

40 It has always been the law that the court `has the jurisdiction to grant any relief that it thinks appropriate to the facts as proved` (per Buckley LJ in **Belmont Finance Corp Ltd v Williams Furniture Co** [1979] Ch 250). This concept was stated by Scrutton LJ in **Lever Brothers Ltd & Ors v Bell & Anor** [1931] 1 KB 557 at pp 582-583 in these words:

... the practice of the courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial.

41 In **Belmont Finance Corp Ltd v Williams Furniture** [1979] Ch 250 the directors of the plaintiff company paid £500,000 for the purchase of shares in a company called Maxim Finance Ltd. Those shares were allegedly worth only £60,069. The moneys so paid were used by the sellers of the Maxim shares to acquire all the shares in the plaintiff company from the shareholders. The plaintiffs, after they were ordered to be wound up, commenced proceedings, alleging breach of s 54 of the Companies Act 1948 (UK) which prohibited a company from giving financial assistance for the purchase of its own shares. On the basis of illegality under that section, conspiracy was alleged against the sellers of the Maxim shares and the directors of Belmont. At the trial, the plaintiffs sought to present a case of constructive trust. The action was brought for the benefit of the depositors. The trial judge precluded the plaintiffs from relying on constructive trust on the ground that it was not part of the pleaded claim. The Court of Appeal upheld the trial judge's ruling on the ground that all the ingredients of constructive trust had not been pleaded and the relief of constructive trust had not been stated in the statement of claim. The Court of Appeal, however, granted leave to amend the statement of claim on the ground of the exceptional facts of the case. It must be noted that in the **Belmont** case⁵ the plaintiffs had, in their original pleadings, made specific reference to s 54 and how it had been transgressed. Additionally, the moneys paid out by directors of Belmont in reality were deposits taken from members of the public. The justice of the case was with the depositors for whose benefit the action was instituted by the liquidators naming Belmont as plaintiffs.

42 On a true construction of O 20 r 5(2) and (5), a plaintiff seeking an order under it must satisfy two requirements: (a) that the facts of the case remain the same or substantially the same; and (b) that the justice of the case is with him. If he fails in one, he fails altogether. As the power conferred on the court is

discretionary, the court considering the application should adopt a broad common sense approach.

43 In my view, the plaintiffs in the present case failed to satisfy both requirements. No factual circumstance was pleaded in connection with s 76 of the Act. Unlike the pleadings in this case, the case of illegality under s 54 of the Companies Act 1948 had been properly pleaded in the **Belmont** case⁵. The main missing link there was knowledge. What the plaintiffs in this case sought to do was to introduce a new factual circumstance in the guise of particulars after time had run out under the Limitation Act. They had pleaded `constructive trust` as a relief based on breach of fiduciary duties of directors. The factual circumstance in support of an offence under s 76 of the Act and the relief of constructive trust is very different from that relating to breach of fiduciary duties of directors.

44 Even if the plaintiffs had complied with the first requirement, they had not shown that it would be just to grant them the application. A party asking the court to exercise a discretionary power in his favour must place some material and advance some cogent reasons to impel the court to lean on his side: see **Ratnam v Cumarasamy**. [1965] 1 WLR 8 In the **Belmont** case **Belmont Finance Corp Ltd v Williams Furniture & Ors** [1979] Ch 250 it was clear that depositors` moneys in the company had first been channelled out under the pretext of the purchase of Maxim shares. The moneys then went into the hands of the shareholders of Belmont and not the company. In the end, the depositors were unjustly deprived of their moneys. The justice was clearly on the side of the depositors. In the present case the plaintiffs, who in effect were the debenture holders, failed to discharge the onus on them to demonstrate that the justice of the cause rested with them.

45 Finally, the events occurred in June 1984 well before the creation of the debenture in favour of Arab Bank Limited. It took some seven years for the plaintiffs to raise a case of constructive trust based on s 76 of the Act. In the **Belmont** case⁵ the English Court of Appeal in 1978 and 1979 had made the law very clear on two separate occasions. There was no explicable reason why the plaintiffs in the present case took seven years to raise the point when the point, if there was one, should have been so obvious in the early stages of the proceedings. The case the plaintiffs sought to present was inextricably founded on the equitable principles of fiduciary duties and constructive trust. Delay defeats equity. In this case there was inordinate delay. The overall equities were clearly not with them. I therefore exercised the discretion against the plaintiffs.

46 **Outcome:**

G P Selvam JC

Wong Meng Meng, Sundaresh Menon and Dilhan Pillay
Sandrasegara (Wong Meng Meng & Partners) for the plaintiffs
Tan Kok Quan, Tang Khin Wai and Maurice Lee (Lee & Lee) for the
first defendants
