

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1993] SGCA 9

CA 6/1992

Between

Multi-Pak Singapore Pte Ltd
(in receivership)

... Appellant

And

Intraco Ltd

... Respondent

GROUND S OF DECISION

Civil Procedure — Pleadings — Amendment

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

[1993] SGCA 9

CA 6/1992

Goh Joon Seng J; Karthigesu J; Yong Pung How CJ

06 February 1993

1 Cur Adv Vult

2 The appellants are a company now under receivership. The respondents are a trading company who were the recipients of a cheque from the appellants dated 6 June 1984 for \$2,371,079.62. The proceeds of this cheque were paid into the respondents' account on 21 June 1984.

3 On 24 July 1985 the appellants' receivers caused a writ to be issued against the respondents, claiming the said sum of \$2,371,079.62 as money lent by the appellants to the respondents or held by the respondents on resulting trust for the appellants.

4 On 13 August 1985 the respondents filed a defence, denying any such loan or trust. Further or in the alternative, they pleaded that the payment was made in discharge of the appellants' obligations under a contract dated 24 May 1984; the cheque was consideration for the assignment by the respondents to the appellants of debts owed to the respondents by two companies, City Carton Co Pte Ltd and Box Pak (S) Pte Ltd ('the debtor companies'). The debtor

companies are not related to the appellants, but Box Pak (S) Pte Ltd is a subsidiary of City Carton Co Pte Ltd.

5 More than a year later, on 23 October 1986, the appellants amended their statement of claim with leave of court. First, they added three other defendants: the second and third defendants were at all material times directors of the appellants and of the debtor companies; the fourth defendant was the financial controller of the appellants and of the debtor companies between 1 June 1984 and early 1985. They were never served and so were never real parties to this action but it is nonetheless convenient for present purposes to refer to them as the second, third and fourth defendants.

6 Secondly, the appellants added two new causes of action. The first new cause of action was that all the defendants had allegedly known that the debtor companies were insolvent and/or incapable of paying their debts so they would also have known that the debts assigned by the respondents to the appellants were worthless. It was thus alleged that the second and third defendants had acted in breach of their duties to act honestly and diligently as directors of the appellants, and that the defendants were thereby liable to the appellants in damages for the tort of conspiracy. Further, para 10 of the amended statement of claim, in particular, stated as follows:

Further or alternatively, in the circumstances that Intraco received the said sum of \$2,371,079.62 in the full knowledge of all the circumstances relating to its payment, it received the said sum with actual or constructive knowledge that such payment was a misapplication of the plaintiffs' assets, and is liable to repay the said sum to the plaintiffs as a constructive trustee of the said money.

7 The second new cause of action essentially involved an allegation that the so-called contract of 24 May 1984 was in fact only created subsequent to the issue of the writ and is immaterial for present purposes.

8 On 26 February 1987 the respondents filed an amended defence. This averred that they had entered into the contract of 24 May 1984 in good faith, that they had no knowledge, actual or constructive, of any breach of duties on the part of the second and third defendants or of any misapplication of the appellants' assets. The respondents averred that on or about 21 June 1984, the date the appellants' cheque was paid into the respondents' account, the respondents had issued two cheques dated 5 June 1984, one for \$2m for subscription of shares allotted by the appellants and one for \$371,079.62 as a loan to the appellants. More details were provided in two sets of further and better particulars, one served on 7 July 1987 pursuant to a request dated 26 March 1987, and the other on 6 October 1987 pursuant to a court order dated 9 September 1987.

9 On 9 July 1988 the respondents filed a re-amended defence and counterclaim for \$371,079.62, which they asserted was an interest-free loan, as yet not repaid, made by them to the appellants. On 1 August 1988 the appellants filed their reply and defence to counterclaim and thereafter pleadings closed.

10 On 26 April 1988, orders of court were made for discovery and inspection. The action was subsequently fixed for hearing in January 1992. Only on 29 October 1991 did the appellants give discovery. On 14 November 1991 the respondents gave discovery. For this delay neither party is blameless, but for the moment it is sufficient to note that it was not till this point that the appellants had notice of a document which indicated a link between the allegedly worthless receivables and the share subscriptions. This document was

one of the respondents' internal memoranda; it was entitled 'Conversion of Owings by City Carton (Pte) Ltd and Box Pak (Pte) Ltd to Equity in Multi-Pak Singapore Pte Ltd' and dated 5 June 1984, some 12 days after the contract of 24 May 1984 alleged by the respondents to have been entered into between the parties. It detailed the financial straits of City Carton, describing it as being on 'the verge of bankruptcy', and introduced a 'rescue operation', which

envisages Multi-Pak ... taking over City Carton as its subsidiary and injecting new cash into it ... As part of the rescue operation, the shareholders of Multi-Pak have offered Intraco to take over the entire \$2.4m owings by City Carton in exchange for shares in Multi-Pak. We have agreed to this in principle because if we stay with City Carton and the rescue operation does not materialize, there is every danger that we would end up recovering perhaps less than 5% of the original debts. As the offer stands, we would end up as a shareholder of Multi-Pak and recover some of the money by the commission from selling paper.

11 The conversion does not involve any cash injection on our part but it seems just the only way for us to recover our credit.

12 On 6 December 1991, during the court vacation, the appellants' solicitors wrote to the respondent's solicitors, stating that they intended to apply to re-amend the statement of claim by adding two matters:

- (a) a claim for relief based on wrongful financial assistance, contrary to s 76 of the Companies Act, having been rendered by the appellants to the respondents, and
- (b) an alternative claim for the par value of the appellants' shares.

13 Paragraphs 1, 9 and 10 read as follows:

- (1) As you are aware a key issue that is raised in these proceedings is the extent to which your clients were aware at the material time, that the receivables from City Carton Pte Ltd

and Box Pak Pte Ltd ... were likely to be uncollectable by reason of the financial crisis being faced by City Carton.

(9) 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 Corporation v Williams Furniture Ltd (No 2)** [1980] 1 All ER 393.

(10) 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. ...

14 On 14 December 1991 the appellants' solicitors wrote again, saying that they would not pursue the claim for the par value of the shares. They also said:

With reference to our clients' claim based on a constructive trust arising from the scheme to unlawfully provide financial assistance, we note 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.

15 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 discovery.

16 Receiving no response from the respondents, the appellants accordingly filed the voluntary particulars purportedly under para 10 of the statement of claim on 19 December 1991. This was still during court vacation. For convenient reference, we set out the voluntary particulars:

(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) 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.

17 When the trial began on 6 January 1992 before GP Selvam JC, the respondents objected to the voluntary particulars being part of the appellants' pleadings on the ground that they introduced a new cause of action outside the limitation period.

18 The learned judicial commissioner disallowed the appellants' application for an order that the voluntary particulars do stand as part of the pleadings or alternatively for leave to amend their pleadings by inserting the voluntary particulars. In disallowing the application, he stated:

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.

19 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 Companies Act. Unlike the pleadings in this case, the case of illegality under s 54 of the Companies Act 1948 (UK) had been properly pleaded in the **Belmont** case. The main missing link there was knowledge. What the plaintiffs in this case sought to do was the introduction of 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 Companies Act and the relief of constructive trust is very different from that relating to breach of fiduciary duties of directors.

20 The appellants appealed to the Court of Appeal. At the appeal, the appellants submitted that the allegation of financial assistance was not a new cause of action and alternatively that it arose out of the same facts or substantially the facts as already pleaded in the statement of claim.

21 In support of their argument, counsel for the appellants relied on **Collins v Hertfordshire County Council & Anor**; ¹ **Dorman v JW Ellis & Co Ltd** ² and **Idyll Ltd v Dinerman Davison & Hillman & Ors.** ³ In **Collins v Hertfordshire County Council & Anor** ¹, the county council owning and managing a hospital, were sued on the ground that the death of a patient was the result of their negligence in and about the conduct of their hospital. By the statement of claim the negligence was said to be (i) a defective and negligent system in the provision of dangerous drugs, and (ii) the negligence of (a) a resident medical officer who was a student and (b) of a visiting surgeon, both on the pay list of the hospital. At the hearing, application was made for leave to include a claim that the authority was also liable for the negligence of the pharmacist employed at the hospital. The application, though outside the

limitation period, was allowed on the ground that it was no more than an amendment of the particulars of the cause of action endorsed on the writ, namely, negligence in or about the conduct of the hospital and did not constitute the addition of a new cause of action.

22 In ***Dorman v J W Ellis & Co Ltd***,² the plaintiff sued his employers for damages for personal injuries alleging that while employed at the factory and standing beside a fellow employee by the name of Stewart who was engaged in drilling holes in a bar, the drill snapped and one of the pieces struck the plaintiff's eye.

23 The statement of claim alleged that 'the said accident and resultant personal injuries were caused by the breach of statutory duty [under the Factories Act] and or negligence of the defendants, their servants or agents'. The particulars of common law negligence alleged that the defendants failed to provide the said Stewart with safe tools. After the limitation period the plaintiff sought to add further particulars alleging negligence on the part of the said Stewart. The application was allowed because no new cause of action was being introduced. In allowing the application, Davies LJ said at p 307:

*... The story that is now set up by the plaintiff is the same story that was set up all along, namely, that the plaintiff lost his eye from a piece of the drill which was being operated by Stewart. What is now sought to be done is not to make out a new case of negligence but to persist in the old story and invite the judge at the trial to approach it, to interpret it, from a different angle or aspect. It is a different approach to the same main story of the accident. **Idyll Ltd v Dinerman Davison & Hillman & Ors** [1985] 4 Const LJ 294 involved a claim for breach of contract and negligence. Specific defects in the building were alleged. An application to amend by adding another defect in the building was allowed on the ground that the amendment did not introduce a new cause of action. If it did, it arose out of the same facts or substantially the same facts as the cause of action already claimed.*

24 We therefore find the authorities relied on by the appellants of little assistance on the matter before us.

25 Here it is contended by the appellants that the voluntary particulars are only expanding upon a cause of action already pleaded in para 10 of the amended statement of claim. However, the assertion in para 10 is that of constructive trust, founded upon a breach of duty on the part of the second and third defendants - the breach being their failure to act honestly and diligently in the discharge of their duties as directors of the appellants, in that they knew the debts being assigned to the appellants were in fact worthless and yet permitted the appellants to enter into the said transaction. The voluntary particulars sought to be filed, on the other hand, add up to what is effectively a completely different allegation. The breach of duty on which the constructive trust is now asserted to be founded is not that there was a failure on the part of the second and third defendant to act honestly and diligently, but that there was a breach of s 76 committed in order to facilitate a larger scheme of corporate development involving the appellants, the respondents and the debtor companies. Accordingly it is our opinion that, despite appearances and the form in which the proposed amendment in the present case is made, it does in fact introduce a new cause of action. In this we find the case of ***Marshall v London Passenger Transport Board*** 4 helpful. In that case, the plaintiff was injured in a collision between his bicycle and a tramcar. He sued the defendants for damages for injuries caused by the negligence of their servant the driver of the tramcar. The plaintiff sought to amend by adding a paragraph alleging as a particular of negligence, a breach of statutory duty of the defendant corporation under the Tramways Act 1870 to maintain the road on which the tramway system was laid and the tramline in good condition and repair. The application was disallowed. At p 88 Lord Wright MR said:

*The claim originally indorsed on the writ was for damages for personal injuries caused by the negligent driving of the defendants' servant - that is, a claim based on negligence in driving and negligence of a vicarious character; it proceeds on the liability of the defendants for their servant's default. The amendment which is proposed is based upon what I regard as something entirely different, not as a claim for negligent driving and not as a claim for breach of duty by the defendants' servant for which the defendants are liable; it is based on a claim for breach of statutory duty that may indeed be regarded as statutory negligence, as explained in the recent case of **Lochgelly Iron & Coal Co Ltd v M Mullan**, but it is certainly an entirely different claim from a claim for negligent driving, and it is a claim which is not based on vicarious liability. It is a claim for breach of a statutory duty, which is a liability personal to the corporation and not capable of being delegated; but in addition to that it involves, as I read the proposed amendment, a quite different set of ideas, quite a different allegation of fact. As I understand it, the original claim of negligence had been because the defendants' tramcar was driven into and struck the plaintiff, whereas the proposed amendment seems to allege that the bad repair of the road and the tramlines caused the plaintiff to collide with the defendants' tramcar, which is quite a different set of ideas from the idea of negligent driving. In my view, therefore, the proposed amendment would, if allowed, have set up a new cause of action involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries. No doubt in cases of negligence injury is the gist of the action, but it is only one element. The cause of action involved duty, breach and damage, and the proposed amendment would have set up an entirely different duty and an entirely different breach of that duty. The one remaining feature of damage, it may be, would have been the same.*

26 This brings us to the issue of the operation of O 20 r 5(5), which provides as follows:

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.

27 As to whether or not the proposed amendment is based on the same or substantially the same facts as those already pleaded, the appellants' claim as pleaded in the amended statement of claim is based on the alleged conspiracy between the respondents and the defendants in breach of their fiduciary duty whereby the appellants paid the respondents the sum of \$2,371,079.62 in consideration for the assignment of receivables from the debtor companies which receivables were worthless in view of the financial position of the debtor companies. These allegations by themselves do not in our view disclose a breach of s 76.

28 Therefore, the new cause of action contained in the voluntary particulars cannot be said to be based on the same facts or substantially the same facts as are already pleaded in the amended statement of claim. Accordingly we dismiss the appeal with costs. ***Appeal dismissed.***

Goh Joon Seng J
Karthigesu J
Yong Pung How CJ

Sundaresh Menon and Anita Dorett (Wong Meng Meng & Partners)
for the appellants
Tang Khin Wai and Raymond Wong (Lee & Lee) for the respondents
