IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1993] SGHC 4

Suit 5858/1986

Between

Great Pacific Finance Ltd

… *Plaintiff*

And

Tan Hock Chan

… *Defendant*

GROUNDS OF DECISION

Version No 1: 29 Oct 2026 (23:45 hrs)

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Great Pacific Finance Ltd v Tan Hock Chan

[1993] SGHC 4

Suit 5858/1986
Lai Siu Chiu JC
04 January 1993

1 **Judgment:**

2 Coram: Lai Siu Chiu JC

3 **GROUNDS OF DECISION**

4 A. On 6 October 1992 three matters came up for hearing before me relating to the above suit:

5 1. the defendant's application (vide summons in chambers no.6222 of 1992) for an order that the affidavit of Tan Puay Hua (the affidavit) filed on 1 October 1992 be struck out under O 41 r 6 of the Rules of the Supreme Court (the RSC);

6 2. the defendant's appeal against the decision of the learned deputy registrar allowing the plaintiffs an extension of time in which to appeal notwithstanding that the time limit under O 56 r 1(3) of the RSC read with the 1991 amendment Rules had expired, and

7 3. the plaintiffs' appeal against the decision of the learned deputy registrar dismissing the plaintiffs' application (vide summons in chambers no.7354 of 1990) for leave to amend their statement of claim.

8 B. I dismissed the defendant's application and appeal and allowed the plaintiffs' appeal. The defendant has appealed against my decisions. Before I give my reasons it is necessary to refer to the background of the application and appeals.

9 1. The plaintiffs filed their statement of claim against the defendant in December 1986 for outstanding loans made to the defendant under two letters of offer dated 9 June and 21 September 1982 respectively. The loans were secured by mortgages on three properties. Of the three loans made, the plaintiffs recovered full payment on one loan.

10 2. Upon the defendant (who is a resident of Malaysia) entering an appearance to the notice of writ, the plaintiffs applied for summary judgment on their claim; they succeeded (partially) before the registrar and were awarded judgment in the sum of S$68,495.64. Pursuant to the defendant's appeal however, the judgment in favour of the plaintiffs was set aside and the defendant was granted unconditional leave to defend the entire claim of the plaintiffs which amounted to S$1,438,574.80.

11 3. The defendant in his defence filed on 17 May 1989 admitted receiving and signing the two letters of offer but denied receiving the loans. He contended that the loan and mortgage transactions were illegal under ss 23(1) and 25(2) of the Finance Companies Act (the Act) Cap 108. The defendant alleged that he lent his name to the purported loan and mortgage transaction on the 'Estoril' property at the request of one Low Chang Hian (Low) who at the material time

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was a director of the plaintiffs as well as of Crown Pacific Pte Ltd (Crown Pacific) Eastern Lagoon Pte Ltd (Eastern Lagoon) and Management Dynamic Pte Ltd (Management Dynamic), for the purpose of circumventing the provisions of the Act which prohibited the plaintiffs from granting a loan to Crown Pacific. He was assured by Low that the plaintiffs would not sue him on the loans. Low's brothers Chung Song and Chun Seng and one Tan Eng Sing (Tan) were also common directors of the plaintiffs, Crown Pacific, Eastern Lagoon and Management Dynamic as well as of a Hong Kong company Asean Resources Ltd. All five companies participated in the scheme. The Estoril property was rented out by Crown Pacific and the rents were collected by Management Dynamic.

12 4. I should add that in his affidavit filed on 6 February 1988 to oppose the plaintiffs' application for judgment, the defendant deposed that in 1982 Low and his two brothers as well as Tan were directors of Ka Wah Bank (the Bank) Hong Kong. The defendant said he was then a director of a Hong Kong company Fit Times Nominees Ltd to which the Bank extended credit facilities. Hence when Low/the plaintiffs approached him to lend his name to the scheme, he felt obliged to agree.

13 5. On 3 September 1991 the defendant filed an amended defence in which he further alleged that at the request of Low made on behalf of the plaintiffs and Eastern Lagoon who were the developers, he allowed his name to be used as purchaser of two units (the units) of the condominium developed by Eastern Lagoon on the understanding that the rents collected therefrom would be utilised to pay the instalments on the alleged loans from the plaintiffs and on Low's assurance that the plaintiffs would not sue him personally for the alleged loans. When approached by Low subsequently, the defendant signed certain documents pertaining to the sale of one of the units. He repeated his earlier

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defence that the plaintiffs were precluded/estopped by their conduct from claiming the sums due on the alleged loans.

14 6. Pursuant to leave granted by an order of court, the defendant filed his re-amended defence on 27 August 1992 wherein he repeated the allegations made in his amended defence and added that he was advised by his solicitors that the loan transactions were designed to circumvent the restrictions under the Act; the following sentence was added to para 9 of the re-amended defence:

15 The defendant will aver that at no time, prior to the aforesaid advice of his solicitors, was he aware that the alleged loan and mortgage transactions were designed by the plaintiffs, its servants and/or agents to circumvent the restrictions under s 23(1) of the Finance Companies Act.

16 C. The defendant's application

17 1. Counsel for the defendant informed the court that it related to matters which transpired after the plaintiffs' application had been heard; she referred to exh TPH 1 of the affidavit wherein the plaintiffs had disclosed at pp 8 and 9 a copy of her letter to their solicitors dated 3 September 1992 (her letter).

18 2. Her letter was a reply to the plaintiffs' solicitors' letter dated 31 August 1992 (the letter) exhibited in exh TPH 1 at p 3 to 5. The letter referred to the re-amended defence which she filed on the defendant's behalf on 27 August 1992 wherein the defendant had alleged that he had no prior knowledge of the illegality of the scheme initiated by Low until he was so advised by his solicitor.

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19 3. The letter then referred to two affidavits (her affidavits) sworn personally by counsel for the defendant to oppose the plaintiffs' previous O 14 proceedings, one was filed on 16 January 1988 and the other on 24 March 1988.

20 4. The letter went on to state that the plaintiffs' claim started on the premise that it was a simple loan transaction until the filing of her affidavits which affidavits were tantamount to admitting that there was a scheme to defraud the plaintiffs; the plaintiffs' application to amend the statement of claim was necessitated by such allegations.

21 5. The letter pointed out that as a result, the defendant and her counsel may have incriminated themselves and counsel would also be a potential witness. The letter inquired whether counsel's firm would consider discharging itself from further acting for the defendant and whether she would consent to the setting aside or striking out (and or examination of the deponents) of all the affidavits filed by the defendant and counsel.

22 6. Counsel took great exception to the letter and in her letter she demanded that the statements made against her which she considered defamatory should be withdrawn within 48 hours. The plaintiffs' solicitors in their reply dated 7 September 1992 refused to retract their statements. She complained that the letter and her letter were irrelevant to the appeal and the affidavit should be struck out.

23 7. Counsel for the plaintiffs explained that contrary to his opponent's contentions, it was necessary to exhibit both letters in the affidavit as the defendant had opposed the plaintiffs' application to amend the statement of claim based on allegations contained in the defendant's re-amended defence in which the defendant took a different stand from that stated in his original

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defence. He contended that counsel for the defendant was now retracting the allegations which she and her client made in their previous affidavits.

24 8. Counsel for the defendant pointed out that the re-amended defence (para 9) asserted that the defendant was advised by his solicitors that the scheme was illegal, not that he was not aware of the scheme. The defendant had not resiled from his previous stand; she had first raised the issue of illegality for breach of s 23(1) of the Act at the O 14 stage. When he first consulted her, the defendant had no documents and it was counsel who conducted inquiries and company searches which showed, that the plaintiffs and the developers of the properties had common directors, who the tenants were and who collected the rent.

25 D. I dismissed the defendant's application for the following reasons:

26 1. I would first of all make the observation that the letter could have been couched in better and more polite terms by counsel for the plaintiffs in accordance with the usual courtesy one member of the Bar should extend to another when corresponding. Having said that, it seems to me that counsel for the defendant was also unnecessarily emotive in her response; her letter could similarly have been better worded.

27 2. I did not agree with the plaintiffs' argument that the defendant's current stand as reflected in his re-amended defence differed from his previous position. What was apparent was that by his latest pleading the defendant had made the state of his knowledge of the legality of the scheme before and after he engaged counsel, a relevant fact. Further the defendant had waived solicitor and client privilege in referring to the advice which he received from his

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counsel. Such waiver opened up a whole avenue of cross-examination by plaintiffs' counsel at the trial.

28 3. It may well be that the affidavit and the offending exhibit were not relevant to the plaintiffs' or defendant's appeal as counsel for the defendant contended. However the same comment cannot be made in relation to the trial proper in view of para 9 of the re-amended defence and what was deposed to in the defendant's affidavit filed on 6 February 1988. It is public knowledge that the Low brothers were apprehended and convicted for wrongdoings committed during the time that the Bank was under their control.

29 4. Accordingly I felt that it was not proper for me to grant the defendant's application and strike out the affidavit at this stage since the correspondence in exh TPH 1 may well be relevant later. It seemed to me that the entire incident concerning both letters could have been better handled by both parties and what was a proverbial storm in a teacup would have been avoided.

30 E. The defendant's appeal The defendant's arguments

31 Counsel for the defendant contended

32 1. that there were no sufficient grounds for the court to grant the plaintiffs an extension of time to appeal. Where no explanation, excuse or reason is given for the delay in issuing the notice of appeal, the judge may refuse to extend the time.

33 2. the court should take into consideration the following factors in deciding whether or not to extend time:

34 (i) length of the delay

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35 (ii) reasons for the delay

36 (iii) chances of success

37 (iv) the degree of prejudice.

38 Where proceedings have been going on for a long time the court held that reasons for delay and the likelihood of success are factors which weigh heavily in the court's consideration (Pearson v Chen Chien Wen Edwin < 1991 > 3 MLJ 208).

39 3. even if the House of Lords in Lonrho plc v Fayed < 1991 > 3 AER 303 did change the law on conspiracy, the plaintiffs have not explained the period of delay from the date of the decision (27 June 1991) to April 1992. Further the mere fact that a higher court in a subsequent case has overruled an authority upon which a decision was based is not by itself sufficient ground to grant leave to appeal out of time (see Re J Wigfull < 1919 > Ch 52 and in Re Berkeley < 1944 > Ch 1).

40 4. as the order of court had been extracted, it cannot be reviewed, reheard, altered or varied except by way of an appeal (see Halbury's Laws of England vol 26 4 ed p 279 para 556).

41 5. in any case the plaintiffs have no chance of success in the appeal even if time for appealing was to be extended.

42 F. The plaintiffs' arguments

43 Counsel for the plaintiffs contended that the decision below to grant the plaintiffs an extension of time to appeal was correct, alternatively that the

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plaintiffs should be given leave to appeal out of time for the same four considerations which had been put forward by counsel for the defendant. Applying the four factors to this case:

44 1. There was no delay on the plaintiffs' part as immediately upon learning of the Lonrho decision (in April 1992) he had written to counsel for the defendant requesting the latter's consent to the proposed amendments but he received no positive reply.

45 2. The chances of the plaintiffs succeeding in the appeal were strongly in the plaintiffs' favour.

46 3. The defendant would suffer no prejudice if leave to appeal out of time was granted since the proceedings in question are merely interlocutory in nature. On the other hand if leave to appeal out of time is not granted to the plaintiffs, the plaintiffs would suffer great prejudice.

47 4. Even if the court feels that the plaintiffs' solicitors were at fault in detecting the Lonrho decision late, he would urge the court to exercise discretion in the plaintiffs' favour (see Gatti v Shoosmith < 1939 > 3 AER 916).

48 G. I granted the plaintiffs leave to appeal out of time and consequently dismissed the defendant's appeal in the exercise of my discretion which according to the Court of Appeal in Gatti's case (supra) and Palata Investments Ltd v Burt Sinfield Ltd < 1985 > 2 AER 517 is unfettered and will be exercised flexibly with regard to the facts of the particular case. I did not think and I was not informed by counsel for the defendant, there would be any prejudice to the defendant in allowing the plaintiffs an extension of time in which to file their appeal. I asked the same question as Chan Sek Keong JC (as he then was) did

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in Hau Khee Wee v Chua Kian Tong < 1987 > 2 MLJ 146 -- 'Should the appellants be deprived of their right of appeal because of the mistakes of their solicitors?' The answer obviously must be 'no' if no prejudice is caused to the defendant thereby.

49 H. The plaintiffs' appeal The plaintiffs' arguments

50 1. Counsel for the defendant had opposed the plaintiffs' application below where the plaintiffs sought to introduce in the proposed amended statement of claim (in paras 11 to 14) an alternative claim based on fraud and conspiracy. The plaintiffs alleged that the defendant conspired and agreed with Low and/or other unknown persons to cheat and or injure the plaintiffs in or about the granting of the loans; the defendant accepted the loans knowing that he was not the principal borrower and that the same were not for his own benefit.

51 2. Counsel for the plaintiffs said that at the hearing before the deputy registrar on 21 August 1991, his office had not yet received the third volume of the 1991 AER which contained the House of Lords decision in Lonrho plc v Fayed; neither party was aware of the decision then. His office received the law report in early 1992 (no date was specified) and in early April 1992 he wrote to the defendant's counsel for her consent to the plaintiffs' amendments to the statement of claim; she did not respond to his request.

52 3. Counsel said that the court below dismissed the plaintiffs' application based primarily on the authorities cited by counsel for the defendant which included Wing On Bank Ltd v Wai Man Estates Ltd < 1990 > 1 HKLR 377. In the light of the House of Lords decision in Lonrho's case, the previous authorities are no longer good law.

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53 4. The law on the tort of conspiracy prior to Lonrho was that to succeed on such a cause of action, the statement of claim must plead and allege that the predominant purpose of the alleged conspiracy was to injure the plaintiffs (see Allied Arab Bank v Hajjar (No 2) < 1988 > 3 AER 103, Metall v Donaldson < 1989 > 3 AER 14 and Wing On Bank, supra). By virtue of Lonrho it is now not an essential ingredient of the tort of conspiracy that the defendant should have had the sole or predominant purpose of injuring the plaintiffs, it is sufficient that the conspiracy can reasonably be foreseen to injure the plaintiffs.

54 5. The defendant had in the various affidavits which he filed to oppose the plaintiffs' application for summary judgment (see his affidavits filed on 17 August 1987 and 14 September 1988) adduced facts to show that the loans made to him by the plaintiffs arose out of a scheme initiated by Low and others to which the defendant was a party. It therefore became necessary for the plaintiffs to plead the alternative cause of action in conspiracy so that 'the real question in controversy between the parties to any proceedings may be determined' (see The White Book 1993 on O 20/5-8/6 at p 371). The same commentary at p 372 stated 'Leave to amend will be given to enable the defendant to raise a defence arising from a change in the law since the commencement of the proceedings affecting the rights of the parties or the relief or remedy claimed by the plaintiff, even though this might lead to additional delay and expense and a much longer trial'.

55 6. Denying the plaintiffs leave to amend would be a miscarriage of justice as they had had been granted leave to make the same amendments to their pleadings in four other suits.

56 I. The defendant's arguments

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57 1. The facts disclosed in the proposed amended statement of claim do not disclose a conspiracy. Although Lonrho says you do not have to prove the predominant intention to injure, you must still prove there was an intention to injure; the particulars alleged in the proposed para 11 did not plead any such intention; particulars will not cure a statement of claim which is defective. The elements to an action for conspiracy are that there must have been arrangement (which there was here) and that the aggrieved party suffered damage as a consequence. Here it was not foreseeable that when the defendant agreed to the scheme with Low, that damage would be caused to the plaintiffs. If the defendant could not foresee the damage at that point in time how can intention to injure be established?

58 2. All that the defendant had said in his re-amended defence was that he lent his name to the plaintiffs' directors at their request. He has said that he accepted the loan knowing it was not for his benefit but he had not given any reasons. The plaintiffs were trying their luck at making out a case of conspiracy through discovery and in Wing On Bank the court ruled that they are not allowed to 'fish' for evidence. The proposed paras 11 to 14 of the statement of claim do not make sense as, if it was the plaintiffs' case that the defendant accepted their loan facilities it was contradictory to aver at the same time that he knew he was not the principal borrower. The proposed amendments do not disclose a sustainable cause of action.

59 3. The claim in conspiracy is in any event timebarred as the alleged cause of action arose in 1982. The defendant had first raised the subject of the scheme in 1987 and the plaintiffs could well have brought up the conspiracy issue then instead of waiting another five years before so doing.

60 J. The decision

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61 I allowed the appeal for the following reasons:

62 1. Generally it is the practice of the court to grant leave to amend unless the party applying acted mala fide or does something to his opponent which cannot be compensated by an order for costs or otherwise. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs. This principle is set out at p 372 of The White Book 1993 in the commentary on O 20 r 5. Counsel for the defendant did not, in opposing the plaintiffs' application give any reasons why her client would be prejudiced by the proposed amendments to the statement of claim or how injustice would be done to the defendant if the amendments were allowed.

63 2. Counsel for the defendant argued that it was unlikely that the plaintiffs would succeed in their proposed action for conspiracy on the ground that the proposed amendments disclose no reasonable cause of action (see Jeyaretnam v Lee Kuan Yew < 1990 > 2 MLJ 65). I did not agree with counsel's contention that it is so plain and obvious that the plaintiffs have no cause of action for conspiracy by the amendments proposed, adopting the test of the Court of Appeal in Jeyaratnam's case that in a contested interlocutory application for leave to amend pleadings, the principles to be applied are the same as if the application before the court had been an application to strike out the amended pleadings. It is noteworthy in this context that O 20 r 5(5) of the RSC clearly allows pleadings to be amended notwithstanding that the effect would be to add a new cause of action, which is the case here.

64 3. The court has a discretion to allow the amendment even after a limitation period has expired on the principle that if the proceedings had been

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properly formulated from the beginning, the defence of limitation would not have been available to the defendant; the amendments would have cured the defective pleadings ab initio and the defendant is not being deprived of the benefit of a defence which he would not have had in the first place if the proceedings had been properly formulated and constituted.

65 J. I rejected the request of counsel for the defendant for further arguments after the hearing as I was of the view that the matters raised by her in support of her request were not fresh points but had been sufficiently canvassed at the hearing itself and no new authorities were cited.

Lai Siu Chiu JC

Scott Thillagaratnam & Kenny Chooi (Khattar Wong & Partners) for the plaintiffs
Thio Ying Ying (Chor Pee & Co) for the defendant

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