

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

GROUND OF DECISION

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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.

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 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

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 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 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

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 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

[illegible]

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 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.

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

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

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 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
