

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 35

Suit 688/1993

Between

Aztech Systems Pte Ltd

... Plaintiff

And

Creative Technology Ltd

... Defendant

GROUND OF DECISION

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Aztech Systems Pte Ltd v Creative Technology Ltd

[1995] SGHC 35

Suit 688/1993
Goh Joon Seng J
07 February 1995

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Judgment:

2 Coram: GOH JOON SENG J

3 **GROUND OF DECISION**

4 The plaintiffs are a company incorporated in Singapore and
they carry on the business of manufacturing and marketing the
'Sound Galaxy' line of sound cards.

5 The defendants are a company incorporated in Singapore and
they carry on the business of manufacturing and marketing the

`Sound Blaster' line of sound cards.

6 Following threats by the defendants to take action to protect their intellectual property rights unless the plaintiffs stopped their copyright infringement by their `Sound Galaxy' line of sound cards of the defendants' `Sound Blaster' line of sound cards, the plaintiffs commenced these proceedings. By their amended statement of claim the plaintiffs claim inter alia for a declaration that the manufacture and sale of the plaintiffs' `Sound Galaxy' sound cards do not infringe the defendants' copyright in their `Sound Blaster' sound cards.

7 By their Re-amended Defence and Counterclaim, prayers 5 and 6, the defendants counterclaim for a permanent injunction restraining the plaintiffs from infringing by their `Sound Galaxy' line of sound cards the defendants' copyright in their

`Sound Blaster' line of sound cards and recovery of the profits made by the plaintiffs from their infringing conduct.

8 Paragraphs 7(b), 39 to 46 of the Re-amended Defence and Counterclaim setting out particulars of the infringement read:

9 7(b) The firmware of the Defendants' SB cards have 2 non-essential features, namely the sine wave feature and the direct memory access feature, which are not necessary for the operation of the sound cards, and the Plaintiffs' `SOUND GALAXY NX PRO' and `SOUND GALAXY NX II' also have the same 2 non-essential features. Details of these non-essential features were provided in the said affidavit of Yeo Choon Tat.

10 39 The Defendants also counterclaim under section 200 (4) of the Copyright Act for the Plaintiffs' copyright infringement of the copyrighted firmware and software contained in the Defendants' `SOUND BLASTER' line of sound cards.

11 40 In 1992, the Plaintiffs released sound cards called `SOUND GALAXY BX', `SOUND GALAXY NX' and `SOUND GALAXY NX PRO' which are distributed throughout the world. The plaintiffs infringed the Defendants' exclusive rights in the code found in `SOUND BLASTER' firmware and `SOUND BLASTER' software to develop their competing sound cards.

12 41 The `SOUND BLASTER' firmware is original material belonging to the Defendants and constitutes copyrightable subject matter. Likewise, the computer programs in the `SOUND BLASTER' software are original material belonging to the Defendants and each constitutes copyrightable subject matter.

13 42 Beginning in 1992 and continuing to the present, the Plaintiffs improperly reproduced, altered and used the Defendants' copyrighted works for the development of `SOUND

GALAXY NX', 'SOUND GALAXY BX' and 'SOUND GALAXY NX PRO'

(collectively 'SB Clones') as follows:

14 Particulars

15 (1) The Plaintiffs obtained one or more copies of 'SOUND
BLASTER' firmware and software;

16 (2) the Plaintiffs then reproduced the copyrighted object code
in these products;

17 (3) the Plaintiffs then created derivative versions of those
copyrighted programs when they disassembled the machine readable
object code stored in the programs and made assembly language
versions of them;

18 (4) the Plaintiffs then fixed these assembly language versions
in a tangible medium;

19 (5) the Plaintiffs made further reproductions of the
disassembled programs; and

20 (6) subsequently the Plaintiffs enhanced such disassembled, intermediate copies of the Defendants' copyrighted programs to create further derivative works.

21 The SB Clones are based, in substantial part, upon the infringing material generated by making intermediate copies of the Defendants' copyrighted programs and derivative works based thereon.

22 43 Further, as a result of the Plaintiffs' infringing conduct, portions of the firmware found in the production version of the SB Clones are substantially similar to portions of the firmware found on 'SOUND BLASTER' sound cards.

23 44 In addition, the Plaintiffs have duplicated the Defendants' copyrighted program 'CT- VOICE.DRV' and sold copies of the duplicated program to a competing manufacturer of sound cards as if it were an original program created by Aztech Labs, Inc., a

subsidiary of the Plaintiffs.

24 45 The Plaintiffs' reproduction and adaptation of the
Defendants' copyrighted programs and their distribution and
marketing of the SB Clones infringes the Defendants' exclusive
rights as provided under the Copyright Act.

25 46 The Plaintiffs' infringing conduct, including its
disassembly of Sound Blaster Firmware and Sound Blaster Software,
was for exploitative reasons and for a direct, commercial
purpose. The SB Clones are based, in substantial part, on
infringing material generated as a result of the Plaintiffs'
infringing conduct. The SB Clones have directly affected the
market for the Defendants' 'SOUND BLASTER' products because a
consumer who purchases an SB Clone will not purchase a 'SOUND
BLASTER' sound card for the same personal computer. Thus, the

Plaintiffs' practice of disassembling 'SOUND BLASTER' firmware and software to create its SB Clones adversely affects the existing and potential market for 'SOUND BLASTER' sound cards because these clones diminish and usurp potential 'SOUND BLASTER' sales.

26 On 9 June 1994, the plaintiffs filed an application in Summons-in-Chambers Entered No 3402 of 1994 for an order that paras 7(b), 39 to 46 and prayers 5 and 6 of the Re- amended Defence and Counterclaim be struck out on the ground that they are scandalous, frivolous or vexatious and or may prejudice, embarrass or delay the fair trial of this action or are otherwise an abuse of the process of the Court or that the said paragraphs be struck out under the inherent jurisdiction of the Court. By Summons-in-Chambers Entered No 5639 of 1994, the plaintiffs

applied for an order that this action and Summons-in-Chambers Entered No 3402 of 1994 be tried with an assessor under Order 33 rule 4.

27 Given the technical nature of the evidence and by consent I appointed Robert G Wedig to be the assessor at the hearing of this action with costs in the cause. But I refused to make an order for the appointment of an assessor for the hearing of the plaintiff's application in Summons-in-Chambers Entered No 3402 of 1994. The plaintiffs have appealed against my decision. I now give my reasons.

28 The application under Summons-in-Chambers Entered No 3402 of 1994 is to strike out parts of the Re-amended Defence and Counterclaim under O.18 r.19 or under the inherent jurisdiction of the court. The principles governing the exercise of powers by the court under this rule is well settled. See Supreme Court

Practice 1995 Vol 1 para 18/19/7 where it is stated:

29 It is only in plain and obvious cases that recourse should be had to the summary process under this rule, per Lindley M.R. in *Hubbuck v Wilkinson* < 1899 > 1 QB 86, p 91 (Mayor, etc, of the City of London v Horner (1914) 111 L.T. 512 C.A.) See also *Kemsley v Foot* < 1951 > 2 K.B. 34; < 1951 > 1 All E.R. 331, C.A. affirmed < 1952 > A.C. 345, H.L. The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Att. Gen of Duchy of Lancaster v L & N.W. Ry. Co* < 1892 > 3 Ch. 274 C.A.). It cannot be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action (*Wenlock v Moloney* < 1965 > 1

W.L.R. 1238; < 1965 > 2 All E.R. 871, (C.A.). The powers conferred by this rule will only be exercised where the case is clear beyond doubt (per Lindley L.J. in *Kellaway v Bury* (1892) 66 L.T. 599, p 602). The Court must be satisfied that there is no reasonable cause of action (as in *South Hetton Coal Co v Haswell, etc, Co* < 1898 > 1 Ch 465; cf *Dominion Steel, etc, Co v Invernairn* < 1927 > W.N. 278) or that the proceedings are frivolous or vexatious (as in *Lawrance v Norreys* (1890) 15 App Cas. 210; *Wyatt v Palmer* < 1899 > 2 QB 106; *Lea v Thursby* (1904) 90 L.T. 65; *Emerson v Grimsby Times, etc, Co.* (1926) 42 T.L.R. 238); or that the defences raised are not arguable (*Waters v Sunday Pictorial Newspapers* < 1961 > 1 W.L.R. 967; <1961> 2 All E.R. 758, C.A.)

30 Where an application to strike out pleadings involves a prolonged and serious argument, the Court should, as a rule decline to proceed with the argument unless it not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out would obviate the necessity for a trial or substantially reduce the burden of preparing for a trial, and therefore where the Court is satisfied, even after substantial argument both at first instance and on appeal, that the defence does not disclose a reasonable ground of defence, it will order it to be struck out < Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd < 1986 > A.C. 368; <1986> 1 All E.R. 129 H.L. affirming < 1985 > 3 W.L.R. 501; <1985> 2 All E.R. 619, C.A.).

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32 On an application to strike out the statement of claim and to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute (*Wenlock v Moloney* < 1965 > 1 W.L.R. 1238; < 1965 > 2 All E.R. 87 C.A.). It has been said that the Court will not permit a plaintiff to be 'driven from the judgment seat' except where the cause of action is obviously bad and almost incontestably bad' (per Fletcher Moulton LJ in *Dyson v Att. Gen.* < 1911 > 1 KB 410 p 419). ...

33 On the inherent jurisdiction of the Court to strike out pleadings, Supreme Court Practice 1995 Vol 1 para 18/19/36 states:

34 Apart from all rules and Orders, ... the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see

Reichel v Magrath (1889) 14 App Cas 665). In such cases, it will strike out part of an indorsement of a writ (Huntley v Gaskell (No. 1) < 1905 > 2 Ch 656); or set aside service of it (Watkins v N. A. Land Co. (1904) 20 T.L.R. 534); or will stay or dismiss before the hearing actions which it holds to be frivolous or vexatious (Metropolitan Bank v Pooley (1885) 10 App Cas 210; Lawrance v Norreys (1890) 15 App Cas 210 p 219; Haggard v Pelicier Freres < 1892 > A.C. 68; The Manar < 1903 > P 95, p.106; Boaler v Power < 1910 > 2 K.B. 229, C.A.; Shackleton v Swift < 1913 > 2 K.B. 304; Norman v Mathews (1916) 85 L.J.K.B. 859; ...

35 On the exercise of this inherent jurisdiction, Supreme Court Practice 1995 Vol 1 para 18/19/37 states:

36 The power to stay or dismiss an action under the inherent

jurisdiction of the Court on the ground that it is obviously frivolous or vexatious is discretionary, just as it is under O.18 r.19 (*Gleeson v J Wippell & Co Ltd* < 1977 > 1 WLR 510; < 1977 > 3 All ER 54, following *Carl-Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* < 1970 > Ch 506; <1969> 3 All ER 897. ... The jurisdiction will not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed (see *Lawrance v Lord Norreys* (1890) 15 App Cas 210; *Goodson v Grierson* < 1908 > 1 KB 766; *El Dev Co v Att. Gen. for Ontario* < 1919 > A.C. 687).

37 Since it must only be in plain and obvious cases that the court will exercise its discretion to strike out any pleading, I did not see the need for the plaintiffs' application in

Summons-in-Chambers Entered No 3402 of 1994 to be tried with an
assessor.

Goh Joon Seng J

Ng Soon Kai for the plaintiffs
Lim Yee Ming for the defendants
