IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1998] SGCA 75

Civil Appeal No 52 of 1998

Between

Chan Kern Miang

… Plaintiff

And

Kea Resources Pte Ltd

… Defendant

GROUNDS OF DECISION

Civil Procedure — Parties — Joinder; Civil Procedure — Third party proceedings; Civil Procedure — Vacation of trial dates

Version No 1: 30 Oct 2026 (00:14 hrs)

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Chan Kern Miang v Kea Resources Pte Ltd

[1998] SGCA 75

Civil Appeal No 52 of 1998
Lai Kew Chai J; Chao Hick Tin J
20 April 1998

Chao Hick Tin J (delivering the grounds of decision of the court):

1 This was an appeal against certain interlocutory decisions of G P Selvam J made in respect of the applications in two summonses in chambers numbered SIC 1027/1998 and SIC 1325/1998 as well as an oral application. At the conclusion of the hearing we dismissed the appeal. We now give our reasons.

2 In SIC 1027/1998, the appellant, Chan Kern Miang ("Chan"), applied for the proceedings in Suit No 2000 of 1996 (Chan is the defendant in the action) to be stayed until the respondent, Kea Resources Pte Ltd ("Kea Resources"), amend their writ of summons and statement of claim by adding one Ngiam Choong Kam ("Ngiam") as a co-defendant in S 2000/1996. In SIC 1325/1998 Chan applied for the hearing dates, 30 March to 3 April 1998, fixed for the continued hearing of the consolidated actions (S 2004/1993 with S 2000/1996) to be vacated and fresh dates fixed. During the course of hearing SIC 1027/1998, as an alternative, counsel for Chan made an oral application for leave to issue a third-party notice against Ngiam. The learned judge dismissed all three applications.

Background

3 Kea Resources, a company incorporated in October 1988, is engaged in the business of shipbuilding and the sale and purchase of vessels. Then it had two shareholders, Kea Holding Pte Ltd, which held 75% of the shares, and Ngiam, who held the remaining 25%. Ngiam was the managing director of Kea Resources from 18 October 1988 to 11 August 1993 when he resigned.

4 Chan was appointed as the business development manager of Kea Resources in January 1989. He was promoted to assistant general manager on 2 September 1991. He resigned from Kea Resources on 15 May 1992.

5 Marine Technologies Holdings Pte Ltd ("MTPL") was a company incorporated on 29 July 1991, with Lim Koh Chee and Tan Yong Aun each holding one share. In March 1992, Ngiam sounded out Chan of the possibility of both of them joining MTPL. On 30 April 1992 Chan became a shareholder and director of MTPL. Kea Resources did not know of Chan's involvement in MTPL. Ngiam represented Kea Resources in entering into the contracts with MTPL. Kea Resources felt that Ngiam and Chan had conspired to injure its business by selling barges to MTPL at an undervalue and in not collecting money owed by MTPL to Kea Resources.

6 On 7 October 1993 Kea Resources commenced Suit 2004/1993 against MTPL where it claimed for a sum of $600,000, being the balance due under nine contracts for the sale of barges to MTPL. It also claimed for an account of profits made by MTPL on the ground that barges were sold to MTPL at an undervalue due to breaches of fiduciary duties on the part of Chan and Ngiam.

7 In November 1993, Kea Resources also instituted Suit No 2270/1993 against Ngiam for breach of fiduciary duties as managing director and for

Version No 1: 30 Oct 2026 (00:14 hrs)

negligence. On 5 December 1994 Kea Resources and Ngiam entered into a settlement agreement to resolve their disputes ("the settlement agreement"), including Suit 2270/1993. Under the settlement, Ngiam was to transfer 500,000 shares in Kea Resources to Kea Holding Pte Ltd at a fair value to be fixed by the accountant of Kea Resources, and Kea Resources was to discontinue Suit No 2270/1993 (among other actions) against Ngiam.

8 On 17 October 1996 Kea Resources commenced Suit No 2000/1996 against Chan for damages for breach of the implied terms of his contract of employment, for conspiracy and for knowing receipt of proceeds in breach of trust, arising out of broadly the same transactions in which Ngiam was involved. Kea Resources prayed for a declaration that Chan was a constructive trustee in respect of the profits which he made from the sale of the barges.

9 Suit No 2270/1993 and Suit No 2000/1991 were consolidated and the consolidated actions were heard by G P Selvam J for seven days before it was adjourned for further dates to be given for the continued hearing. At the time of the adjournment, Kea Resources was about to close its case as all its principal witnesses had been called and cross-examined. Only one more witness on valuation remained to be called. At that part of the hearing, Chan was represented by M/s C Arul & Partners. However, on 24 October 1997 M/s Wong Partnership took over the conduct of the defence of Chan from M/s C Arul & Partners.

10 On 14 November 1997 the parties appeared before the learned registrar who fixed 30 March–3 April 1998 and 24–30 April 1998 (altogether ten hearing days) for the resumed hearing. The latter set of dates were later altered to 27–30 April and 6 May 1998. On 19 November 1997 Chan's leading counsel, Mr Mohan Pillay, was informed by Mindef that his reservist training scheduled for

Version No 1: 30 Oct 2026 (00:14 hrs)

9–14 February 1998 had been postponed to 30 March–3 April 1998. On 11 December 1997 Mr Pillay wrote to Mindef requesting for a deferment on account of this case. On 14 January 1998 Mindef turned down the request. On 23 January 1998 Mr Pillay asked Mindef to review their decision. On 2 February 1998, Mindef replied affirming their decision. This brought about the application in SIC 1325/1998.

11 To complete the picture, we ought to mention that in December 1995, Ngiam instituted OS 1181/1995 against Chan, MTPL and another party over a dispute on the ownership of certain shares in MTPL. On 16 September 1996, midway through the trial in the High Court, the parties entered into an arbitration agreement and the action was discontinued.

Decision below

12 In his brief grounds of decision the learned judge gave the following reasons for the decisions he made:

> (a) Kea Resources had almost concluded its case. To compel it to add another party as a second defendant at this stage of the proceedings, which would require Kea Resources to revise its statement of claim, and literally to start all over again, was oppressive; all the more so when Kea Resources had entered into a settlement agreement with Ngiam.
>
> (b) Chan had plenty of time to apply to add Ngiam as a party but chose not to do so.
>
> (c) Costs could not adequately compensate the plaintiffs for the loss of time and effort if the application had been allowed.

(d) For the same reasons, the addition of a third party at this juncture was equally objectionable. It would enable Chan to achieve indirectly what he could not achieve directly.

(e) Vacating the hearing dates was disallowed as Chan and their solicitors had ample time to arrange for another counsel/solicitor in the same firm to take over the conduct of the case and vacating the five days would cause "administration difficulties and loss of public funds".

Vacating of dates

13 We shall first deal with the issue of vacating hearing dates. In recent years, in the interest of prompt administration of justice and efficiency and to avoid wastage of judicial time, the High Court adopted a strict view on the question of vacating hearing dates. Strong compelling grounds must exist before the court will consider the exercise of its discretion.

14 In the present case, M/s Wong Partnership (Mr Mohan Pillay in particular) took over the conduct of the defence of Chan from his previous solicitors on 24 October 1997, after the first set of hearings stretching over seven days had been completed. M/s Wong Partnership could not be faulted for agreeing to the dates fixed by the Registrar as, at that point in time, they did not clash with Mr Pillay's reservist training schedule. A few days later Mindef made the change to his reservist training schedule. But from that point on, M/s Wong Partnership had ample time to make the necessary internal arrangement for someone else in the firm to take over the conduct of the case. We noted that Mr Pillay had written to Mindef to explain his difficulties and asked for deferment, which request was turned down. He appealed and that was also rejected. The fact that a request had been made to Mindef for deferment does not mean that some provisional arrangement should not have been made within the firm in

Version No 1: 30 Oct 2026 (00:14 hrs)

case the request could not be acceded to. In any case, from the date the appeal was turned down on 2 February up to 30 March 1998 was a period of about eight weeks. That should be ample time for someone else in the firm to take over.

15 In the circumstances of the instant case, we did not think that the learned judge was wrong in the exercise of his discretion when he refused the application.

Joining Ngiam as co-defendant

16 The application of Chan to require the joining of Ngiam as a co-defendant was made pursuant to O 15 r 6(2)(*b*) of the Rules of Court which reads:

> (2) Subject to the provisions of this Rule, at any stage of the proceedings in any cause or matter, the Courtmay, on such terms as it thinks just and either of its ownmotion or on application —
>
> …
>
> (*b*) order any or the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter theremay exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

Version No 1: 30 Oct 2026 (00:14 hrs)

17 Counsel for Chan relied upon a passage in the *Supreme Court Practice* para 15/6/7 to support his contention that Chan's application should be granted:

> In this respect, it would therefore seem that the objects of para 2(b) as to joinder of parties are broadly the same as the objects of the rules relating to third party proceedings, namely (a) to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action, and (b) to prevent the same or substantially the same questions or issues being tried twice with possibly different results.

18 Counsel argued that as Kea Resources' claim against Chan in S 2000/1996 is for:

(a) breach of contract of employment;

(b) conspiring with Ngiam to injure Kea Resources; and

(c) knowingly assisting, or knowingly receiving proceeds from, Ngiam's breach of trust,

Chan's liability would be dependent on Ngiam's breaches. If Chan were held liable in conspiracy it must be predicated on Ngiam being a joint tortfeasor. Chan should be entitled to seek an indemnity/contribution from Ngiam. Similarly with regard to the claim in trust, Chan's liability, if any, is the liability of a third party to a trust for knowing receipt or knowing assistance. Chan's liability thereby must be contingent upon Ngiam's breach of trust as a trustee, a liability akin to that of the liability of a guarantor. A failure to join Ngiam would lead to a multiplicity of proceedings with a risk of differing results. A related question was whether the settlement agreement reached between Kea Resources and Ngiam was effective to release Chan from any liability to Kea Resources.

Version No 1: 30 Oct 2026 (00:14 hrs)

Our decision

19 The first point we wish to make is that while O 15 r 6(2)(*b*) allows for the addition of a party at any stage of the proceedings, including the appeal stage as was the case in *Dollfus Mieg et Compagnie SA v Bank of England* [1951] Ch 33, it is a matter of discretion, to be decided by the court as it thinks just. It is purely an enabling provision. The court will exercise it taking into account all the pertinent circumstances of the case.

20 Where two or more persons are liable for the tort of conspiracy or for breaches of trust, liability of each is joint and several. This is unlike the position of a guarantor. As a rule, where liability is joint and several, a plaintiff is entitled to sue whomsoever he wishes. In the present case there is an absolute ground why Ngiam should not be added as a defendant. This is the settlement agreement reached between Kea Resources and Ngiam. Pursuant thereto Ngiam had fulfilled the terms thereof. There would be no reason to add Ngiam as a defendant, as Kea Resources would be barred from claiming any reliefs against Ngiam. There is really no answer to this. And if Kea Resources were to seek to add Ngiam as a defendant, Ngiam would be entitled to apply to have the action against him struck out. As far as Ngiam is concerned, any dispute between Kea Resources and Ngiam had been completely determined by the settlement agreement. Thus O 15 r 6(2)(*b*)(i) should not be invoked. It is not necessary to join Ngiam to determine the action brought by Kea Resources against Chan.

21 The way in which Chan has sought to argue his case seemed to us to indicate that he has confused the question of proof with liability. In Suit 2000/1996, the burden is on Kea Resources to prove breach of contract, conspiracy and the breaches which caused Chan to be deemed a constructive

Version No 1: 30 Oct 2026 (00:14 hrs)

trustee. If Kea Resources should fail to prove all that then the claim against Chan will be thrown out.

22 As regards O 15 r 6(2)(*b*)(ii), while we recognise that the claim by Chan for indemnity/contribution against Ngiam would come within that sub-rule, it is subject to the overriding consideration of "just and convenient".

23 This is where the extreme lateness of the application would have a serious bearing. As mentioned above, Kea Resources has almost closed its case except for a witness on valuation. Its main witnesses have all been cross-examined. To allow the application under r 6(2)(*b*)(ii) would mean that Kea Resources would have to revise its statement of claim, and might have to literally start all over again as Ngiam would certainly want to cross-examine the witnesses of Kea Resources who have already given evidence. There might also be a need for discovery. Costs cannot compensate for the pain and anxiety of litigation or the prejudice caused thereby to Kea Resources. It would probably have been different if the application were made at the commencement of trial as the learned judge below also recognised.

24 In this regard it is obvious that the court should not only take into account the interest of Chan but also that of Kea Resources. In weighing what is "just and convenient", the positions of both parties must be reckoned. Here it was not a case where new facts suddenly emerged, which were not known before, and which necessitated the application. At all times the facts were within the possession of Chan and his solicitors. They must bear the consequences of their own default or choice. While the object behind r 6(2)(*b*) is to prevent multiplicity of actions the exercise of that power must be done fairly. All too often an offer of payment of costs has been advanced as if it were a cure for all defaults, in whatever the circumstances. That cannot be so. We think the

Version No 1: 30 Oct 2026 (00:14 hrs)

following remarks of Lord Griffiths in *Ketteman v Hansel Properties Ltd* [1988] 1 All ER 38 at 62 are apt, even though they were made in the context of an application to amend:

> We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

25 Counsel for Chan relied upon *Walker & Knight v Donne, Mileham & Haddock* The Times (9 November 1976) to demonstrate that leave to make a third party a defendant was granted even after trial commenced. It ought to be borne in mind that in that case only one witness had been called (before the long vacation intervened) and it was anticipated that the continued hearing will take from fall until Easter the next year.

26 In *Brett v Fleet* (1981) 116 DLR (3d) 516 leave to add in additional defendants were made at the commencement of the trial. In *Collin Hotels Ltd v Surtees, Schutte and Oliver* [1984] 5 WWR 277, two parties were added before the commencement of trial.

27 We recognised that in *Shinko Machinery Co Pte Ltd v Wong Hansen* [1992] SGHC 114 a judgment of Chan Sek Keong J (as he then was), the court granted leave to the defendants to add one Mr Lim as a party to the proceedings apparently at the end of the trial. There, the defendants counterclaimed against the wrong party. However, the learned judge found that the confusion in the mind of the first defendant was caused entirely by Mr Lim. It is clear that there were special circumstances why the learned judge there granted leave to add Mr Lim as a party at that hour. This can be seen from the following portion of the grounds of decision:

Version No 1: 30 Oct 2026 (00:14 hrs)

> Having regard to the evidence and also the fact that the defendants did not have the benefit of professional representation at the trial, I did not consider it fair that, because of the technical rule that a partner in a firm may not be made liable for his debts in another firm of which he was the sole-proprietor and therefore preventing a set-off of credits and debits, the defendants should be left without any remedy. Accordingly, I granted leave to the defendants to add Mr Lim …

28 As mentioned above, in *Dollfus Mieg* ([19]*supra*), two defendants were added at the appeal stage. There, the case concerned some gold-bars recovered in Germany during the concluding stages of the Second World War and placed in the custody of the Bank of England by the Governments of the United Kingdom, the United States of America (USA) and France. The plaintiff claimed for the gold bars. The governments of USA and France applied to intervene as defendants. The court granted the application pursuant to r 6(2)(*b*)(i) as the two governments had a right nearly akin to a proprietary right and their intervention was essential to ensure that all matters in the cause were effectually and completely determined. It would be noted that the "cause" there was the delivery of the gold bars, a subject matter in which the two foreign governments had an interest.

29 In the circumstances of the present case, apart from causing delay if the application were granted, hardship, inconvenience and prejudice would also be caused to Kea Resources. Thus, we did not think the learned judge exercised his discretion wrongly in refusing it. We were unable to accept the argument that the object of preventing multiplicity of proceedings must override all other considerations.

30 For the same reasons, Chan's oral application for leave to issue third-party notice against Ngiam must also be refused. As Chan admitted in the

Version No 1: 30 Oct 2026 (00:14 hrs)

appellant's case, if third-party notice were issued there was a real possibility that Ngiam would apply for leave to cross-examine Kea Resources' witnesses.

Effect of settlement agreement

31 The final point concerns the settlement agreement. The fact that there is a settlement agreement in writing between Kea Resources and Ngiam is not in dispute. In our view, the question whether that agreement would release Chan from any liability to Kea Resources is really one of law. That point can be taken without any need to make Ngiam a party.

Lai Kew Chai J
Chao Hick Tin J

Mohan Pillay and Chan Hock Keng (Wong Partnership) for the appellant
Hee Theng Fong and Doris Lee (Hee Theng Fong & Co) for the respondent.