Asia Business Forum Pte Ltd v Long Ai Sin and Another
[2004] SGCA 6

Case Number : CA 102/2003, NM 109/2003

Decision Date : 13 February 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Woo Bih Li J

Counsel Name(s) : Michael Hwang SC (instructed), Stanley Lai and Esther Ling (Allen and Gledhill) for applicant; Low Chai Chong and Kelvin Poon (Rodyk and Davidson) for respondent

Parties : Asia Business Forum Pte Ltd — Long Ai Sin; Pacific Conferences Pte Ltd

Civil Procedure – Pleadings – Amendment – Whether leave ought to be granted to amend applicant's Further and Better Particulars after judgment and after Notice of Appeal lodged to Court of Appeal – Order 20 r 5(1), O 57 r 13(1) Rules of Court (Cap 322, R 5, 1997 Rev Ed)

13 February 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This motion was filed by the appellant-applicant, Asia Business Forum Pte Ltd ("ABF"), for leave to amend its pleadings (*ie*, the Further and Better Particulars) post-judgment and after a notice of appeal had been lodged to the Court of Appeal. We dismissed the application and now give our reasons.

The background

2 ABF is in the business of producing conferences. It was the plaintiff in the action (Suit No 949 of 2002) commenced on 13 August 2002 and the respondents were the defendants. The first respondent, Long Ai Sin ("Long"), was in the employment of ABF from early 1995 to 1999. After leaving ABF in September 1999, Long, together with her husband, set up Pacific Conferences Pte Ltd ("PCP"), the second respondent, which is in the same line of business as ABF. In the action, ABF claimed that Long had disclosed confidential information and trade secrets of ABF to PCP. It prayed for an injunction restraining Long from dealing with such information, delivery up of documents containing the information and damages or an account of profits made by the respondents from the use of the information.

3 The action came up before Kan Ting Chiu J who, after hearing the evidence, dismissed the action. ABF has appealed against the dismissal. The appeal is pending.

The pleadings

4 In the statement of claim, ABF described the nature of its business, its competitive and confidential nature, and set out some of the terms of Long's contract of employment. One of the terms required that Long would not, during the period of employment and thereafter, "disclose to anyone any information of a confidential nature relating to the Company". Another covenant was that:

> [Long] will not copy, duplicate, record, reproduce, communicate, divulge or otherwise use for the benefit of himself or any other person or legal entity [any] confidential information and trade secrets obtained during his employment.

5 Paragraph 15 of the statement of claim averred that:

> [T]he highly confidential information and trade secrets relevant to this action will be identified in a confidential schedule ("the Schedule"). The Schedule will be served after receipt of undertakings from the 1st and 2nd defendants and/or their solicitors to preserve the confidentiality of its contents.

6 Paragraph 20 of the statement of claim further averred that:

> [T]he items in the Schedule are proprietary to [ABF] and are trade secrets. Alternatively, they are of such confidentiality as to merit protection as trade secrets or are otherwise confidential as to be legitimate interests that should be protected from disclosure by former employees.

7 Pursuant to an order of court of 2 October 2002 where ABF was required, in relation to para 15 of the statement of claim, to state the full particulars of the alleged confidential information and trade secrets which ABF would be relying upon in the action, ABF stated as follows:

Section A – TRADE SECRETS

1. The Plaintiffs' Training Manual consisting of highly confidential information and trade secrets. This manual sets out the Plaintiff's business model and techniques in conference organizing a conference from the first stage in topic selection, to research, marketing and running the conference. It also embodies the Plaintiffs' unique system of work including briefing procedures, reporting forms, various formats and templates, etc.

...

Section B – CONFIDENTIAL INFORMATION

The Plaintiff's database and contact information under the following categories:

1. The Plaintiffs' database information comprising of speakers with full contact details, name of company, addresses and telephone numbers for conferences produced by the 1st Defendant.

2. The Plaintiffs' database information comprising of speaker with full contact details, name of company, addresses and telephone numbers for conference supervised by the 1st Defendant.

3. The Plaintiffs' database information comprising of delegates for all conferences produced by the 1st Defendant.

4. The Plaintiffs' database information comprising of delegates for all conferences supervised by the 1st Defendant.

5. The Plaintiffs' database information comprising of A-code or contact lists for conferences produced by the 1st Defendant.

6. The Plaintiffs' database information comprising of A-code or contact lists for conferences supervised by the 1st Defendant.

7. Business cards of contacts and prospects including speakers, delegates, sponsors, publications and suppliers, obtained by the 1st Defendant during her course of employment, and

which were not surrendered to the Plaintiffs when she left.

8 The amendments which ABF sought were to switch what were listed under "Confidential Information" to be "Trade Secrets" and *vice versa*. Effectively, this meant that ABF's database and contact information would be re-classified as "trade secrets". ABF stated that this was necessary because in accordance with the decision of the Court of Appeal in *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617 only trade secrets would enjoy protection beyond the termination of employment. There was some doubt as to whether an express clause was capable of protecting confidential information post-termination of employment. Moreover, there were authorities, *eg*, *Lansing Linde Ltd v Kerr [1991]* 1 All ER 418, which indicated that customer lists and business listings could be protected as trade secrets.

Power to amend

9 It is settled law that the court, including the Court of Appeal, has the power to grant leave to a party to amend his pleadings at any time: see s 37(2) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) and O 20 r 5(1) and O 57 r 13(1) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed).

10 In *Ketteman v Hansel Properties Ltd* [1987] AC 189, Lord Brandon of Oakbrook, after reviewing the authorities, summarised the principles under the following main heads (at 212):

> First, all such amendments should be made as are necessary to enable the real questions in controversy between the parties to be decided. Secondly, amendments should not be refused solely because they have been made necessary by the honest fault or mistake of the party applying for leave to make them: it is not the function of the court to punish parties for mistakes which they have made in the conduct of their cases by deciding otherwise than in accordance with their rights. Thirdly, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment earlier, and however late the application for leave to make such amendment may have been, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourthly, there is no injustice to the other party if he can be compensated by appropriate orders as to costs.

11 In the same case, Lord Griffiths expressed the principles in a slightly different form as follows (at 220):

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. 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.

12 Generally, it is true that an amendment may be allowed at any stage of the proceedings, including post-judgment. Clearly, the later an application is made, the stronger would be the grounds required to justify it. As it is a matter of discretion, no hard and fast rules may be laid down. But at the end of the day, the court must balance it against the justice of the case.

13 On the face of it, the amendment seemed fairly simple and straightforward. The database, instead of being treated as confidential information, would be categorised as trade secrets and the training manual would be treated as confidential information. ABF said that this amendment would not require any new evidence to be adduced before the court as all the necessary evidence was already on the record.

14 On the other hand, the respondents contended that if the amendments were allowed they would be prejudiced because the case they would have had to meet under the amendments would have been different from what it was at the trial. They would be denied the opportunity of explaining why the manual, which was not even marked confidential, could not be treated as "confidential information". The confidentiality and non-disclosure terms in the contract of employment did not refer to the manual. More importantly, they would also be denied the opportunity of showing why the information in the database could not be "trade secrets". They said that they themselves had specially compiled their contact lists from information derived from the public domain and through public sources. They could have explained how the lists could be drawn up without in any way having sight of ABF's lists. Conference producing business was not a restricted business. The respondents argued that the position could be different where the trade or business involved highly specialised goods or services which were provided to a very limited and specialised client base not known to the general public. If ABF's pleadings had originally been in the form under the proposed amendments, the respondents said they would have introduced additional evidence to meet the case and the cross-examination of ABF's witnesses might have taken on a different character. A similar point was made by Lord Atkin in *Ley v Hamilton* (1935) 153 LT 384 at 385 when he said:

> It is obvious that if either point had been raised at the trial the examination of the plaintiff and the cross-examination of the defendant and Wakeling might have taken a very different form.

15 The aspect on which we found difficulty with was the assertion by ABF that even with the amendments there was no substantive or material change in its claim. It stated in its affidavit:

> With the proposed amendments, the Appellants would still proceed on the same premise as they did in the Court below; that one or more of the items of information that are referred to in the Schedule, either should be classified as a trade secret or is of such a highly confidential nature as to require protection as a trade secret, merit protection of the law post-employment. I verily believe that no surprise or prejudice would be occasioned by such amendment, and the Respondents' response in terms of argument would not materially differ from the submissions that were made below.

16 It seemed to us that with the proposed amendments, while the nature of the claim remained substantially the same, the premises upon which the claim was based would be altered. If the position were truly as ABF had asserted, there would have been no need to amend. The fact that the amendments were needed necessarily suggested that there were some material differences and, in our view, there were. Evidence was adduced and the parties cross-examined at the trial on the basis that what was in the training manual were trade secrets and what was in the database, confidential

information. The trial judge had reached his decision on that basis. If we had allowed the amendments, what would be before the Court of Appeal would not be the same as what was before the trial judge. The appeal court would not be deciding whether the trial judge was correct because the premises would have changed. Unlike the trial judge, we would have to decide if the contents of the training manual were confidential information and the database, trade secrets. Thus, the grounds of decision of the judge would become immaterial and this court would be deprived of the benefits of the opinion of the court below. We would have had to examine the claim almost from scratch.

17 We have mentioned above that the court has the power to grant an amendment even after final judgment and pending appeal. Clearly, leave to amend in such circumstances would be rare. Generally, very good and compelling grounds must be shown, unless the proposed amendments are technical and of no real consequence. An example of the latter is the case of *Soon Peng Yam v Maimon bte Ahmad* [1996] 2 SLR 609. A useful summary of the point in *Maimon bte Ahmad* is set out in Jeffrey Pinsler's *Supreme Court Practice 2003* (LexisNexis, 2003) at para 20/5/9:

> [T]he Court of Appeal allowed a party to amend the capacity in which she originally brought proceedings (as administratrix of her mother's estate). The outcome of the order was that she was divested of her representative status and could proceed on a personal basis. The court record was amended to reflect this development. The Court of Appeal determined that its order would not result in prejudice because the party's case "was, all along, a case founded on her own personal adverse possession of the land …" and that this was known to the other party.

18 Without intending to be exhaustive, and in the context of the present case, it was our view that two key factors should be borne in mind. Firstly, the amendments should not cause any prejudice to the other party. Secondly, the amendments should not give rise to a situation whereby the applicant was effectively asking for a second bite at the cherry. This case failed on both counts. Granted that there is considerable overlap between the concepts of trade secrets and confidential information, they are nevertheless distinct. Counsel for the respondents submitted that had it been pleaded that the database and the contact information were trade secrets, his clients would have elaborated how the database and the contact information could not have constituted trade secrets. We were not satisfied that there was nothing more the respondents could have amplified or explained. While a trade secret must be confidential, it does not follow that confidential information would be a trade secret.

19 Moreover, this amendment seemed to us to be a clear case of ABF seeking a second bite at the cherry. There must be finality to court proceedings. We would hasten to add that we fully appreciated the position of the present solicitors for ABF. They stepped into the picture after judgment had been delivered by the court below. They studied the case and felt that the amendments were necessary at the appeal stage. Perhaps, the case of *Lansing Linde Ltd* had a bearing on the proposed amendments. But, as explained before, this presented the respondents with a somewhat different "battle". Therein was the problem. It was not a problem which could be taken care of just by way of an order for costs. Solicitors do differ as to how a case should be presented. But the other party should not be required to fight a different "battle" at the appeal stage.

20 In the result, we dismissed the motion with costs.

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