IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 48

Suit No 434 of 2014

Between

(1) Parakou Shipping Pte Ltd (in liquidation)

… *Plaintiff*

And

(1) Liu Cheng Chan
(2) Chik Sau Kam
(3) Liu Por
(4) Yang Jianguo
(5) Parakou Investment Holdings Pte Ltd
(6) Parakou Shipmanagement Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Pleadings] — [Amendment]

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Parakou Shipping Pte Ltd (in liquidation)
v
Liu Cheng Chan and others

[2016] SGHC 48

High Court — Suit No 434 of 2014
Chua Lee Ming JC
18, 22 March 2016

31 March 2016

Chua Lee Ming JC:

Introduction

1 On the fourth day of trial, the plaintiff, Parakou Shipping Pte Ltd (in liquidation), made an oral application to amend its statement of claim. I allowed some of the amendments but disallowed certain amendments which sought to introduce a new cause of action against the 1st to 4th defendants. I granted the plaintiff leave to appeal against my decision on these disallowed amendments.

Background

2 The plaintiff was in the business of ship management, chartering and providing offshore supply vessel services to ships in and around Singapore. The 1st defendant, Mr Liu Cheng Chan, and the 2nd defendant, Madam Chik Sau Kam, were the directors of the plaintiff until 31 December 2008. Both

were shareholders of the plaintiff until 21 December 2008. The 2nd defendant is the 1st defendant's wife.

3 The 3rd defendant, Mr Liu Por, is the 1st and 2nd defendants' son. He was Vice-President of the plaintiff from 2006 and was appointed a director on 22 December 2008. Liu Por has also been a shareholder of the plaintiff since 1 January 2005. The 4th defendant, Mr Yang Jianguo, has been a director and shareholder of the plaintiff since 22 December 2008.

4 The 5th defendant, Parakou Investment Holdings Pte Ltd and the 6th defendant, Parakou Shipmanagement Pte Ltd were at all material times related companies of the plaintiff. At all material times, the 1st, 2nd and 3rd defendants were directors and shareholders of the 5th and 6th defendants, and the 4th defendant was a director of the 6th defendant.

5 At all material times, the 1st and 2nd defendants and another son, Lau Hoi, were directors of 12 other companies, the names of each of which start with the word "Pretty" ("the Pretty Entities"). The sole shareholder of the Pretty Entities was a company known as Parakou International Ltd ("PIL"). The 1st, 2nd and 3rd defendants and Lau Hoi were the shareholders of PIL.

6 On 14 April 2011, the creditors of the plaintiff passed a resolution to put the plaintiff into creditors' voluntary liquidation. The liquidator brought this action in the name of the plaintiff. Essentially, the case against the defendants is that they orchestrated various transactions to strip the plaintiff of its assets in anticipation of it being put into liquidation. There are therefore a multitude of claims against the defendants, including

(a) claims against the 1st to 4th defendants based on breaches of fiduciary duties and/or statutory duties of care and skill, breaches of

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trust, liability to account as constructive trustees, and liability to account for profits earned through the Pretty Entities;

(b) claims against the 5th and 6th defendants on the basis that they are liable to account as constructive trustees;

(c) a claw back of the subject matter of certain undervalued transactions; and

(d) claims against all the defendants for conspiracy to defraud/injure the plaintiff by unlawful means, an account of all sums misappropriated by the 1st to 4th defendants, and an account of all sums received by the defendants as constructive trustees.

The amendments that were disallowed

7 I disallowed the amendments that were comprised in three new paragraphs ("Paragraphs 42A, 42B and 42C"). The plaintiff subsequently stated that it was no longer proceeding with Paragraph 42B. Paragraphs 42A and 42C related to certain ship management agreements ("SMAs"). The plaintiff had been managing vessels owned by the Pretty Entities ("the Pretty Vessels") under these SMAs before they were terminated in October 2008.

8 As currently pleaded in the statement of claim, the plaintiff claims that the 1st to 4th defendants, in breach of their duties owed to the plaintiff, caused the SMAs to be transferred to the 6th defendant for no consideration. The transfer was allegedly effected by causing the Pretty Entities to terminate the SMAs in October 2008 and to enter into new ship management agreements for the Pretty Vessels with the 6th defendant in December 2008, on substantially the same terms as the SMAs that were terminated. The plaintiff alleges that the SMAs were the plaintiff's "key revenue-generating assets" and that the actions

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by the 1st to 4th defendants in transferring the SMAs to the 6th defendant caused loss and damage to the plaintiff in the form of loss in management fees and loss of profits under the SMAs.

9 Paragraph 42A sought to introduce a new cause of action against the 1st to 4th defendants for breaches of fiduciary duties owed to the plaintiff which resulted in the plaintiff suffering loss and damage. In Paragraph 42A, the plaintiff alleged that

> (a) the 1st to 4th defendants caused the plaintiff to enter into separate Addendum agreements to each of the SMAs in July 2007 ("the Addendum agreements");
>
> (b) the terms of the Addendum agreements were not commercial, not at arm's length, inconsistent with market practice and agreed to without any consideration given to the plaintiff;
>
> (c) the terms of the Addendum agreements were designed to benefit the Pretty Entities at the expense of the plaintiff; and
>
> (d) the 1st to 4th defendants knew that the Addendum agreements would result in onerous obligations being incurred by the plaintiff and that the plaintiff's costs and expenses would be far in excess of the revenue under the SMAs. Notwithstanding this, the 1st to 4th defendants caused the plaintiff to enter into the Addendum agreements to benefit themselves through the Pretty Entities at a time when the plaintiff had been suffering repeated and increasing balance sheet losses since 2002.

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10 In brief, the Addendum agreements changed the fee structure of the SMAs from a fee of US$8,000 *per month* plus reimbursement of expenses to a lump sum fee of US$5,000 *per day* inclusive of expenses.

11 Paragraph 42C alleged that the 1st to 4th defendants, having acted in breach of their fiduciary duties owed to the plaintiff, were liable as constructive trustees to account for all profits and benefits derived by or through the Pretty Entities. The plaintiff also claimed to be entitled to "trace into such profits or enforce an equitable lien over any such profits including subsequent profits held on constructive trust" by the 1st to 4th defendants.

12 Paragraphs 42A and 42C thus sought to make a completely different and new claim which focused on the 1st to 4th defendant's actions in causing the plaintiff to enter into the Addendum agreements. A key allegation in the new claim was that the Addendum agreements caused the SMAs to be loss-making.

Reasons for my decision

13 The law is well-established. The guiding principle is that amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined; however, two key factors to bear in mind are (a) whether the amendments would cause any prejudice to the other party which cannot be compensated in costs, and (b) whether the amendments are effectively giving the party who is applying for leave to amend a second bite at the cherry: *Singapore Civil Procedure 2016* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2016) at para 20/8/8. Although amendments may be allowed at any stage of the proceedings, the later an application is made, the stronger would be the grounds required to

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justify it: *Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR(R) 173 at [12]. The court must balance the need for amendment against the justice of the case. It is harder to say that justice favours allowing an amendment when it is sought in the middle of a trial: *Sin Leng Industries Pte Ltd v Ong Chai Teck* [2006] 2 SLR(R) 235 ("*Sin Leng*") at [23].

14 I disallowed the plaintiff's application with respect to Paragraphs 42A and 42C for the following reasons:

(a) The amendments would cause prejudice to the 1st to 4th defendants which cannot be compensated in costs.

(b) Allowing the amendments would be giving the plaintiff a second bite at the cherry.

(c) Allowing the amendments would affect the management of the courts' resources and scheduling due to the need to vacate the rest of the trial.

Prejudice to the 1st to 4th defendants

15 In my view, the amendments would cause prejudice to the 1st to 4th defendants which cannot be compensated in costs. Paragraphs 42A and 42C sprung a surprise on the defendants. There had hitherto been no allegation of any breach of duties with respect to the Addendum agreements and the plaintiff had proceeded with the trial on the basis that the SMAs were of value to it. I agreed with the 1st to 4th defendants that

(a) the plaintiff had changed its case completely with respect to the SMAs under Paragraphs 42A and 42C;

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(b) substantial preparations would be required to be done by their lawyers and themselves in order to meet the new claim in Paragraphs 42A and 42C; and

(c) they would be prejudiced if they (and their lawyers) had to undertake the work necessary to meet the new claim, whilst at the same time continuing with the trial.

16 The plaintiff referred me to *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 ("*Multistar*") at [52] and argued that the new paragraphs did not introduce a new case and were merely "different legal characterisations of the same underlying facts" requiring "no additional factual material" to advance the claim. I disagreed. It must be borne in mind that the Court of Appeal was using "factual material" to refer to the material facts which support a claim (see *Multistar* at [34]). Understood in that light, the plaintiff did require additional factual material to advance the new claim. In an action for breach of fiduciary duty, the fact that a defendant caused a plaintiff company to enter into a transaction, the fact that the transaction was a breach of its fiduciary duty, and the particulars of the breach are facts which must be pleaded. These are the facts on which evidence would have to be led. In the present case, evidence also has to be led on how the new lump sum fee structure would cause the SMAs to be loss-making. The original statement of claim only stated that the plaintiff agreed to the Addendum agreements to the SMAs. It did not state who precisely had caused the plaintiff to enter into the Addendum agreements, much less how doing so was a breach of fiduciary duty. Plainly, the essential factual material supporting the new claim (see [9] above) has not been pleaded in the original statement of claim.

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17 The present action, with its multitude of claims including breaches of fiduciary duties and remedies based on constructive trusts and tracing, is a complex one. The trial will demand their full attention. In my view, it would be unjust to require the 1st to 4th defendants and their lawyers to investigate the new set of facts and prepare to meet the new claim whilst the trial continued.

18 Of course, the rest of the trial dates could be vacated so that the 1st to 4th defendants could prepare to meet the new claim. Indeed, the 1st to 4th defendants submitted that if the amendments were allowed, they would seek a vacation of the remaining trial dates. However, trial having started, the defendants were entitled to expect the trial to proceed without undue delay. I saw no reason why they had to choose between vacating the rest of the trial dates and trying to cope with preparing to defend against the new claim whilst the trial continued. This was especially so when the new claim was based on facts known to the plaintiff from the very beginning: see *Ong Kai Hian v Tan Hong Suan Cecilia* [2009] 3 SLR(R) 385 at [23].

19 The plaintiff argued that the new claim under Paragraphs 42A and 42C was only being raised now because it was founded on certain statements in the 3rd defendant's Affidavit of Evidence-in-Chief ("AEIC") filed in February 2016. Those statements were to the effect that the ship management business was an in-house service and that the focus was on saving costs for the owners (*i.e.* the Pretty Entities) rather than making profits for the plaintiff.

20 I disagreed with the plaintiff. The 3rd defendant's AEIC merely said that the ship management business was an in-house service and that profits were not the key focus. There was nothing in the AEIC to suggest that the "in-house" nature of the business was any different before the fee structure was

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changed. The "in-house" nature of the business would have been apparent to the liquidator by the time this action was commenced. At all material times, the SMAs were entered into by the plaintiff in order to manage the vessels owned by its related companies, *i.e.* the Pretty Entities. The plaintiff's ship management business had no external clients (*i.e.* clients that were not related companies). In addition, it was patently clear that the facts supporting the new claim had been known to the plaintiff much earlier on. The liquidator had the SMAs and the Addendum agreements before this action was commenced. He also had the relevant financial statements at least after discovery, if not earlier. It would have been clear to the liquidator how the Addendum agreements changed the fee structure under the SMAs and what the financial impact of those changes was. However, having done his investigations, the liquidator decided, for reasons best known to himself, to proceed on the basis that the SMAs were of value to the plaintiff and that the relevant breach was in the transfer of these SMAs to the 6th defendant, rather than in the signing of the Addendum agreements. Other than pointing to the 3rd defendant's AEIC, the plaintiff did not offer any explanation why it did not include the new claim in its statement of claim or seek to amend its statement of claim earlier.

Second bite at the cherry

21 Second, in my view, the plaintiff sought to make the new claim under Paragraphs 42A and 42C at this stage because the plaintiff's original case (that the SMAs were of value to the plaintiff) was considerably weakened during the cross-examination of the liquidator. The liquidator himself conceded that although revenue-generating, the SMAs were in fact loss-making contracts for the plaintiff. That meant that the transfer of the SMAs to the 6th defendant would not have caused the plaintiff any loss. It seems to me that allowing the

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amendments in Paragraphs 42A and 42C in these circumstances would be giving the plaintiff a second bite at the cherry.

Management of courts' resources

22 Another relevant factor in this case was the management of the courts' resources and scheduling: see *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*") at [59], citing *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 ("*Digilandmall*") at [85]. I was also guided by the Court of Appeal's observation that "apart from the interests of the immediate parties to the action, there [is] also the public interest that judicial proceedings be conducted efficiently and with finality": *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 at [122]. In this case, the trial had been fixed for 17 days. Vacating the rest of the trial dates would have meant having to find new dates for 13 trial days. It is axiomatic that a court will generally be cautious if not reluctant to effect any amendments once hearing has commenced: *Susilawati* at [62], citing *Digilandmall* at [84]. In the present case, the trial had started and the plaintiff did not have any good explanation why it had not sought to amend the statement of claim earlier despite having known all the relevant facts. In these circumstances, the court should be very slow to allow amendments if it was likely that doing so would mean having to vacate the remaining trial dates in order to avoid any injustice to the defendants. I share the view expressed in *Sin Leng* that legal business should be conducted efficiently and that the surprise occasioned by such an amendment causes prejudice which is not compensable by costs (at [42]).

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Limitation

23 The 1st to 4th defendants also submitted that the new cause of action under Paragraphs 42A and 42C was time-barred as more than six years have passed since the Addendum agreements were entered into. The plaintiff disagreed.

24 If the limitation period had expired before the application to amend was made, then the onus would be on the plaintiff to show that the amendment fell within the provisions of O 20 r 5(5) of the Rules Of Court (Cap 322, R 5, 2014 Rev Ed). Otherwise, the only question is whether the amendment should be allowed under O 20 r 5(1) based on the principles articulated at [13] above and I have held that it should not.

25 The issue that was argued before me was whether the new cause of action fell within the scope of s 22(1) of the Limitation Act (Cap 163, 1996 Rev Ed) ("the Act"). Section 22(1) and (2) state as follows:

> **Limitations of actions in respect of trust property**
>
> 22.—(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of 6 years from the date on which the right of action accrued.

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26 A distinction has been drawn between "Class 1" and "Class 2" constructive trusts. If a person holds property in the position of a trustee and deals with that property in breach of that trust, he will be a Class 1 constructive trustee. On the other hand, a wrongdoer who fraudulently acquires property over which he had never previously been impressed with any trust obligations, may, by virtue of his fraudulent conduct, be held liable in equity to account as if he were a constructive trustee; such a person was never a trustee of the property and it is only by virtue of equity's reach that he is regarded as a Class 2 constructive trustee: *Yong Kheng Leong v Panweld Trading Pte Ltd* [2013] 1 SLR 173 ("*Yong Kheng Leong*") at [36], [46] and [51].

27 Only Class 1 constructive trustees fall within the ambit of s 22 of the Act: *Yong Kheng Leong* at [51]. Even then, a Class 1 constructive trustee is still subject to the limitation period in s 22(2) unless the exception in s 22(1) applies: *Yong Kheng Leong* at [49]. Class 2 constructive trustees are subject to the six-year limitation period in s 6(7): *Yong Kheng Leong* at [69].

28 In *Yong Kheng Leong*, a director was sued for breach of fiduciary duty for placing his wife on the company's payroll and paying her salaries although she was never an employee. The director was held to be a Class 1 constructive trustee because he had dealt with the company's assets in breach of the trust and confidence placed in him as a trustee.

29 The judgment in *Yong Kheng Leong* referred to *Gwembe Valley Development Co Ltd (in receivership) v Koshy (No 3)* [2004] 1 BCLC 131 ("*Gwembe Valley*") as an illustration of a Class 2 constructive trust. In *Gwembe Valley*, a director arranged for another company (which he controlled) to loan money to the claimant company without disclosing his

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interest in the other company to the board of the claimant company. It was held that the defendant's liability to account for his secret profits was not within Class 1. This was because the defendant's liability arose from his failure to disclose, and not because of any misappropriation of specific property belonging to the company (see *Yong Kheng Leong* at [47]).

30 I agreed with the plaintiff that the 1st to 4th defendants were Class 1 constructive trustees in respect of the new claim in Paragraphs 42A and 42C. The claim against the 1st to 4th defendants was that in breach of their fiduciary duties owed to the plaintiff, they caused the plaintiff to enter into the Addendum agreements knowing that under the Addendum agreements the plaintiff's costs and expenses would exceed the revenue under the SMAs (see [9(d)] above). In other words, to the extent that the costs and expenses exceeded the revenue, the 1st to 4th defendants were using the plaintiff's resources (financial or otherwise) to service and maintain the vessels belonging to the Pretty Entities. The 1st and 2nd defendants were directors of the plaintiff at the material time. The 3rd and 4th defendants were the Vice-President and President respectively but they have been alleged to be *de facto* directors of the plaintiff at the material time. With respect to the new claim, the 1st to 4th defendants were Class 1 constructive trustees because as directors/*de facto* directors, they held the plaintiff's property as trustees and dealt with that property in breach of the trust placed in them as directors/*de facto* directors.

31 In their submissions before me, the parties assumed that s 22(1) (and not s 22(2)) of the Act would apply if the defendants were to be regarded as Class 1 constructive trustees. Therefore, I concluded that the new cause of action would not be subject to any limitation period.

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Conclusion

32 For the reasons stated above, I disallowed the plaintiff's application for leave to amend the statement of claim by adding Paragraphs 42A and 42C and awarded costs fixed at $2000 (inclusive of disbursements) to each of the 1st and 2nd defendants, the 3rd and 4th defendants and the 5th and 6th defendants.

Chua Lee Ming
Judicial Commissioner

Edwin Tong SC, Kenneth Lim Tao Chung, Chua Xinying and Yu Kexin (Allen & Gledhill LLP) for the plaintiff;
Tan Shien Loon Lawrence, Senthil Dayalan and Ng Jia En (Eldan Law LLP) for the first and second defendants;
Siraj Omar and Premalatha Silwaraju (Premier Law LLC) for the third and fourth defendants;
Sim Chong and Yap Hao Jin (Sim Chong LLC) for the fifth and sixth defendants.

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