

Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim
[2006] SGHC 17

Case Number : Suit 1079/2003
Decision Date : 27 January 2006
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Edmond Pereira and Ravendra Krishnasamy (Edmond Pereira and Partners) for the plaintiff; Jimmy Yim SC and Kelvin Tan (Drew and Napier LLC) for the defendant
Parties : Rabiah Bee bte Mohamed Ibrahim — Salem Ibrahim

Civil Procedure – Pleadings – Amendment – Whether court should allow plaintiff's application for leave to re-amend statement of claim after trial commenced – Applicable principles for allowing amendments to pleadings at late stage

27 January 2006

Judith Prakash J:

Introduction

1 The plaintiff and defendant are siblings, the defendant being the younger brother of the plaintiff. The plaintiff is, and at all material times has been, resident in the UK. The defendant is resident in Singapore.

2 In 1996, the parties agreed to engage in a joint enterprise to purchase residential properties in London, with a view to refurbishing such properties for rental and resale at a profit. The parties played different roles in regard to the enterprise with the plaintiff as the person on the ground in London being primarily responsible for identifying properties and undertaking the refurbishing and management work. The defendant's main role was to acquire offshore companies to own the properties, obtain financing and administer the joint venture.

3 Between October 1996 and February 1998, a total of seven residential properties in London were purchased by the parties. An eighth property was bought subsequently but there is now a dispute as to whether that property was meant to be part of the portfolio. All the properties except the last have now been sold. Unfortunately, although the venture was successful financially, the parties have fallen out.

4 In November 2003, the plaintiff filed the present action. The main relief claimed was an order that the defendant do furnish a full and proper account of his dealings with respect to the venture, the properties and the offshore companies. The plaintiff also wanted him to pay such sums as might be found due to her upon the taking of the account and, in the alternative, damages arising from the defendant's alleged breach of duty. The defendant filed a Defence and Counterclaim. By the Counterclaim, he in turn asked for an account of all moneys received and paid by the plaintiff in connection with the properties and an order for payment of such sums as might be found due to him upon the taking of the account.

5 The trial of the action commenced before me on 4 July 2005. It was adjourned part-heard on 8 July 2005. The hearing recommenced on 10 October 2005. By that time, the plaintiff had testified and been cross-examined and it had been agreed that the affidavits of evidence-in-chief of certain other witnesses for the plaintiff would be admitted without the need for those witnesses to be cross-

examined. The defendant then took the stand. On 14 October 2005, whilst the defendant was in the course of cross-examination by Mr Pereira, counsel for the plaintiff, the plaintiff applied for leave to re-amend her Statement of Claim. The defendant objected to most of the proposed amendments. After hearing arguments, I allowed the Statement of Claim to be further amended though not to the extent requested by the plaintiff. The defendant was dissatisfied and has now appealed against my order.

The amendments

6 The amendments that I allowed and that the defendant is dissatisfied with are set out in paras 25 and 26 of the Re-re-amended Statement of Claim and the new para 5 of the reliefs claimed by the plaintiff. These read as follows:

25. The Plaintiff avers that the Defendant was responsible for the legal and financial affairs of the Companies and the Defendant had failed to discharge his duties diligently to the Plaintiff as a Joint Venture Partner and Director of the Joint Venture Company in accordance with the express terms of the Agreement as pleaded in paragraph 5(d).

Particulars

(a) Failure to disclose to the Plaintiff that there was no JV Bank Account and using his personal accounts instead;

(b) Failure to disclose to the Plaintiff that he had used the accounts that he shared with his wife to receive the Plaintiff's contribution to the JV;

(c) Failure to disclose to the Plaintiff that he had kept the moneys from the drawdown into a personal account he maintained with his wife.

(d) Failure to disclose to the Plaintiff that he was using the JV funds for his personal expenses.

(e) Failure to keep and maintain proper records of all the properties purchased and sold by the JV Companies.

(f) Failure to keep and maintain proper records of all documents pertaining to the sale and purchase and mortgage of the JV Companies in particular.

(i) The Sale & Purchase Agreements

(ii) Valuation Reports

(iii) Completion Statements

(iv) Letters of offer

(v) Mortgage documents

(vi) Annual and Quarterly Mortgage Interest Statements

(vii) Copies of Title Deeds

(viii) And all correspondence relating to the loans.

(g) Failure to secure the best possible price for the sale of 49 Peckham Rye.

(h) Failure to disburse the proceeds of the sale of 22 St. Aidans [Road] and 79 Mundania Road to the Plaintiff;

26 By reason of the foregoing the Plaintiff has lost the benefit of the JV Agreement and lost the revenue she would otherwise [have] received under it and have thereby suffered loss and damage.

...

(5) Losses and Damages arising from the Defendant's breach of his fiduciary duties to the Plaintiff as pleaded at paragraphs 16 to 27 to be assessed by the Court;

...

7 It can be seen that the new paragraphs reflected the addition of a new claim brought by the plaintiff against the defendant, to wit, a claim for damages arising out of an alleged breach of fiduciary duty by the defendant. Although the original pleading did contain a claim for damages, those damages were asked for on the basis that they had been caused by the defendant's breach of a duty to account. The new damages claimed were for breach of very different duties.

8 As is well known, pleadings may be amended at any stage of an action and it is in the discretion of the judge hearing the application to allow or dismiss it. The usual principle is that all such amendments will be allowed as will permit the true issues in dispute between the parties to be raised and disposed of as long as this can be done without injustice to the other party. Generally speaking, in weighing whether injustice will be caused, the courts consider whether the amendments will inflict prejudice on the other party that cannot be compensated for by an order as to payment of costs. The discretion has to be exercised judicially.

9 In this particular case, I allowed the amendments although the application was made at a rather late stage because the plaintiff had for some time, though not in her pleadings, complained of the matters that she raised in her amendments and the defendant was well aware of her dissatisfaction in relation to those issues even though she had not based a claim for recovery on them. These were matters that were in evidence already. Further, the acrimony between the parties had gone on for some years and, bearing in mind their close relationship and the effect the dispute had on relationships within the family, I considered it would be better for all matters in dispute between them to be heard and disposed of in one action, rather than risk a further action being brought at a subsequent stage that would raise issues arising out of the same transactions but which had not been dealt with in the present suit because it retained its original form as an action that was basically for an account.

10 I also took into account the reliance that the plaintiff placed on the defendant during the time of their joint venture. Although the plaintiff was an experienced businesswoman, she did not have the education and professional qualifications of the defendant. The defendant, a lawyer in practice in Singapore for many years, also had experience in dealing with investments outside Singapore and with international bankers and in administering foreign corporate vehicles for investment in order to lessen tax liabilities. The organisation of the companies that held the joint-venture properties was entirely controlled by the defendant and he made all the arrangements for the

financing of the properties and the disbursement of the credit facilities. The plaintiff had nothing to do with the bankers. She was the person on the ground who located the various properties that were purchased, arranged for them to be renovated and rented out and attended to other practical details regarding the properties in London. The plaintiff had a great sense of grievance arising out of the breakdown of the joint venture and since she had expressed her various complaints at various times to various family members including the defendant, it appeared to me that it would be in the interest of both parties if these complaints were ventilated and examined and a decision taken on their validity once and for all.

11 In my opinion, these complaints could not have come as a surprise to the defendant no matter how aggrieved he may have been by what he considered to be unjustifiable recriminations. Many of the complaints were also contained in the plaintiff's Affidavit of Evidence-in-Chief and therefore were before the court even before the amendments were made, although at the time when the plaintiff was cross-examined, counsel did not see the need to take her on these points since they were not pleaded and there was no relief claimed in respect of them at that time. It also appeared from the evidence of the defendant that he had indeed done some of the things that the plaintiff complained about although his position was that such actions had not been in breach of duty and/or were matters which the plaintiff had known about and had had no difficulty with at the material time.

12 The defendant strenuously contested the application for amendment and subsequent to my decision, wrote in asking for further arguments. His letter basically repeated the points that had been made in oral argument and, therefore, I did not accede to his request. I will, however, deal briefly with these arguments below.

13 The first point made by the defendant was that the amendments would cause him prejudice that could not be compensated for by a costs order. Mr Yim, counsel for the defendant, submitted that the defendant would suffer prejudice because:

(a) Costs cannot compensate for the pain and anxiety of litigation. The defendant, a personal litigant, had had to contend with the action since November 2003. The plaintiff had now sought six more hearing days whereas had it not been for the plaintiff's application to amend, the trial would have concluded in October 2005.

(b) The defendant legitimately expected at least the evidence taking to have been completed in October 2005. The action was originally fixed for hearing over ten days and following the vacation of five days midway during the first tranche, the defendant only expected a further five days of trial.

(c) The amendments allowed the plaintiff to have an improper "second bite at the cherry".

14 Whilst I accept that litigation does create anxiety, in this case, I did not think that the anxiety experienced by the defendant of conducting the litigation with the addition of the new charges outweighed the benefit (to both defendant and plaintiff) to be attained from having all outstanding issues between the parties dealt with and decided once and for all. Further, including these additional charges in this action would remove the chance of the defendant suffering further stress if and when the plaintiff commenced a separate action for damages for breach of duty. As regards the lengthening of the trial, it was clear to me by the time the application for amendment was made, that the trial would not be completed within the second span of days allocated to it and that a third tranche of trial dates would have had to be taken in any case. It was also not the plaintiff's fault that the first tranche of trial dates for the hearing had to be vacated. These dates were vacated because Mr Pereira was taken ill during the trial and had to be hospitalised. Finally, on the

third point, I did not consider that the amendments allowed gave the plaintiff an improper second bite at the cherry. Arguably, there was a basis for the plaintiff's allegations of breach of duty that I had allowed to be pleaded in the Re-re-amended Defence, although the extent of such breaches, and the damages, if any, sustained by the plaintiff by reason thereof were matters which I would have to consider at a later date after hearing full submissions.

15 The second main argument that the defendant made was that the prospect of multiplicity of actions was irrelevant and was not a good reason for allowing the amendment. Mr Yim argued that if this were a good argument, all amendments must be allowed however late in the trial they may be made and even if they are sought on appeal. He also relied on a passage from the decision of the English Court of Appeal in *Worldwide Corporation Ltd v GPT Ltd* (2 December 1998) (Court of Appeal (Civil Division), UK) (unreported) where Waller LJ stated:

We are not impressed by the dilemma on the horns of which Mr Brodie seeks to place the court. We assume that the judge when making the order contemplated that the plaintiffs would not be able to proceed with the claims they were attempting to make by a last minute amendment. He would not have expected that the plaintiffs would discontinue the present proceedings and try to commence others. The fact thus that the plaintiffs *may* be prevented from bringing a second action is actually no more draconian a form of order than the judge intended to produce.

If Mr Brodie were right that either (a) the possibility of a party bringing a second action or (b) the possibility of the court not allowing a second action to be brought both leave the court without any alternative but to allow the amendment, then it seems to follow that the interests of justice to the other party and to other litigants simply has no place in the exercise by the court of its discretion. It would follow that a plaintiff must simply have a right to amend at any time prior to the expiry of any relevant period of limitation, provided the pleading was not demurrable, however much inconvenience that causes to the opposition and other litigants. We do not believe that to be even arguably the position, and this final point of Mr Brodie's does not persuade us that he has any arguable point on an appeal.

16 I agreed that it could not be argued that all amendments must be allowed, however late in the trial they may be made as long as they were applied for before the relevant limitation period expired. I was also conscious that, as stated in an earlier passage in the same authority, where a last minute amendment is sought which entails various consequences as to costs and as to the course of the trial, there will be a heavy onus on the amending party to show the strength of the new case and why justice both to her, her opponent and other litigants, requires her to be able to pursue it. I did not grant leave to amend simply because I wanted to avoid a multiplicity of actions. As I have stated, there appeared to be some basis for the plaintiff's complaints and, in the circumstances of the special relationship between her and the defendant, I considered that it was in the interests of justice if all issues that lay between them were disposed of in the one action and at the one time instead of, possibly, by a series of actions. It was also in the interest of other litigants using the court system that the disputes between these two parties were dealt with as expeditiously as possible and in the one existing suit.

17 The third point made by the defendant was that the plaintiff's new claims were doomed to fail. The defendant made various arguments in support of this point. First, he argued that the amendments did not raise the true issues between the parties but that the allegations they contained were peripheral to the relief that the plaintiff sought and were aimed at prolonging the action. I did not accept this argument as it appeared to me that some of the issues between the parties were reflected by the amendments and that the plaintiff was acting in good faith in making them. Her aim was to seek redress for what she considered to be injury having been done to her and not simply to

punish the defendant by prolonging the proceedings.

18 The second argument was that there was a lack of particularity in the plaintiff's new claims in that she had failed to provide any particulars of the loss and damage that she had sustained by reason of the alleged breaches of duty. This was a more substantial point in relation to some of the breaches pleaded but as far as other breaches were concerned, the type of damage that could have been caused by them was clear from the phraseology. Also, any deficiency in such pleadings could be rectified by the submission of voluntary further and better particulars. It would be for the plaintiff in any case to establish that she had sustained substantial damages by reason of the breaches as otherwise, even if she made out her case, she would only recover nominal damages and such an order would have adverse costs consequences.

19 The third argument was that the plaintiff had done some of the things that she complained about the defendant having done. I did not find much substance in this argument as the plaintiff's own wrongdoing, if any, would not justify the defendant's wrongdoing and especially so if the latter's actions caused damage to the plaintiff. The defendant also argued that the plaintiff's case was weak and doomed to fail. I did not think that I should prejudge this issue as much depended on how I eventually weighed up the evidence and assessed the actions of the parties.

20 Whilst I paid due regard to the arguments of the defendant, having considered the matter on a global basis, I was of the view that it was in the interests of justice to allow certain of the amendments applied for by the plaintiff to be made.

Copyright © Government of Singapore.