Sin Leng Industries Pte Ltd v Ong Chai Teck and Others
[2006] SGHC 25

Case Number : Suit 487/2004

Decision Date : 14 February 2006

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : R Govin and Claire Nazar (Gurbani and Co) for the plaintiff; R S Bajwa and Cheryl Monteiro (Bajwa and Co) for the third defendant

Parties : Sin Leng Industries Pte Ltd — Ong Chai Teck; Gaylin International Pte Ltd; Kiswire Sdn Bhd

Civil Procedure – Pleadings – Amendment – Plaintiff seeking to amend statement of claim in second week of trial – Whether plaintiff seeking amendment too late

14 February 2006

Tan Lee Meng J:

1 This is a rather strange case where a plaintiff's pleaded case was supported to the hilt during the trial by its primary expert and then totally contradicted by its other expert witness, after which the plaintiff sought in the middle of the trial to abandon its pleaded case and its primary expert's conclusions and to amend its Statement of Claim to bring it in line with the different findings of its "secondary" expert witness. If the amendment was allowed, the trial would have had to be postponed to give the defendant some time to meet the new case against it. I did not allow the proposed amendment of the Statement of Claim and now set out the reasons for my decision.

Background

2 This case has its roots in the snapping of a wire rope of a Sumitomo crawler crane (the "crane") belonging to the plaintiff, Sin Leng Industries Pte Ltd ("Sin Leng"). The crane was leased to McConnell Dowell Interbeton Joint-Venture ("McConnell") for reclamation work in Jurong Island. According to Sin Leng, its crane operator reported on 1 October 2001 that the crane's wire rope had to be replaced due to wear and tear. On the same day, a replacement wire rope was ordered from the first defendant, Mr Ong Chai Teck ("Mr Ong"), a ship's chandler. After the said rope was delivered, it was installed on the crane.

3 Six months later, on 2 April 2002, the boom of the crane collapsed as a result of the snapping of its wire rope. One person was killed and another injured. The crane and other property were damaged. Sin Leng was prosecuted for offences under the Factories Act (Cap 104, 1998 Rev Ed). It pleaded guilty and was fined.

4 Sin Leng's insurers, Asia Insurance Company Limited, exercised its right of subrogation. As a result, Sin Leng claimed damages for the loss, damage and expense suffered as a result of the snapping of the crane's wire rope from the first defendant, Mr Ong, who supplied the wire rope, the second defendant, Gaylin International Pte Ltd ("Gaylin"), from whom Mr Ong bought the wire rope, and the third defendant, Kiswire Sdn Bhd ("Kiswire"), who manufactured the wire rope.

5 At the commencement of the trial, leave was granted to Sin Leng to discontinue proceedings against both Ong and Gaylin. As such, the trial proceeded on the basis that Kiswire was the sole defendant in the action.

The pleadings

6 From the start, the manner in which Sin Leng's claim was advanced against Kiswire left very much to be desired. As early as April 2002, Sin Leng's insurers obtained a report from Det Norske Veritas Pte Ltd ("DNV") that put the blame for the snapping of the crane's wire rope squarely on quench cracks in the manufacturing process. On the other hand, McConnell, the users of the crane in the Jurong reclamation project, commissioned a report by Setsco Services Ptd Ltd ("Setsco"), which concluded that the wire rope was free of any defect and that it probably snapped as a result of excessive wear and abrasion of its surface.

7 Sin Leng tailored its entire case against Kiswire on the conclusion in the DNV report that the crane's wire rope snapped because of quench cracks. In para 15 of its Statement of Claim, which was filed on 8 June 2004, it pleaded as follows:

> In the aftermath of the above incident, the Plaintiffs' underwriters engaged investigators to investigate the circumstances and cause of the snapping of the wire rope including appointing Det Norske Veritas Pte Ltd ("DNV") to conduct a metallurgical analysis of the said wire rope. DNV in their report dated 27th April 2002 concluded that the said wire rope contained inherent and pre-existing manufacturing defects and was a rejectable product *in that there were many quenching cracks in the component wires of the said wire rope,* resulting in the said wire rope snagging and snapping during normal operation due to the breakage of the defective component wires of the said wire rope. [emphasis added]

8 Elsewhere in the Statement of Claim, where the cause of the snapping of the wire rope was in issue, Sin Leng consistently maintained that the manufacturing defect was caused by quench cracks. While furnishing particulars of Kiswire's alleged negligence in para 19(a) of the Statement of Claim, Sin Leng pleaded as follows:

> Manufacturing and supplying the said wire rope when they knew or ought to have known that the same was unfit and dangerous to be used for its purpose of lifting loads and that it was likely to fracture suddenly in the normal course of such use by reason that *it contained many quenching cracks of its component wires*. [emphasis added]

9 Furthermore, in para 19(c) of the Statement of Claim, Sin Leng referred to the "type of defects complained of", which meant quenching cracks, and the same approach was adopted in para 19(d), where the words "of such defects" and "the defects … complained of" were used.

10 As the DNV report was obtained in May 2002, Sin Leng had ample time to prepare its case for the trial, which commenced in the first week of October 2005. However, it was not until August 2005, barely a few weeks before the trial and more than three years after the DNV report was issued, that Sin Leng sought a second opinion from Dr Douglas William Townsend ("Dr Townsend)", a Canadian engineering consultant, who filed his Affidavit of Evidence-in-Chief ("AEIC") on 13 September 2005. Dr Townsend did not take the same position as DNV as he said that the defects which contributed to the snapping of the crane's wire rope were caused by pre-existing hydrogen embrittlement rather than quench cracks. However, Sin Leng appeared oblivious to the inherent contradictions between its two experts and did not seek to amend its pleadings before the trial commenced on 4 October 2005.

Sin Leng is alerted on the apparent inconsistency between its experts

11 On 3 October 2005, a day before the trial commenced, Sin Leng's counsel, Mr R Govin, wrote to Kiswire's counsel, Mr R S Bajwa, to suggest a meeting between DNV's expert, Dr Bag, and Setsco's

expert to "see if there are any subsidiary technical issues which in their view requires to be determined or in respect of which there is common ground". Mr Bajwa replied on the same day that he did not find the proposed meeting helpful and pointed out that DNV's expert and Dr Townsend differed in their positions on the cause of the defect in the crane's wire rope "to a material extent". He suggested a meeting instead between Dr Townsend and Kiswire's expert, Dr Andrew G Stacey, a British metallurgist and Chairman of Stonepark Consultancy Ltd.

12 In his reply to Mr Bajwa on the same day, Mr Govin recorded his disappointment that Kiswire did not see the need for a meeting between Dr Bag and Setsco's expert and had proposed a meeting instead between Dr Townsend and Dr Stacey. Mr Govin stated as follows:

> We are surprised at your insistence that a meeting between [DNV's expert , Dr Bag] and Setsco's expert would not be helpful. *These two experts are the primary experts relied on by the parties as they had actually observed the subject wire rope, sampled it, carried out various lab analysis, site visits etc.* On the other hand, Dr Stacey appears not to have done so and certainly Dr Townsend had not done so. If in your opinion there is no point for the primary experts to meet, we can't see the rationale for the meeting of *the secondary experts (Dr Townsend and Dr Stacey)*. [emphasis added]

13 As for Mr Bajwa's comment that Dr Townsend disagreed with DNV to a material extent, Mr Govin lambasted the former for not really understanding Dr Townsend's position. He wrote as follows:

> With respect to your comment on Dr Townsend's views on DNV's report, it appears that you have not digested what Dr Townsend is saying. In case you are not aware, Dr Townsend has upheld the conclusion of DNV that the subject wire rope contains manufacturing defects in the nature of cracks and that there is evidence of this fact in all the reports of the various experts. *Dr Townsend however does not agree with Setsco's conclusions (as opposed to DNV's conclusions).* [emphasis added]

14 It was against this background that the trial commenced.

The trial and collapse of Sin Leng's pleaded case

15 In paras 15 and 16 of its Opening Statement, Sin Leng's counsel, Mr Govin, reiterated that DNV's position regarding quench cracks would be relied on during the trial when he stated as follows:

> On 27th April 2002, DNV issued their Technical Report … and concluded as follows:
>
> > [T]he laboratory analysis results indicate this was a rejectable product – as many pre-existed quenching cracks were found in some of the wire sections. …
>
> Dr Asim Bag of DNV will testify on behalf of the Plaintiffs as to DNV's findings.

16 However, in the second week of the trial, despite having alleged that Kiswire's counsel did not understand what Dr Townsend wrote in his report, Sin Leng finally saw the light and sought to amend its Statement of Claim on 12 October 2005 to alter its case from one alleging that manufacturing defects were specifically caused by quench cracks to one that opened the door to any other type of manufacturing defect hitherto not pleaded. This was of course to accommodate Dr Townsend's view that manufacturing defects and not quench cracks had caused the crane's wire rope to snap.

17 Kiswire objected vehemently to this proposed amendment on the ground that it was not obliged to meet a different case altogether in the middle of the trial. Its counsel, Mr Bajwa, pointed out that in the light of Sin Leng's pleadings, which stated categorically that the crane's wire rope snapped because of quench cracks, it prepared its defence to meet this very specific allegation and obtained an expert opinion to the effect that there were no quench cracks in the crane's wire rope. After discussions in chambers, the hearing of the application to amend the pleadings was adjourned on the understanding that depending on how Sin Leng conducted its case thereafter, the application could be heard again.

18 Sin Leng then called its primary expert, DNV's Dr Asim Bag, to testify on its behalf. Dr Bag spent one whole day in the witness box in an attempt to bolster Sin Leng's pleaded case that the manufacturing defect that caused the crane's wire rope to snap was indeed due to quench cracks. He had no doubt that his was the correct view.

19 On the following day, Sin Leng's other expert, Dr Townsend, who was regarded by Sin Leng as its secondary expert, was cross-examined. He immediately left no doubt as to how little he thought of the finding by Sin Leng's primary witness, Dr Bag, that the crane's wire rope snapped because of quench cracks. The relevant part of the cross-examination is as follows:

> Q: … [F]or my very first question, … I want to talk about quench cracks. Now, … I refer you to the report of DNV, of Dr Asim Bag… where he says: "… this was a rejectable product with many pre-existed quenching cracks in some of the wire sections".
>
> A: I certainly would not have said there were quench cracks because I don't believe they were. There were cracks but I don't believe they were quench cracks.
>
> Q: So quite clearly, Asim Bag's conclusion … is wrong, as far as quench cracks [are] concerned.
>
> A: As much as he believes that there were quench cracks, I believe he is wrong.
>
> Q: So this morning when you're going to give evidence, you are not going to talk about quench cracks at all?
>
> A: No, I'm going to talk about cracks but not quench cracks.

20 At this juncture, Kiswire's counsel, Mr Bajwa, informed the court that he need not cross-examine Dr Townsend any further as the latter intended to talk about other defects that had not been pleaded in the Statement of Claim.

21 Sin Leng's counsel, Mr Govin, was asked to clarify his client's position regarding quench cracks, which was foundational to its claim and which had hitherto been supported to the hilt by DNV's Dr Bag but was now being completely undermined by Dr Townsend. He informed the court that his client had decided to abandon its pleaded case that the crane's wire rope snapped because of quench cracks altogether. Instead, it would like to adopt Dr Townsend's position that other manufacturing defects, which had nothing to do with quench cracks, caused the crane's wire rope to snap. This was surprising considering that Sin Leng had, as mentioned earlier, considered Dr Bag as a primary expert who had examined and analysed the wire rope in question whereas Dr Townsend, its secondary expert, had not.

22 In view of Sin Leng's stand, its application for an amendment of its pleadings was heard

again.

Whether the application to amend should be allowed

23 Whether an amendment to pleadings should be allowed is a matter of discretion for the trial judge. While there are numerous and diverse factors relevant to the exercise of the court's discretion, there must be an assessment of where justice lies. The later an amendment to pleadings is sought, and especially so when it is sought in the middle of a trial, the more difficult it would be to say that justice lies in the direction of allowing the amendment.

24 It has often been said that where the other party can be compensated with costs, an amendment should be allowed but this statement must nowadays be qualified. In *Ketteman v Hansel Properties Ltd* [1987] AC 189 (the "*Ketteman* case") at 220, Lord Griffiths pointed out that "justice cannot always be measured in terms of money". Hence, the courts have been careful to differentiate between an amendment that merely clarifies an issue in dispute and one that raises a totally different issue at too late a stage.

25 It is obvious that Sin Leng had not indicated until after the commencement of the trial that anything other than quench cracks was an issue to be determined at the trial. A party is bound by its pleadings. In *Blay v Pollard and Morris* [1930] 1 KB 628 at 634, Scrutton LJ explained:

> Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

26 Scrutton LJ's views was endorsed by Chao Hick Tin J, as he then was, in *Loy Chin Associates Pte Ltd v Autohouse Trading Pte Ltd* [1991] SLR 755 at 759, [19].

27 Kiswire was thus entitled to concentrate all its efforts on countering this specific allegation of quench cracks in the Statement of Claim. Its counsel, Mr Bajwa, who submitted that the proposed amendment of the Statement of Claim causes grave prejudice to his client which cannot be compensated by costs because it introduced a new case altogether, asserted as follows:

> [If] my learned friend's stand now is that there are no quenching cracks, why did he allow Asim Bag to give evidence and waste everybody's time …? He had [Dr Townsend's] report before the trial. He could have said to Asim Bag, we don't agree with you, … . But he allowed him to give evidence before this Court, quenching cracks, quenching cracks all the way. …
>
> … [O]ur expert looked at the DNV report. He sees pre-existing quench cracks; he has focused his mind on that, he has destroyed that theory and then all of a sudden during the course of the trial, they themselves abandon quench cracks and come up with some other cracks.

28 Sin Leng's counsel, Mr Govin, tried to downplay the significance of the proposed amendment to the Statement of Claim. To begin with, he claimed that Kiswire raised only a token objection and did not expect its objections to be taken seriously, a surprising claim that was denied forcefully by Kiswire's counsel, Mr Bajwa. Secondly, Mr Govin asserted that if the amendment is allowed, the issue before the court would still concern manufacturing defects, whether they resulted from quench cracks or other causes. He added that his pleadings need not have been so specific as to refer to quench cracks. It would have been sufficient to refer to the defects as "manufacturing defects". This is a simplistic view as the proposed amendment to the pleadings is not a mere clarification of an issue

before the court. In the present case, the type of manufacturing defect is a crucial issue in the trial. If the type of defect had not been pleaded, Kiswire would certainly have demanded further and better particulars, and the interrogatories would have narrowed the type of manufacturing defect complained of, namely, quench cracks.

29 Mr Govin also submitted that as the parties were in the middle of the trial, Kiswire should be able to continue with the trial and meet the new case against it. In the process, he went so far as to suggest that Kiswire knew about Dr Townsend's views, which were enunciated in his AEIC. This ignores the fact that the relevant issues before the court relate to what has been pleaded and it is trite that fundamental defects in pleadings cannot be cured by statements in an affidavit: see *Abdul Latif bin Mohammed Tahiar v Saeed Husain s/o Hakim Gulam Mohiudin* [2003] 2 SLR 61. More importantly, Sin Leng's other counsel, Ms Claire Nazar, when explaining in her affidavit in support of the amendment why the amendment was sought at such a late stage, pointed out that her client and its lawyers could not determine earlier on whether an amendment to the pleadings should be made, if at all it should be made, due to "the relatively minor difference in how DNV and Dr Townsend identified or labelled the manufacturing crack". Despite calling the difference a "minor" one, she added in para 12 of her affidavit that it was only after "extensive discussions with Dr Townsend over the weekend to understand the technical aspects of the DNV, Setsco and his own report" that Sin Leng decided to propose certain amendments to the Statement of Claim to delete the word "quenching" and substitute it with the word "manufacturing". If Sin Leng and its counsel took so much time to digest what Dr Townsend meant in his report, a question arises as to whether it is fair to expect the other party to continue with the trial as if the change of pleadings is only to clarify issues when it is not. Lord Griffiths' apt statement in the *Ketteman* case ([24] *supra* at 220) that to allow an amendment before a trial begins is quite different from allowing it at the end of a trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different ground applies to Sin Leng, which no longer had the appetite to litigate on the basis of its pleaded case.

30 To assist the court, Dr Townsend and Dr Stacey were asked for their views on the effect of the proposed amendments on the unfolding of technical evidence to be presented to the court. Dr Townsend suggested that the trial could still proceed with the amended claim on the basis of evidence already before the court.

31 In contrast, Dr Stacey asserted that the parameters of his work with Kiswire's counsel had all along been limited to the DNV report, which was quite explicit in concluding that the failure of the crane's wire rope was due to pre-existing quench cracks. He stressed that far from being a minor change, the proposed shift of focus from quench cracks to hydrogen embrittlement "changes the scene entirely". In view of this, Kiswire asserted that if the application to amend the pleadings is allowed, the trial ought to be adjourned and the remaining trial dates vacated to enable it to seek further and better particulars of the nature of the new type of defect and to consider a response to the different case now relied on by Sin Leng. Mr Bajwa's view was endorsed by Dr Stacey. The relevant part of the proceedings relating to what Dr Stacey said is as follows:

> Q: [A]re there enough particulars provided already by Dr Townsend in his report to enable you to respond effectively as possible, or … do you need more particulars?
>
> A: The only evidence that's been in front of us … has been from two reports from DNV and Setsco. Dr Townsend's affidavit is an interpretation, a hypothesis of many possibilities, one of which he touches on is hydrogen embrittlement. But without any specific evidence that we are asked to address, it's very hard to know where to start. It's an open spectrum of … possibilities, and so, it would be quite difficult to … prepare for .. such a vague suggestion. So more evidence or actual evidence would need to be identified as to what we are going to be asked to respond

to.

32 When asked to clarify, Dr Stacey said that he would be interested in the chemical evidence of contaminants that might have caused the evolution of hydrogen, the environment that led to that and the residual chemical elements present that create hydrogen. In this regard, it is crucial to note that no chemical analysis or any other analysis of the allegedly defective crane wire rope examined by DNV and Dr Bag can now be performed by either Sin Leng or Kiswire because the said wire rope has been lost. This means that Kiswire would be restricted to looking at photographs to determine whether Sin Leng's new case on hydrogen embrittlement lacks substance. This is not satisfactory. Dr Stacey explained:

> [T]he problem with looking at photographs is, you're looking at after the event. Hydrogen embrittlement is a chemical process, you don't see chemical processes from photographs. So … I'd be more interested … in hearing what evidence is being proposed in support of this new theory of explaining the fracture.

33 In a letter addressed to the court on 22 October 2005 to request for a further hearing on its application to amend its Statement of Claim, Mr Govin went so far as to question whether DNV was even qualified to comment on the nature of the cracks in the crane's wire rope as they are not rope manufacturers. He stated as follows:

> DNV themselves are not experts on wire rope manufacturing processes. They are expert metallurgists who have investigated and conducted metallurgical analysis of the wires of the snapped wire rope samples. … DNV need not have gone so far as to opine that these were "quenching" cracks since they are not wire rope manufacturers and they had no knowledge of [Kiswire's] manufacturing processes.

34 Sin Leng's assertion that the DNV report was made by persons who are not wire rope manufacturers is alarming. If Dr Bag's conclusion on the cause of the defect in the crane's wire rope is questioned on the ground that DNV is not a rope manufacturer, its other expert, Dr Townsend, whose views are now relied on by Sin Leng is also not a rope manufacturer and, like Dr Bag, has no knowledge of Kiswire's manufacturing processes.

35 After pointing out that DNV is not a rope manufacturer, Mr Govin added as follows in his said letter of 22 October 2005:

> Be that as it may, [Sin Leng is] in no position to assess if DNV's inference of quench cracks is accurate, even up to the present as DNV maintains their opinion even under cross-examination. Just as DNV are entitled to their view that these are "quenching cracks", Dr Townsend is entitled to his view that these are hydrogen embrittlement cracks.

36 If, as Sin Leng now claims, it is in no position to assess if DNV's finding on quench cracks is accurate, why did it abandon its pleaded case on quench cracks altogether? Having done so, Sin Leng is now suggesting that DNV may be right after all, in which case Dr Townsend is, on the basis of DNV's evidence, wrong. This lack of direction on Sin Leng's part after opting to abandon DNV's conclusion on quench cracks and to endorse Dr Townsend's evidence is disturbing.

37 Attention will next be focused on Sin Leng's argument that the doctrine of *res ipsa loquitur* applies so that it is Kiswire's task to rebut the *prima facie* case of negligence. Reliance was placed on *Donoghue v Stevenson* 1932 AC 562 and it was submitted that the plaintiff in that case was not asked how the snail got into the bottle. Surely there is a material difference between a freshly

opened bottle with a snail inside and a wire rope that had been heavily used by Sin Leng in a land reclamation project for six months before it snapped. In *Clerk & Lindsell on Torts* (The Common Law Library) (Sweet & Maxwell, 15th Ed, 1982) at para 10–113, the position is summed up as follows:

> The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence…. (3) there must be no evidence as to why or how the occurrence took place.

38 In the present case, the crane's wire was not under Kiswire's management and control at the material time. It had been installed by Sin Leng or its agents and was under its own control. Whether it had been properly maintained during the six months before it snapped and whether some of the crane's winches and other parts had been badly worn out were questions that were considered by the witnesses who testified before Sin Leng's experts were cross-examined. Moreover, Sin Leng had been prosecuted for breaching the Factories Act in relation to the use of the crane. In these circumstances, the doctrine of *res ipsa loquitur* does not apply.

Conclusion

39 Litigation practice is not the same today as in the past. Older cases, where the courts were more liberal in allowing amendments to pleadings, may not be altogether relevant today. In the *Ketteman* case ([24] *supra*), Lord Griffiths explained at 220:

> 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 them 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 upon their own heads rather than by allowing an amendment at a very late stage of the proceedings.

40 Several cases in the Singapore courts have endorsed the *Ketteman* approach. In *Lam Soon Oil and Soap Manufacturing Sdn Bhd v Whang Tar Choung* [2002] 2 SLR 395, the court refused to allow an amendment of pleadings during the trial because this would, among other things, have resulted in the vacation of the trial dates and a prolonged interlocutory process. In *Hong Leong Finance Ltd v Famco (S) Pte Ltd* [1992] 2 SLR 1108, a similar approach was adopted by the court, which noted that if the proposed amendments had been allowed, there would be a delay in the trial and the defendants' anxiety and desire to have the matter resolved must be taken into account.

41 Anyone who commences litigation must get its act together in time for a trial. Sin Leng is clearly the author of its own predicament. The DNV report was released in May 2002 and it waited more than three years until the eve of the trial to commission another expert opinion, which was not fully digested until after the commencement of the trial. It had not given proper thought to its case and had wasted the court's time by having its primary expert, Dr Bag, testify on the subject of quench cracks, only to abandon its entire pleaded case on quench cracks the day after.

42 Sin Leng's application to amend its pleadings in such a drastic way in the second week of the trial was obviously made at too late a stage. Apart from the fact that this is not a case where the payment of costs would compensate for the surprise sprung on the other party, if legal business should be conducted efficiently in the interests of the whole community, there is no reason why the trial dates should be vacated because of Sin Leng's failure to organise itself properly for the trial. As

Lord Griffiths rightly said in the *Ketteman* case ([24] *supra* at 220), "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".

43 After taking all circumstances into account, I dismissed Sin Leng's application to amend its Statement of Claim.

44 As the application to amend the Statement of Claim was not allowed and Sin Leng decided not to rely on its pleaded case based on quench cracks, its claim against Kiswire was dismissed with costs.