Wishing Star Ltd v Jurong Town Corp
[2006] SGHC 82

Case Number : Suit 31/2003, SUM 1319/2006, RA 115/2006

Decision Date : 18 May 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Lawrence Tan and Eugene Tan (Drew & Napier LLC) for the plaintiff; Ho Chien Mien and Jagateesan Sathiaseelan (Allen & Gledhill) for the defendant

Parties : Wishing Star Ltd — Jurong Town Corp

Civil Procedure – Pleadings – Amendment – Whether amendment causing prejudice to opposing party – Applicable principles – Order 20, r 5, Rules of Court (Cap 322, R 5, 2006 Rev Ed)

18 May 2006

Choo Han Teck J:

1 This was an appeal by the plaintiff against the assistant registrar's refusal to grant leave to amend its re-amended reply and defence to counterclaim dated 13 October 2003. The suit was commenced on 13 January 2003. The trial proceeded on the preliminary issue of misrepresentation only and the rest of the issues were deferred since the resolution of the preliminary point might have rendered the other issues unnecessary. At the conclusion of the trial on the preliminary issue, I found that there were misrepresentations but that the defendant was not induced by the misrepresentations, and further, that the defendant had affirmed the contract in spite of the misrepresentations. The defendant appealed and the Court of Appeal allowed the appeal and ordered damages to be assessed.

2 On 24 March 2006, the plaintiff applied to amend its re-amended reply and defence to counterclaim by pleading that the defendant failed to mitigate its loss. The application was dismissed on 7 April 2006. At the hearing of the plaintiff's appeal, I directed the defendant to file an affidavit to set out what prejudice it might suffer if the application to amend was allowed.

3 On 20 April 2006, Ms Mao Whey Ying ("Ms Mao"), the executive vice president of the defendant, filed the affidavit as directed. The main concern of Ms Mao was that the defendant may have to recall some of their witnesses, depending on what new issues arise from the amendment. The defendant feared that some of its witnesses, including Mr Spencer Lim Teong Boon, a deputy director, might not be available to testify as they have either been posted overseas or have left the defendant's group of companies. On 21 April 2006, counsel submitted their respective written arguments together with a chronology of events prepared by the defendant's counsel. On 9 May 2006, I allowed the plaintiff's appeal and gave directions on the further conduct of the matter. I now set out the grounds upon which I decided to allow the appeal.

4 Order 20 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) permit a party to amend his pleadings at any stage with the leave of the court. Although the kind of amendments that could be permitted are explicitly laid down, for example, amendments as to the capacity of a party, or the substitution of a cause of action, the reasons for granting leave is left to the discretion of the court. There are, however, well-established principles to guide the court in the exercise of that discretion. These principles appear clear and uncomplicated when the underlying tension between the applicant and opponent in an application to amend the pleadings is understood. One is entitled to prepare his case according to what he has to meet on the basis of what has been pleaded. Careful and precise

pleadings are such time and money savers. The quality of the pleadings is also a reflection of legal skills. And so is the response to changes made to the case. Each time a pleading is amended, the opposing side will have to reconsider its own case and pleadings. It is reasonable to assume, generally, that when substantive amendments are required, it is because hitherto, the applicant's case has not been adequately pleaded, or was not pleaded at its best, or in its strongest form. Consequently, a weak case could be strengthened if the amendments are allowed; but that is not always true, of course, because an otherwise sound pleading could be rendered a mess by unnecessary or careless amendments (we are not presently concerned with such a case). Conversely, the opposing party would, understandably, prefer to have the applicant pinned down to what he might think to be a weaker case. All that, it might be argued, is part of the adversarial system. If a gladiator, having arrived at the coliseum with just a sword, and finding his opponent more heavily armed, asks for leave to increase his with a shield, or an extra blade, should his request be allowed? Should he be told that he was a professional, and ought therefore, stand by his choice of weapons; and if his predicament was of his own making, that is, in forgetfulness, ought he be assisted? To arm him better might have made it a more even fight, but would that have been fair to the other warrior who had come prepared? On the other hand, should we be so absorbed in the examination of the gladiators' weapons that we forget the fight, or misdirect ourselves as to the issue – fairly armed or fairly fought? That one follows the other is already an indication what the answer ought to be.

5 In the process of adjudication in the courts, it is the substantive laws that govern the substantive rights of the litigants; and the procedural rules govern the way and manner the litigants assert their claims. By and large, substantive laws do not pose as many problems as procedural ones simply because they are usually well settled and the main question, broadly speaking, is whether the facts lay with one or the other party. When the law is likened to a spider's web, trapping small prey while larger ones break right through it, it is procedural laws, and not the substantive ones, that are likely to fit the bill. If it were the substantive law itself that was bad, it would not be long before it is changed. That is not so with procedural laws, for at the heart of procedure, is judicial discretion. There is often no complaint about the rules themselves, for in that sense, they are like the substantive law. They are noticeable in print. And everyone is presumed to know them, or at least, can easily find out what they are. But the application of those rules hinges on discretion – whether leave for this, that, or the other ought to be given or refused; whether an affidavit ought to be admitted or expunged; whether an extension of time should be granted or refused, and so on, are some of the myriad matters in procedure which concerned, not the ultimate rights of the parties, but some remote issue as to the manner in which the proceedings were to continue. Although these were remote in the sense that they might not be connected directly with the substantive rights of the parties, they could, nevertheless, be crucial to the case because the substantive case in dispute might be redefined, substantially, and even entirely; and the question always, would be, would it have been fair to allow that?

6 Prof Lon Fuller once remarked, "The litigant cannot join issue with his opponent in a vacuum." That was a reference to the fact that a common substantive fact or principle of law must necessarily be in existence between the parties before a dispute as to interpretation can arise; but it is up to each litigant to define his own. That being so, it remains only to determine what limits there might be in permitting the litigants the right to define, and redefine, his case, and more importantly, under what circumstances ought he be stopped. Following from the main proposition that no battle may ensue without a definition of the issues, and by that it is meant the issues as arising from the way each party defines his case, which by necessity, might have to be redefined even after the trial has commenced. The court, as adjudicator, need not consider the necessity or wisdom of a party's decision to amend his case until it delivers the grounds of its decision in the outcome of the trial. The court is, however, obliged to take into account how the amendment might result in an unfair trial. In this regard, it is the same question that it must ask in regard to the applicant – how might it result in

an unfair trial if the amendment was refused? This fundamental question, in my view, is addressed in Lord Brandon of Oakwood's four propositions enunciated in *Ketteman v Hansel Properties Ltd* [1987] 1 AC 189 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.

7 One important way of gauging of how the fairness of the trial might be compromised, or enhanced, is to measure the proposed amendment against the prejudice that may be caused to the opposing party. The proposed amendment of the plaintiff in this case was to plead that the defendant failed to mitigate its loss in failing to obtain the services of alternative façade contractors to take over the plaintiff's work. This was a point that had been alluded to at the trial of the preliminary issue (misrepresentation). In that sense it could not be said that the defendant would be caught by surprise. Judith Prakash J dealt with a similar situation in *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* [2006] SGHC 17. The plaintiff sued her younger brother for an account of his dealings in respect of various properties jointly owned by them, and alternatively, for damages for breach of a duty to account. The plaintiff applied to amend her case by adding a new cause of action that might entitle her to damages for breach of fiduciary duty if she should succeed. She made the application after the defendant had opened his case, and was midway through the cross-examination by the plaintiff's counsel. Prakash J, at [9], was of the view that:

> [A]lthough 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.

Factually, *Rabiah Bee bte Mohamed Ibrahim v Salem Ibrahim* and the present case were very different, of course; but it was not the evidence in that case that interested me. The point that I agree with is that if it can be shown that the proposed amendment concerned a matter that the opposing party was aware of, and ought reasonably have been prepared for at the start of the trial, then it should not be surprised that it was to be formalised in the pleadings by way of an amendment.

8 When the defendant in the present case counterclaimed for breach of contract and claimed damages, it must have been aware that mitigation would be in issue. The broad issue in the present case concerned the ability of the plaintiff to complete the façade work that they had contracted to do. In the preliminary issue, the defendant made the point that it had discovered a number of misrepresentations that entitled it to rescind the contract. The evidence showed that there were indeed many misrepresentations, but there were also many meetings in which the defendant had to consider what course of action it would take. Various alternatives and fallback plans were discussed between the parties and other principal parties involved in the project. These plans included having the plaintiff subcontract part of its work elsewhere. Plans of this nature are too well-connected to the idea of mitigating one's loss. The question cannot, in my view, have been far from the defendant's

mind even before it terminated the contract. Ms Mao deposed in her affidavit that the plaintiff's assertion that the defendant ought to have engaged the contractors named by it was an assertion based on the assumption that those contractors were willing and able to accept the job. I do not think that this was a real concern of the defendant. The burden of proving this assertion, as I see it, lies with the plaintiff to prove that assumption. So far as the fourth contractor was concerned, namely, Bovis Lend Lease, it appeared that that company eventually did take over the job. I am, therefore, of the view that the defendant would not have been caught by surprise as its counsel submitted.

9 That it was aware that mitigation would be a likely issue concerned only the question of surprise, which in some cases, but not the present one, could amount to prejudice; but clear particulars must follow. Even if it were not taken by surprise, an amendment might not be allowed if the defendant was able to show that the amendment would cause it to suffer prejudice. Reverting to the affidavit of Ms Mao, it was feared that the defendant would be unable to recall some of their witnesses at this stage. That is an obvious problem, but it is not an insurmountable difficulty. Witnesses who have left the company can still be summoned to testify. It is relevant that in this present case, the bulk of the evidence could be found or established from the extensive documents of the respective parties. Secondly, the burden of proving that the defendant failed to mitigate is a burden that the plaintiff has to discharge. So what it needed to plead is not the same thing as what it could prove, although, of course, in taking this into account, one has to see if there were any real and substantial evidentiary problems unfairly cast on the defendant. I do not see any. I need, finally, in passing, comment on the defendant's argument that since the Court of Appeal had ruled in its favour on the misrepresentation ground, it should be entitled to "enjoy the fruits of this lengthy litigation". There is no question about that. I am only concerned that it takes what it is entitled to and no more, lest it clears the entire orchard when it was entitled to less.

10 For the reasons above, the plaintiff's appeal was allowed with costs reserved.