

MID PASTEL RESOURCES SDN BHD v CELCOM MOBILE SDN BHD

CaseAnalysis

| [2017] MLJU 2153

Mid Pastel Resources Sdn Bhd v Celcom Mobile Sdn Bhd

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Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

FAIZAH JAMALUDIN JC

CIVIL SUIT NO WA-22NCVC-585-11 OF 2015

29 November 2017

Luqman bin Mazlan (Shamsuddin & Co) for the plaintiff.

Rabindra S Nathan (Tan Jie Xun with him) (Shearn Delamore & Co) for the defendant.

Faizah Jamaludin JC:

FOUNDATIONS OF JUDGMENTINTRODUCTION

[1]This is the Plaintiff's application (encl. 61) for leave to amend its Statement of Claim.

[2]After considering the proposed amendments to the Statement of Claim, the procedural history of this case, the respective parties' affidavits and after hearing the submissions of both counsels, I decided not to use this Court's discretion to allow the Plaintiff's application to amend its Statement of Claim. For the reasons discussed herein, I found that the Plaintiff's application lacked bona fides. I also found that the proposed amendments, if allowed, would in effect turn this suit from one character into another and the resulting prejudice caused to the Defendant

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cannot be compensated with cost. In my judgment, to allow the amendment application would cause great injustice to the Defendant. This would be contrary to the principles laid down by the Federal Court in *Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn. Bhd & Ors* [1983] 1 MLJ 213;; [1983] 1 CLJ 191.

[3]Furthermore, the Plaintiff filed this application on 12.07.2017, which is more than one and half years after it commenced this suit against the Defendant and after trial had commenced. As discussed in more detail below, since the introduction of the pre-trial case management regime under O.34 of the Rules of Court 2012 (“ROC”), where an application to amend pleadings is made at a very late stage, the Federal Court in *Hong Leong Finance Bhd. v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1;; [2016] 1 MLJ 301 held that the principles in **Yamaha Motors** are not the only consideration for the Court in deciding whether to grant leave to amend. The Federal Court held that the applicant must also explain the reason for the delay.

[4]However, the Plaintiff in its affidavit and the Plaintiff’s counsel in his written and oral submissions at the hearing of the application before me failed to provide any explanation as to why the amendments were sought at such a late stage and not earlier.

BACKGROUND FACTS

[5]The Defendant is a company authorised to provide telecommunication and network services. The Plaintiff was appointed by the Defendant as one of its distributors. The Plaintiff had filed two previous suits in the Kuala Lumpur High Court against the Defendant in 2011 and 2014 and had filed this present suit against the Defendant in 2015.

[6]The present suit relates to a dispute between the parties as regards the terms of the settlement agreement of the 2014 suit (referred to in the pleadings as “the second settlement agreement’). The Plaintiff filed this present suit against the Defendant on 4.11.2015.

[7]The procedural history of this present suit is as set-out in the table below:

DATE	EVENT
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DATE	EVENT
04.11.2015	Plaintiff filed Writ and Statement of Claim
23.12.2015	Defendant filed its Defence
05.01.2016	Plaintiff filed Reply to Defence
22.01.2016	Defendant filed its Rejoinder to the Reply
13.06.2016	Defendant's application to amend Defence allowed
24.06.2016	Defendant filed Amended Defence
13.09.2016	Trial dates of 22.05.2017 until 26.05.2017 fixed
23.05.2017	At trial, Plaintiff's counsel applied for trial to be adjourned because the Plaintiff's first witness was admitted into hospital for 3 days. The trial was adjourned and postponed to 21-22 August 2017, 3-6 October 2017.
12.07.2017	Plaintiff filed the application to amend the Statement of Claim.

The Plaintiff's Application

[8]The Plaintiff submits that the reason for the application is to ensure that all the facts and issues are properly and accurately presented before this Court. It further submits that the amendments will not delay the proceedings of this suit and they will assist the court in resolving the true controversy between the parties.

[9]The Plaintiff asks this court to exercise its discretion to allow the proposed amendments since they are bona fide and will not change the nature or character of the suit. The Plaintiff submits that the amendments will not prejudice the Defendant at all and says that even if there was any prejudice to the Defendant, such prejudice can be compensated with cost. The Plaintiff claims that if the amendments are not allowed, its rights and interest will be more negatively affected and prejudiced as compared to the prejudice suffered by the Defendant.

The Defendant's Objections

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[10]The Defendant strongly objects to the Plaintiff's amendment. It argues that the application should not be allowed since it fails to satisfy the requirements under O.20 r.5(1) of the ROC.

[11]The Defendant submits that the amendment application should be rejected on the following grounds:

- (i) The Plaintiff is excessively delaying the suit;
- (ii) The amendment application is not bona fide and amounts to a tactical manoeuvre;
- (iii) The amendment application will change the nature or character of the suit; and
- (iv) The Plaintiff failed to provide any reason for the delay in applying for the amendment.

LAW ON AMENDMENT OF PLEADINGS

[12]Under O.20 r.5 of the Rules of Court 2012 ("ROC") this Court may at any stage of the proceedings allow the parties to amend its pleadings. O.20 r. 5 provides *inter alia* as follows:

5. Amendment of writ or pleading with leave

(1) Subject to Order 15, rules 6, 6A, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any other party to amend his pleading, on such terms as to costs or otherwise as may be just in such manner, if any, as it may direct.

[13]The *locus classicus* on the amendments of pleadings after close of pleadings is *Yamaha Motor Co. Ltd v. Yamaha Malaysia Sdn. Bhd & Ors* [1983] 1 MLJ 213; ; [1983] 1 CLJ 191, where the Federal Court held that under O.20 of the Rules of the High Court 1980 ("RHC"), a judge has the discretion to allow leave to amend pleadings where such amendments would not cause injustice to other parties. Mohamed Azmi FJ in delivering the judgment of the Federal Court said that:

The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would result, (1) whether the application was *bona*

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vide, (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character. (See *Mallal's* Supreme Court Practice page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim.

[14]In the case of *Palaniappan v. Universiti Pertanian Malaysia* [1995] 1 MLJ 353;; [1995] 1 CLJ 693, Visu Sinnudurai J referred to decision in **Yamaha Motor** and observed that:

One cardinal principle which the courts bear in mind in considering whether an amendment ought to be allowed is whether by so allowing the amendment, injustice would be caused to the other party.

It should, however, be stressed that the proper test which the courts apply, is not whether in allowing the amendment, it would cause injustice to the other party, **but whether in the circumstances of the case, it is just to grant leave. In considering whether it is just to grant leave, the courts must necessarily consider the interests of both parties: whether injustice would be caused to the applicant if leave is not allowed, and whether injustice would be caused to the defendant if leave is granted.** Therefore, in exercising its discretion, the courts have to balance the prejudice involved to both the parties in allowing or disallowing the amendment.

[Emphasis added]

[15]Similarly, the Court of Appeal in the case of *Bacom Enterprise Sdn Bhd v. Jong Chuk & Ors* [1998] 2 MLJ 301; ; [1998] 2 CLJ 11 held that:

Generally speaking, the exercise of the power to grant or refuse amendment of pleadings at any stage of the proceedings is in the discretion of the judge, but **the power must always be exercised judicially having regard to the prevailing practice and whether the amendment sought by one party, if allowed would cause injustice or prejudice to the other party which cannot be compensated by costs**, bearing in mind that it is not always easy to measure justice in terms of the money. Where the amendment causes no injustice or prejudice, it should be allowed.

[Emphasis added]

[16]The Court of Appeal in *Vincent Tang Fook Lam v. Sook Chun Tang* [2004] 2 MLJ 145; ; [2004] 1 CLJ 296 made it clear that in an application to amend pleadings, the burden of persuasion lies with the applicant. The Court of Appeal held that:

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The law on amendment of pleadings is already well-settled. The provision relating to amendment of the writ and pleadings is governed by O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). It is trite that amendments can be made at any stage of the proceedings including at the trial. **The general principle is that the court will allow such amendments as will cause no injustice to the other parties.** It is equally trite that if the application is allowed, the opposite party will normally be compensated by way of costs. Be that as it may, the Federal Court, had in the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 set out three basic questions for consideration and **it was for the plaintiff who asked the court to exercise a discretionary power in her favour to place some material and advance some cogent reasons to impel the court to lean on her side.**

[Emphasis added]

[17]The decision in **Yamaha Motor** and all the other cases quoted above were made under O.20 of the RHC, prior to the introduction of O.34 of the ROC. O.34 of the ROC contains rules dealing with pre-trial case management. It was introduced by the ROC on 1 August 2012 to facilitate case management in the courts and to replace the previous O.34 of the RHC, which dealt with the setting down for trial of actions begun by writ. The editors of the *Malaysian Civil Procedure 2015 ('White Book')* commented that:

The amendments made extensive changes to the procedure to be followed before the trial of an action. They envisage the court taking a proactive role in setting down time frames and giving directions as to the preparation of each party's case for the preparation of each party's case for the purposes of the trial, while enabling the court to impose sanctions for non-compliance with those directions.....

[18]After the introduction of O.34 of the ROC, the Federal Court in *Hong Leong Finance Bhd. v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1;; [2016] 1 MLJ 301, observed that **Yamaha Motor** was decided under the old RHC while under the new case management regime introduced under O.34 ROC, a different approach needs to be taken to prevent delay in the progress of a case to trial. The Federal Court held that when an application to amend the pleadings is made at a very late stage, the principles in **Yamaha Motor** should not be the sole consideration.

[19]Zulkefli Ahmad Makinudin CJM (as he then was) in delivering the decision of the Federal Court in **Hong Leong Finance** said that:

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[18] It is pertinent to note that *Yamaha Motor* was decided under the old RHC 1980. The civil procedure has since then changed with the introduction of the pre-trial case management in the year 2000 under O.34 of the RHC 1980 (w.e.f. 22 September 2000) and now under O.34 of the RC 2012 (w.e.f. 1 August 2012). Nowadays the court recognises especially under the new case management regime that a different approach needs to be taken to prevent delay in the progress of a case to trial and for its completion. The progress of the case is no longer left in the hands of the litigants but with the court in the driver's seat. (See the case of *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557). **In particular when an application to amend the pleading is made at a very late stage as was done in the present case, the principles in *Yamaha Motor* ought not to be the sole consideration. This is because an order for compensation by payment of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice which affects the courts, the parties and the other users of the judicial process.** (See the case of *Conlay Construction Sdn Bhd v. Perembun (M) Sdn Bhd* [2013] 9 CLJ 828;; [2014] 1 MLJ 80).

[Emphasis added]

[20] His Lordship observed that in the United Kingdom, the House of Lords in their decision in *Ketteman and Others v. Hansel Properties Ltd* [1988] 1 All ER 38;; [1987] AC 189 had taken into consideration the strain of litigation on parties when new issues are introduced and an amendment is made late. He quoted with approval the statement of general principle against delayed amendment set out by Lord Griffiths in *Ketteman* and remarked that the principle in *Ketteman* has been considered on numerous occasions by the Malaysian courts (in *Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals* [1998] 3 CLJ 432;; [1998] 3 MLJ 649 and *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [1998] 2 CLJ 11;; [1998] 2 MLJ 301). Lord Griffiths in *Ketteman* [1988] 1 All ER 38 at p.62 said:

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 on 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 begin, it 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.**

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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. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings.

(Emphasis added by Zulkefli Ahmad Makinudin CJM in **Hong Leong Finance**)

ANALYSIS

[21]The Plaintiff relies on **Yamaha Motor** to support its application for amendment of its Statement of Claim. The Plaintiff submits that its application falls within the principles set-out in **Yamaha Motor** in that the application is bona fide, that it does not prejudice the Defendant, which prejudice, if any, can be compensated with costs and that the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[22]The Federal Court in **Yamaha Motor** held that a judge has a discretion to allow leave to amend pleadings but cautioned that like any other discretion, it must of course be exercised judicially. It held that the general principle is the court would allow amendments to pleadings under O.20 of the RHC where such amendments would cause no injustice to the other parties to a suit.

[23]**Yamaha Motor** was decided prior to the introduction of O.34 of the ROC. As stated by the Federal Court in **Hong Leong Finance**, the courts recognise under the pre-trial case management regime introduced by O.34, a new approach needs to be taken to prevent delay in the progress of a case to trial and for its completion. In **Hong Long Finance**, the Federal Court held that where an application to amend the pleadings is made at a very late stage, the principles in **Yamaha Motor** should not be the sole consideration. It held that the party seeking to amend its pleadings must justify why the amendments are sought so late and why they were not sought earlier.

[24]Zulkefli Ahmad Makinudin CJM (as he then was) in delivering the judgment of the Federal Court cited with approval the principles set out by the British Court of Appeal in the leading case

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of *Worldwide Corporation Ltd v. GPT Ltd & Anor* [1998] EWCA Civ 1894,. His Lordship also cited a number of decisions in England and Wales which followed the principles set-out in **Worldwide Corporation**. He said:

[22] In the case of *Claire Swain-Mason, David Jonathan Berry and Neil Gordon Kirby (executors of CJ Swain deceased) & Ors v. Mills & Reeve (a firm)* [2011] EWCA Civ 14, the English Court of Appeal reiterated the need for an explanation for the delay in late applications and further stated that the proposed amendments had to be clear and detailed:

A point which also seems to me to be highly pertinent is that, if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules.

First, as *Worldwide Corporation v. GPT* shows, there is a heavy burden on party who seeks to raise a new and significantly different case so late as the opening of the trial. **The party applying to amend needs to show why the change is sought so late and was not sought earlier.**

(Emphasis added)

[23] *In Hague Plant Ltd v. Martin Hartley Hague & 2 Ors* [2014] EWHC 568 (Ch), the High Court considered an application to amend the statement of claim 2 1/2 years after the action was filed. In dismissing the amendment application, the High Court referred to the principles laid down in *Swain-Mason* and *Worldwide Corporation* and **reiterated that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it.**

[Emphasis added]

[25]The High Court of England and Wales adopted a robust approach against last minute amendments following Lord Woolf's *Access to Justice* reports, which precipitated the Civil Procedure Rules (CPR) that came into force in England and Wales on 26 April 1999. In **Worldwide Corporation**, the claimant sought to amend its claim 11 days before the trial commenced. The claimant sought to amend and introduce a new case after realising that it

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could not succeed based on its pleaded case. The High Court dismissed the application. On appeal, Waller LJ in the Court of Appeal held:

Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?

We accept that at the end of the day a balance has to be struck. **The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice both to him, his opponent and other litigants, requires him to be able to pursue it.**

(emphasis added)

[26]In this present case, the Plaintiff applied to amend the Statement of Claim on 12.07.2017, which is more than one and half years after it first filed this suit. There had been more than 11 case managements prior to the filing of the amendment application. The Plaintiff filed this amendment application after witness statements were filed in court and after the Defendant raised preliminary objections to the some of the contents of the witness statements at the beginning of trial.

[27]As held in **Swain-Mason, Worldwide Corporation and Hong Leong Finance**, the onus lies on the applicant to justify the delay in making the application to amend. However, the Plaintiff failed to provide any explanation for the delay. Learned counsel for the Plaintiff also did not explain in his written submissions or at the hearing before me as to why the application to amend the Statement of Claim was made so late in the day and why it was not made earlier.

[28]The Court of Appeal in *Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359; ; [1999] 1 CLJ 703 held that delay in making the amendment application together with the lack of explanation for the delay could give rise to a finding that the application lacked bona fide. Haidar JCA in delivering the judgment of the Court of Appeal said:

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Furthermore, the application was filed four years after the commencement of this action. We would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in *Multi-Pak Singapore Pte Ltd* and correctly followed by the learned judge, **the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side. We would further add that the application borders on lack of bona fides, one of the basic questions set out in *Yamaha Motor Co Ltd*.**

[Emphasis added]

[29]The Court of Appeal in *Raphael Pura v. Insas & Anor* [2001] 1 MLJ 49; ; [2000] 4 CLJ 830 emphasised the need for an explanation where there is a delay in making an amendment application.

[30]The Defendant argues that if this Court is to allow the Plaintiff to amend its Statement of Claim it would cause grave injustice to the Defendant. It argues that the Plaintiff's application was made mala fide and amounts to a tactical manoeuvre that should not be condoned by this Court. The Defendant's counsel points out that the very first time the Plaintiff's counsel informed this Court of the Plaintiff's intention to make an amendment application was on 24.05.2017, which is a day after the Defendant's counsel raised preliminary objections that certain paragraphs or statements in the witness statements of the Plaintiff's witnesses were related to facts that were not pleaded in the Statement of Claim or Reply and should accordingly be struck out from the witness statements.

[31]Defence counsel argues that the Plaintiff's amendment application is to overcome the Defendant's objections to the witness statements. Furthermore, the amendments proposed by the Plaintiff are facts which the Plaintiff should have known before the commencement of this suit in November 2015. The Defendant's counsel submits that the Plaintiff failed to furnish any explanation as to why the facts giving rise to the alleged breach of the second settlement agreement and/or fraud which were or should have been in the knowledge of the Plaintiff at the time when the Statement of Claim was in filed in November 2015. The Defendant's counsel argues that without any proper explanation of the delay, it seems that the amendment

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application was triggered after the Plaintiff's counsel became aware of the Defendant's preliminary objection on 23.05.2017. He submits that it is an afterthought of the Plaintiff and should not be allowed.

[32] I agree with Defendant's counsel that the proposed amendments will introduce new facts into the Statement of Claim, which facts the Plaintiff would and should have known at the time of filing this suit in 2015 or during one of the 11 pre-trial case managements conducted by this court over the last one and a half years.

[33] Based on **Hong Leong Finance** and also the British Court of Appeal cases in **Swain-Mason** and **Worldwide Corporation**, the Plaintiff as the party seeking leave to amend must show why the amendment is sought so late and why it was not sought earlier during the case management sessions. It is insufficient for the Plaintiff to aver without providing any reasons to support the averments that the (1) the proposed amendment was bona fide; (2) if the Defendant was prejudiced, he can be compensated with cost; and (3) the proposed amendment would not in effect turn the suit from one character into a suit of another and inconsistent character, just so to persuade this Court that the application falls within the parameters set by the Federal Court in **Yamaha Motors**.

[34] Without any cogent reasons from the Plaintiff to persuade this court to lean on its side and without any explanation of the delay, based on the decision of the Court of Appeal in **Taisho Co**, I would have to infer that the Plaintiff's application lacked bona fides. I find that the Plaintiff's bare averments without any cogent reasons to support these averments insufficient to persuade this court that it should use its discretion to allow the Plaintiff's leave application. As stated by Haidar JCA in *Raphael Pura v. Insas Bhd & Or* [2001] 1 MLJ 49; ; [2000] 4 CLJ 830:

With respect, this is no excuse for the appellant to delay the application for the amendment of his defence at a very late stage without placing sufficient material before the court and to give cogent reasons thereof. **It should be noted that an application for amendment of a writ or pleadings is not as a matter of a right of a party but is left to the judicial discretion of the court depending on the circumstances of each case.**

[Emphasis added]

DECISION

[35]For the reasons above, I am not persuaded that the Plaintiff's proposed amendments fall within the parameters set by the Federal Court in **Yamaha Motors**. Having considered the circumstances of the case and the interest of both parties, I am of the view if this Court were to allow the Plaintiff's application to amend the Statement of Claim at this late stage, such amendments would likely cause injustice and prejudice to the Defendant which cannot be compensated by costs.

[36]Accordingly, the Plaintiff's application to amend the Statement of Claim is dismissed with cost.

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