

# Jupiter Securities Sdn Bhd v Wan Yaakub bin Abd Rahman

HIGH COURT — CIVIL APPEAL R2-12-246 OF 1999  
 FAIZA TAMBY CHIK J  
 1 MARCH 2000

*Civil Procedure — Amendment — Defence — Amendment to add allegation of fraud to statement of defence — Defendant had knowledge of the alleged fraud at the time the original statement of defence was filed — Whether amendment was bona fide — Whether amendment should be allowed*

This was the plaintiff's appeal against the decision of the sessions court giving leave to the defendant to amend his statement of defence. The plaintiff had filed an application for summary judgment and served the same on the defendant more than five months before the date fixed for hearing. Two days before the hearing of the summary judgment application, the defendant filed an application for leave to amend the statement of defence. The crux of the amendment was that the defendant intended to add the allegation of fraud to the statement of defence, which in its original state contained mainly bare denials. It was not disputed that at the time the original statement of defence was filed, the defendant had knowledge of the fraud alleged to be committed. His explanation for not having disclosed the alleged fraud earlier was that the purported perpetrator of the fraud had undertaken to put right the wrong caused by the alleged fraud, but up until the amendment application was filed, the perpetrator failed to honour his undertaking.

**Held**, allowing the appeal with costs:

- (1) An application to amend the pleadings to add an allegation of fraud would not be allowed if the facts relating to fraud were known by the applicant earlier at the time the original pleading was filed. If fraud is intended to be raised, it ought to be disclosed at the earliest opportunity. The defendant's conduct in not disclosing the same when the original statement of defence was filed showed that the said allegation of fraud was not bona fide; *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348 and *Lim Nyang Tak Michael v ACE Technologies Sdn Bhd* [1995] 4 MLJ 616 followed (see p 269A-B, F-G).
- (2) One of the most important criteria to amend a pleading is that the said amendment must be bona fide. The defendant's application was not bona fide because: (i) the defendant failed to disclose the purported fraud in his original statement of defence although the facts were known to him then; (ii) the defendant's application to amend was very late and was a 'tactical manoeuvre' to delay proceedings of the summary judgment application; (iii) there was

- A no reasonable excuse for the defendant to delay the filing of his application to amend the statement of defence till two days before the hearing of the summary judgment application if the alleged facts were known to him much earlier; and (iv) the defendant's application changed the basis of the defendant's defence to a stand inconsistent with the original statement of defence (see pp 269G, 270A–C, H–271A).
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- (3) If the defendant's explanation was accepted, it would mean that the defendant was at liberty to file a statement of defence that did not disclose all the facts so that the proceedings could be delayed with an intention to amend the same later for his own personal motives. Further, there was no reasonable ground for the defendant to wait until the last moment before the hearing of the summary judgment application to amend although more than five months had lapsed since the application for summary judgment was served upon him (see pp 271H–272A).
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#### [Bahasa Malaysia summary]

- Ini merupakan rayuan plaintiff terhadap keputusan mahkamah sesyen membenarkan defendan meminda pernyataan pembelaan beliau. Peristiwa relevan yang membawa kepada rayuan ini adalah seperti berikut. Plaintiff telah memfailkan permohonan untuk penghakiman terus dan telah menyampaikan permohonan tersebut ke atas defendan lebih daripada lima bulan sebelum tarikh yang telah ditetapkan untuk pendengaran. Dua hari sebelum pendengaran permohonan penghakiman terus, defendan telah memfailkan permohonan untuk kebenaran meminda penyata pembelaan beliau. Pokok pindaan adalah bahawa defendan berniat untuk menambah pernyataan fraud kepada pernyataan pembelaan, yang dalam keadaan asalnya hanya mengandungi penafian. Ia tidak dipertikaikan pada masa pernyataan pembelaan yang asal difailkan, defendan telah tahu tentang fraud yang dikatakan telah dilakukan. Beliau menyatakan bahawa beliau tidak mendedahkan fraud yang dikatakan pada awalnya kerana orang yang dikatakan melakukan fraud tersebut telah membuat akujanji untuk membetulkan kesalahan yang disebabkan oleh fraud yang dikatakan tersebut, tetapi sehingga masa permohonan pindaan difailkan, orang yang melakukan fraud tersebut gagal melaksanakan akujanji beliau.
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**Diputuskan** membenarkan rayuan dengan kos:

- (1) Permohonan untuk meminda pliding untuk menambahkan fraud tidak akan dibenarkan jika fakta-fakta yang berkaitan dengan fraud telah diketahui oleh pemohon pada awalnya apabila pliding yang asal difailkan. Jikalau fraud hendak dibangkitkan, ia patut didedahkan seawal-awalnya. Kelakuan defendan, dengan tidak mendedahkan fraud tersebut semasa pernyataan pembelaan yang asal difailkan menunjukkan bahawa pengatahan fraud tersebut tidak bona fide; *Ismail bin Ibrahim & Ors v Sum Poh Development*
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*Sdn Bhd & Anor* [1988] 3 MLJ 348 and *Lim Nyang Tak Michael v ACE Technologies Sdn Bhd* [1995] 4 MLJ 616 diikuti (lihat ms 269A–B, F–G).

- (2) Salah satu daripada kriteria yang paling penting dalam meminda plying adalah bahawa pindaan tersebut mestilah bona fide. Permohonan defendan tidak bona fide kerana: (i) defendan gagal mendedahkan fraud yang dikatakan di dalam pernyataan pembelaan yang asal, walaupun fakta-fakta telah diketahui oleh beliau; (ii) permohonan defendan untuk meminda adalah terlalu lewat dan merupakan ‘tactical manoeuvre’ untuk melambatkan prosiding permohonan penghakiman terus; (iii) tiada alasan yang munasabah untuk defendan melambatkan pemfailan permohonan beliau untuk meminda pernyataan pembelaan sehingga dua hari sebelum pendengaran permohonan penghakiman terus jika fakta-fakta yang dikatakan telah diketahui oleh beliau terlebih dahulu; dan (iv) permohonan defendan telah menukarkan dasar pembelaan defendan kepada pendirian yang tidak konsisten dengan penyata pembelaan asal (lihat ms 269G, 270A–C, H–271A).
- (3) Jikalau alasan defendan diterima, ini akan bermakna bahawa defendan bebas memfailkan pernyataan pembelaan yang tidak mendedahkan segala fakta-fakta supaya prosiding tidak akan dilambatkan dengan niat untuk meminda kemudiannya untuk motif beliau tersendiri. Selanjutnya, tiada alasan yang munasabah untuk defendan menunggu sehingga ke saat-saat akhir sebelum pendengaran permohonan penghakiman terus untuk meminda, walaupun lebih daripada lima bulan telah berlalu sejak permohonan untuk penghakiman terus disampaikan ke atas beliau (lihat ms 271H–272A).

## Notes

For cases on amendment to defence, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 437–452.

## Cases referred to

- Abdul Johari Abdul Rahman v Lim How Chong & Ors* [1997] 1 CLJ 361 (refd)
- Bank of Commerce (M) Bhd v Hj Mazlan Hj Khamis & Ors* [1999] 1 CLJ 499 (refd)
- Hongkong Bank (M) Bhd v Tan Took Sing & Ors* [1998] 6 MLJ 89 (refd)
- Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348 (folld)
- Lim Nyang Tak Michael v ACE Technologies Sdn Bhd* [1995] 4 MLJ 616 (folld)

**A Legislation referred to**

Rules of the High Court 1980 O 32 r 2(1)

*Justin Voon (Cheah Teh & Su)* for the appellant.

*Zaiton bte Mohamed Abd Rahman (Aris & Co)* for the respondent.

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**Faiza Tamby Chik J:** The appellant's/plaintiff's ('the plaintiff') appeal herein is with respect to the part of the decision of the sessions court judge in Kuala Lumpur given on 4 August 1999 which, inter alia, ordered that the respondent/defendant ('the defendant') be given leave to amend the statement of defence dated 23 December 1998.

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At all material times, the plaintiff was a member of the Kuala Lumpur Stock Exchange trading in securities as a company incorporated in Malaysia. The plaintiff had, at the written request of the defendant, opened the trading account for the defendant under client code No WA 406 in accordance with the written terms and conditions in an individual account application form dated 18 December 1996. The plaintiff's suit against the

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defendant in the sessions court of Kuala Lumpur is for recovery of contra losses of RM130,471.95 together with interest thereon for shares listed in the Kuala Lumpur Stock Exchange purchased based on the instructions from the defendant. The plaintiff had on 8 January 1999 filed an application for summary judgment against the defendant (which was served on the

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defendant's solicitors on 11 January 1999) which was first fixed for hearing on 30 June 1999. At a very late stage on 28 June 1999, ie two days before the hearing of the said application for summary judgment, the plaintiff had filed an application for summary judgment, the defendant had filed an application vide notice of application dated 28 June 1999 which applied for

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the defendant to be given leave to amend the statement of defence dated 23 December 1998 as per the proposed amended statement of claim as annexed (see pp 44–50 of the record of appeal). Subsequently, the solicitors for the defendant had written two separate letters to the registrar of the sessions court where:

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(a) the first letter dated 28 June 1999 applied for an adjournment of the hearing on 30 June 1999 on the basis that they had 'filed an application on 21 June 1999' to amend the statement of defence dated 23 December 1998 which hearing date had yet to be fixed (see p 60 of the record of appeal); and

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(b) the second letter dated 29 June 1999 which applied for an adjournment of the hearing on 30 June 1999 because the lawyer in charge of the matter had an important case in Shah Alam High Court Case No MT4–1568–98 (see p 61 of the record of appeal).

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It is observed that despite the plaintiff's objection to the said adjournment because of the late application by the defendant to amend and that there was no affidavit in reply at all from the defendant to the plaintiff's application for summary judgment filed, the sessions court had on 30 June 1999 adjourned the hearing of the summary judgment pending the hearing

of the said application to amend. It is noted that the affidavits relevant to the defendant's application to amend are as follows:

- (a) the defendant's affidavit in support affirmed by the defendant on 17 June 1999 (see pp 63–65 of the record of appeal);
- (b) the plaintiff's affidavit in reply affirmed by Ong Eng Leong on 2 June 1999 (see pp 66 to 70 of the record of appeal); and
- (c) the corrective affidavit affirmed by the defendant on 13 June 1999 (see pp 71–73 of the record of appeal).

The defendant's said application to amend the statement of defence had been fixed for hearing on 4 August 1999 and after submissions by both parties, the sessions court had allowed the defendant's application with costs to be paid by the defendant. To date, the application for summary judgment had yet to be heard.

The plaintiff submitted that the decision of the learned sessions court judge giving leave to amend was erroneous in law and in fact, and this appeal ought to be allowed based on the following grounds:

- (a) the defendant's said application is a wrongful attempt by the defendant to add the allegation of fraud. Even if the said allegation was true, the facts with respect to the same were already known to the defendant from the very start before this action was commenced. In these circumstances, the law is very clear that the defendant's application ought to be dismissed;
- (b) from the facts and circumstances of this case, the defendant's application was not bona fide and is a 'tactical manoeuvre';
- (c) the defendant's application was made very late without a reasonable explanation.

From the proposed amended statement of defence of the defendant (see pp 48–50 of the record of appeal), it is observed that the main intention behind the defendant's application was to add the allegation of fraud by his remisier En Ismail bin Mohamad and, inter alia, alleging that En Ismail bin Mohamad had utilized the defendant's account without his permission or knowledge. In the defendant's original statement of defence dated 23 December 1998 (see pp 41–43 of the record of appeal), these allegations were not mentioned at all and the original statement of defence contained mainly bare denials. It is important to stress that at all material times, at the time the original statement of defence of the defendant was filed on 23 December 1998, the defendant had knowledge of the fraud alleged by him to be committed by the said En Ismail bin Mohamad. This is apparent from the defendant's own evidence, ie exh 'WYWAR-1' ie the 'surat akujanji' allegedly from Ismail bin Mohamad dated 23 September 1997 (see pp 75 of the record of appeal) where En Ismail bin Mohamad 'admitted' the said 'fraudulent' conduct). If the said 'surat akujanji' is scrutinized the defendant, ie Wan Yaakub bin Wan Abd Rahman had signed on the said letter and the date stated is '23 September 1997'. With respect to the said 'surat akujanji' the plaintiff had pleaded that they had received the same in

A para 16 of the statement of claim (see p 21 of the record of appeal) but the plaintiff had not agreed to the same or whether the contents were true or not.

B I am of the view that the law is very clear that an application to amend the pleadings to add an allegation of fraud would not be allowed if the facts relating to fraud has been known by the applicant earlier at the time the original pleading was filed. In *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348, the court held:

Held, dismissing the plaintiffs application:

C (1) The rule governing the amendment of pleadings is that the court will allow such amendments as will cause no injustice to the other parties. However, there are two circumstances in which an amendment to add an allegation of fraud would not be permitted: (a) where the facts giving rise to the plea of fraud were known at the time of the original pleading and (b) where the delay in pleading fraud was in connection with some tactical manoeuvre.

D In *Lim Nyang Tak Michael v ACE Technologies Sdn Bhd* [1995] 4 MLJ 616 the court held:

Held, dismissing the defendant's application to amend statement of defence and allowing the plaintiff's application for summary judgment with costs:

E (1) If the defendant had a truly valid defence against the plaintiff's claim, it should not have waited until 25 July 1994 or, as stated in the proposed amended defence, until the discovery and/or inspection of documents to plead forgery and to bring in, in the proposed amendment, the issue of someone else other than the plaintiff who was the agent.

F (2) It was not a question of negligence to plead all those matters in the original defence but a tactical manoeuvre and done in bad faith to delay the rights of the plaintiff on his claim. The application to amend the defence after exposure by the plaintiff in his affidavit in support was a tactic to confuse the issues by creating imaginary 'triable issues' and to stall the plaintiff of his rights. If this was allowed, it would unnecessarily cause prejudice to the plaintiff which could not be compensated by costs.

G It must be observed that allegations of fraud are of a serious nature and therefore the law had placed a strict condition that if fraud is intended to be raised, if known, ought to be disclosed at the earliest opportunity. The defendant's conduct in not disclosing the same when the original statement of defence was filed showed that the said allegation of fraud was not bona fide.

H One of the most important criterion for an application to amend a pleading is that the said application must be bona fide. In *Abdul Johari Abdul Rahman v Lim How Chong & Ors* [1997] 1 CLJ 361, the Court of Appeal said at p 71:

The Federal Court in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 had laid down the guidelines when amendments to the pleadings are applied for. They said that:

I 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 or would not result:

(a) whether the application was bona fide; (b) whether the prejudice caused to the other side can be compensated by costs; and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

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In the instant case, the defendant's application was not bona fide due to the following reasons:

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(i) although the defendant purportedly had knowledge of the purported fraud even if it was true, the facts were known by the defendant since 1997 but the defendant had failed to disclose the same in his original statement of defence;

(ii) the defendant's application to amend was also very late and was made in the nature of a 'tactical manouvre' to delay proceedings of the summary judgment application against the defendant. Although the hearing of the summary judgment application was fixed on 30 June 1999, the defendant had filed its application to amend on 28 June 1999, ie the date of its application to amend (see pp 42-44 of the record of appeal), ie two days before the said hearing. The defendant's statement that the said application to amend was filed on 21 June 1999 (see para 3 of the correction affidavit affirmed by the defendant on 13 June 1999, p 72 of the record of appeal) was incorrect because the date of filing should be the date fixed by the court on the notice of application. In *Hongkong Bank (M) Bhd v Tan Took Sing & Ors* [1998] 6 MLJ 89, the court said:

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The words 'issued' and 'sealed' are not defined in the RHC. Guidance may be obtained from Black's Law Dictionary (6th Ed) which defines the words as follows:

*Issue*

When used with reference to writ, process, and the like, the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service, etc.

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*Sealed*

Authenticated by a seal, executed by the affixing of a seal.

The issue of a summons takes place when it is filed in the registry for the purpose of being sealed to authenticate it. As the issue of a summons takes place when it has been sealed in accordance with O 32 r 2(1) of the RHC (Rules of the High Court 1980), the process of the issue of a summons is completed when it is sealed;

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(iii) in addition, it is observed that although the affidavit in support of the defendant for the said application to amend was affirmed since 17 June 1999, the defendant had not filed his application until 28 June 1999. There was no reasonable excuse for the defendant to delay the filing of his application to amend the statement of defence if the alleged facts were known to him since September 1997 until two days before the hearing of the summary judgment;

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(iv) after perusing the documents in the file, I have come to the conclusion that the defendant's application was also not bona fide because it changed the basis of the defendant's defence to a stand inconsistent

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**A** with the original statement of defence. The original statement of defence of the defendant was generally a bare denial, and the defendant even denied that he had entered into a contract with the plaintiff to open the trading account of shares vide the individual account application form dated 18 December 1996 and denied the terms therein (see paras 2 and 3 of the original statement of defence at p 41 of the record of appeal), whereas now the defendant admitted in the amended statement of defence that the contract was entered into and all the terms therein (see para 1 of the amended statement of defence, p 46 of the record of appeal). The amendment application of the defendant which was inconsistent with the original pleading without due explanations was wrongful and ought not to be allowed. In *Bank of Commerce (M) Bhd v Hj Mazlan Hj Khamis & Ors* [1999] 1 CLJ 499, the court held that:

A court has to look at the substance of the amendments sought and not the label that the party applying to amend attaches to the amendments, even if the amendments are contended to raise claims or defences in the alternative.

**D** Looking at the amendments sought here, it was clear that the first defendant was pleading disputed facts. The first defendant sought to take a stance not only inconsistent with but also contrary to what was pleaded in the original defence and counterclaim.

**E** The defendant's application was filed on 28 June 1999 although he knew the alleged facts earlier and although the plaintiff's application for summary judgment was filed and served upon the defendant's solicitors since 11 January 1999 (see p 57 of the record of appeal). The defendant alleged in paras 5, 6 and 7 of the affidavit affirmed by him on 17 June 1999 that he could not disclose this fact earlier because:

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- (a) his remisier En Ismail bin Mohamad had undertaken to pay the debt;
  - (b) the statement of defence was filed on 23 December 1998 on the assumption that En Ismail bin Mohamad would fulfill the said undertaking; and
- G** (c) in any event, until the amendment application was filed, he had failed to honour his undertaking.

I am of the view that the allegation stated by the defendant was not logical; not reasonable and ought not to be accepted because:

- H** (i) if the defendant's explanation was accepted, this would mean that the defendant will be at liberty to file a statement of defence that did not disclose all the facts so that the proceeding can be delayed with an intention to amend the same later for his own personal motives. The defendant ought not to be allowed to abuse the process of court for his own reasons;
- I** (ii) there was no reasonable ground for the defendant to wait until the last moment before the hearing of the summary judgment application to file his application to amend, although more than 5½ months had



lapsed since the application for summary judgment was served upon him. **A**

Appeal allowed with costs. Order of the sessions court judge dated 4 August 1999 is hereby set aside.

*Appeal allowed with costs.*

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Reported by D Sivalingam

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