

Metro Giant Group Sdn Bhd v Gala Sari Resources Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–1255 OF 2004
KANG HWEE GEE J
8 FEBRUARY 2007

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Civil Procedure — Discovery — Inadequate pleadings — Whether dismissal of the application for an order of further and better particulars would prejudice the plaintiff

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Civil Procedure — Discovery — Further and better particulars — Whether disclosure of allegations tantamounts to disclosure of evidence

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The plaintiff appealed against the decision of the Senior Assistant Registrar in dismissing the plaintiff's application for an order of further and better particulars against the defendants. The order sought, for further and better particulars was in respect of para 16 of the first defendant's defence, inter alia, that the plaintiff had failed to honour cl 1.1 of the Sale and Purchase Agreement ('settlement agreement') which required the plaintiff to withdraw all the allegations against Dato' Abd Gani bin Yusof and/or the second defendant and the subcontractors. However, it was not specified in para 16 of the defence, what were the allegations and which one had not been withdrawn. Plaintiff's counsel submitted, inter alia, that without those further and better particulars, the plaintiff would be unable to meet the defendants' defence on those allegations as an element of the defendants' defence with respect to their refusal to honour the agreement. Under the circumstances, the plaintiff would not be able to prepare for the trial. In opposing the application, the following grounds were, inter alia, raised: (a) the breach emanated from cl 1.1 of the Sale and Purchase Agreement and the plaintiff who signed the Sale and Purchase Agreement was fully aware of all the allegations made against Dato' Abd Ghani bin Yusof and third parties; (b) that the defendants were not liable to pay unless the plaintiff withdrew those allegations and that the plaintiff had not done so; (c) that some of the allegations had been withdrawn but there were others which had not been withdrawn.

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Held, allowing the appeal with costs:

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- (1) It was clear that para 16(a) of the defence lacked particulars sufficient to enable the plaintiff to prepare its case for trial. Paragraph 16(a) constituted a line of defence against the plaintiff's claim on an averment which the defendants alone would be able to substantiate at the trial (see paras 9, 10).
- (2) Paragraph 16(a) failed to mention specifically what allegations were withdrawn and what were not. It would not be possible for the plaintiff to meet the defence in para 16(a) of the trial without knowing which had been withdrawn and which had not been. The disclosure of the allegations do not tantamount to a disclosure of evidence as they were clearly only allegations (see para 11).

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A [Bahasa Malaysia summary]

- Plaintif telah merayu terhadap suatu keputusan Penolong Kanan Pendaftar yang telah menolak permohonan plaintif untuk satu perintah butiran lanjut dan jelas terhadap defendan. Perintah yang dipohon dalam butiran lanjut dan jelas adalah berkenaan dengan perenggan 16 di dalam pembelaan defendan pertama, antara lain, plaintif telah gagal untuk mematuhi kl 1.1 Perjanjian Jual Beli ('perjanjian penyelesaian') yang mengkehendaki plaintif untuk menarik balik keseluruhan dakwaan terhadap Dato' Abd Gani Bin Yusof dan/atau defendan kedua dan juga kontraktor-kontraktor kecil. Walaubagaimanapun, ianya tidak dinyatakan dalam perenggan 16 pembelaan, apakah dakwaan-dakwaan tersebut dan yang mana satukah yang belum ditarik balik.
- B** Peguam plaintif menghujahkan, antara lain, tanpa butiran lanjut dan jelas, plaintif tidak akan dapat membalas pembelaan defendan berkaitan keengganan plaintif untuk mematuhi perjanjian. Di bawah keadaan-keadaan tersebut, plaintif tidak dapat bersedia untuk perbicaraan. Dalam menentang permohonan, alasan-alasan berikut, antara lain, telah dibangkitkan; (a) kemungkiran bertitik tolak daripada kl 1.1 Perjanjian Jual Beli dan plaintif telah menandatangani Perjanjian Jual Beli adalah berpengetahuan penuh terhadap keseluruhan dakwaan yang dibuat terhadap Dato' Abd Ghani bin Yusof dan pihak-pihak ketiga; (b) defendan-defendan adalah tidak bertanggungjawab untuk membuat bayaran melainkan plaintif menarik balik dakwaan-dakwaan itu dan plaintif tidak pernah melakukannya; (c) sebahagian daripada dakwaan-dakwaan telahpun ditarik balik tetapi terdapat juga yang masih belum ditarik balik.
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Diputuskan, membenarkann rayuan dengan kos:

- F** (1) Adalah amat jelas perenggan 16(a) pembelaan kekurangan butir-butir yang mencukupi bagi membolehkan plaintif menyediakan kesnya untuk perbicaraan. Perenggan 16(a) membentuk barisan pembelaan terhadap tuntutan plaintif ke atas pernyataan yang mana defendan-defendan secara bersendirian berkebolehan untuk menyokongnya semasa perbicaraan kelak (lihat perenggan 9,10)
- G** (2) Perenggan 16(a) telah gagal untuk menyatakan secara terperinci apakah dakwaan-dakwaan yang telah ditarik balik dan yang belum ditarik balik. Adalah tidak munasabah bagi plaintif untuk menjawab perenggan 16(a) semasa perbicaraan tanpa mengetahui yang mana telah ditarik balik dan yang mana belum. Pendedahan dakwaan-dakwaan adalah tidak serupa dengan pendedahan keterangan kerana ia secara jelas hanyalah mengenai dakwaan-dakwaan (lihat perenggan 11).]
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Notes

- I** For cases on inadequate pleadings, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2205.
For cases on further and better particulars, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2202–2204.
Yusof Khan (Mathew Thomas Philip and Balan Nair Thamodaran with him) (Thomas Philip) for the plaintiff.

Firuz Jaffril (Firuz Jaffril, Aidil & Zarina) for the first defendant.
(Zain Megat & Murad) for the second defendant.
(BK Goh & Goh) for the third defendant.
(Sidek Teoh Wong & Denis) for the fourth defendant.

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Kang Hwee Gee J:

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[1] This is an appeal by the plaintiff against the decision of the senior assistant registrar in dismissing the application of the plaintiff for an order for further and better particulars against the defendants.

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THIS IS MY ORAL JUDGMENT: (EX-TEMPORE)

[2] The order sought for further and better particulars was in respect of the first defendant's defence of para 16 (for the present appeal only confined to para 16(a) which reads as follows:

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Defendan pertama menyatakan bahawa plaintiff telah memungkirkan dan melanggar perjanjian dan tanggungjawabnya di bawah (antara lainnya) kll 1.1, kl 1.3.1(ii) dan kl 2.1.1 SPA tersebut kerana (antara lainnya):

- (a) Plaintiff telah gagal dan/atau enggan untuk menarik-balik segala dakwaan, tohmahan, aduan dan lapuran yang tak berasas dan yang telah dibuat oleh plaintiff terhadap Dato' Abd Gani bin Yusof ('DG') dan defendan kedua kepada pihak-pihak ketiga, yang termasuk (tetapi tidak terhad kepada) pihak polis, Lembaga Hasil Dalam Negeri dan Badan Pencegah Rasuah (walaupun plaintiff dan ARO telah mengakui bahawa dakwaan, tohmahan, aduan dan lapuran tersebut adalah tidak berasas sama sekali dan telah dibuat semasa keadaan kehangatan pertikaian dengan DG dan defendan kedua untuk tujuan kolateral. Plaintiff di dalam memaksa DG dan defendan kedua untuk membelikan saham-saham kepunyaan plaintiff di dalam defendan ketiga untuk suatu harga yang sekurang-kurangnya RM24j).
- (b) Plaintiff telah gagal dan/atau enggan untuk menulis kepada bank-bank dan institusi-institusi yang berkenaan untuk memaklumkan mereka tentang penarikan-balik petisyen tersebut (walaupun sejurus selepas pengfailan petisyen tersebut, peguamcara plaintiff telah menulis kepada bank-bank dan institusi-institusi di Kuala Lumpur untuk memaklumkan mereka tentang pengfailan petisyen tersebut dengan tujuan serong untuk membekukan akaun-akaun bank defendan ketiga, iaitu suatu cara penyalahgunaan proses mahkamah untuk memberikan tekanan ke atas DG dan defendan kedua supaya mereka membeli saham-saham kepunyaan plaintiff di dalam syarikat defendan ketiga atas harga belian yang dituntut oleh plaintiff sendiri);
- (c) Plaintiff telah gagal dan/atau enggan untuk melepaskan ('waived') tuntutan hak dan kepentingannya terhadap DG dan defendan kedua oleh kerana (antara lainnya) plaintiff telah menuntut semula haknya kepada sejumlah 780,000 saham di dalam defendan ketiga yang dipegang oleh defendan kedua (yang mana [tidak kira samada terdapat sebarang kebenaran kepada tuntutan plaintiff tersebut] kesahihan tuntutan plaintiff tersebut telahpun dinafikan oleh defendan kedua pada setiap masa yang material).

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[3] The plaintiff's claim in the present suit arose purportedly from the defendants' failure to honour their obligation to pay the plaintiff the sum due under a sale and

A purchase agreement ('the agreement') entered into between the parties. The agreement was in fact a settlement agreement which the parties entered into to settle a dispute between shareholders of the third defendant.

B [4] A crucial term of the agreement entailed the plaintiff withdrawing all actions instituted against the third defendant and five other persons and all allegations against Dato' Abd Gani bin Yusof and/or the second defendant and subcontractors mentioned in the two cases not specifically stated in cl 1.1 of the sale and purchase agreement.

C [5] Essentially the defendants' defence to the present claim, inter alia, is that the plaintiff had failed to honour that part of the agreement which requires it to withdraw all the allegations against Dato' Abd Gani bin Yusof and/or the second defendant and the subcontractors pursuant to cl 1.1 of the agreement without specifying in para 16 what the allegations were and which one had not been withdrawn.

D [6] Hence the necessity for the plaintiff to apply for further and better particulars with respect to the defence under para 16(a).

THE SUBMISSIONS BY COUNSEL FOR THE PLAINTIFF WERE THAT

- E** (1) Without these further and better particulars, the plaintiff would be unable to meet the defendants' defence on these allegations as an element of the defendants' defence with respect to their refusal to honour the agreement.
- F** (2) Under the circumstances, the plaintiff would not be able to prepare for the trial. Paragraph 16(a) as formulated is not sufficiently specific as to prejudice the plaintiff in its preparation for draft.

[7] The application was opposed before the senior assistant registrar on the following grounds:

- G** (1) The breach emanates from cl 1.1 of the sale and purchase agreement and the plaintiff signed the sale and purchase agreement fully aware of all the allegations made against Dato' Abd Ghani bin Yusof and third parties.
- (2) Our defence is basically that we are not liable to pay unless the plaintiff withdraws those allegations and the plaintiff has not done so.
- H** (3) Some of the allegations had been withdrawn but there are others which had not been withdrawn.

FINDINGS AND DECISION

I [8] Having heard the submission of parties, it is clear that para 16(a) of the defence lacks particulars sufficient to enable the plaintiff to prepare its case for trial.

[9] Paragraph 16(a) constitutes a line of defence against the plaintiff's claim on an averment which the defendants alone would be able to substantiate at the trial.

[10] Paragraph 16(a) fails to mention specifically what allegations were withdrawn and what were not. It would not be possible for the plaintiff to meet the defence in paragraph 16(a) at the trial without knowing which had been withdrawn and which had not been. The disclosure of the allegations is not tantamount to a disclosure of evidence as they were clearly only allegations.

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[11] The appeal is allowed with costs. The defendants are to provide further and better particulars with respect to the allegations averted to in para 16(a) of the defence.

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[12] The defendants must provide the particulars within 14 days from today failing which para 16(a) would be struck off.

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Appeal allowed with costs.

Reported by Eugene Daniel Louis

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