

Terence Robert Taylor
Mary Rose Taylor

... **1st Appellant**
... **2nd Appellant**

AND

Fathan Rudi Lee Annie
Kon & Associates
Lee Kim Boon
Annie Kon Lu Choo
Fathan Bin Haji Anuar

... **1st Respondent**
... **2nd Respondent**
... **3rd Respondent**
... **4th Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 13 of 2011)

Before: Mortimer P, Davies and Leonard JJ A.
5th December, 2011.

Appellant in person
Mr. John Lee Boon Leng of YC Lee and Lee for the Respondents

Cases cited in the Judgment:

White v Jones (H.L (E.) [1995] AC 2, 207

Leonard, J.A.

This is an appeal from a decision of Findlay J who on the 14th July 2011 dismissed appeals brought by the appellants against orders made by the Registrar for:

- a. the setting aside of judgment in default of defence;
- b. the dismissal of their application for an order that “*a stay of execution in the proceedings be granted under Order 55 R.12 of the High Court Rules or under the inherent jurisdiction of the Court*” and
- c. the setting aside of the writ of summons in HCCS No. 172 of 2010

The arguments in the court below and the decisions giving rise to the appeal were concerned mainly with arguments about irregularities of service and the filing without leave of a conditional appearance as well as technical objections to the nature and mode of an application for stay made by the appellants. The judge set the writ aside, taking the view that the appellants had no locus standi. It appears to have been assumed throughout by the respondents and by the judge that the appellants were attempting to bring proceedings which could be brought only by a limited company called Yourslimline Sdn. Bhd. (“*Yourslimline*”) The 1st appellant and the respondents’ counsel appeared before us prepared to argue the appeal on the basis upon which the case had hitherto been conducted.

The writ was issued on the 24th November 2010. It is accompanied by a Statement of Claim which extends to seven pages. The appellants are named on the writ as the 1st and 2nd Plaintiffs and it is clear from the Statement of Claim that in their own names and on their own behalf they are suing the respondents, who are partners in a firm of solicitors, for damages. They claim that economic damage was suffered by them as a result of the respondents' alleged negligence in the conduct of legal proceedings in which the respondents acted for Yourslimline. They say that as a result of the alleged negligence, Yourslimline has been made subject to a winding up order and that as a consequence they have suffered financial losses.

From the outset the defendants have taken the stance that the writ should be set aside mainly on the basis that the appellants have no *locus standi* in an action for damage suffered by Yourslimline, which is subject to a winding up order. They say correctly that only the Official Receiver can cause that company to sue the respondents for damage suffered by it, such damage having allegedly been caused by the negligence of the respondents in the conduct of the company's litigation. That argument found favour with the learned judge. It disregards, however, the fact that nowhere in the writ and statement of claim do the appellants claim to be suing on behalf of the company for damage suffered by the company. It is plain that they are suing on their own behalf for damage allegedly suffered by them. They are not on the face of it attempting to stand in Yourslimline's shoes. The key question is whether the claim they seek to advance can be brought within the law of negligence as it stands today.

The question whether the appellants might have a freestanding cause of action had not been addressed before the appeal hearing or in the written submissions submitted for the appeal. Could the appellants show that theirs was one of the rare cases where as third parties they could sue the respondents for damages for negligence where there was no privity of contract between them and where the damage allegedly suffered by the appellants was consequential upon the winding up of the respondents' client namely Yourslimline, the winding up having been caused by the negligence of the respondents? If they could not show that, then the writ should be set aside, in which case the other issues would fall away.

The general rule is that a lawyer is not normally liable to a third party for negligence unless it can be shown that his obligation to his client was undertaken or imposed for the benefit of that third party. The class, however, of claims for economic damage caused by negligence is not closed: it has been extended incrementally in exceptional cases to benefit a third party. We therefore invited the parties to deal with the question whether the appellants' case could and should be treated as an exception to the normal rule, drawing their attention to the decision in *White v Jones* (H.L. (E.) [1995] AC 2, 207. There a firm of solicitors was held liable in negligence to a person who would have been a beneficiary of an intended will which, because the solicitors were slow in carrying out the instructions, was not drawn up before the client died. The House of Lords by a majority held that the assumption of responsibility by a solicitor to his client extended to an intended beneficiary under a proposed will in circumstances where the solicitor could reasonably foresee that a consequence of his negligence might result in the loss of the intended legacy without either the testator or his estate having a remedy against him and that, accordingly the plaintiffs were entitled to relief.

The background to this appeal is as follows. The appellants are husband and wife. It is common ground that from the 15th August 1998 the 1st appellant was a director of Yourslimline but he resigned on 1st September 1998. He has not since then been a director or shareholder but he claims to be a major investor. No details of the investment are pleaded. The 2nd appellant is registered as the managing director and a shareholder as to one share of the company. In MCCS No 92 of 2005 a company called Copynice Marketing Sdn Bhd (*"Copynice"*) sued Yourslimline for arrears of rent for premises occupied by the Yourslimline, which defended on the basis that Copynice had been guilty of a misrepresentation through its alleged agent Valor Property Agency (B) Sdn Bhd (*"Valor Property"*) as to the suitability of the premises for Yourslimline's business. The court held that Valor Property was not an agent of Copynice and judgment was entered in favour of Copynice. An appeal from the judgment failed, the judge holding that the company instead of repudiating the lease had remained in the premises and continued to pay the rent for 7 months, thus waiving any right to rescind. Eventually the judgment creditor instituted winding up proceedings against the Yourslimline, which failed to pay the judgment debt and so almost inevitably the winding up order was made. The respondents had apparently advised the 1st appellant that the debt must be paid if the winding up was to be avoided.

The respondents acted for the company in its proceedings HCCS No 37 of 2009 against Valor Property, seeking damages for the alleged misrepresentation referred to above. According to the appellants they had instructed the respondents in 2003 to commence proceedings but it was 6 years before they did so. The respondents say that it was because the appellants could not make up their minds as to whether another defendant should be added. As a result of the winding up order the proceedings against Valor Properties are at a standstill. The respondents have pointed out that they could not continue to act after the winding up without the leave of the official Receiver, which has not been given because there is doubt as to who would pay any costs incurred in the litigation. The appellants' case appears to be that had the respondents not been dilatory (which is denied) in their conduct of the proceedings against Valor Property, and had the action been successful, the winding up would have been avoided.

If it is assumed for the purpose of argument that the respondents by their negligence caused the winding up, it is necessary in the case of each appellant to consider what right or interest he or she had that required the protection of the law and which was alleged to have been infringed or devalued by the negligence of the respondents. They say in paragraph 33 the Statement of Claim that

"As the 2nd Plaintiff was the managing Director and the 1st Plaintiff a major shareholder of Yourslimline Sdn Bhd, the following are the losses and damages that both the 1st and 2nd Plaintiffs have suffered:-"

We note that the 1st appellant now agrees that he was not a shareholder. There follows under the heading 'Schedule 1' a list of alleged losses as at 17th November 2010. It comprises loss of salaries payable, housing allowances, car allowances, loss of children's' school fees allowances and loss of utilities (electricity and water bill) allowances. That appears to indicate that the appellants were employees of Yourslimline

and claim as such but it is nowhere pleaded that they were employees. If they intended to claim for loss of employment there is no indication as to what that employment was worth. The 1st appellant has told the court that he is not an employee and receives no salary. If he and his wife were able to amend the pleadings it could only be to show that the 2nd appellant was an employee and not that the 1st appellant was. Thus the 1st appellant, who on his own admission was neither a director nor a shareholder, could seemingly only plead a claim, if he could amend the Statement of Claim, as a creditor. Nowhere does he plead as a creditor any amount for which Yourslimline is indebted to him. When asked in court whether he was major creditor he avoided the question. His position seems to be that he and his wife, having financed the company, own the business and that the existence of the limited company is to be disregarded having regard to the reason why it was set up. The 1st appellant told the court that the limited company only existed because the commercial reality was that a foreigner could not carry on business in Brunei otherwise than through the agency of a limited company, with 30% of the shares being owned by a Brunei citizen. For that reason alone, Yourslimline had been set up and a Brunei Citizen had been made a nominal shareholder without, he said, any expectation of reward, though if the company prospered, the appellants 'would be generous'.

Further losses are claimed under Schedule 2. In addition to an unspecified company search fee of \$5.00 the alleged losses comprise a sum of \$25,000 as security for costs awarded against Yourslimline in HCCS No 37 of 2009; \$2,000 costs awarded in MCCS 192 of 2005; costs in the sum of \$16, 078.50 awarded against Yourslimline in Civil Appeal No 8 of 2006 ; interest on taxed costs at 6% per annum in Civil Appeal No. 8 of 2006 in the sum of \$3,160.06 as at 17th November 2010 and allocatur fees in Civil Appeal No 8 of 2009 in the sum of \$2,228.00. It is common ground that the appellants were not parties to the proceedings mentioned and that the sums referred to were not awarded against them. There is nothing in the pleadings to explain the basis for these claims. It has been suggested by the 1st respondent that the respondents entered into a contingency fee agreement in relation to Yourslimline's litigation and that the appellants were parties to the agreement. That is denied by the respondents who maintain that the appellants whenever they instructed them in relation to the company's litigation were merely acting as the human agents of Yourslimline. There is a third schedule listing claims for alleged aggravated damages, namely loss of Yourslimline's net worth in the sum of \$473,000.00 and loss of returns on investment in the sum of \$319, 200. No facts are pleaded to support such claims.

The 1st appellant in his written submissions stated that at all material times the 2nd respondent had always recognised the appellants as his clients "*despite the fact that the subject matter of his representation was Yourslimline*" and that the respondents had always understood that they were answerable to both the appellants and hence owed them a duty of care although the claim pertained to the respondents' negligent misrepresentation of Yourslimline. The appellants had financed the company. All the money in the company's bank account, of which they were the only signatories, was provided by him. They were owners of the business as to about 80% for the 1st appellant and 20% for his wife. In reality the business was his and his wife's and the respondents well knew it. The 1st appellant appeared to be implying that the circumstances of the case would justify a finding that the respondents, knowing the reality of the situation, had assumed a duty of care towards the appellants, since they must have realised that damage

caused to Yourslimline by negligence on the respondents' part would result in damage to them. The respondents say that they did act for the appellants personally in some matters but maintain that when the appellants gave them instructions to conduct proceedings for Yourslimline they were so doing as the human agents of a separate legal person, namely Yourslimline and it was to that person that the respondents owed a duty of care.

If the appellants could amend their pleadings to allege that together they "*owned the company*" and that by the winding up they lost its net worth as well as income which they regarded as a return on their investment, no facts are presently pleaded that would support either allegation. It may be that by proper pleading the appellants could allege actual reliance by them on the care of the appellants in conducting the litigation and also actual or imputed knowledge on the part of the respondents that the appellants were so reliant. In that, they would be seeking to establish, relying on the reasoning in *White v Jones*, an exception to the normal rule

Mr Lee submitted that *White v Jones* was to be distinguished. In that case it was held on the facts that there was a special relationship between the solicitors and the intended beneficiaries whereas here there was no such special relationship. He also raised the argument of public policy in that if the appellants were to succeed, the case would open the floodgates to litigation against solicitors and other professionals, such as accountants, providing professional services to limited companies to them.

White was an exceptional case and may be distinguished. An important consideration appears to have been the absence of any other remedy as may be seen from Lord Goff's remark appearing at page 262 of the report where he said:

"...the real reason for concern in cases such as the present lies in the extraordinary fact that, if a duty is owed by the testator's solicitor to the disappointed beneficiary is not recognised, the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim."

This is not such a case. If there was negligence it cannot be said that there is no remedy available to Yourslimline, which would be able to bring an action against the solicitors if the Official Receiver thought it worthwhile.

Here, on the face of it, the respondents were acting for the company, a legal person, for the benefit of the company. Whatever may have been the reason for the appellants' decision to conduct their business through the medium of a limited company, thus enjoying the benefit of limited liability, they must also have accepted the possible disadvantages of involving another legal person. They could not have it both ways, being entitled to the income and assets of the business whilst being immune to claims made against it. It would not be just and reasonable to recognise the existence of the liability for which the appellants contend.

This court is not in a position to say what the outcome of proceedings against Valor Properties might be but in our view they were for the company to take. The situation is

not one in which the law should be extended to allow a third party, whether director, employee or creditor, or de facto 'owner' to claim against the respondents. We know of no precedent for an action such as the one that the appellants seek to pursue. It would be taking the law of negligence too far if a professional acting for a limited company had to consider the possibility of claims by an unknown number of people who in one way or another might have a financial interest in the company's financial welfare. This is not a case where the court is prepared to hold that the class of actions in tort for economic loss should be extended to make possible an action such as that brought by the appellants. Such litigation would not in our view be in the public interest and the appeal against the setting aside of the writ must fail. The technical issues as to service, leave and the like accordingly fall away and do not merit further consideration.

The appeal is accordingly dismissed.

We now turn to the question of costs. The normal practice is that costs follow the event but the award of costs is a matter for discretion. It would be very unfortunate and not in the interests of justice if litigants in person were to be driven from the court on the basis of curable technicalities of procedure. It is a tradition of the common law courts to assist litigants in person to overcome technical hurdles so that they may be able to bring before the court claims made in good faith albeit mistakenly. In the present case points were raised on both sides about service and other technicalities which had nothing to do with the merits of the case. Concentration on such matters was, it seems to us, an unnecessary distraction. It caused an unnecessary waste of time and money and it was not until this appeal came before us that there was any appreciation of what the appellants were trying to do. The 1st appellant himself observed that if the question that this court asked the parties to consider was all there was to it, he could not understand why the respondents had not addressed themselves to it when they had seen the writ and statement of claim. That was fair comment. There will be no order as to costs.

Mortimer, P.

Davies, J.A.

Leonard, J.A.