

Goldmyne Hardware Sdn Bhd

AND

Lim Yu Teck

**(Intermediate Court of Brunei Darussalam)
(Commercial Civil Suit No.14 of 2022)**

Appeal against Registrar's Order

Dk Hjh Norismayanti binti Pg Hj Ismail, Judge
5th September 2023

*Civil Law – Striking out of Writ and Statement of Claim – Order 18 of the Rules of Supreme Court -
Application to amend Writ & Statement of Claim – Order 20 Rule 5 of Rules of the Supreme Court
– Rectification of instruments – sections 30 to 33 of the Specific Relief Act, Cap 109- issue of no
jurisdiction – declaratory decrees.*

Mr Lim Li Chyi (M/S Yusof Halim & Partners) for Plaintiff/Respondent.

Mr Czar Cabading Calabazon (M/S Rudi Lee, Annie Kon & Associates) for Defendant/Appellant.

Cases cited in Judgment:

Lim Kok Kim v Lim Lian Poy, Lee Eng Ching and Lim Teng Huan (1997) 2 JCMD 170

GL Baker Ltd v Medway Building and Supplies (1958) 1 WLR 1216

John Daniel Chong Lai Mann v Major Haji Mohammad Hussain bin Hj Mohamad (2005) 1 BLR 299

Ahmad bin Putit v Abdul Kader Abdul Rasheen and Perusahaan Sinar Amnor (2002) 1 BLR 20

Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor (1967) 1 MLJ 87

JUDGMENT

Dk Hjh Norismayanti, Judge:

1. This is the Defendant's appeal to judge in chamber against the decision of the learned Registrar made on the 16th February 2023 dismissing the Defendant's application to strike out the Statement of Claim and granting the Plaintiff's application for leave to amend the Writ and Statement of Claim. The Defendant also appeals against the order for cost in favour of the Plaintiff, to be taxed if not granted.

Brief summary of case

2. The Plaintiff is a business dealing with the supply of construction materials and the Defendant is the Managing Director and shareholder of Dara Construction Sdn Bhd. It is the Plaintiff's case that Dara Construction by way of an application made on the 24th November 2010 had obtained a credit facility from the Plaintiff to the maximum sum of \$100,000.00 for a period of 60 days. In consideration of the agreement, the Defendant had executed a personal continuing guarantee (PCG) in favour of the Plaintiff for the credit facilities granted to Dara Construction. Based on the agreement, the Plaintiff continued to supply Dara Construction with construction materials at the

Defendant's request. By the 24th January 2022, Dara Construction had an outstanding amount of \$358,261.62 due and owing to the Plaintiff.

3. Following the Plaintiff's filing of the Writ and Statement of Claim (WSOC) on the 12th March 2022, the Defendant filed an application to strike out the WSOC. Before the striking out application could be heard, the Plaintiff filed an application to amend the WSOC on the 4th June 2022. The learned Registrar decided to hear both applications together resulting in the ruling handed down on the 16th February 2023. The court will now proceed to deal with each of the said applications below.

Defendant's application to strike out the WSOC (Summons in chamber no. 41 of 2022)

4. The main contention relied upon by the Defendant in its application to strike out the WSOC is the assertion that there are no contractual relations between the Plaintiff and the Defendant to bind him to any credit facilities granted to Dara Construction. It is argued that the Plaintiff's case falls solely on there being a contractual claim against the Defendant based on a Personal Continuing Guarantee (PCG) dated 24th November 2010 for the benefit of Dara Construction Sdn Bhd. In opposition, with reference to the PCG, the Defendant submits that the principle debtor in the PCG is the Defendant himself and Dara Construction is not mentioned as a party at all. Considering that there is no alleged contract between the Plaintiff and Dara Construction, the Defendant submits that the WSOC filed against him should be struck out under Order 18 rules 18 (a), 18(b) or 18(d) or under the inherent jurisdiction of the court.

Plaintiff's application for leave to amend the WSOC (Summons in chamber no.67 of 2022)

5. Under this summons, the Plaintiff applies for leave to add a specific relief for the rectification of the PCG under sections 30 to 33 of the Specific Relief Act by correcting a mistake in the PCG and that the said amendment does not purport to add a new cause of action. It is contended that the amendment should be allowed to enable the real question in controversy between the parties to be determined. In other words, it should be allowed to enable the court to decide whether the PCG provided by the Defendant is for the credit facilities granted to Dara Construction Sdn Bhd and the Defendant was at the material time acting as the Managing Director of Dara Construction or whether the PCG made in respect of the Defendant's own development project. The Plaintiff submits that there was a mutual mistake between the parties in preparation of the PCG which was a result of an administrative error by the Plaintiff's employee in filling in the PCG and is an issue to be proven at trial.
6. In opposition of this application, the Defendant contends that there is no pleading of mutual mistake as required under sections 30 and 31 of the Specific Relief Act and the relief sought by the Plaintiff to correct a fatal flaw in the PCG tantamount to making a declaratory decree which is an order the Intermediate Court has no jurisdiction to make.

Court's consideration

7. The court will address both of the above-mentioned applications together. Firstly, the court refers to the striking out application. In considering the contention of there being no contractual ties between the parties, the court turns to the PCG. It is clear that from the face or reading of the PCG, there is no mention of Dara Construction Sdn Bhd being the recipient or customer of the credit facilities extended by Goldmyne Hardware Sdn Bhd. In fact, the customer's name is handwritten as "Lim Yu Teck" and the Defendant claims that the PCG was granted for his own

development project and not Dara Construction. As such, the Defendant submits that it would be of grave injustice if the matter was allowed to proceed further.

8. Based on this PCG alone, it would appear that this is a plain and obvious case where the court ought to exercise its discretion to strike out the WSOC considering that the PCG does not show Dara Construction to be the recipient of the credit facilities nor does the PCG state that Dara Construction is a customer of the Plaintiff. It is also not expressly stated in the PCG that the Defendant had signed the personal guarantee on behalf of Dara Construction as the managing director of the said company.
9. Nevertheless, the Plaintiff through their application to amend the WSOC purports to show the court the true intentions of the parties i.e. the real purpose of the PCG and to rectify the PCG accordingly. Based on the Plaintiff's submission to the court, there is an assertion of mutual mistake in the preparation of the PCG and the Plaintiff seeks to rectify the PCG in order to reflect the true intentions of the parties i.e. that the Defendant signed the PCG as a personal guarantee to the Plaintiff for the credit facilities granted to Dara Construction and not for his own personal development project. The question before the court is therefore whether or not the court should allow the proposed amendment or strike out the WSOC with or without considering the proposed amendment.

Principles of amendments

10. The court refers to the case of *Ketteman & Ors v Hansel Properties Ltd & Ors* (1987 1 Ac 189 (HL)) which provides for the core principles of amendments as laid out below:

"...First, all such amendments should be made necessary to enable the real questions in controversy between the parties to be decided. Second, 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. Third, however blameworthy (short of bad faith) may have been a party's failure to plead the subject matter of a proposed amendment may have been seen, the application should, in general, be allowed, provided that allowing it will not prejudice the other party. Fourth, there is no injustice to the other party if he can be compensated by appropriate orders as to costs".

11. These four principles were cited in the case of *Lim Kok Kim v Lim Lian Poy, Lee Eng Ching and Lim Teng Huan* (1997) 2 JCMD 170, a case referred to the court by the Plaintiff in support of their application to amend. The Plaintiff also relies on the case of *John Daniel Chong Lai Mann v Major Haji Mohammad Hussain bin Hj Mohamad* (2005) 1 BLR 299 which cited the case of *GL Baker Ltd v Medway Building and Supplies* (1958) 1 WLR 1216 which also laid out the guiding principle to be applied in deciding applications for amendment as follows:

"It is a guiding principle of cardinal importance.... That generally speaking all such amendments ought to be made as may be necessary for the purpose of determining the real questions in issue between the parties".

12. Having taken into account the principles referred to above and consideration of facts and circumstances adduced by both parties in present case, the court is of the view that the proposed amendment to the WSOC should be allowed in order for the court to determine the real questions in issue between the parties. The court believes that to close this avenue for the Plaintiff to amend

the WSOC and consequently to strike it out would be too premature and would result in a grave injustice to the Plaintiff.

13. The court also finds that the proposed amendment does not equate to adding a new cause of action for the Plaintiff. It is still a matter for the court to decide whether or not the rectification of the PCG should be allowed and it does not affect the Defendant's defense and the Defendant is not stopped from adducing evidence to prove that the PCG was entered into in his own personal capacity and prove it was not signed for the benefit of Dara Construction.

Declaratory decree

14. The court now turns to the Defendant's contention that the relief of rectification of the PCG would result in the court making a declaratory decree and such orders are not within the powers of the Intermediate Court to make.
15. The Plaintiff submits that the relief of a declaratory decree is a completely separate form of relief dealt under Chapter VI of the Specific Relief Act and the Plaintiff is only concerned with the rectification of an instrument which is dealt with under sections 30 to 33 of the Specific Relief Act which reads as follows:

Section 30: *"When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified: and if the court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value."*

Section 31: *"For the purpose of rectifying a contract in writing, the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement."*

Section 32: *"In rectifying a written instrument, the court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be."*

Section 33: *"A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the court thinks fit, specifically enforced."*

16. The relief of declaratory decrees can be found under section 41 of the Specific Relief Act and deals with the court's discretion to declare the status or right of a person to any legal character or to any right as to property and this is a matter that the Intermediate Court has no jurisdiction to hear. In the circumstances, based on the facts of the case and the issues contended, the court makes a finding in favour of the Plaintiff's submission that the relief sought by way of rectification of the PCG is not synonymous to the court making a declaratory decree and is an issue that is within the Intermediate Court's jurisdiction to hear.

Requirement of mutual mistake

17. The court now turns to the issue of mutual mistake which is required under section 30 of the Specific Relief Act. It is the Defendant's contention that the Plaintiff failed to plead mutual mistake

as required. The fact is the Plaintiff has pleaded on the issue of mistake in its proposed amendment, specifically the following:

"6. Despite the mistake of writing "Lim Yu Teck" instead of "Dara Construction Sdn Bhd" in the first paragraph of the Personal Continuing Guarantee (the "Mistake"), at all material times, the Defendant knew and ought to have known that the Pernabal Continuing Guarantee was executed in favour of the Plaintiff in consideration of the Plaintiff granting credit facilities to Dara."

18. The court finds that considering that a mistake in the PCG is pleaded in the proposed amendment, the issue of whether the mistake as pleaded should be accepted as mutual mistake or should be seen as a unilateral mistake is for the Plaintiff to prove at the trial of this matter. It is too soon to decide whether there is mutual mistake at the interlocutory stage based on submissions and affidavit evidence alone.
19. In addition to the above findings, the court concludes that based on the proposed amendments, this is no longer a case where it is plain and obvious for the court to exercise its discretion to strike out the WSOC [cases of *Ahmad bin Putit v Abdul Kader Abdul Rasheen and Perusahaan Sinar Amnor* (2002) 1 BLR 20 and *Mooney & Ors v Peat, Marwick, Mitchell & Co & Anor* (1967) 1 MLJ 87 are referred].

Conclusion

20. Based on the above-mentioned findings, the court makes the following orders:

- (a) The Registrar's decision to grant the Plaintiff leave to amend the WSOC is upheld;
- (b) The Registrar's decision to dismiss the Defendant's striking out of the WSOC is upheld;
- (c) The Intermediate Court does have jurisdiction to hear any relief sought under sections 30 to 33 of the Specific Relief Act and does not tantamount to making a declaratory decree.

Cost Order

21. On the cost order made by the Registrar, the court allows the appeal on cost in so far that the cost of the application to amend the WSOC is awarded to the Defendant, to be taxed if not agreed and the cost of the striking out application as awarded by the Registrar is upheld. As for the appeal, the court has made an overall finding in favour of the Plaintiff and cost of the appeal is awarded accordingly, to be taxed if not agreed.

DK HJH NORISMAYANTI BINTI PG HJ ISMAIL
Judge, Intermediate Court