

Riders Lodge Sdn Bhd**v****Tropik Sentosa Sdn Bhd & Anor**

High Court, Johor Bahru – Civil Suit No. 22NCvC-129-08/2015
Al Baishah Abd Manan JC

March 6, 2017

Civil procedure – Pleadings – Particulars of – Further and better particulars – Matters of evidence – Whether further and better particulars ought to be granted – Rules of Court 2012, Order 18 rr 7, 12(3), (4), (5), (6), (7)

The defendants had filed a notice of application for inter alia an order that the plaintiff do serve on the defendants' solicitors further and better particulars in writing pursuant to Order 18 r 12(3) to (7) of the Rules of Court 2012 ("the ROC"). The defendants' requests in the said notice of application were for particulars of the alleged representations, discussions, negotiations, and/or assurance, whether express or implied or partly express and partly implied; particulars of the alleged mistake, whether in law or in fact and with regard to the plaintiff's previous acknowledgement of the existence of the loan, whether made orally or in writing; and particulars of the implied term, whether in law or in fact and consequently, the alleged basis for the presumed intention of the contracting parties or, alternatively, the alleged policy ground. The defendants' application was however dismissed by the deputy registrar. Hence the instant appeal.

Issue

Whether further and better particulars pursuant to Order 18 r 12(3) to (7) of the ROC ought to be granted.

Held, dismissing the defendants' appeal with costs of RM1,500

1. The defendants' application for further and better particulars was matters of evidence for the defendants to adduce. Such a request is prejudicial to the plaintiff. The defendants' solicitor was attempting to go on a detailed "fishing expedition". Such details and particulars ought to be obtained via trial and examination of witnesses at the full trial and not at this stage. It was premature. [see p 373 paras 10-11]
2. The defendants' request for the type and form of representations and/or the mistake as to the acknowledgement of the existence of purported loan is an act of trying to obtain the name of the plaintiff's witnesses and this is akin to a "fishing expedition". These are clearly matters of evidence and the

plaintiff is under no obligation to disclose these particulars at this stage. [see p 375 para 20] 1

3. The defendants also requested for particulars of the alleged mistake, whether in law or in fact. Pursuant to Order 18 r 7 of the ROC, every pleading shall contain and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim. It is not necessary for law to be pleaded. [see p 375 para 22] 5

4. As such, further and better particulars ought not to be granted as the defendants had more than sufficient material particulars to state their defence. Further, there was no special reason for the court to allow the defendants' application when in actual fact the defendants had already filed in their defence and counterclaim. [see p 373 para 9] 10
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Cases referred to by the court

Insas Credit & Leasing Sdn Bhd & Ors v Kerjajadi Sdn Bhd & Ors [2003] AMEJ 0062; [2003] 6 CLJ 234, HC (ref) 20

Dato' Seri Dr Ling Liang Sik, v Krishna Kumar Sivasubramaniam [2002] 2 CLJ 642, HC (foll)

Skrine & Co v MBf Capital & Anor [1998] 4 AMR 3298; [1998] 3 CLJ 432, CA (foll) 25

Toh Her Chiew (Zhuo Huoshu) & Anor v Grand Isle Holdings Pte Ltd [2012] SGHC 201, HC (Sing) (ref)

Legislation referred to by the court

Malaysia 30

Rules of Court 2012, Order 18 rr 7, 12(3), (4), (5), (6), (7)

Justin Voon (Justin Voon Chooi & Wing) for plaintiff 35

Adi Radlan Abdul Rahman and Mohd Faizal (Adi Radlan & Co) for defendants

Judgment received: April 13, 2017

Al Baishah Abd Manan JC 40

Introduction

[1] This is the defendants' (by original action) appeal to the judge in chamber (encl 71) against the deputy registrar's decision dated March 21, 2016 who dismissed the defendants' application for further and better particulars pursuant to Order 18 r 12(3) to (7) of the Rules of Court 2012 (hereinafter referred to as "the ROC 2012") vide encl 42.

1 Background facts

[2] Pursuant to the request for further and better particulars by the defendants' solicitor dated November 30, 2015 (pp 6-7 of exh "A" of the defendants' affidavit in support affirmed by Oh Chee Eng on December 14, 2015 in encl 43), the plaintiff's solicitor responded via letter dated December 2, 2015 as exhibited in p 8 of exh "A" in encl 43 to inform the defendants' solicitor that the plaintiff will respond by December 15, 2015.

[3] After having received the plaintiff's solicitor's letter dated December 2, 2015, the defendants' solicitor issued a letter dated December 6, 2015 (p 9 of exh "A" of encl 43) asking the plaintiff to reply as to whether they are responding "positively or otherwise" to the request of particulars.

[4] The plaintiff's solicitor then replied to the letter dated December 6, 2015 saying that the plaintiff will endeavour to reply by December 15, 2015. The plaintiff had vide the plaintiff's solicitor's letter dated December 15, 2015 (exh "S-1" of the plaintiff's affidavit in reply affirmed by Sennett Edward Tzinberg on December 30, 2015, encl 45) to respond to that letter.

[5] The defendants then filed a notice of application on December 15, 2015 (encl 42) for, inter alia an order that the plaintiff do serve on the defendants' solicitors further and better particulars in writing with regard to paragraph 5-7, 34(v) and 13 and 22(ii) of the plaintiff's statement of claim.

[6] In the said notice of application, the defendants requested for, inter alia:

UNDER PARAGRAPHS 5-7 OF THE STATEMENT OF CLAIM:

(a) The particulars of the alleged representations, discussions, negotiations, and/or assurance, whether express or implied or partly express and partly implied.

UNDER PARAGRAPH 34(v) OF THE STATEMENT OF CLAIM:

(a) The particulars of the alleged mistake, whether in law or in fact; and with regard to the Plaintiff's previous acknowledgement of the existence of the loan, whether made orally or in writing;

UNDER PARAGRAPH 13 & 22(ii) OF THE STATEMENT OF CLAIM:

The particulars of the implied term, whether in law or in fact: and consequently, the alleged basis for the presumed intention of the contracting parties or, alternatively, the alleged policy ground (as the case may be) under Paragraphs 13 & 22(ii) of the said Statement of Claim.

Findings of the court

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[7] This is the defendants' notice of appeal to the judge in chambers against the decision of the deputy registrar on March 21, 2016 in refusing the defendants' application for further and better particulars vide (encl 42) under Order 18 r 12(3) to (7) of the ROC 2012. Order 18 r 12(3) provides:

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- (3) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case of the case on which he relies, and the order may be made on such terms as the Court thinks just.

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[8] The legal principles governing further and better particulars were concisely stated in the case of *Dato' Seri Dr Ling Liang Sik v Krishna Kumar Sivasubramaniam* [2002] 2 CLJ 642 which inter alia held:

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At the out set it is necessary to state the functions of particulars. This is comprehensively set out in the *Supreme Court Practice*, 1997, vol 1, p 308 which reads:

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"The function of particulars is accordingly:

- (1) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved (per Lindley LJ in *Duke v Wisden* [1897] 77 LT 67, p 68 per Buckley LL in *Young & Co. v. Scottish Union & Co* [1907] 24 TLR 73 pf. 74, *Aga Khan v. Times Publishing Co.* [1924] 1 KB 675, p. 679);
- (2) to prevent the other side from being taken by surprise at the trial (per Cotton LJ in *Spedding v. Fitzpatrick* [1888] 38 Ch. D 410, p. 413. *Thomson v. Birkley* [1882] 31 WR 230;
- (3) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial (per Cotton LJ *ibid*; per Jessel MR in *Thorp v. Holdsworth* [1876] 3 Ch. D 637, p. 639; *Elkington v. London Association for the Protection of Trade* [1911] 27 TLR 329 p. 330);
- (4) to limit the generality of the pleadings (per Thesiger LJ *Saunders v. Jones* [1877] 7 Ch. D 435) or of the claim or the evidence (*Milbank v. Milbank* [1900] 1 Ch. 376, p. 385);
- (5) to limit and define the issues to be tried, and as to which discovery is required (*Yorkshire Provident Life Assurance Co. v. Gilbert* [1895] 2 QB 148; per Vaughan Williams LJ in *Milbank v. Milbank* [1900] 1 Ch. 376; 385);
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included (per Brett LJ in *Philipps v. Philipps* [1878] 4 QBD 127, p. 113; *Woolley v. Broad* [1892] 2 QB 317) seen. 'All material facts' para 18/7/10: and *Wooley v. Broad* [1892] 2 QB 317). But if the opponent omits to ask for particulars, evidence may be given which supports any

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1 material a/legation in the pleadings (*Dean of Chester v. Smelting Corp.*
[1902] WN 5; *Hewson v. Clevee* [1904] 2 Ir. R 536)."

[9] In my view the further and better particulars ought not to be granted as the
defendants had more than sufficient material particulars to state their defence.
5 There is no special reason for this court to allow the defendants' application when
in actual fact the defendants had already filed in their defence and counterclaim.

[10] The court found that the particulars sought by the defendants are not
10 necessary and really giving into evidence. All the relevant facts have been
pleaded by the plaintiff in the statement of claim. The defendants' application for
further and better particulars were matters of evidence for the defendants to
adduce and to show about the representations, the plaintiff's acknowledgment of
15 the purported loan and the presumed intention of the parties. Following the dicta
in *Skrine & Co v MBf Capital & Anor* [1998] 4 AMR 3298; [1998] 3 CLJ 432, a litigant
is not entitled to have his opponent's evidence. In that case, the court held that:

20 At the heart of the dispute between parties lies the well established principle that
governs the law of particulars in the field of practice and procedure. It is this. *A
litigant is entitled to have from his opponent, particulars of facts relevant to the issues at
stake in order to prevent surprise, but he is not entitled to have his opponent's evidence.*

25 (Emphasis added.)

[11] With respect, the court agrees with the plaintiff's contention that such a
request is prejudicial to the plaintiff and the defendants' solicitor is attempting to
go on a detailed "fishing expedition". Such details and particulars ought to be
30 obtained via trial and examination of witnesses at the full trial and not at this
stage. It is premature.

[12] The court is of the view that the learned deputy registrar was right in
35 dismissing the application of the defendants as the relevant and necessary
material facts are clearly set out in the plaintiffs statement of claim. In respect of
the defendants' request under paragraphs 5 to 7, it is clear that the plaintiff has
pleaded the particulars of the representations given by both defendants in inter
40 alia paragraphs 5 and 6 of the said statement of claim.

[13] In respect of the defendants' request under paragraph 34 of the statement of
claim, the plaintiff's acknowledgement of the existence of the purported loan
have already been inter alia pleaded in paragraphs 9 to 10 of the said statement of
claim. Furthermore, the court also found that the particulars and the basis of the
mistake are also clearly set out in inter alia paragraph 34 itself.

[14] In respect of the defendants' requests under paragraphs 13 and 22(ii) of the
said statement of claim, this court also found that it is clear that the particulars of
the implied terms are set out inter alia in paragraph 13 and the basis for the
presumed intention of the parties are set out in inter alia paragraphs 22(i) and (ii).

[15] It is an established principle that the plaintiff needs to plead a summary form of the material facts on which the party is relying on in the pleadings and not the evidence by which those facts are to be proved as clearly stated in Order 18 r 7 of the ROC 2012 as follows: 1

Subject to the provisions of this rule and rules 10, 11 and 12, *every pleading shall contain, and contain only, a statement in a summary form of the materials facts on which the party pleading relies, for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.* 5
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(Emphasis added.)

[16] This court is also guided by the principle set out in the case of *Dato' Sri Dr Ling Liong Sik* (supra), Arifin Zakaria J (as he then was) set out the functions of particulars and the general principle governing the application for further and better particulars as follows: 15

At the out set it is necessary to state the functions of particulars. This is comprehensively set out in the *Supreme Court Practice, 1997*, vol 1, p 308 which reads: 20

"The function of particulars is accordingly: 25

- (1) to inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved (per Lindley LJ in *Duke v. Wisden* [1897] 77 LT 67, p. 68 per Buckley LL in *Young & Co. v. Scottish Union & Co* [1907] 24 TLR 73 pf. 74, *Aga Khan v. Times Publishing Co.* [1924] 1 KB 675, p. 679); 30
- (2) to prevent the other side from being taken by surprise at the trial (per Cotton LJ in *Spedding v. Fitzpatrick* [1888] 38 Ch. D 410, p. 413. *Thomson v. Birkley* [1882] 31 WR 230; 35
- (3) to enable the other side to know with what evidence they ought to be prepared and to prepare for trial (per Cotton LJ *ibid*; per Jessel MR in *Thorp v. Holdsworth* [1876] 3 Ch. D 637, p. 639; *Elkington v. London Association for the Protection of Trade* [1911] 27 TLR 329 p. 330); 40
- (4) to limit the generality of the pleadings (per Thesiger LJ *Saunders v. Jones* [1877] 7 Ch. D 435) or of the claim or the evidence (*Milbank v. Milbank* [1900] 1 Ch. 376, p. 385);
- (5) to limit and define the issues to be tried, and as to which discovery is required (*Yorkshire Provident Life Assurance Co. v. Gilbert* [1895] 2 QB 148; per Vaughan Williams LJ in *Milbank v. Milbank* [1900] 1 Ch. 376; 385);
- (6) to tie the hands of the party so that he cannot without leave go into any matters not included (per Brett LJ in *Philipps v. Philipps* [1878] 4 QBD 127, p. 113; *Woolley v. Broad* [1892] 2 QB 317) seen. 'All material facts' para 18/7/10: and *Wooley v. Broad* [1892] 2 QB 317). But if the opponent omits

1 to ask for particulars, evidence may be given which supports any
material allegation in the pleadings (*Dean of Chester v. Smelting Corp.*
[1902] WN 5; *Hewson v. Cleeve* [1904] 2 Ir. R 536)."

5 [17] Thus, it is clear that the purpose of the pleadings is to allow the opponent to
understand the nature of the case against them. A request for further and better
particulars is only justified if the particulars sought for relates to material facts
and not evidence. The defendants here are well aware of the nature of the case
10 against them and they had already filed their defence and counterclaim which
denied the misrepresentations and the implied terms as to the assessment of
property tax and alleged that the assignment of debt is valid.

15 [18] It is settled law that the court generally refuse to grant the application for
further and better particulars on the grounds that these particulars form the
subject of evidence as illustrated in the case of *Insas Credit & Leasing Sdn Bhd &*
Ors v Kerjajadi Sdn Bhd & Ors [2003] AMEJ 0062; [2003] 6 CLJ 234.

20 [19] In the instant case, the court agrees with the plaintiff's solicitor's submission
that dates are not relevant particulars in the pleadings in the circumstances of the
case since the plaintiff has to prove its case at the trial. Furthermore, the
particulars of misrepresentations and/or the mistake of the acknowledgement of
25 the existence of purported loan were already pleaded in the said statement of
claim.

30 [20] The court also of the view that, the defendants' request for the type and form
of representations and/or the mistake as to the acknowledgement of the
existence of purported loan is an act of trying to obtain the name of the plaintiff's
witnesses and this is akin to a "fishing expedition". These are clearly matters of
evidence and no obligation on the part of the plaintiff to disclose these particulars
at this stage.

35 [21] This court also agrees with the plaintiff that the particulars requested by the
defendants comprise "gist of the conversation" and "gist of the documents"
which were similar to the particulars requested by the defendant in the
Singaporean case, *Toh Her Chiew (Zhuo Huoshu) & Anor v Grand Isle Holdings Pte*
40 *Ltd* [2012] SGHC 201.

[22] In the application in encl 42, the defendants also requested for particulars of
the alleged mistake, whether in law or in fact. Pursuant to Order 18 r 7 of the ROC
2012, it is established principle that every pleading shall contain and contain
only, a statement in a summary form of the material facts on which the party
pleading relies for his claim. It is not necessary for law to be pleaded.

[23] From the facts, it shows that the defendants are parties to the lease
agreement and/or the purported assignment of debt and the defendants are
privity to the facts and nature of the case. Thus, this court is of the view that the

particulars sought by the defendants are well within the defendants' knowledge and it is sufficient for the defendants to understand the nature of the case. 1

[24] In the circumstances and reasons given above, it is reasonable to conclude that the defendants' requests for better and further particulars in themselves indicate that was sought was evidence. 5

[25] After considering the arguments of the counsels, the written and oral submissions together with the authorities, the court found that the deputy registrar had not erred in refusing the application and therefore the appeal by the defendants is dismissed with cost of RM1,500. 10

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