IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC(I) 12

Suit No 5 of 2017 (Summons No 41 of 2017)

Between

MACQUARIE BANK LIMITED

… Plaintiff by Original Action

And

GRACELAND INDUSTRY PTE LTD

… Defendant by Original Action

And

Between

GRACELAND INDUSTRY PTE LTD

… Plaintiff in Counterclaim

And

(1) MACQUARIE BANK LIMITED
(2) STEPHEN BECHER WOLFE

… Defendants in Counterclaim

GROUNDS OF DECISION

[Civil procedure] — [Pleadings] — [Amendment]

Macquarie Bank Ltd
v
Graceland Industry Pte Ltd

[2017] SGHC(I) 12

Singapore International Commercial Court — Suit No 5 of 2017 (Summons No 41 of 2017)
Henry Bernard Eder IJ
21 December 2017; 8, 10 January 2018

24 January 2018

Henry Bernard Eder IJ:

Introduction

1 On 21 December 2017, I heard an application (the "first hearing") on behalf of the Defendant, Graceland Industry Pte Ltd ("Graceland") under O 20 r 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules") seeking leave to amend its defence and counterclaim. Following submissions on behalf of Graceland, the Plaintiff, Macquarie Bank Limited ("Macquarie") and the Second Defendant in Counterclaim ("Mr Wolfe"), I informed the parties of my decision to grant Graceland leave to amend its defence and counterclaim, apart from the proposed amendments in para 8, the last sentence of para 12, para 15.7, para 26 and para 44.

2 Thereafter, counsel on behalf of Graceland sought to advance what were described as "further arguments" pursuant to s 28B(1) of the Supreme Court of

Judicature Act (Cap 322, 2007 Rev Ed) in relation to the proposed amendments which I had disallowed, as set out in its letter to the Registry dated 27 December 2017. However, attached to this letter was a new draft amended defence and counterclaim which included additional proposed amendments. By its letter dated 28 December 2017, counsel on behalf of Macquarie submitted that such "further arguments" should be refused. In the event, I decided to have a further oral hearing in relation to such further arguments and the additional proposed amendments. That hearing took place on 8 January 2018 (the "second hearing"). In light of the further arguments, I decided to grant Graceland further leave to amend, as set out below, in respect of certain of the proposed amendments. However, other proposed amendments remained in a form which were, in my view and for various reasons, ambiguous or unsatisfactory. For that reason, I decided to give Graceland's counsel a further opportunity to serve a yet further draft amended defence and counterclaim with a view to ensuring that Graceland's case was properly pleaded without uncertainty and ambiguity.

3 Following the service of that further draft, it was unfortunately necessary to have a yet further oral hearing to hear further arguments and to finalise matters. That hearing took place on 10 January 2018 (the "third hearing"). In the event, at that hearing, I gave leave to amend the defence and counterclaim in a final form as referred to below and as subsequently extracted by the Registry. These are my brief reasons for the various decisions which I have taken.

4 The application for amendment of pleadings was originally issued on behalf of Graceland by Summons No 41 of 2017 dated 28 November 2017 supported by an affidavit of Sun Jiawen. Thereafter, there was served an affidavit of Amber Riley dated 7 December 2017 on behalf of Macquarie. On 12 December 2017, Graceland filed and served a second affidavit of Sun Jiawen

in response, as well as its written submissions in support of the application. This was followed by Macquarie's written submissions on 18 December 2017 in opposition to the application. Finally, on 19 December 2017, Graceland filed its written submissions in reply.

The parties' cases

5 In summary, Graceland submitted that the proposed amendments were necessary to ensure that the relevant issues and facts would be fully canvassed at trial and/or for the purpose of determining the real questions in controversy between the parties. Further, the proposed amendments would not cause surprise to Macquarie and Mr Wolfe, or give rise to any form of prejudice. For instance, the proposed amendment in para 13 of the defence and counterclaim concerned a potential fertiliser derivative transaction ("the proposed DAP transaction") which had been addressed in the affidavit of evidence-in-chief ("AEIC") of Mr Liu Zhongjin filed on behalf of Graceland, the expert report of Mr Darrell Ingram filed on behalf of Graceland, and the expert report of Mr Joseph Bauman filed on behalf of Macquarie. From these documents, it was submitted, Macquarie would have known all along what Graceland's case was. Graceland therefore asserted that the proposed amendments were simply clarificatory in nature, and did not materially change the complexion of its case.

6 Macquarie made several points in opposition to Graceland's application. I should mention that underlying much of Macquarie's written submissions was the suggestion that Graceland had commenced the present application in bad faith, with a view to seeking to vacate the trial dates fixed for 19–23 February 2018. However, as I made it clear to the parties during the first hearing that those trial dates would remain save for any exceptional circumstances, that objection fell away. Macquarie's oral submissions therefore focused primarily

on two points: Graceland's failure to provide an adequate explanation for the lateness of its application, and Graceland's egregious conduct.

7 On the first point, Macquarie pointed out that Graceland had not explained its reasons for bringing the amendment application beyond stating that "part of the impetus" for doing so was my prior decision in Summons No 32 of 2017.[1] I had there denied Graceland's application for specific discovery of Macquarie's internal correspondence relating to the proposed DAP transaction, on the basis that the relevance of the proposed DAP transaction had not been properly spelt out in Graceland's pleadings. Macquarie submitted that the lack of proper explanation for the application and its lateness prevented the court from deciding on the proper consequential directions or cost orders.

8 On the second point, Macquarie raised, *inter alia*, the following arguments:

(a) The proposed amendments raised allegations that were based on facts entirely within Graceland's knowledge or possession, control or power.

(b) Graceland had previously represented to this court, via the proposed case management plan filed in the parties' joint case management bundle dated 10 July 2017, that it did not intend to amend its pleadings.

(c) The proposed amendments in paras 13, 16, 20.1 and 33.3 of the defence and counterclaim sought to introduce the very particulars that Graceland had earlier refused to provide pursuant to Macquarie's letter

[1] Second affidavit of Sun Jiawen dated 12 December 2017, para 14.

of request dated 24 March 2017. Macquarie had then asked for details of the "language" and "correspondence" that formed the basis of Graceland's case for mistake and misrepresentation, but Graceland had responded that Graceland was "not entitled as the same goes to evidence".[2]

(d) Graceland's proposed amendments were an attempt to take an impermissible second bite at the cherry and re-litigate an issue that has already been determined by the Singapore High Court. Macquarie had previously commenced an application to strike out Graceland's defence and counterclaim. Macquarie's appeal from the decision of the assistant registrar had been heard by Woo Bih Li J, who had, *inter alia*, struck out para 9 of the defence and counterclaim which averred that no contract had been concluded between Macquarie and Graceland.[3] However, the proposed amendments purported to put in issue again whether there was a binding contract between the parties, and what the terms of that contract were.

(e) The proposed amendments were deficient. For instance, the proposed amendment at para 15.7, which referred to Graceland providing Macquarie with "commercially sensitive and confidential information belonging to Wengfu Group and [Graceland]" was vague.

9 I agreed with Macquarie that Graceland had displayed egregious conduct. Graceland's application to amend its defence and counterclaim came

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2 Further and Better Particulars of Defence and Counterclaim dated 16 August 2016 pursuant to Letter of Request dated 24 March 2017, para 6.

3 Notes of Evidence for HC/S 416/2016 (HC/RA 30/2017) dated 4 and 5 May 2017, p 12, lines 25–27 (see Defendant's Bundle of Documents (Amendment Application) dated 12 December 2017 at Tab 18).

very late in the day, close to the festive season and a mere eight weeks ahead of the trial fixed for February 2018. I also agreed with Macquarie that Graceland had had plenty of opportunities previously if they had wanted to make the necessary amendments, but they had either failed or refused to do so. As counsel for Macquarie, Mr Foo, correctly pointed out, Graceland had previously indicated to the court on at least one occasion that it was not going to make amendments to its pleadings.

10 I recognise that, in certain circumstances, such egregious conduct might, of itself, justify the refusal of any application for leave to amend. However, in my view, it is also necessary to consider what prejudice has or might be suffered by Macquarie if I were to allow the amendments proposed by Graceland, and whether such prejudice can be adequately compensated by an appropriate order as to costs (see *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [113]).

11 I therefore asked Mr Foo at the first hearing where in its affidavit evidence or its written submissions Macquarie had dealt with the issue of prejudice. Mr Foo pointed me to the following:

(a) Paragraphs 12 and 13 of Macquarie's written submissions, which set out potential steps that Macquarie and Mr Wolfe "may well" need to take in response to the proposed amendments, and made the point that in view of the holiday season, Macquarie and Mr Wolfe "may well require additional time to confer with and instruct their respective solicitors." I note, however, that the phrase "may well" is very tentative.

(b) Paragraph 25(b) of the affidavit of Amber Riley, which stated that Macquarie did not have the opportunity to file an AEIC to address

allegations raised in the proposed amendments to the defence and counterclaim.

(c) Paragraph 27 of the affidavit of Amber Riley, which stated that Macquarie would suffer prejudice in the form of "added expense and drain on management time" and "through having various Macquarie staff (including its legal, credit and internal document management teams) diverted to, among other things, providing responses to the [p]roposed [a]mendments and filing […] supplemental AEICs. This will inevitably impact Macquarie's preparation for trial in February 2018".

12 I bore all the above in mind as I considered each of the major amendments proposed by Graceland.

My decision

13 The first major amendment application was in respect of para 8 of the defence and counterclaim. By this proposed amendment, Graceland sought to extend its denial of paras 7–13 of the statement of claim to paras 4–6 of the same. Although this amendment seemed at first blush to be a relatively small amendment as a matter of form, it was in truth potentially a very significant amendment because paras 4–6 of the statement of claim address the issues of when the parties entered into the commodity swap transaction in respect of 30,000 metric tonnes of urea fertiliser and where the terms of that agreement were set out. Linked to that was the proposed amendment in para 44 of the defence and counterclaim, by which Graceland sought to deny that any damages which Macquarie may be entitled to (which was denied) should be calculated on the basis of the 2002 International Swaps and Derivatives master agreement ("the ISDA agreement"), because parties had not negotiated and/or expressly agreed to adopt the terms of the ISDA agreement into any agreement between

parties. At the end of the first hearing, my view was that the proposed amendments in paras 8 and 44 sought to raise entirely new issues. The suggestion that certain terms in the agreement were not negotiated and/or expressly agreed was, on the face of the pleadings, something entirely new. To be clear, I use the term "entirely new" bearing in mind that such issues might have once been a part of the original pleadings but, as the result of a previous judgment of Woo J, are no longer a part of the pleadings. It was for these main reasons that I originally concluded that, given the proximity to trial, to allow the proposed amendments in paras 8 and 44 would cause real prejudice to Macquarie and raise matters that could not be properly compensated by an order as to costs.

14 However, in the letter dated 27 December 2017, counsel on behalf of Graceland brought to my attention certain matters which had not previously been raised. It is unnecessary to explain this in detail. For present purposes, it is sufficient to note that in the course of argument during the second hearing, counsel on behalf of Graceland abandoned the application to deny para 4 of the statement of claim and, in effect, made plain that the purpose of the remainder of the proposed amendments to paras 8 and 44 of the defence and counterclaim was limited to putting in issue what were the terms of the contract pleaded by Macquarie. However, it seemed to me that this did not appear properly from the face of the proposed amendments; and that if that was indeed the intended purpose of these proposed amendments, Graceland should, at the very least, identify properly what its case was as to what the terms of the contract were – subject as always to its case on mistake. For these reasons, I set down a tight timetable for Graceland to set out fully such a case. As stated at [2] above, counsel for Graceland subsequently served a revised draft defence and counterclaim. Counsel on behalf of Macquarie objected to certain parts of this revised draft. Again, the details do not matter. For present purposes, it is

sufficient to note that it was for this reason that it was necessary to have the further third hearing. In the event, counsel for Graceland proposed certain further amendments to meet such objections and after hearing further argument, I was content to grant leave in the form as stated at [3] above. For the avoidance of doubt, I am satisfied that such amendment was necessary to identify properly the relevant issues and did not cause any prejudice to Macquarie which could not be compensated by an order for costs.

15 The second major amendment application was in respect of para 12 of the defence and counterclaim. Graceland sought to add a sentence at the end of the paragraph stating that it was "not aware that a bank could be a counterparty to a commodity derivative transaction". On its face, this might again seem a relatively innocuous plea. However, in reality, it potentially raises considerable difficulty because it pleads the negative, *viz*, the absence of knowledge of a certain kind. I had, in the course of the first hearing, asked counsel for Graceland, Mr Wong, whether he could say that all documents in relation to that issue had already been disclosed. Mr Wong informed me that he could not answer that question directly, but that it would potentially require further disclosure and he would have to take further instructions from his client. Mr Wong said that at this stage, he could not say when any such disclosure could be made or what further steps would be taken. Mr Wong also recognised that there was a continuing obligation on his part to provide disclosure. Therefore, he needed to confer with his client and satisfy himself, as solicitor on record, that such proper disclosure had been given. Mr Wong told me that on his current instructions, Graceland has never carried out a commodity derivative transaction with a bank as a counterparty. Irrespective of whether that is the case, that does not, in my view, address the question of whether there are any documents as to what Graceland may or may not have been aware of. In such circumstances, given the proximity to trial and the absence of satisfactory

assurances by Mr Wong, it originally seemed to me that there was very considerable potential for prejudice if I were to allow that plea to be introduced at this stage. Therefore, I originally refused leave in relation to the proposed amendment in para 12.

16 However, following the first hearing, counsel for Graceland took further instructions and thereafter expressly confirmed in its letter dated 27 December 2017 that Graceland had been unable to locate any document which may be relevant and material to this issue. In light of such express confirmation and in the absence of any prejudice to Macquarie, I therefore decided to allow this proposed amendment.

17 The third major amendment application was in respect of para 13 of the defence and counterclaim concerning the proposed DAP transaction. Although much lengthier than the other proposed amendments, most of that length came from the particulars to that paragraph, which were simply a recitation of particular correspondence between the parties. It seemed to me that there was much less difficulty with this amendment. Mr Wong informed me that Graceland had already provided all relevant documents in respect of the proposed DAP transaction. I was also informed that Macquarie had, in a previous case management conference on 24 October 2017, taken the position that the same had been provided. Mr Wong also pointed out that the proposed DAP transaction had been dealt with in affidavit evidence and expert reports (see [5] above). Even if that is not correct, based on the evidence or submissions submitted on behalf of Macquarie before me, I was of the view that there would not be great difficulty in dealing with those matters at trial. I did not think that, at least in relation to this point on the proposed DAP transaction, the matters mentioned at para 12 of Macquarie's written submissions (*ie*, filing consequential amendments to their pleadings, seeking further and better

particulars, requesting specific discovery and filing supplementary AEICs) would be as great a burden as Mr Foo suggested. I also did not consider that the amendment at para 13 would give rise to the need to conduct any particular investigations, but even if it did, I am satisfied that any further matters to be investigated would be a peripheral matter. Therefore, I allowed the amendment in relation to para 13 of the defence and counterclaim. Flowing from that, I also allowed the amendments in paras 14 and 15 of the same.

18 The fourth major amendment application was in respect of paras 15.7 and 26 of the defence and counterclaim. These amendments concerned the alleged fiduciary relationship between Macquarie and/or Mr Wolfe and Graceland. I agreed with Macquarie that, as originally formulated prior to the first hearing, the proposed amendment at para 15.7 was far too vague and lacking in particulars. It did not identify what "commercially sensitive and confidential information" had been requested by and provided to Macquarie and/or Mr Wolfe by Graceland. On that basis alone, I was of the view that that paragraph was embarrassing for lack of particulars. The same must be said in respect of para 26 (as originally formulated), which utilised similar language. In an ordinary case, I might have allowed the amendments and granted the other party leave to ask for further particulars. However, given the proximity to trial in the present case, Graceland should have provided the necessary particulars at the outset. I therefore originally refused leave in relation to the proposed amendments in paras 15.7 and 26.

19 However, the revised draft defence and counterclaim which Graceland served on 27 December 2017 did set out further particulars, and after considering the further arguments set out in the covering letter of that date and the further arguments raised at the second hearing, I decided to grant leave in respect of these proposed amendments, with some edits to the wording thereof

which Mr Wong consented to. Once again, for the avoidance of doubt, I should make plain that I am satisfied that such amendment was necessary to identify properly the relevant issues and did not cause any prejudice to Macquarie which could not be compensated by an order for costs.

20 The final major amendment application was in respect of para 33.1 of the defence and counterclaim, which sought to refer to certain "follow-up phone conversations between Mr Wolfe and Mr Liu on 16 to 21 May 2014". Mr Wong informed me that this matter had been addressed in an AEIC filed on behalf of Graceland while Mr Foo informed me that it had not been dealt with by Mr Wolfe in his AEIC. Mr Wong indicated that Graceland would not object to Macquarie leading additional evidence on this point. In light of Mr Wong's assurances and Macquarie's assent, it seemed to me that the appropriate course was to allow the amendment at para 33.1, subject to Mr Wolfe's being able to serve a further AEIC dealing only with those follow-up phone conversations.

21 It is for these reasons that I ultimately granted Graceland leave to amend its defence and counterclaim as set out above and in the form extracted by the Registry. I also gave certain further directions as set out in my order.

Costs

22 Although Graceland's amendment application was eventually allowed in large part, it seemed to me that costs of the application and costs in relation to consequential amendments to the pleadings ought to be paid by Graceland to Macquarie and Mr Wolfe. This was in view of the lateness of the application, the fact that Graceland's application had failed in part as well as Graceland's egregious conduct which I have already mentioned.

23 So far as costs in relation to consequential amendments were concerned, Macquarie and Mr Wolfe submitted that they were entitled to such costs and that the quantum could be dealt with at a later stage. Graceland also accepted that in principle, it should bear such costs in any event. I therefore awarded Macquarie and Mr Wolfe costs consequential upon the amendments in any event, with the quantum of costs reserved.

24 As regards the costs of the application itself and the first hearing, parties relied on Appendix G of the Supreme Court Practice Directions, the Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore. That document provided, as a useful benchmark, that the quantum of costs typically awarded in relation to applications for amendments of pleadings ranges between $1,000 and $6,000. Macquarie submitted that in light of Graceland's egregious conduct, it was entitled to costs at the very top end of the range. It thus sought a total of $8,000, which included $2,000 in disbursements. Counsel for Mr Wolfe, Mr Lim, submitted for $4,000 in costs on the basis that he had had to review the submissions filed by Graceland and Macquarie and prepare for the hearing.

25 In response to Macquarie, Graceland argued that costs at the top end of the range were reserved for full day hearings. Graceland therefore submitted that Macquarie should only be entitled to costs of $3,000, excluding reasonable disbursements. As regards Mr Wolfe, Graceland submitted that $4,000 in costs was "manifestly excessive" in light of the fact that no affidavit evidence or written submissions had been filed, nor any oral submissions made, on behalf of Mr Wolfe.

26 The present application was an important one for Graceland and, in my view, also a heavy one. On each side, several affidavits were filed and the

quantity of documents was extensive, approaching something in the order of 2,000 pages. Given that the application no doubt involved considerable work on Macquarie's part, I agreed that Macquarie should be entitled to costs at the higher end of the scale. In relation to the first hearing, I therefore ordered that Graceland pay costs to Macquarie fixed at $6,000, including disbursements. However, I agreed with Graceland that Mr Wolfe's claim for $4,000 was excessive. In relation to the first hearing, I therefore ordered that Graceland pay costs to Mr Wolfe fixed at $1,500, including disbursements.

27 As for the costs of the second and third hearings, I ordered Graceland to pay additional costs to Macquarie and Mr Wolfe in the total sum of $3,500 and $1,000 respectively.

Henry Bernard Eder
International Judge

Nish Kumar Shetty, Jerald Foo and Tay Jia Wei, Kenneth (Cavenagh Law LLP) for the plaintiff by original action and first defendant in counterclaim;
Wong Hin Pkin Wendell, Priscylia Wu Baoyi and Wong Zi Qiang, Bryan (Drew & Napier LLC) for the defendant by original action and plaintiff in counterclaim; and
Abraham Vergis and Lim Mingguan (Providence Law Asia LLC) for the second defendant in counterclaim.