IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 265

Originating Summons No 325 of 2017

Between

THU AUNG ZAW

… *Applicant*

And

KU SWEE BOON (TRADING AS NORB CREATIVE STUDIO)

… *Respondent*

High Court/Registrar's Appeal from State Courts No 23 of 2017
(District Court Summons No 1246 of 2017)

Between

THU AUNG ZAW

… *Appellant*

And

KU SWEE BOON (TRADING AS NORB CREATIVE STUDIO)

… *Respondent*

GROUNDS OF DECISION

[Civil procedure] — [Summary judgment] — [Setting aside]

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Tan Siong Thye J:

Introduction

1 Thu Aung Zaw ("Thu"), the appellant, took out two related actions against Ku Swee Boon ("Ku"), the respondent. The two actions were as follows:

(a) Registrar's Appeal from the State Courts No 23 of 2017 ("RAS 23"). In RAS 23, Thu appealed against the decision of the District Judge upholding the decision of the deputy registrar allowing Ku to amend the plaintiff's name in a summary judgment obtained in District Court Suit No 3647 of 2014 ("DC 3647") from Ku's sole proprietorship, Norb Creative Studio ("Norb"), to Ku's own name (the "Amendment Application").

(b) Originating Summons No 325 of 2017 ("OS 325"). In OS 325 Thu had four prayers:

(i) That the summary judgment and guarantee (see below at [3]–[4]) were void as these were in Norb's name. Norb lacked the legal capacity to bring the claim in DC 3647 and/or to enter into a guarantee.

(ii) Alternatively, that the summary judgment against Thu be set aside.

(iii) Alternatively, that leave be granted to Thu to appeal against the summary judgment.

(iv) As a consequence of the above three grounds, that the bankruptcy application that Norb had taken out against Thu in HC/B 2527/2016 be stayed.

2 I ruled against Thu for both actions and dismissed RAS 23 and OS 325 with costs. Thu is dissatisfied with both the decisions. In particular, Thu is dissatisfied with RAS 23 (which concerned Ku's Amendment Application), as the central ground for the prayers Thu sought in OS 325 was undermined when I allowed Ku's Amendment Application in RAS 23. However, he could not appeal against my decision in RAS 23. Thus he lodged an appeal against my decision in OS 325 to circumvent his inability to appeal against my decision in RAS 23.

Background

3 Thu was a partner of the firm Adlogic Asia LLP ("Adlogic"). In October 2011, Adlogic approached Ku, who is the sole proprietor of Norb, to print

100,000 booklets of discount dining vouchers. Norb contracted with Adlogic to print these booklets for a sum of $80,000.[1] In return, Norb required Thu and another partner of Adlogic, Huang Ziting, to furnish a personal guarantee. When Adlogic could not pay for the cost of printing the booklets, Norb sued Thu on the guarantee for the unpaid sum.[2]

4 Norb obtained summary judgment against Thu in DC 3647 under O 14 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Thu was present and challenged Norb's application for summary judgment, although he was not legally represented. The District Court granted summary judgment in favour of Norb after hearing arguments from both parties.

5 When Thu failed to pay the judgment debt, Norb took out bankruptcy proceedings against Thu in HC/B 2527/2016. In response, Thu took out OS 325. He sought to stay the bankruptcy application by setting aside, rendering void, or obtaining leave to appeal against the summary judgment, which formed the basis of the bankruptcy action.[3] Thu argued that Norb, as a sole proprietorship, could not commence an action against him, since O 77 r 9 of the ROC requires a sole proprietorship to commence an action in the name of the sole proprietor. Therefore, Norb lacked the legal capacity to apply for summary judgment.[4] Ku then filed the Amendment Application asking for leave under O 20 r 5(3) of the ROC to amend the name of the plaintiff in the summary judgment from Norb to

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1 Affidavit of Thu Aung Zaw, 22 March 2017, paras 4–6.

2 Affidavit of Thu Aung Zaw, 22 March 2017, paras 10–14.

3 Affidavit of Ku Swee Boon, 5 May 2017, paras 4–12.

4 Applicant's Written Submissions for OS 325/2017 ("AWS (OS 325/2017)"), paras 16–20.

"Ku Swee Boon (trading as Norb Creative Studio)". Ku's basis for seeking leave was that he had made a mistake when he filed DC 3647.[5]

6 The matter first came before a deputy registrar in the State Courts who granted the Amendment Application in District Court Summons No 1246 of 2017. Thu was dissatisfied and appealed to a District Judge in chambers by way of District Court's Registrar's Appeal No 46 of 2017. The District Judge affirmed the deputy registrar's decision in *Ku Swee Boon (trading as Norb Creative Studio) v Thu Aung Zaw* [2017] SGDC 241 ("*Ku Swee Boon (DC)*"). Thu then appealed to the High Court in RAS 23. I first heard Thu's appeal in RAS 23 before hearing his application in OS 325.

Parties' submissions

RAS 23: Whether the Amendment Application should be allowed

7 Ku accepted that Norb, as a sole proprietorship, had no legal capacity to bring the summary judgment application.[6] But Ku submitted that the Amendment Application should be allowed as it satisfied both requirements of O 20 r 5(3) of the ROC: that the wrong party was named due to a genuine mistake, and that the mistake did not mislead Thu as to the party to the claim nor did it cause Thu prejudice.[7]

8 Ku submitted that there was a genuine mistake as he had started the summary judgment claim in the name of the sole proprietorship instead of his

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5 Affidavit of Ku Swee Boon, 3 April 2017, para 12.

6 Respondent's Skeletal Submissions for RAS 23/2017 ("RWS (RAS 23/2017)"), para 10(b).

7 RWS (RAS 23/2017), para 6.

own name due to "inadvertence".[8] Ku also submitted that Thu had always been aware that Norb's only proprietor was Ku and that Ku was in substance bringing the claim.[9] This was because the summary judgment application was not the first suit to deal with the subject matter of the guarantee. There were various other proceedings – some of which had even been heard by the Court of Appeal – to which Norb had been a party. In those proceedings, Ku had filed numerous affidavits and most of the affidavits explicitly stated that Ku was Norb's sole proprietor.[10] Hence, there would be no prejudice to Thu given that correcting Norb's name to Ku would be a "mere correction of the nomenclature".[11]

9 In response, Thu submitted that the Amendment Application should not be allowed as the mistake was "not merely one of form but of substance".[12] Rather than being a mere irregularity, as the District Judge had held, naming a sole proprietorship as plaintiff meant that the summary judgment was a "nullity" which could not be corrected by amendment.[13]

10 Further, Thu submitted that allowing the Amendment Application would prejudice him because the summary judgment was a nullity. According to Thu, he should not be expected to respond to or defend against such nullities. He would not be given a chance to respond to the change and make the "relevant and necessary changes to his defence and have any opportunity to have his defence considered fully by the court".[14]

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8 RWS (RAS 23/2017), para 15.

9 RWS (RAS 23/2017), para 20.

10 RWS (RAS 23/2017), para 21.

11 RWS (RAS 23/2017), para 26.

12 Appellant's Written Submissions for RAS 23/2017 ("AWS (RAS 23/2017"), para 8.

13 AWS (RAS 23/2017), para 11.

OS 325: Whether Thu can set aside, render void, or be granted leave to appeal against the summary judgment

11 Thu submitted that the summary judgment should be set aside because triable issues were present. Alternatively, Thu also sought to render void the summary judgment or to be granted leave to appeal against it for the same reasons that triable issues were present. These triable issues were essentially whether Norb, as a sole proprietorship, had the requisite legal capacity to bring the summary judgment application in the first place.[15] Thu described this as a "fundamental error" in respect of the writ of summons and pleadings that led to the summary judgment.[16] Thu submitted that this tainted the "very root and existence" of the summary judgment, rendering it a nullity.[17]

12 In response, Ku took the position that its successful Amendment Application meant that there was "no basis" for Thu's objections to the summary judgment.[18]

13 In any event, Ku submitted that it was an abuse of process for Thu to seek to set aside the summary judgment because it had been made in the District Court. The proper procedure should have been to challenge the summary judgment in that court, and not before the High Court. Rather, OS 325 was only taken out to "stymie" the bankruptcy application, which should not be allowed.[19] Moreover, Thu had 14 days to appeal against the summary judgment. He chose

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14 AWS (RAS 23/2017), paras 47–48.

15 AWS (OS 325/2017), para 39.

16 AWS (OS 325/2017), para 36.

17 AWS (OS 325/2017), para 78.

18 Respondent's Written Submissions for OS 325/2017 ("RWS (OS 325)"), para 26.

19 RWS (OS 325/2017), paras 8–10.

not to do so for 21 months until the present application. Ku submitted that Thu should not be allowed to "subvert" this 14-day period.[20]

Issues

14 It can be clearly seen from the parties' arguments that Thu's position in OS 325 was predicated on the argument in RAS 23 that Norb, as a sole proprietorship, could not bring a claim in its own name. These arguments buckled when I allowed Ku's Amendment Application. Hence, I will first address the Amendment Application (and RAS 23) before turning to the impact it had on OS 325.

Ku's Amendment Application

15 To begin with, both parties acknowledged that O 77 r 9 of the ROC only permits a sole proprietor to sue in his own name and not in the name of the firm. Hence, I only had to decide whether Ku should be granted leave under O 20 r 5(3) of the ROC to amend the plaintiff's name in the summary judgment to "Ku Swee Boon (trading as Norb Creative Studio)".

16 In this case, the Amendment Application was taken out after summary judgment had been given in DC 3647. Hence, in order to determine whether or not to grant Ku's Amendment Application, I had to address the following preliminary issues:

(a) Was the District Court *functus officio* when the summary judgment was granted and thus no longer had the power to grant the Amendment Application?

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[20] RWS (OS 325/2017), paras 15–17.

(b) If the court was not *functus officio*, should the Amendment Application be granted?

I shall address each of these issues in turn.

Whether the District Court could allow amendments of its order after it had already delivered its summary judgment

17 This preliminary issue arises because O 20 r 5(1) of the ROC appears to suggest that the court can only grant amendment applications whilst the proceedings are ongoing. Order 20 r 5(1) of the ROC provides as follows:

> **Amendment of writ or pleading with leave (O. 20, r. 5)**
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> **5.**—(1) Subject to Order 15, Rules 6, 6A, 7 and 8 and this Rule, the Court may *at any stage of the proceedings* allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> [emphasis added]

18 The term "proceedings" in O 20 r 5(1) of the ROC is not defined but it is usefully contrasted against O 20 r 11 of the ROC, which provides for an amendment to a judgment or order already given:

> **Amendment of judgment and orders (O. 20, r. 11)**
>
> **11.** Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

A comparison of the two provisions may suggest that amendments after the judgment has been delivered fall outside the purview of O 20 r 5 of the ROC. Accordingly, the issue here is whether the delivery of the judgment renders the court *functus officio* such that O 20 r 5 of the ROC is no longer applicable.

The court can make non-substantive amendments even after the delivery of the judgment

19 The parties did not initially make submissions on this point both in the court below and when they appeared before me. I requested them to tender further arguments on this issue. After hearing the parties' submissions, I found that the court had the jurisdiction to make certain non-substantive amendments even after the judgment (in this case under O 14 of the ROC) had been delivered. I came to this conclusion based on the Court of Appeal's decision in *Godfrey Gerald QC v UBS AG and others* [2004] 4 SLR(R) 411, where the Court of Appeal explained *functus officio* in similar terms (at [18]–[19]):

> 18 The Latin term *functus officio* is an abbreviated reference to a facet of the principle of finality in dispute resolution. *Functus officio* means that the office, authority or jurisdiction in question has served its purpose and is spent. A final decision, once made, cannot be revisited. In dispute resolution, this principle may manifest itself in the guise of *res judicata, functus officio* or issue estoppel. This principle of finality is intended to embody fairness and certainty. It is not to be invoked merely as a sterile and mechanical rule in matters where there are minor oversights, inchoateness in expression and/or consequential matters that remain to be fleshed out. Given that the court is always at liberty to attend to such axiomatic issues, various judicial devices such as the "slip" rule and the implied "liberty to apply" proviso are invoked from time to time to redress or clarify such issues. In short, both the High Court and the Court of Appeal retain a residual inherent jurisdiction even after an order is pronounced, to clarify the terms of the order and/or to give consequential directions.
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> 19 That such inherent jurisdiction exists, has never been doubted. In point of fact, it is regularly invoked and exercised by the court: see O 92 r 4 of the RSC and the helpful and incisive conspectus in Professor Jeffrey Pinsler's article "Inherent Jurisdiction Re-Visited: An Expanding Doctrine" [2002] 14 SAcLJ 1 and the commentary in *Singapore Court Practice 2003* at paras 1/1/7 and 1/1/8. This inherent jurisdiction is a virile and necessary one that a court is invested with to dispense procedural justice as a means of achieving substantive justice between parties in a matter. The power to correct or clarify an order is inherent in every court. This power

> necessarily extends to ensuring that the spirit of court orders are appropriately embodied and correctly reflected to the letter. Indeed, to obviate any pettifogging arguments apropos the existence of such inherent jurisdiction, the RSC was amended in 1995 to include O 92 r 5, which expressly states:
>
> > Without prejudice to Rule 4, the Court may make or give such further orders or directions incidental or consequential to any judgment or order as may be necessary in any case.
>
> By dint of this rule, the court has an unassailable broad discretion and jurisdiction to give effect to the intent and purport of any relief and/or remedy that may be necessary in a particular matter. Admittedly, while the rule sets out in stark terms the court's wide inherent jurisdiction in this area of procedural justice, I should add for completeness, that the power to "make or give such further orders or directions incidental or consequential to …" does not *prima facie* extend to correcting substantive errors and/or in effecting substantive amendments or variations to orders that have been perfected. This is plainly not such a case.

In other words, a court is *functus officio* when it has made a final decision. But the doctrine exists to ensure finality and so it does not extend to situations where non-substantive amendments are made.

20 The court's power to make non-substantive amendments after delivery of judgment also applies to summary judgments. In *Oversea-Chinese Banking Corp Ltd v Measurex Corp Bhd* [2002] 2 SLR(R) 684, OCBC obtained default judgment against Measurex. Measurex sought to set aside the default judgment on the ground that it was ambiguous. In response, OCBC applied to amend the default judgment to clarify it. The High Court affirmed the deputy registrar's decision to allow the amendment. In doing so, the High Court opined that the test for whether the amendment would be allowed was whether it would cause "injustice" to the respondent (at [7]). In that case there was no injustice since the amendment simply removed an ambiguity that existed in the default judgment.

21 Similarly, in *Philip Securities (Pte) v Yong Tet Miaw* [1988] 1 SLR(R) 566 ("*Philip*"), the plaintiff applied for amendment of a default judgment to correct the sum ordered by $6,328.44. The High Court affirmed the registrar's decision to allow the amendment, although the High Court said that the amendment could also be justified by O 20 r 11 of the ROC (at [8]).

22 Finally, in *Sunny Daisy Ltd v WBG Network (Singapore) Pte Ltd* [2008] 4 SLR(R) 769, the defendant sought to set aside the summary judgment in favour of the plaintiff on the ground that the plaintiff did not exist. The summary judgment contained a mistake: the plaintiff was stated to be a Taiwan-incorporated company when it was actually incorporated in the British Virgin Islands. The plaintiff sought to amend the summary judgment to correct the mistake. The High Court allowed the amendment. It said that the amendment was "genuinely made in order to correct an error rather than to substitute one party for another" and that "the amendment was not prejudicial to [the defendant]" (at [34]–[35]).

23 The common element in all three cases is that the court can make non-substantive amendments even to summary judgments, as long as the amendment only corrects an irregularity and does not substantively vary the decision. Hence, the success of Ku's Amendment Application depended on whether he could show that an amendment to the name of the party in DC 3647 was a non-substantive amendment.

Amending Norb's name to Ku's was a non-substantive amendment

24 The parties' submissions were poles apart as to whether amending Norb's name to Ku's in DC 3647 was a non-substantive amendment. Ku contended that the amendment was not substantive. Thu argued that the

amendment sought was substantive given the far-reaching difference in outcome should the amendment be granted. Thu explained that Norb, being a sole proprietorship, could not sue in its own name. Thus disallowing the amendment would result in the summary judgment (and hence the bankruptcy application) being null and void.[21] According to Thu, the diametrically opposite outcomes showed that the amendment was substantive.

25 The District Judge agreed with Ku and found that the amendment was not substantive (*Ku Swee Boon (DC)* at [21]–[24]). She relied on three cases in coming to her decision: *Mohamed Mustafa v Syed Ahmad* [1972] 2 MLJ 241 ("*Mohamed Mustafa*"),[22] *Noble Lowndes and Partners (a Firm) v Hadfields Ltd* [1939] Ch 569 ("*Noble*"),[23] and *Hughes v Pump House Hotel Company, Ltd (No 2)* [1902] 2 KB 485 ("*Hughes*").[24] She reasoned that in each of these cases, despite the original plaintiff not being vested with the cause of action in the suit, the court allowed the amendments. The mistakes were "all treated as irregularities which could be cured by amendment, and did not render the actions as nullities" (*Ku Swee Boon (DC)* at [25]).

26 I agreed with the District Judge and found that the amendment was non-substantive. The three cases cited by the District Judge, taken together, bear this out. In *Noble*, the claim was filed in the name of a partnership. Under the Rules of Supreme Court in force in the UK then, a partnership was permitted to sue in its own name. However, it was subsequently discovered that the partnership was non-existent: the applicant had been under a misapprehension that his

21 AWS (OS 325/2017), paras 36–37.

22 Appellant's Bundle of Authorities ("ABOA"), Tab 3.

23 ABOA, Tab 5.

24 ABOA, Tab 6.

arrangement with five others had created a partnership when it in fact had not. The applicant thus applied to remove the other five parties from the record and to proceed as the sole plaintiff. One argument raised in opposition was that this amendment amounted to substituting a living person for a partnership which had never existed. The court considered that the rule enabling a partnership to sue in its own name was but a rule of convenience; such an action was in fact brought by the individual members comprising the partnership. Since those individuals did exist, the court concluded that it was "not being asked to substitute a living person for a non-existent entity", but that it was "being asked to strike out the names of all the plaintiffs except one and to leave that one as the sole plaintiff" (at 572). I note that *Noble* is distinguishable since it concerned a partnership that could have sued in its own name, unlike the sole proprietorship in the present case. Nonetheless, *Noble* does support the District Judge's holding that it is no bar to an amendment application that the original plaintiff was not vested with the legal cause of action.

27 The same principle was also borne out in *Hughes*. The original plaintiff in *Hughes* discovered that he no longer held the legal cause of action after another court's ruling that he had assigned his cause of action to a bank. The original plaintiff then applied to amend his name in the suit to that of the bank. In granting the application, the court rejected the submission that the amendment should not be allowed "where it is shewn that the plaintiff has no right of action" (at 487). *Noble* and *Hughes* therefore stand for the proposition that if, for whatever reason, the party originally named as plaintiff could not hold the legal cause of action, such an irregularity is nonetheless curable by amendment.

28 The same proposition was affirmed in *Mohamed Mustafa* in the context of sole proprietorships. In nearly identical facts to the present case, the plaintiff commenced an action in the name of his sole proprietorship and obtained summary judgment. The defendant applied to set it aside on the ground that the plaintiff had no capacity to sue. When the plaintiff applied to amend the name of the party to the suit, the defendant objected on the basis that the plaintiff as a different entity could not be substituted as a party. The court rejected this argument and allowed the amendment. The one difference between *Mohamed Mustafa* and the present case is that the amendment application in *Mohamed Mustafa* was taken out during the trial and not after delivery of judgment. In my view this is not a material difference at this stage of the analysis since I have already found that the court is not *functus officio* vis-à-vis non-substantive amendments despite the delivery of judgment. The only question at this stage is whether amending the name of a party is a non-substantive amendment, and the trio of cases I have just referred to confirm that it is.

29 Accordingly, the District Court was not *functus officio* in relation to amending the pleadings to substitute the name of a party, even after judgment had been delivered. But this was not the end of the matter because the discussion thus far only shows that the court *could* allow the amendment. Whether the court *should* have allowed the Amendment Application depended on whether Ku could satisfy the requirements of O 20 r 5(3) of the ROC. I turn now to this issue.

Whether the Amendment Application satisfied the requirements of O 20 r 5(3) of the ROC

30 Order 20 r 5(3) of the ROC sets out the two requirements that Ku must establish in order to succeed in his Amendment Application. It provides:

> An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

There are two limbs in this provision: first, the party seeking the amendment must have made a "genuine mistake" in naming the wrong party; and second, the effect of the mistake must not have been to mislead the respondent or to cause any reasonable doubt as to the identity of the party bringing the claim. These requirements were also set out by the Court of Appeal in *Lim Yong Swan v Lim Jee Tee and another* [1992] 3 SLR(R) 940 ("*Lim Yong Swan*") at [16].

Did Ku make a genuine mistake in commencing the action in the name of his sole proprietorship?

31 In relation to the first limb, I was satisfied that Ku's mistake in naming Norb as the plaintiff in DC 3647 was genuine. Both parties appeared to have laboured under the misapprehension that the papers were properly filed and it was only when Thu filed his application to set aside the bankruptcy application and the summary judgment that this issue came to light. Ku immediately applied to amend Norb's name to his own. Indeed, in Thu's own submissions, he conceded that this was "a mistake which appears to have been missed by all relevant parties in all three proceedings".[25] Thu himself also highlighted to the court in his own affidavit that Ku had "admitted that he has made a mistake with regard to bringing the suits and applications in the wrong name".[26]

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25 AWS (OS 325/2017), para 43.

26 Affidavit of Thu Aung Zaw, 19 May 2017, para 12.

Was Thu misled or was there any reasonable doubt as to who was suing him?

32 I was also satisfied that the second limb was fulfilled. Thu was not misled, nor was there any reasonable doubt that it was Ku who had brought the claim all along. The essential inquiry under this requirement is to determine whether "in truth and in substance" Thu had known that Ku was bringing the claim, even if there was a "nominal defect in form" (see *Lim Yong Swan* at [16]).

33 The proceedings in this matter were long and drawn-out. Although the writ of summons in DC 3647 was only filed on 21 November 2014[27] and summary judgment only entered on 9 July 2015,[28] Thu had known that Ku was bringing a claim against him long before that. Adlogic and Norb had entered into a contract to print the discount booklets in October 2011.[29] When Adlogic could not pay, a statutory demand was served on Thu in June 2013 and Norb filed for bankruptcy against Thu in September 2013.[30] Thu contested the bankruptcy application and sought to set aside the statutory demand before the assistant registrar. The assistant registrar dismissed Thu's application and he appealed to the High Court. The High Court allowed the appeal and set aside the statutory demand (see *Thu Aung Zaw v Norb Creative Studio* [2014] SGHC 67 at [22]). The Court of Appeal dismissed Norb's appeal on the basis that Norb did not bring its claim by a writ of summons.[31] Because of the Court of Appeal's decision, Norb then took out the writ of summons in DC 3647 that

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27 Affidavit of Ku Swee Boon, 5 May 2017, para 5.

28 Affidavit of Ku Swee Boon, 5 May 2017, para 7.

29 Affidavit of Thu Aung Zaw, 22 March 2017, para 5.

30 Chronology of Bankruptcy Applications in 2013 (tendered by parties).

31 Affidavit of Thu Aung Zaw, 22 March 2017, para 18.

led to the present set of proceedings. Eventually the summary judgment was entered against Thu in 2015.

34 Thu chose not to apply for the summary judgment to be set aside for nearly two years before doing so in OS 325 in 2017 when he was faced with an imminent bankruptcy action. Whatever his reasons, it was clear to me that since 2013, Thu had known "in truth and in substance" the identity of the party bringing the claim against him. Indeed, Thu had the opportunity to depose on affidavit that he had been misled by Norb being the plaintiff on record, but he chose not to do so. Instead, Thu's position was that Ku had "misunderstood or mistaken the real point in issue" and that it was "not [a question of] whether [he was] factually confused about who was bringing these suits and applications against [him]". Thu only contested Ku's claims on the basis that the proceedings were not "properly constituted".[32] Accordingly, I found that Thu had not been misled nor did Norb's name being on the record cause any reasonable doubt as to the identity of the party bringing the claim.

Would Thu be prejudiced if the court granted Ku's Amendment Application?

35 At this point, I noted that Thu had argued that allowing the Amendment Application would result in substantial prejudice to him in two ways. First, since Norb did not have legal capacity to bring the claim, the summary judgment was a "nullity" which Thu should not be expected to defend against. Second, Thu could have amended his defence and thus it would be "fair and just" for DC 3647 to be "re-tried with the necessary and proper amendments".[33]

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32 Affidavit of Thu Aung Zaw, 19 May 2017, paras 6–8.

33 Affidavit of Thu Aung Zaw, 22 March 2017, para 28.

36 I rejected Thu's submissions and found that there was no prejudice to him. The first "prejudice" that Thu submitted was not a prejudice at all because it was simply repeating what would have happened if Norb were allowed to continue as the plaintiff on record. If Thu were right that this was considered prejudice under O 20 r 5(3) of the ROC, then amendments would never be allowed as every such case would either involve a non-existent plaintiff or a plaintiff who did not currently hold the legal cause of action. As Ku pointed out, this was precisely why he had to seek an amendment in the first place.

37 Instead, the prejudice that O 20 r 5(3) of the ROC aims to protect against is that suffered by a respondent who has been misled into thinking that the applicant is some *other* party because of the difference in name. Such a respondent would then be prejudiced in terms of defending his claim. For instance, the respondent could have filed a different defence had he known that the party actually bringing the suit against him was someone else. This was the second prejudice that Thu had argued was present in this case. I did not accept that Thu had been prejudiced in any such manner on the facts. He had not been deprived of the chance to make an argument that he would have otherwise made if Ku was on the record instead of Norb. He had not provided any explanation of any arguments that he would have made differently if Ku was on the record instead of Norb. In fact, Norb being on the record was even *better* for Thu and not worse, since Thu could have challenged any of the previous proceedings for irregularity. But he did not do so.

38 Accordingly, I found that there was no prejudice to Thu within the meaning of O 20 r 5(3) of the ROC.

The relevance of O 20 r 11 of the ROC

39 My analysis above was based on O 20 r 5(3) of the ROC, which I found applied for non-substantive amendments and that Ku satisfied the relevant requirements. But I noted that the High Court in *Philip* (see [21] above) was also prepared to allow the amendment to correct the sum ordered in a default judgment on the basis of O 20 r 11 of the ROC.

40 I agreed with this finding. Even if O 20 r 5 of the ROC is limited to amendments whilst proceedings are ongoing, I would still have allowed Ku's Amendment Application under O 20 r 11 of the ROC which reads:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal.

41 This provision allows the court to amend a judgment for "errors arising … from any accidental slip or omission". For the same reasons above, I would have found that the error in this case arose from an accidental slip or omission and I would also have exercised my discretion under O 20 r 11 of the ROC to allow the amendment given that Thu suffered no prejudice.

Conclusion on the Amendment Application

42 In summary, I allowed the Amendment Application for the following reasons:

(a) The District Court was not *functus officio* and thus could allow Ku's Amendment Application as it was a non-substantive amendment.

(b) Ku's Amendment Application had satisfied the conditions under O 20 r 5(3) of the ROC as it was a genuine mistake and the effect of the

mistake had not misled Thu or caused reasonable doubt to him that it was Ku who had brought the claim and other applications against him all along.

(c) By allowing the Amendment Application under O 20 r 5(3) of the ROC, there was no prejudice to Thu as he had not demonstrated that his defence would have been any different.

(d) Alternatively, the Amendment Application could also have been granted under O 20 r 11 of the ROC as this was an accidental slip or omission by Ku.

43 Having granted Ku's Amendment Application, I now turn to explain why it resulted in OS 325 being dismissed.

The Amendment Application's impact on OS 325

44 I had directed that the Amendment Application be heard first as the outcome of RAS 23 would have a critical impact on the four prayers in OS 325. In particular, prayers one and two were premised on Norb's lack of legal capacity. Thus, following my decision in RAS 23 to grant the Amendment Application, prayers one and two became unsustainable. I therefore dismissed these two prayers.

45 I would further add that the guarantee mentioned in prayer one was not void although it had been given in favour of Norb. If Thu was convinced that the guarantee could be set aside on this ground he should have appealed against the summary judgment.

46 In prayer three, Thu alternatively applied for leave to appeal against the summary judgment. Thu had conceded in his written submissions that it would have been unmeritorious for him to apply for an extension of time to appeal against the summary judgment given the undue delay of close to two years and the late stage of the proceedings:[34]

> … The stage of proceedings are so late in the day that Bankruptcy in the form of HC/B 2527/2016 is already knocking on the Applicant's [*ie*, Thu's] door. Given these circumstances, it would have been too late in the day as well as wholly unmeritorious for the Applicant [*ie*, Thu] to apply for extension of time to appeal against the O14 Judgment.

47 By Thu's own admission, he could not provide any good reasons for his inordinate delay in filing his appeal against the summary judgment. The timeline given for an appeal against a summary judgment in the ROC is 14 days. Thu was right that if he had applied for an extension of time to appeal against the summary judgment now, he would probably have failed. Setting aside this summary judgment was Thu's key bulwark to Ku's bankruptcy action. For the same reasons, I dismissed prayer three.

48 Prayer four, in which Thu sought a stay of the bankruptcy application, would also be dismissed following my decisions on prayers one to three. When RAS 23 was dismissed, Thu's argument that Norb could not bring an action in the summary judgment application and the bankruptcy proceedings became unsustainable. Thu also could not furnish any other reasons to stay the bankruptcy action.

49 Furthermore, Ku's counsel stated that he would be making the consequential amendments to the bankruptcy proceedings as a result of the

[34] Applicant's Supplemental Written Submissions for OS 325/2017, para 22.

court's decision in RAS 23, *ie*, that the applicant in the bankruptcy proceedings would also be amended from Norb to Ku. There was accordingly no basis to grant prayer four.

50 For nearly two years, Thu had failed to appeal against the contested summary judgment that had been awarded against him. Hence his application to appeal was completely hopeless. In the face of imminent bankruptcy proceedings and out of desperation, Thu brought OS 325, urging the court to exercise its discretion to declare the summary judgment and the guarantee void or to set aside the summary judgment. He even asked for leave to appeal although he knew that he was out of time and had no good reasons for his delay. In my view, this backdoor strategy to circumvent the appeal process was an abuse of the court's process. For the foregoing reasons, I therefore dismissed OS 325.

Costs

51 Relying on the Guidelines for Party-and-Party Costs Awards in the Supreme Court of Singapore, Ku asked for $10,000 for the costs of RAS 23 and between $4,000 and $15,000 for the costs of OS 325 given that there was no basis for this application. Thu recognised that costs would be paid to Ku but asked for costs to be fixed at $10,000 for both applications including disbursements. I fixed costs at $12,000 for both RAS 23 and OS 325, inclusive of disbursements. Subsequently, the parties wrote to the Court that they had agreed to apportion the fixed costs into $8,000 for RAS 23 and $4,000 for OS 325, inclusive of disbursements. I had no objection to this application.

Tan Siong Thye
Judge

Ong Ying Ping and Chew Zijie (Ong Ying Ping Esq) for the applicant in OS 325/2017 and the appellant in RAS 23/2017;
Tan Wen Cheng Adrian and Janus Low (August Law Corporation) for the respondent in OS 325/2017 and RAS 23/2017.
