

Ling Mang Khong Stanley v Teo Chee Siong and others (Yeo Boon Hwa, third party)
[2013] SGHC 58

Case Number : Suit No 752 of 2007 (Registrar's Appeal No 459 of 2012)
Decision Date : 07 March 2013
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Mark Goh and Andrew Goh (Mark Goh & Co) for the plaintiff; Deepak Natverlal (Maximus Law LLC) for the defendants; Dominic Chan (Characterist LLC) for the third party.
Parties : Ling Mang Khong Stanley — Teo Chee Siong and others (Yeo Boon Hwa, third party)

Civil Procedure – Striking Out

7 March 2013

Lai Siu Chiu J:

Introduction

1 Tee Chee Siong ("the first defendant"), and Christopher Goh Wee Min ("the second defendant") (hereinafter referred to collectively as "the defendants") were the appellants in Registrar's Appeal No 459 of 2012 ("the Appeal") in Suit No 752 of 2007, in which Yeo Boon Hwa ("the third party") was the respondent. The defendants appealed against the decision of the assistant registrar ("the AR") made on 12 November 2012 allowing the third party's application in Summons No 5071 of 2012 ("the Striking-Out Application") to strike out the defendants' statement of claim against him. As the defendants have filed a notice of appeal (in Civil Appeal No 159 of 2012) against my dismissal of the Appeal, I shall now set out the grounds for my decision.

The background

2 Ling Mang Khong Stanley ("the plaintiff"), the first and second defendants and the third party were shareholders in Anewtech Systems Pte Ltd ("the third defendant"). The crux of the dispute between the plaintiff and the three defendants centred on a meeting on 7 April 2007 ("the Meeting") at which the first and second defendants allegedly misled the plaintiff into selling his shares in the third defendant for a low price without disclosing that there were Taiwanese investors scheduled to invest in the third defendant, which would have more than tripled the third defendant's share price.

3 The plaintiff commenced proceedings against the three defendants on 30 November 2007 based, *inter alia*, on breach of fiduciary duties/trust as directors, misrepresentation, deceit and conspiracy to injure. The plaintiff also obtained an Anton Piller order on 4 December 2007 against the first and second defendants. In the execution of the Anton Piller order on the first and second defendants, the desk of the second defendant at the office of the third defendant at No 1026 Tai Seng Avenue #03-3544, Singapore, was raided on 10 December 2009 and documents belonging to the third defendant were taken away by the supervising solicitor for the Anton Piller order. I should add that the Anton Piller order itself was not extended to the third defendant even though its documents were seized. The defendants commenced third party proceedings against the third party thereafter.

4 The plaintiff's claim was struck out in Registrar's Appeal No 165 of 2010, but the plaintiff was successful in his appeal against that decision. Pursuant to the order made by the appellate court on 10 November 2011 in Civil Appeal No 20 of 2011 ("the CA Order"): (a) the order of court striking out the plaintiff's claim was set aside; (b) the plaintiff's claim against the third defendant was discontinued; (c) the Anton Piller order effected against the third defendant was discharged with costs to be paid by the plaintiff; and (d) an inquiry was ordered to be held to determine whether the third defendant had sustained any damage by reason of the Anton Piller order and, if so, what damages the plaintiff ought to pay pursuant to his undertaking in the Anton Piller order. The inquiry, however, was ordered to be stayed until after the trial between the plaintiff and the defendants.

5 After the CA Order, the plaintiff amended and narrowed his claim to one of misrepresentation. The defendants amended and filed their statement of claim against the third party on 9 July 2012. On 3 October 2012, the third party filed the Striking-Out Application.

The decision below

6 The AR held that there was no authority that supported the proposition that an application for striking out should be dismissed on the ground that it was made close to trial. The third party's consent to the amendments made to the defendants' statement of claim against him did not result in his being estopped from making the Striking-Out Application.

7 The defendants alleged that the third party had conspired with the plaintiff to bring a frivolous claim against them, and that he had collaborated with the plaintiff, thereby obtaining an Anton Piller order without disclosing to the court their wrongful and collateral purpose. The AR held that those claims were no basis for the defendants to seek an indemnity or a contribution from the third party pursuant to O 16 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules").

8 Accordingly, the AR struck out the defendants' statement of claim against the third party on the ground that it did not disclose a reasonable cause of action.

The defendants' case

9 In the Appeal, the defendants raised several arguments as to why the AR's decision was wrong. First, the Striking-Out Application was made at a late stage of the proceedings and no valid reasons had been given by the third party for such lateness.

10 Second, the third party was estopped from making the Striking-Out Application because he had consented to the amendments to the defendants' statement of claim against him.

11 Third, leave to amend should have been granted to the defendants to rectify any particulars lacking in their statement of claim against the third party.

12 Fourth, the defendants were entitled to a contribution from the third party because the third party had been present at the Meeting where the alleged misrepresentations took place; hence, he was a joint tortfeasor.

13 Fifth, the third party had colluded with the plaintiff to injure the defendants by seeking an Anton Piller order and commencing the current action against the defendants.

14 Sixth, even though the plaintiff had elected to discontinue his claim against the third defendant, that did not preclude the third defendant from continuing to be a defendant in respect of

the third party proceedings.

15 Lastly, the third party's intention by the Striking-Out Application was to cause the trial dates to be vacated and this amounted to an abuse of process.

The Third Party's case

16 The third party, on his part, presented seven arguments as to why the AR's decision should be upheld. First, the defendants' claim against him for malicious prosecution was unsustainable because:

- (a) a civil suit could not form the subject matter of a claim for malicious prosecution;
- (b) the main action had not been completed; and
- (c) the right party for the defendants to sue *vis-à-vis* their claim for malicious prosecution should be the plaintiff and not the third party.

17 Second, the defendants' claim in the third party proceedings that the third party had poached their business, suppliers and clients formed the subject matter of another claim in District Court Suit No 1993 of 2008 ("the DC Suit"). Allowing this claim to be the basis of the third party proceedings in the present action would amount to multiplicity of proceedings and an abuse of process.

18 Third, the defendants' claim of conspiracy by the plaintiff and the third party in commencing a malicious prosecution was equally unsustainable because:

- (a) the plaintiff's claim had not yet been adjudicated and hence, it could not be said that the plaintiff's claim was frivolous and/or that the predominant purpose of the claim was to injure the defendants; and
- (b) the defendants' claim that the third party poached their business, suppliers and clients was the subject matter of the DC Suit. (It should be noted that this argument has no bearing on the defendants' claim on conspiracy.)

19 Fourth, in respect of the plaintiff's claim in misrepresentation, the defendants could not claim contribution from the third party because the common law did not allow any contribution from a fellow tortfeasor. Further, it was not disputed that the third party had kept quiet at the Meeting and did not owe any duty to convey any information to the plaintiff.

20 Fifth, the defendants' claim of conspiracy by the plaintiff and the third party in obtaining the Anton Piller order was obviously unsustainable because the Court of Appeal had ordered the plaintiff to pay damages to the third defendant for any loss occasioned by the Anton Piller order, although the inquiry was to be postponed pending the outcome of the trial of the main action.

21 Sixth, the third defendant was no longer a party to the main proceedings. There was therefore no basis for the third defendant to claim an indemnity and/or contribution from the third party.

22 Lastly, the defendants' claim was scandalous, frivolous, vexatious or an abuse of process as it was meant to dissuade the third party from testifying for the plaintiff. Exposing the third party to civil liability for being a witness for the plaintiff was against public policy as it would deter honest witnesses from testifying in court.

The law

23 Under O 16 r 1 of the Rules, a defendant may initiate third party proceedings against a person who is not already a party to the action ("the proposed third party") if the defendant:

- (a) claims against the proposed third party any contribution or indemnity;
- (b) claims against the proposed third party any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
- (c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and the defendant, but also as between either or both of them and the proposed third party.

Only O 16 r 1(1)(a) (*viz*, a claim for contribution or indemnity), as pleaded by the defendants, was relevant in the Appeal.

24 A right to contribution usually arises as between joint debtors, joint contractors, joint trustees, joint sureties or joint wrongdoers, and it may be created by statute (*Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell Asia, 2013) at para 16/1/2). A right to claim contribution is created by s 15 of the Civil Law Act (Cap 43, 1999 Rev Ed), which states that "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage, whether jointly with him or otherwise".

25 A right to an indemnity may arise by express contract or from some statute, or it may be implied from some principle of law (*Singapore Civil Procedure 2013* at para 16/1/3). Proceedings on a third party notice may, at any stage of the proceedings, be set aside by the court under O 16 r 6 of the Rules. The principles applicable to an application to set aside a third party notice are the same as those governing the determination of an application to strike out a plaintiff's claim under O 18 r 19 of the Rules or under the inherent jurisdiction of the court (*Lee Kuan Yew v Nair Devan (Straits Times Press (1975) Ltd and another, third parties)* [1992] 3 SLR(R) 757).

My decision

Preliminary issues

26 As preliminary issues, the defendants argued that the Striking-Out Application should not be allowed because: (a) of the third party's delay in filing the application; and (b) the third party had consented to the amendments to the defendants' statement of claim against him.

27 It should be noted, however, that O 18 r 19(1) of the Rules provides that a striking-out application may be made at any stage of the proceedings. The rule states:

The Court may *at any stage* of the proceedings order to be struck out ... any pleading ...
[emphasis added]

28 While an application to strike out a pleading should be made as soon as possible, a late application is not doomed to failure (*Tapematic SpA v Wirana Pte Ltd and another* [2002] 1 SLR(R) 44 at [66], approved in *Orient Centre Investments Ltd and another v Société Générale* [2007] 3 SLR(R) 566 at [61]).

29 Although the third-party notice in the present case was filed on 30 January 2008, the plaintiff's claim based on misrepresentation only became clear on 15 November 2011 when the plaintiff's statement of claim (Amendment No 4) was filed following the CA Order. In the plaintiff's statement of claim (Amendment No 4), the causes of action were for breach of contract, breach of the memorandum and articles of the third defendant and oppression under s 216 of the Companies Act (Cap 50, 2006 Rev Ed). The defendants' statement of claim (Amendment No 6) against the third party following the plaintiff's statement of claim (Amendment No 4) was only filed as late as 9 July 2012, while the defendants' amended defence to the latter statement of claim was filed on 24 July 2012.

30 Even though the defendants' allegations against the third party in their statement of claim (Amendment No 6) against him were not entirely different from the allegations in their earlier statements of claim against him, the positions of both the plaintiff and the defendants had to be known before the third party knew what claims he had to meet and whether to apply for a striking out of those claims. This is because the defendants' claim against the third party was essentially for a contribution and/or an indemnity under O 16 r 1(1)(a) of the Rules. Since there were significant changes in the plaintiff's cause of action and since the Striking-Out Application was filed on 3 October 2012, less than two months after the close of pleadings (on 7 August 2012), the Striking-Out Application was not made too late. An application to strike out the defendants' statement of claim against the third party before 9 July 2012 would have been premature.

31 As for the defendants' argument that the Striking-Out Application should not be allowed because the third party had consented to the amendments to the defendants' statement of claim against him, there was no basis for such an argument. This was not a case of *res judicata* – there was no previous similar application. Neither was this a case of issue estoppel because the issue of whether the defendants' claim should be struck out under O 18 r 19 of the Rules was not decided when the defendants' statement of claim against the third party was amended.

Conspiracy

32 The defendants claimed that the third party had conspired with the plaintiff to commence a frivolous claim against them and to obtain an Anton Piller order against them. Even if that was true, it is not a recognised ground for bringing third party proceedings under O 16 r 1 of the Rules against the third party. Any conspiracy between the plaintiff and the third party does not give the defendants a right to contribution or indemnity against the third party. In other words, the defendants' claim against the third party, in so far as it was based on O 16 r 1(1)(a) of the Rules, was legally unsustainable.

33 The defendants' claim did not come under O 16 r 1(1)(c) of the Rules either. As held in *Nganthavee Teriya (alias Gan Hui Poo) v Ang Yee Lim Lawrence and others* [2003] 2 SLR(R) 361 at [37], it is a requirement of this rule that "the issues on which it is sought to have a determination between the defendant and the proposed third party must already be issues in the action between the plaintiff and the defendant". In the present case, the defendants did not seek to counterclaim against the plaintiff in an action for conspiracy. Therefore, O 16 r 1(1)(c) of the Rules would not assist the defendants.

34 As for the defendants' claim in conspiracy in relation to the plaintiff's conduct in bringing a frivolous claim against them, the proper course would be for the defendants to commence an action against the plaintiff and the third party for conspiracy after the present proceedings have concluded. For one, it will then be clearer whether the plaintiff has a legitimate claim. If the plaintiff's claim in the present action fails, it may well support the defendants' claim in conspiracy, *viz*, that the plaintiff launched a frivolous claim against them with the predominant purpose of injuring them.

35 As regard the two defendants' claim in conspiracy based on the plaintiff's conduct in obtaining an Anton Piller order against them, the plaintiff had undertaken to compensate the defendants for any loss sustained by the granting of such an order. However, the Court of Appeal only awarded the third defendant damages to be assessed and paid by the plaintiff. Therefore, no claim could lie against the third party unless the plaintiff was unable to meet the claim for damages when assessed.

36 Further, where a party commences a new action in respect of a claim which was the subject matter of previous proceedings, it is liable to be struck out for abuse of process unless that party can show a good reason to justify the commencement of the new action (*Syed Ahmad Jamal Alsagoff v Harun bin Syed Hussain Aljunied* [2011] 2 SLR 661 at [42]). In so far as the defendants' claim against the third party related to the alleged poaching of their business, suppliers and clients, whether in the form of conspiracy or breach of confidence and restrictive covenants, that is already the subject of the pending DC Suit. As the defendants' claim did not come under O 16 r 1 of the Rules, their statement of claim against the third party should be struck out.

Concurrent tortfeasor

37 The defendants argued that the third party was a concurrent tortfeasor with the plaintiff. However, this was not pleaded in their statement of claim against the third party. The portion of their statement of claim which seemed to allude to the third party being a concurrent tortfeasor merely stated at para 2.2:

...The Defendants would aver that if the 1st and 2nd Defendants are in breach of any purported duty to the Plaintiff and/or have misrepresented as alleged or otherwise, which is denied, the Third Party (at the material time a shareholder, and a confidante of the Plaintiff) had also participated, acquiesced and consented to many of the events in issue as General Manager of the 3rd Defendant, and personally financially benefited from the Plaintiff's exit from the 3rd Defendant as General Manager of the 3rd Defendant. The 1st and 2nd Defendants herein claim a full indemnity against the Third Party for the frivolous claims brought by the Plaintiff against them which the Plaintiff himself has orchestrated and conspired with.

38 There were several problems with the above pleading. Notably, the defendants did not claim that the third party was a concurrent tortfeasor with the plaintiff by participating in any misrepresentation to the plaintiff. Instead, the defendants claimed an indemnity against the third party "for the frivolous claims brought by the plaintiff against them which the plaintiff himself has orchestrated and conspired with" on the ground that the third party had "participated, acquiesced and consented to many of the events in issue as General Manager of the 3rd defendant, and [had] personally financially benefited from the plaintiff's exit". In other words, the defendants alleged that the third party had knowledge of the entire transaction, knew that the plaintiff's claim was frivolous, and yet conspired with the plaintiff to bring about the claim. The third party could have expected a claim by the defendants against him for conspiracy, but he would have been taken by surprise by the novel claim that he was a concurrent tortfeasor with the plaintiff.

39 Further, any particulars stated in the defendants' statement of claim against the third party relating to any participation of the third party did not suggest that the defendants were contending that the third party participated in the alleged misrepresentations to the plaintiff. Paragraph 5 of the defendants' statement of claim (Amendment No 6) against the third party pleaded:

...

l. The Third Party had full knowledge of the terms on which the 2nd Defendant purchased the shares of the Plaintiff;

m. The Third Party was aware, as it had been agreed, that the 2nd Defendant would thereafter re-transfer some of the Plaintiff's shares to the 1st Defendant and the Third Party equally;

n. The shares were accordingly re-transferred and the agreements executed and stamped;

o. The Third Party was the one who computed the mechanics of the re-transfer and assigned himself the full uplift of the Plaintiff's portion of the investment gain. Therefore the Third Party benefited disproportionately from the Plaintiff's exit as the General Manager of the 3rd Defendants;

...

40 The defendants could not have pleaded that the third party participated in any misrepresentation by the defendants to the plaintiff because the defendants' defence was that there were no such misrepresentations as alleged by the plaintiff. What was pleaded by the defendants in para 5(o) and para 8 of their statement of claim (Amendment No 6) was that the third party benefited disproportionately from the plaintiff's sale of his shares to the second defendant. I do not see the relevance of that allegation to the issue of being a concurrent tortfeasor.

41 Order 18 r 19 of the Rules gives the court the discretion to allow an amendment of a statement of claim as an alternative to striking it out. As was held in *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 at [12], the court's general approach to an application to strike out a statement of claim is to "consider if the deficiency or defect therein, on the basis of which the application was made, could be cured by an amendment, and would prefer to allow an amendment rather than to take the drastic course of *striking it out*". In this case, I did not think the defendants' statement of claim (Amendment No 6) could be improved by further amendments.

42 As shown in the above analysis at [26]–[36], the various grounds which the defendants sought to rely on to challenge the Striking-Out Application were unmeritorious. Coupled with the absence of a claim that the third party was a concurrent tortfeasor with the plaintiff in the defendants' statement of claim against him and the lack of particulars which could support such a claim, the totality of the circumstances suggested that the defendants' purpose in launching third party proceedings against the third party was not to seek a contribution or an indemnity from him, but to dissuade him from testifying for the plaintiff, knowing that the third party was a key witness to what transpired at the Meeting where the alleged misrepresentations took place.

43 The commencement of third party proceedings for a collateral purpose other than the legitimate pursuit of a remedy is an abuse of process (*Lonrho PLC and Others v Fayed and Others (No 5)* [1993] 1 WLR 1489; and *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649). Accordingly, the defendants' statement of claim (Amendment No 6) against the third party was struck out as I did not allow further amendments to that statement of claim. Should the trial of the main action reveal facts which could support a legitimate claim by the defendants for contribution or indemnity against the third party, the defendants are at liberty to commence proceedings afresh against the third party to claim a contribution or an indemnity.

Conclusion

44 For the reasons set out earlier, I dismissed the Appeal with costs fixed at \$5,000 to the third party, excluding disbursements on a reimbursement basis.

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