

Ng Kit Har v Yii Chee Ming
[2008] SGCA 6

Case Number : CA 43/2007
Decision Date : 26 February 2008
Tribunal/Court : Court of Appeal
Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s) : Thio Shen Yi and Adeline Lee Huay Yen (TSMP Law Corporation) for the appellant; Cheah Kok Lim (Sant Singh Partnership) and Keh Kee Guan (Tang & Tan) for the respondent
Parties : Ng Kit Har — Yii Chee Ming

Civil Procedure – Third party proceedings – Failure to serve third-party notice before conclusion of main action – Legislative intent and construction of provisions on third-party proceedings – Whether third-party action validly constituted

26 February 2008

V K Rajah JA (delivering the grounds of decision of the court):

1 Within the broad terrain of civil procedure, the rules on third-party proceedings in O 16 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") have a narrow but significant role. These rules encourage the combination of a plaintiff's claim against a defendant (referred to in these grounds of decision as a "main claim") with a claim by the same defendant against a person who is not already a party to the main claim (a "third-party claim") if the main claim and the third-party claim are related in the manner delineated in O 16 r 1(1) of the Rules. The court may then either determine both the main claim and the third-party claim simultaneously, or direct a sequential hearing of the third-party action. In this way, the court can determine in a single action the issues in dispute among all the parties involved. This avoids the unnecessary delay and costs occasioned by separate suits as well as the potential conundrum of different outcomes being reached in relation to the same factual issues. It also ensures that the third party is bound by the decision on the main claim. The third-party claim, however, is distinct from the main claim and cannot be affected by any compromise effected *vis-à-vis* the main claim without the third party's consent.

2 At its simplest, the mechanics of O 16 of the Rules allow a defendant who has entered an appearance in an action to issue a third-party notice against a third party. When that notice is served on the third party, he shall, by virtue of O 16 r 1(3), be, as from the time of service, a party to the action with the same rights in respect of his defence against any claims made against him in the third-party notice as if he had been sued in the ordinary way in respect of those claims by the defendant.

3 This appeal raised the issue of whether a third-party action can be validly constituted if the third-party notice is served only *after* the action in respect of the main claim ("the main action") has ended. We held the answer to be in the negative – in others words, a third-party action is only validly constituted if the third-party notice is served *before* the main action ends. We now give the reasons for our decision.

The facts

4 In 1999, Banque Nationale de Paris ("BNP") commenced Suit No 344 of 1999 ("S 344/1999") against the appellant, Mdm Ng Kit Har ("Mdm Ng"), for the sum of US\$4.8m, and Suit No 605 of 1999 ("S 605/1999") against Mr Tan Teow Gim ("Mr Tan") for the sum of US\$1.7m. The two actions (collectively referred to as "the Main Actions") were founded on guarantees issued by Mdm Ng and Mr Tan respectively. BNP filed the writ for S 344/1999 on 3 March 1999 and that for S 605/1999 on 22 April 1999. Mdm Ng and Mr Tan filed their defences on 3 May 1999 and 20 May 1999 respectively, and issued third-party notices (collectively referred to as "the Original Third-Party Notices") against the respondent, Mr Yii Chee Ming ("Mr Yii"), on 25 May 1999 and 1 July 1999 respectively. Under the Original Third-Party Notices, Mdm Ng and Mr Tan claimed an indemnity or contribution from Mr Yii to the extent of BNP's claims against them in the Main Actions on the basis that they had been acting as nominees or agents of Mr Yii, and/or that Mr Yii had agreed that he would be liable to BNP under the guarantees and/or would indemnify them against any claims made against them under the guarantees.

5 Mdm Ng and Mr Tan, on 26 May 1999 and 1 October 1999 respectively, obtained leave to serve the Original Third-Party Notices on Mr Yii in Malaysia. After a Malaysian law firm effected service, Mr Yii entered appearance in response to Mdm Ng's third-party notice ("the May 1999 Third-Party Notice") on 5 July 1999 and sought to set aside the service of that notice. The court did so on 30 August 1999. Notwithstanding that, Mdm Ng subsequently obtained fresh leave to serve the May 1999 Third-Party Notice out of jurisdiction on Mr Yii, but was unsuccessful in effecting personal service.

6 On 19 January 2000 and 13 March 2000, orders for substituted service of the Original Third-Party Notices were made (each of the orders prescribed a different mode of substituted service). On 16 May 2000, a pre-trial conference was held, at which Senior Assistant Registrar Audrey Lim decided that the Main Actions would proceed even though the Original Third-Party Notices had not been served on Mr Yii yet. Counsel for Mdm Ng and Mr Tan agreed with this direction. The Main Actions ended with judgment given in favour of BNP by Amarjeet Singh JC on 9 June 2000.

7 Between 2000 and 2002, further attempts were made to serve the Original Third-Party Notices on Mr Yii, but these were all unsuccessful. Finally, on 16 August 2002, Mdm Ng and Mr Tan purported to serve the Original Third-Party Notices by substituted service, and subsequently applied on 23 September 2003 to enter judgment in default of appearance against Mr Yii. The applications were heard on 6 October 2003, and were disallowed on the ground that Mdm Ng's and Mr Tan's third-party actions against Mr Yii were deemed under O 21 r 2(6) of the Rules of Court (Cap 322, R 5, 2001 Rev Ed) to have been discontinued after a year of inactivity. However, on 15 December 2003, Mdm Ng obtained leave to issue a fresh third-party notice against Mr Yii. Thereafter, she tried to serve the fresh notice on Mr Yii twice, but failed on both occasions.

8 On 6 September 2005, Mr Tan rejoined the fray, presumably after realising that Mdm Ng had managed to obtain leave to issue a fresh third-party notice. He similarly applied for leave to issue a fresh third-party notice against Mr Yii. At the hearing of that application on 26 September 2005, Assistant Registrar Yeong Zee Kin directed counsel for Mr Tan (who was also acting for Mdm Ng) to apply for reinstatement of the original third-party notice issued by Mr Tan in July 1999, rather than seek leave to issue a fresh third-party notice. The assistant registrar also directed counsel to take out an application to regularise the May 1999 Third-Party Notice in respect of Mdm Ng's third-party claim against Mr Yii. Mdm Ng accordingly took out an application to, *inter alia*, reinstate the May 1999 Third Party Notice. That application was served on Mr Yii on 27 October 2005. Court orders reinstating the Original Third-Party Notices ("the reinstatement orders") were made on 17 November 2005.

9 On 8 September 2006, Mr Yii applied to set aside the reinstatement orders. On 3 January

2007, Assistant Registrar Denise Wong set aside the reinstatement orders on the ground that Mr Yii would have been unduly prejudiced by the long delay in the third-party proceedings against him. On 16 January 2007, Mdm Ng and Mr Tan appealed against the assistant registrar's decision.

10 Both appeals were dismissed by the High Court judge ("the Judge") on 22 March 2007 (see *Banque Nationale de Paris v Ng Kit Har* [2007] SGHC 101 ("the GD")). The Judge rejected Mdm Ng's and Mr Tan's arguments for reinstatement on three grounds, namely:

- (a) when a main action had proceeded without any direction as to third-party proceedings, the doctrine of *res judicata* would extinguish all pending matters once judgment was given in respect of the main action (see the GD at [3]);
- (b) Amarjeet Singh JC had already dismissed the contention which Mdm Ng and Mr Tan continued to maintain against Mr Yii in the third-party proceedings, *viz*, that they had acted as Mr Yii's agents (*id* at [4]); and
- (c) Mdm Ng and Mr Tan had not acted with due diligence in proceeding against Mr Yii (*id* at [5]).

11 Mdm Ng (but not Mr Tan) appealed against the decision of the Judge. Notwithstanding the convoluted case history, the essential facts can be briefly summarised as follows: Mdm Ng failed to effect valid service of the May 1999 Third-Party Notice on Mr Yii before the Main Actions ended with judgment awarded in BNP's favour on 9 June 2000. She allegedly served that third-party notice on Mr Yii on 16 August 2002, but her third-party action against the latter had, by then, been deemed to be discontinued due to inactivity for more than a year. She therefore sought the reinstatement of the May 1999 Third-Party Notice in the hope of resurrecting her action against Mr Yii.

The legal issues

12 Whilst the Judge adopted a *res judicata* line of reasoning in upholding the assistant registrar's decision to set aside the reinstatement orders, we considered, on the other hand, that a prior issue to be determined was whether Mdm Ng's third-party action against Mr Yii had been validly constituted in the first place. If no such action had been validly constituted to begin with, there was nothing for the court to reinstate. We thus distilled two issues in this appeal, namely:

- (a) whether a third-party action can be constituted through the service of a third-party notice after the main action has ended; and
- (b) if the above question is answered in the affirmative, whether Mdm Ng's third-party action against Mr Yii, which has been automatically discontinued, should be reinstated in the present case.

Whether a third-party action can be constituted through the service of a third-party notice after the main action has ended

13 Counsel for Mdm Ng missed the point in belabouring the principle that a third-party action can continue even after the main action has ended. It bears emphasis at the outset that the *commencement* of a third-party action is different from the *constitution* of such an action. The third-party action is *commenced* once the third-party notice is *issued* (see *Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006) at para 16/1/4), but is only *constituted* upon service of the notice. The significance of the constitution of a third-party action is explained in *Singapore Court*

Practice 2006 (*ibid*) as follows:

Once constituted by *issue and service*, the third party proceeding has a life of its own so that if the main action is settled between the plaintiff and the defendant, the third party proceeding may continue as if it were a separate action. [emphasis added]

14 Similarly, in *Singapore Civil Procedure 2007* (G P Selvam ed) (Sweet & Maxwell Asia, 2007) at para 16/0/2, it is noted that:

[W]here a defendant *issues and serves* a [third-party] notice on another person ... the respective parties stand in relation one to another as if the defendant had brought a separate action against that other person ... The proceedings which thereby arise have or may have, as it were, a life of their own, quite independent of the main action. [emphasis added]

15 Hence, a third-party action, once properly constituted, survives independently of the main action (see *Chong Yew Kee v Wah-Chang International Corp Pte Ltd* [1995] 1 SLR 153). For example, if the main action is settled between the plaintiff and the defendant, the third-party action can still proceed in the same way as if it had been started by a separate action (*Stott v West Yorkshire Road Car Co Ltd* [1971] 2 QB 651 ("Stott")). It must be remembered, however, that the principle that a third-party action may continue as if it is a separate action is premised upon the *precondition* that the third-party action must have been validly constituted in the first place.

16 Accordingly, before Mdm Ng could rely on the principle that her third-party action against Mr Yii could continue independently of the conclusion of the Main Actions, she had to establish that that third-party action had been validly constituted by the *issue and the service* of the May 1999 Third-Party Notice in the first place. In the present case, any such service took place, at the earliest, only on 16 August 2002. This in turn gave rise to the issue of the latest time by which a defendant must serve his third-party notice in order to validly constitute a third-party action.

17 In our view, the third-party notice must be served, at the very latest, before the main action ends. Regardless of the time of issue of the third-party notice, if the notice is served only after the main action has ended, a third-party action cannot be validly constituted. This conclusion is derived from the intent and the letter of the relevant provisions of the Rules.

The express wording of the Rules

18 Order 16 of the Rules does not lay out explicitly the time by which a defendant must serve his third-party notice so as to validly constitute a third-party action. Nonetheless, a close examination of the wording of O 16 r 1(3) of the Rules suggests that there must be a main action subsisting before a third-party action can be constituted. Order 16 r 1(3) states:

Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (referred to in this Order as a third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued. [emphasis added]

19 A plain reading of O 16 r 1(3) suggests that once the third-party notice is served, the third party becomes a party to the *main action*; if the main action has already ended by the time the third-party notice is served, there is no longer any action for the third party to be a party to. Crucially, O 16 r 1(3) of the Rules uses the phrase "a party to the action" [emphasis added] instead

of "a party to an action". This signifies that there must be a main action subsisting in order to sustain the constitution of a third-party action.

20 Such a reading of O 16 r 1(3) of the Rules is in harmony with the other rules under O 16.

21 For instance, O 16 r 7(1), which allows the court, where a third-party action has been validly constituted, to enter judgment at any time in respect of that action for either the defendant or the third party, reads:

Where in any action a defendant has served a third party notice, the Court may at or after the trial of the action, or, if the action is decided otherwise than by trial, on an application by summons, order such judgment as the nature of the case may require to be entered for the defendant against the third party or for the third party against the defendant. [emphasis added]

It is noteworthy that O 16 r 7(1) of the Rules begins with the phrase "Where in any action a defendant has served a third party notice" [emphasis added]. The words "Where in any action" suggest that service of the third-party notice is to be effected *while* the main action is subsisting. By implication, this provision excludes the scenario where the third-party notice is served only after the main action has concluded. The Rules Committee could easily have omitted the words "in any action" if it had intended O 16 r 7(1) of the Rules to operate so long as the defendant had served a third-party notice, but it did not do so.

The spirit and the objective of Order 16 of the Rules

22 The objectives of O 16 of the Rules have been adverted to earlier (at [1] above). *Singapore Court Practice 2006* ([13] *supra*), at para 16/1/1, states as follows:

The objective of the procedure is to enable the parties to raise all issues in relation to the subject-matter of the dispute for the adjudication of the court in one set of proceedings (whether the third party appears in the main action or his dispute with the defendant is determined immediately after the main action), thereby avoiding delay resulting from separate suits, and saving costs which would otherwise be occasioned by a multiplicity of actions.

23 The constitution of a third-party action before the conclusion of the main action squares precisely with this aim: it brings the third party in as a party to the main action, thereby allowing the court to adjudicate in one action on all the issues in a way which it deems fit. This would help to save the time and the costs which would otherwise be occasioned by a multiplicity of actions.

24 Lest it be said that there is dissonance between the principle that there must be a subsisting main action before a third-party action can be validly constituted and the principle that a third-party action can continue even after the main action has ended, this contradiction, it must be pointed out, is apparent rather than real. The significance and the effect of a properly constituted third-party action – *ie*, properly constituted by service of the third-party notice *before* the end of the main action – must be borne in mind. Upon such service, the third party thereafter becomes a party to the main action. This is significant because it allows the third party to fully participate in the main action and the court to adjudicate on all the issues in dispute between not only the plaintiff and the defendant, but also the main parties and the third party.

25 Once a third-party action is properly constituted, the court may make such orders and directions as are expedient to the unique circumstances of each case. If the court considers that the third-party proceedings should be dealt with only after the end of the main action, the court may

make an order to this effect so as to best resolve all the issues in dispute among the parties. In contrast, allowing a third-party action to be constituted *after* the main action has ended cannot achieve the same objectives. This is because, the dispute between the plaintiff and the defendant (*ie*, the main action) having been resolved by then, there is no longer a need to allow a third-party action to be constituted so that the court can adjudicate on all the issues *vis-à-vis the plaintiff*, the defendant and the third party in a single suit. A third party action which purports to be constituted after the main action has concluded is, in reality, a separate proceeding, and should be recognised as such. In short, there is no peg on which such a third-party action can hang. Indeed, in such a scenario, the term "third party" becomes a misnomer as the main action is no longer in existence, with the result that the only parties between whom a live dispute still exists are the defendant to the (already concluded) main action and the so-called "third party".

26 Our holding that a third-party action can only be validly constituted while the main action is still subsisting dovetails neatly with the rationale of allowing a properly constituted third-party action to continue independently even after the main action is resolved (for example, where the main action is settled, as in *Stott* ([15] *supra*)). Whilst the main action is subsisting, the constitution of the third-party action would allow the court the opportunity to consider the most expedient way to adjudicate upon all the issues *vis-à-vis* the plaintiff, the defendant and the third party. Requiring the defendant to abandon the third-party action and issue a fresh statement of claim against the third party if the main action is subsequently settled may, in some cases, only lead to further costs and delay (see *Hunter v Bank of Montreal* (1988) 12 ACWS (3d) 352). Hence, where a third-party action is validly constituted while a main action is subsisting, the former action is allowed to continue notwithstanding the conclusion of the latter action.

27 The foregoing also explains why it would not be incongruous with the spirit of our civil procedure rules to allow the constitution of a third-party action even when the trial of the main action has commenced. The English Court of Appeal in *Walker & Knight v Donne, Mileham & Haddock* The Times (9 November 1976) held that:

There is no limitation upon the power of the court to add a third party as a party to an action, notwithstanding that the trial of the action has commenced, whenever in its discretion it thinks it right so to do.

In essence, the English Court of Appeal considered that, in exceptional cases, the power to add a third party even after the trial of the main action had commenced was necessary so that all the relevant issues could be determined (see *Singapore Court Practice 2006* ([13] *supra*) at para 16/2/1).

28 Further, we are of the view that the position we have taken – *viz*, that a third-party action can only be validly constituted while the main action is subsisting – will not cause undue hardship or potential injustice to the defendant. Subject to any applicable limitation period, the defendant's rights against the third party are not automatically extinguished in the event that the third-party action is not validly constituted or is set aside. A diligent defendant (subject to any applicable statutory provisions on limitation) retains the option of commencing a fresh action against the third party. This comports with this court's earlier reminder in *The Melati* [2004] 4 SLR 7 that a claimant should have his claim adjudicated by the courts on its merits and should not be defeated by non-compliance with procedural requirements, unless there are sufficient grounds which warrant a decision to the contrary effect.

29 Lastly, we emphasise that a defendant must not be allowed *carte blanche* to delay serving his third-party notice until just before the conclusion of the main action. The rules on third-party proceedings are intended to facilitate the dispute resolution process and must not be abused for a

defendant's tactical advantage. Where there is evidence of such abuse, the court retains a discretion under O 16 r 6 of the Rules to set aside the third-party proceedings at any stage. Alternatively, the court may decline to give third-party directions under O 16 r 4 of the Rules, with the effect that the third-party proceedings are rendered nugatory (see *Courtenay-Evans v Stuart Passey & Associates* [1986] 1 All ER 932; *Singapore Court Practice 2006* at para 16/4/10).

Our decision

30 Applying the above principles to the facts of the present appeal, we found that Mdm Ng had plainly failed to validly constitute a third-party action against Mr Yii as the service of the May 1999 Third-Party Notice was, at the earliest, effected only in August 2002, some two years after the conclusion of the Main Actions in June 2000. *A fortiori*, there was no valid third-party action to reinstate.

31 Accordingly, there was no need for this court to even consider the second issue of whether reinstatement should be allowed (see [12] above). We therefore dismissed the appeal with costs and the usual consequential orders.

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