Terrestrial Pte Ltd *v* Allgo Marine Pte Ltd and another and another appeal [2013] SGHC 98

Case Number : Suit No 827 of 2011(Registrar's Appeal Nos. 44 and 45 of 2013)

Decision Date : 06 May 2013

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Edgar Chin (Kelvin Chia Partnership) for the appellant; Govindarajalu Asokan (Gabriel Law Corporation) for the respondents.

Parties : Terrestrial Pte Ltd — Allgo Marine Pte Ltd and another

Civil Procedure – Striking Out

6 May 2013

Chan Seng Onn J:

1 Registrar's Appeal No 45 of 2013 ("RA 45") was an appeal by Terrestrial Pte Ltd ("Terrestrial"), the Plaintiff in Suit No 827 of 2011/B ("Suit 827"), against an order by the Assistant Registrar ("AR") in Summons No. 69 of 2013 ("SUM 69") on 28 January 2013 that Suit No 1000 of 2012/R ("Suit 1000") not be struck out, but consolidated with Suit 827 to proceed as one action. Suit 1000 had been commenced against Terrestrial by Allgo Marine Pte Ltd ("Allgo Marine"), the 1st Defendant in Suit 827.

2 Registrar's Appeal No 44 of 2013 ("RA44") was an appeal by Allgo Marine against the AR's order which dispensed with the filing of any further pleadings for Suit 1000, in particular, the filing of the defence by Terrestrial.

3 At the conclusion of the hearing, I allowed RA 45 and ordered that Suit 1000 be struck out. RA 44 was dismissed. Allgo Marine has appealed against my decision in RA 45. Allgo Marine's application for leave to appeal against my decision in RA 44 was not granted. I set out below the grounds of my decision.

Background

4 Suit 827 was commenced by Terrestrial on 18 November 2011 against Allgo Marine and Koh Lin Yee ("Koh") for monies owing under a loan agreement dated 3 January 2011 ("the Loan Agreement") and an additional loan given on 31 January 2011. Koh is and was at all material times a director of Allgo Marine and was the guarantor under the Loan Agreement.

5 After instituting various procedural challenges, Allgo Marine and Koh eventually filed their Defence and Counterclaim on 27 November 2012, by which they set out (i) a substantive defence and (ii) an alternative defence of set-off, as well as a counterclaim brought by Allgo Marine against Terrestrial seeking damages in the sum of US$1.35m.

6 On 26 November 2012, a day before the Defence and Counterclaim was filed, Allgo Marine filed a Writ of Summons and Statement of Claim in Suit 1000, claiming a sum of US$1.35m against Terrestrial. On 28 November 2012, Allgo Marine filed an amended Writ of Summons ("Writ of Summons (Amendment No 1)") and Statement of Claim ("Statement of Claim (Amendment No 1)") in Suit 1000.

Thereafter, Terrestrial brought an application by way of SUM 69 for the Writ of Summons (Amendment No 1) and Statement of Claim (Amendment No 1) in Suit 1000 to be struck out for being frivolous and vexatious and/or otherwise being an abuse of the process of the court on the basis that the pleadings in Statement of Claim in Suit 1000 raised a cause of action against Terrestrial which was identical to Allgo Marine's counterclaim in Suit 827.

7 At the hearing of Terrestrial's application, the AR recorded that counsel for Allgo Marine had himself admitted that on the face of the pleadings, the Statement of Claim (Amendment No 1) in Suit 1000 was almost identical to the counterclaim in Suit 827. The AR agreed with Terrestrial's position that there was "no logical reason why an additional suit was necessary when the issues could have been dealt with in Suit 827". [note: 1]

8 However, the AR felt that in light of the limited instances in which the court can exercise its discretion to strike out an action pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"), a more appropriate order would be an order for consolidation. [note: 2] She thus ordered that Suit 1000 be consolidated with Suit 827 [note: 3] and further directed that Terrestrial was not required to file any defence in Suit 1000 [note: 4]. Notwithstanding the order for consolidation, the AR awarded costs to Terrestrial as she found that there was no apparent reason why Suit 1000 was necessary in the first place and that Allgo Marine's action in filing Suit 1000 was the reason for parties appearing before the court. [note: 5]

9 Parties thereafter filed their respective appeals against the AR's decision which came before me. Terrestrial's appeal in RA 45 was on the basis that the AR had refused to strike out Suit 1000. Allgo Marine's appeal in RA 44 was not on the basis that the two actions had been wrongly consolidated by the AR but that the AR had dispensed with the filing of any further pleadings for Suit 1000, in particular, the filing of the defence by Terrestrial.

My decision

10 Like the AR, I agreed with Terrestrial's submission that the present Statement of Claim (Amendment No 1) in Suit 1000 was essentially a mirror image of the counterclaim pleaded by the Defendant in Suit 827 and was based on the same cause of action for damages arising from a breach of contract by Terrestrial. A quick perusal of the Statement of Claim (Amendment No 1) in Suit 1000 and the Defence and Counterclaim in Suit 827 revealed:

(a) That the amount claimed in Suit 1000 and the counterclaim in Suit 827 was the same, *viz*, US$1.35m.

(b) Paragraphs 3 to 7 and 30 of the Defence and Counterclaim in Suit 827 were replicated word for word (with some cosmetic amendments) in paragraphs 3 to 8 of the Statement of Claim (Amendment No 1) in Suit 1000.

Thus in Suit 1000, there was a clear duplication of issues already raised by Allgo Marine in its counterclaim to Suit 827.

11 The primary issue therefore was whether the AR was correct in finding that an order for consolidation was more appropriate in the present circumstances and a striking out order was not justified.

12 Order 18 r 19(1) of the Rules of Court provides that:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (*a*) it discloses no reasonable cause of action or defence, as the case may be;
>
> (*b*) it is scandalous, frivolous or vexatious;
>
> (*c*) it may prejudice, embarrass or delay the fair trial of the action;
>
> or
>
> (*d*) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

Apart from this rule, the court pursuant to its authority to regulate its own process has an inherent power to make any order(s) it considers necessary to prevent injustice or an abuse of its process, see Order 92 r 4 Rules of Court. It is trite law that the court will not deprive a plaintiff of his right to have his case adjudicated at trial unless it is a "plain and obvious" case for striking out, see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [18] and further in *The "Bunga Melati" 5* [2012] 4 SLR 546 at [39]. The onus of proof is on the party who makes the application.

13 Counsel for Terrestrial, Mr Chin, referred to the decision of the Court of Appeal in *Bank of Canton Ltd v Dart Sum Timber (Pte) Ltd* [1977-1978] SLR(R) 367 ("*Bank of Canton*") as authority for the proposition that it was *prima facie* vexatious to bring duplicate actions. Relying on the English authority of *McHenry v Lewis* (1883) 22 Ch D 397 at 400, the Court of Appeal in *Bank of Canton* held at [23]:

> If a plaintiff brings two actions in the same court in respect of the same cause of action the court will generally regard it as an abuse of the process of the court and vexatious and would put the plaintiff to his election as to which action he will continue and will stay one of the actions.

In that case, the plaintiffs had filed a claim based on a guarantee given by the defendants. The defendants filed their defence contending that the plaintiffs had not given a notice of demand. The plaintiffs then served a notice of demand and filed a fresh suit against the defendants which was identical to its earlier claim. The Court of Appeal refused to order a consolidation of the suits, and upheld the defendants' application for the plaintiffs to elect which suit they intended to proceed with and for all further proceedings in the other suit to be stayed.

14 Mr Chin also drew my attention to *Syed Ahmad Jamal Alsagoff (administrator of the estate of Noor bte Abdulgader Harharah, deceased) and others v Harun Bin Syed Hussain Aljunied (alias Harun Aljunied) and others and other suits* [2011] 2 SLR 661 347("*Syed Ahmad Jamal Alsagoff*") where Belinda Ang J held at [42]:

> It is not controversial that *where proceedings based on a particular cause of action are in existence, it is* prima facie *an abuse of process to bring a second action based on the same cause of action, and the latter action between the same parties is liable to be struck out ...* Put another way, it is abusing the process of the court to bring a new action without good reason if

the matters can be resolved within an existing action. ... [emphasis added]

15 The above cited decisions refer to duplicate actions commenced by the same party. As such, these decisions could arguably be distinguished from the present case which concerned a counterclaim by Allgo Marine *as a defendant* and a fresh action commenced by Allgo Marine *as a plaintiff*. Drawing such a distinction would however clearly be artificial. A counterclaim effectively operates as a separate action for which the defendant is put in the position of a plaintiff. Order 15 r 2 of the Rules of Court states:

(1) Subject to Rule 5 (2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.

(2) Rule 1 shall apply in relation to a counterclaim *as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant*.

(3) *A counterclaim may be proceeded with notwithstanding that judgment is given for the plaintiff in the action or that the action is stayed, discontinued or dismissed*.

...

[emphasis added]

The principles governing O 15 r 2 were elucidated at paragraph 15/2/5 of *Singapore Civil Procedure 2013* (G P Selvam gen ed) (Sweet & Maxwell, 2013). It stated that a counterclaim is substantially a cross-action which the court would have jurisdiction to entertain as a separate action. In short, Allgo Marine's counterclaim was an independent cause of action from Terrestrial's claim in Suit 827. Allgo Marine would be entitled to seek the reliefs prayed for therein, *regardless of how Terrestrial's claim in Suit 827 was dealt with*. As Jeffery Pinsler SC in the *Principles of Civil Procedure* (Academy Publishing, 2012), further explained at [07.007]:

The *purpose of this process is to enable the defendant to include his claim in the suit brought by the plaintiff rather than commence a separate action which would unnecessarily incur additional expense, time and resources*. *The counterclaim*, which must be pleaded in the defence, *is treated as a separate action and the defendant is put in the position of a plaintiff for this purpose*. [emphasis added]

16 From the foregoing, it was clear to me that the present case was one where a duplicate action had been commenced by the same party. Moreover, allowing Suit 1000 to proceed would defeat the aforementioned purpose of instituting a counterclaim in the first place. Therefore, I found that the commencement of Suit 1000 was *prima facie* an abuse of process of the Court. In fact, when Allgo Marine filed Suit 1000, it already intended to file its counterclaim in Suit 827, which was done on the following day.

17 Notwithstanding a *prima facie* abuse of process, Ang J in *Syed Ahmad Jamal Alsagoff* held at [42] and [47] that the court had discretionary power to permit the new action to proceed if there was good reason to justify it in the circumstances of the case. The burden would be on the party bringing the action to show that the new proceedings were the more appropriate course for the just, expeditious and economical disposal of the matters in dispute.

18 Counsel for Allgo Marine, Mr Govind, submitted that Suit 1000 had to be filed against Terrestrial in order to compel Terrestrial to state in its defence if it was going to rely on the defence of equitable set-off. I rejected Mr Govind's submission. First, his concern that s 3(*d*) of the Civil Law Act (Cap 43, 1999 Rev Ed) which provides:

> the court shall recognise and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities, appearing incidentally in the course of any cause or matter, in the same manner in which the court on its equity side would have recognised and taken notice of the same, in any suit or proceeding duly instituted therein before 1st January 1879

would allow Terrestrial to bring up the defence of equitable set-off to Allgo Marine's counterclaim in Suit 827 without pleading it would not be assuaged by filing Suit 1000. Terrestrial was free to plead its defence to Suit 1000 in a manner similar to its defence to the counterclaim in Suit 827, and thus Suit 1000 would in any event not achieve the purpose intended by Mr Govind. If Terrestrial were to rely on the defence of equitable set-off during the trial of the counterclaim in Suit 827 without having pleaded that defence earlier, Allgo Marine could object to its late inclusion. Further, even if the court were to raise the issue of equitable set-off on its own during the trial of the counterclaim (as it would be entitled to do *per* s 3(*d*) according to Mr Govind) both parties would likely be given the opportunity to address the issue *per* the *audi alteram partem* rule. Allgo Marine would suffer no prejudice in this regard.

19 Second, it was clearly improper to file Suit 1000 for Allgo Marine's alleged purpose. The Court of Appeal held in *Gabriel Peter* at [22], citing *Lonrho plc and others v Fayed and others (No 5)* [1993] 1 WLR 1489, that where an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court. In my view, Mr Govind's submission at [18] clearly disclosed an action brought solely for a collateral purpose. There were other avenues through which Allgo Marine could seek to determine or clarify Terrestrial's pleadings in Suit 827, for instance by seeking further and better particulars or through interrogatories.

20 In any case, Mr Chin confirmed before me that they were presently not pleading a defence of equitable set-off to the counterclaim in Suit 827. However, this was without prejudice to Terrestrial's rights to amend its defence to the counterclaim if it wished to raise such a defence of equitable set-off subsequently.

21 Moreover if Suit 1000 were allowed to continue and if Allgo Marine's appeal in RA 44 was allowed, far from resulting in the just, expeditious and economical disposal of the matters in dispute, Terrestrial would be placed in an invidious position as:

> (a) Terrestrial would have to file a defence which would be similar in nature to its defence to the counterclaim filed in Suit 827; and
>
> (b) Terrestrial would have to file a counterclaim which would be similar in nature to its Statement of Claim in Suit 827 and join Koh as a party to the counterclaim.

Adding to the absurdity of the situation, Allgo Marine and Koh's defence to Terrestrial's counterclaim in Suit 1000 would necessarily be similar in nature to their defence in Suit 827.

Conclusion

22 For the reasons given above, I allowed Terrestrial's appeal in RA 45 and ordered that Allgo

Marine's Writ of Summons (Amendment No 1) and Statement of Claim (Amendment No 1) be struck out as being frivolous or vexatious and an abuse of the process of the court. The cross-appeal brought by Allgo Marine in RA44 was accordingly dismissed. I further ordered Allgo Marine to pay costs and disbursements here and below fixed at $5,000 to Terrestrial.

[note: 1] NE 28 Jan 2013 p 8 Lines 27-29.

[note: 2] NE 28 Jan 2013 p 8 Lines 8-12 and 30.

[note: 3] NE 28 Jan 2013 p 9 Lines 9-12.

[note: 4] NE 28 Jan 2013 p 9 Lines 15-16 and p12 Lines 15-17.

[note: 5] NE 28 Jan 2013 p 11 Lines 23-28.

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