

Syed Nomani v Chong Yeow Peh
[2017] SGHC 117

Case Number : HC/RAS No 10 of 2017 (DC 1797 of 2016))
Decision Date : 24 May 2017
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Amirul Hairi bin Mohamed Rawi (I.R.B. Law LLP) for the plaintiff/appellant; Peh Chong Yeow (Advent Law Corporation) for the defendant/respondent.
Parties : Syed Nomani — Chong Yeow Peh

Civil procedure – Representative proceedings

24 May 2017

Choo Han Teck J:

1 The most basic rule in any litigation is that the correct parties are named in the action. It requires discipline and, often, the responsibility falls on both sides. Sometimes a misjoinder or nonjoinder may be rectified under O 15 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“the Rules”). Sometimes it may not. In any case, it is incumbent upon the solicitors to get the parties right and to have their names correctly spelled. In this case, the defendant is named as Chong Yeow Peh, but he told the court that his name is actually Peh Chong Yeow. It was not explained why this was not pointed out to the plaintiff, or, if it was, why nothing was done to correct the writ.

2 Peh Chong Yeow appeared to represent himself but says that he is not a litigant-in-person because his firm (Peh Chong Yeow is a practising lawyer) is acting for him, with him as the solicitor on record. That may be so, but when Peh Chong Yeow appears to address the court in respect of a suit in which Peh Chong Yeow himself is a defendant, he is a litigant-in-person as far as the court is concerned at the hearing.

3 The substantive matter before this court was an appeal against the order of a District Judge affirming the decision of a Deputy Registrar to dismiss the plaintiff appellant’s application that the defendant respondent, Peh, be appointed as a representative defendant on behalf of himself and 11 others in the plaintiff’s action for the recovery of legal fees pursuant to an agreement allegedly reached between the plaintiff, the defendant and 11 others. I dismissed the appeal and now give my reasons.

4 The defendant and 13 others were involved in the purchase of strata units in a condominium hotel property in Canada from the Le Soleil Group (“the Group”). Disputes arose and the Group brought three lawsuits against the defendant and 13 others in Canada. The plaintiff offered to help with their legal issues. The plaintiff alleges that in 2008, the plaintiff, defendant and 13 others entered into a written agreement regarding the sharing of legal fees (“the Agreement”) for the purposes of defending the Canadian action. The defendant argues that the plaintiff was not a party to the Agreement.

5 The plaintiff originally commenced this action in the High Court against the defendant in his (the defendant’s) personal capacity on 20 December 2014, claiming S\$1,440,000 as liquidated

damages for alleged breaches of the Agreement, but this claim was struck out by the High Court and subsequently not pursued. In the same action, the plaintiff also claimed \$1,1163,764 in Canadian dollars for the legal fees he allegedly paid to Canadian lawyers on behalf of the defendant and 11 others due under the Agreement. This claim was allowed to proceed on a pro-rated basis (since only the defendant had been personally named in the action), which meant that the amount due had to be amended to the smaller sum of S\$72,735.25. The plaintiff accordingly amended and filed his statement of claim on 30 December 2015. Given the significantly lower value of the claim, the action was transferred to the State Courts (District Court Suit 1797 of 2017) ("the Suit").

6 Two of the 13 other persons involved in the Agreement conceded liability to the plaintiff. The plaintiff now hopes for the court to make an order appointing the defendant to represent the remaining 11 persons so that the plaintiff can claim all of the respective pro-rated shares of the legal fees. None of the 11 persons were named in the Suit. On 15 August 2016, the plaintiff made an application under O 15 r 12 of the Rules in the State Courts for the defendant to be appointed a representative defendant to represent and defend himself and 11 others. The Deputy Registrar dismissed the application primarily because the defendant did not have any consent, agreement, or authority from the potential represented defendants to represent them. The District Judge upheld this decision. He noted that in representative defendant actions, each of the potential represented defendants may have a different defence to the claim and the court had to be very careful in ensuring that a representation order would not prejudice the potential represented defendants. The other potential represented defendants had not given consent to such representation. The representation order would also unduly protract the proceedings to the defendant's detriment.

7 The question before me was whether the District Court was wrong to dismiss the plaintiff's application for the representation orders. The plaintiff's application was made under O 15 r 12 of the Rules, which reads:

Representative proceedings (O. 15, r. 12)

12.—(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of the proceedings under this Rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in the exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.

...

8 Under O 15 r 12(1) of the Rules, proceedings may be begun as representative actions without leave of court. This is to be done by an indication of representative capacity on the writ of summons (see O 6 r 2(1)(d) of the Rules). Order 15 r 12(1) of the Rules explicitly requires that the persons have the "same interest" in the proceedings, and the court is given power to order that the action be discontinued as a representative action later on in the proceedings.

9 The two-stage test for O 15 r 12(1) of the Rules was laid down by the Court of Appeal in *Koh Chong Chiah and others v Treasure Resort Pte Ltd and another* [2013] 4 SLR 1204 ("Koh Chong

Chiah”). First, there is a threshold requirement that the represented plaintiffs and/or defendants have the “same interest” in the proceedings. Second, even if this threshold requirement is satisfied, the court has the discretion to refuse to permit proceedings to continue as a representative action if it finds that representative proceedings are not suitable. Considerations include the possibility of defendants raising different defences, the costs involved, as well as any loss of the defendants’ rights against the represented persons (who are not treated as parties to the proceedings).

10 In this case, O 15 r 12(1) of the Rules is inapplicable. The plaintiff had named the defendant personally in the Suit, and not as a representative of the 11 others. The Suit was therefore not commenced as a representative proceeding under O 15 r 12(1) of the Rules. In his decision, the District Judge also stated that the plaintiff’s application was made under O 15 r 12(2), and not O 15 r 12(1), of the Rules. It is therefore unclear why the plaintiff’s arguments focused only on fulfilling the test in *Koh Chong Chiah*, which pertained to O 15 r 12(1) of the Rules, without any explanation as to why this test would be applicable or similar to that under O 15 r 12(2) of the Rules.

11 In my view, the court does not have the power under O 15 r 12(2) of the Rules to order that the proceedings be converted to representative proceedings and appoint a representative defendant for this purpose if representative proceedings have not already been brought under O 15 r 12(1) of the Rules. The opening words of O 15 r 12(1) of the Rules, “at any stage of the proceedings under this Rule”, circumscribe the court’s powers under this sub-rule. It presupposes that the plaintiff has already commenced representative proceedings under O 15 r 12(1) of the Rules by indicating, on the writ of summons filed and served on the defendant(s), the representative capacity in which the plaintiff sues (representative plaintiffs), or the representative capacity of the defendant that the plaintiff is suing (representative defendants). Viewed in the light of O 15 r 2(3) of the Rules (which provides that judgments given in proceedings under this Rule shall be binding on all the represented persons), it is clear that “proceedings under this Rule” refers to representative proceedings that have already been properly commenced under O 15 r 12(1) of the Rules.

12 Order 15 r 12(2) of the Rules is a tool to further streamline and organise the management of the case where representative proceedings have already commenced. In *Irish Shipping Ltd v Commercial Union Assurance Co Plc (The Irish Rowan)* [1989] 3 All ER 853, Purchas LJ described it as the plaintiff’s “right to apply to the court... at any stage of the proceedings to adjust the parties both to the action itself and to those represented”. For example, if it appears from the proceedings that another defendant or a represented person is better able to represent the others, the plaintiff may apply to the court to appoint this person as a representative defendant. This interpretation is bolstered by the fact that the court only has the power to appoint, as representative defendants, any of the defendants or the persons whom the defendants are already representing. The plaintiff does not get a second bite of the cherry by asking the court to appoint an existing defendant to represent non-defendants that were never involved in the litigation (as represented persons or otherwise), conveniently converting the proceedings to a representative one.

13 The defendant was never sued in any representative capacity. None of the other 11 persons are parties (or represented persons) named in this action. None of them were served with the application to have the defendant represent them in a suit in which they might be ordered to pay up to S\$72,735.25 each to the plaintiff. The plaintiff did not apply nor had he sought to make the 11 others defendants under O 15 r 6 of the Rules. Even if he had, no court would have granted the application to join anyone as a defendant if no notice had been served on the potential defendants, or no sound reason had been given explaining why the persons concerned have not been served or joined as defendants. If they are not named as defendants, the application for the defendant to represent them, and have them potentially made liable without them exercising their rights to appoint their lawyers or have their consent to let someone represent them, must surely fail. An application

under O 15 r 12(2) can succeed only if the persons to be represented are already defendants or have persons representing them in the action. No one should wake up to be served with a judgment against him in which he was not a party to. It does not make it any more proper if he was told that someone whom he had not agreed to represent him had represented him at the trial.

14 If the plaintiff wants to assert his claim against the 11 others, he has to join them as defendants. If he wishes to do so via representative proceedings, he should have applied for leave to amend the writ in this particular action or restart the proceedings as a representative action. Even then, the plaintiff has to prove to the court's satisfaction that this case is suited for representative proceedings in accordance with the two-stage test in *Koh Chong Chiah*. I find that, at least in the hearing before me, he has failed to prove this.

15 First, I was not convinced that the represented defendants had the same interest in the matter. The plaintiff's reliance on *Koh Chong Chiah* as authority that O 15 r 12 of the Rules is to be applied broadly and flexibly has to be seen in the light of the Court of Appeal's statement (at [25]) that its discussion of O 15 r 12(1) of the Rules was only from the viewpoint of representative plaintiffs unless otherwise stated. I agree with the District Judge that the court should be more cautious in allowing proceedings with representative defendants as compared to those with representative plaintiffs. The potential prejudice caused to represented defendants is likely to be greater as compared to represented plaintiffs because of the liability the represented defendants face if judgment is entered against them. Although the eventual judgment will not be enforceable against them without leave of court, it is nevertheless binding upon them and onus is placed upon them to justify why the judgment should not apply to them. Each potential represented defendant may have different defences to the plaintiff's claim, which would affect their interest in the matter: see *Koh Chong Chiah* at [64]. Without hearing from these potential represented defendants, it would be unfair to make a finding that they would necessarily have similar defences and thus the same interest in the matter.

16 Second, representative proceedings would not lead to significant procedural efficiency, such as to outweigh any prejudice that may be caused to the potential represented defendants. There are only 11 other persons involved in the matter. There is no minimum number as to what constitutes "numerous persons" in O 15 r 12(1) of the Rules, but cases concerning representative proceedings have usually involved a significantly larger number of represented plaintiffs or defendants, affording far more procedural benefits. In *Koh Chong Chiah*, the representative plaintiffs commenced the suit on behalf of themselves and 202 other members. The defendant submits that the smallest number of represented defendants that has been allowed in a reported case was 30 committee members of a club: *Andrews v Salmon* [1888] W.N. 102. The governing philosophy of O 15 r 12 of the Rules is that it is a tool of convenience in the administration of justice, especially in cases where it would be very procedurally inefficient to have multiple actions on the same issue. The court's role is to ensure that this tool is used only where there is a fair balance between the interests of both parties. In this case, I find that it is feasible for the plaintiff to join the 11 others as defendants to the action without great inconvenience. The administrative efficiency to be gained is relatively little compared to the prejudice that would be caused to the potential represented defendants, who would, amongst other things, be unable to seek security for costs or discovery to protect their position as against the plaintiff.

17 Third, the plaintiff did not adduce any evidence to show that the potential represented defendants had agreed to let the defendant represent them, or that the defendant consented to act as a representative defendant. I do not agree with the plaintiff that consent to representative proceedings had been given in Clause 7.1 of the Agreement. This states:

7.1 Any party to this agreement may enforce any or all the terms of this agreement either singly or jointly with one or more of the other parties to this agreement. It shall not be a requirement that all parties to this agreement be named or included as a party to any legal action or proceedings to enforce the terms of this agreement.

It is disputed that the plaintiff was a party to the Agreement. Even if the plaintiff were a party, Clause 7.1 merely allows one or some parties to enforce the agreement as against another party (to determine that party's own liability) without having to join the rest to the action. I do not interpret it as the parties giving their consent to representative proceedings.

18 The consent of the potential represented defendants and representative defendant is not an absolute prerequisite for representative proceedings to continue, but it is an important factor. Ultimately, the court needs to ensure that it appoints a representative defendant that is able to fairly and capably represent the interests of himself and 11 others during proceedings: *Singapore Civil Procedure 2017*, Vol 1 (Foo Chee Hock gen ed) (Sweet & Maxwell, 2017) at para 15/12/24, citing *Walker v Sur* [1914] 2 KB 930. To do so, it must be aware of the concerns of the representative and represented defendants. In some cases, the court may even require a meeting of the potential represented defendants: *Morgan's Brewery v Crosskill* [1902] 1 Ch. 898 at 900. In this case, the potential represented defendants did not even have the chance to consider the matter. The defendant does not wish to be a representative defendant and there is no evidence that the defendant is in any way implicitly (eg, by being the leader of the group) or explicitly authorised to represent the potential represented defendants. It is in fact evident from the procedural history that the plaintiff is only proposing the defendant as a representative because the defendant was the only person that the plaintiff had sued in the first instance. The plaintiff attempts to argue that the defendant is suitable as a representative because he had drafted the Agreement and was an advocate and solicitor. This does not mean that he can represent the interests of the other 11 persons without their consent.

19 This appeal by the plaintiff was therefore dismissed with costs.