IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 55

Civil Appeal No 58 of 2019

Between

Suresh Agarwal

… *Appellant*

And

Naseer Ahmad Akhtar

… *Respondent*

GROUNDS OF DECISION

[Civil Procedure] — [Striking Out]

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Suresh Agarwal
v
Naseer Ahmad Akhtar

[2019] SGCA 55

Court of Appeal — Civil Appeal No 58 of 2019
Tay Yong Kwang JA; Quentin Loh J
13 September 2019

14 October 2019

Tay Yong Kwang JA:

The facts

1 This appeal was brought against the order of the Judge in the High Court striking out the appellant's application in Summons No 1757 of 2018 ("SUM 1757"). SUM 1757 was taken out in Originating Summons No 624 of 2017 ("OS 624"). Having heard the parties on 13 September 2019, we dismissed the appeal although we disagreed with some of the grounds in the Judge's decision. We now set out our reasons.

2 The appellant held 34.7% and the respondent held 64.3% of the shares in a company called Infotech Global Pte Ltd ("ITG"). The remaining 1% was held by one Pang Hee Hon ("Pang").[1]

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[1] ROA III (1) at p 4 para 4.

3 Disputes emerged among the three shareholders of ITG. On 25 June 2015, the appellant commenced a minority oppression action in High Court Suit No 631 of 2015 ("S 631") against the respondent.[2] S 631 was fixed for trial in October 2017.[3]

4 Sometime in May 2017, the appellant and the respondent began discussions with a view to settling S 631. The action was eventually discontinued on 30 May 2017.[4]

5 The respondent took the position that S 631 was discontinued pursuant to a settlement agreement that was reached between the parties sometime in late-May 2017. On 6 June 2017, the respondent took out OS 624[5] against the appellant and Pang, seeking a determination that there was such a settlement agreement among the parties pursuant to which S 631 was discontinued and pursuant to which the parties agreed to put an end to all disputes between them. The respondent also sought in OS 624 to enforce a term in the settlement agreement for the appellant and Pang to transfer their shares in ITG to the respondent for $100.[6]

6 On 12 April 2018, the appellant took out SUM 1757 in OS 624 and prayed for the following reliefs:[7]

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2 ROA III (1) at p 4 para 6.

3 ROA III (1) at p 5 para 7.

4 ROA III (3) at p 262 para 1.

5 ROA II at p 8.

6 ROA I at p 14 lines 5–8.

7 ROA III (3) at p 265.

(a) That judgment be entered in favour of the appellant against the respondent in the sum of $10,359,120 with interest thereon and costs

(b) Alternatively, that there be an inquiry as to the sums due and payable by the respondent to the appellant and payment be made by the respondent to the appellant of such sums found due and payable

(c) Costs of and incidental to this application be paid by the respondent to the appellant.

7 On 7 January 2019, after having heard the cross-examination of witnesses, the Judge ruled in OS 624 that the respondent had failed to prove that there was a conclusive agreement that the appellant and Pang would transfer their shares to the respondent.[8] Accordingly, the Judge dismissed OS 624 and added that "[f]or the avoidance of doubt, the [respondent] and the [appellant] are at liberty to bring claims contained within S 631 against each other".[9]

8 After the Judge's decision in OS 624 on 7 January 2019, the parties appeared before the Judge again on 21 February 2019 in relation to SUM 1757. It was on this occasion that the Judge struck out SUM 1757.

9 The Judge relied on three grounds in her oral judgment. First, that the appellant's claim for final relief in SUM 1757 could not be brought by way of a summons within an Originating Summons ("OS").[10] Second, there were

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8 ROA III (3) at p 263 para 4 and p 264 para 10.

9 ROA III (3) at p 264 para 10.

10 ROA I at p 14 lines 19–20.

clearly substantial disputes of fact between the parties. Third, the appellant's claims went well beyond the scope of OS 624.[11]

10 On the first ground, the Judge was prepared to waive the procedural irregularity by treating SUM 1757 as notice of a counterclaim under O 28 r 7(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules").[12] In relation to the second ground, the Judge was prepared to allow the conversion of the counterclaim in SUM 1757 to a writ action under O 28 r 8 given the substantial disputes of fact involved.[13] However, she noted that the appellant was not asking for his application to be treated as a counterclaim or for it to be converted to a writ action. Even if the Judge should decide to do the two things stated above in order to assist the appellant (who also appeared in person before the High Court), the Judge stated that, pursuant to O 28 r 7(3), she had to consider whether the subject matter of the counterclaim should be disposed of in that manner. The appellant's claims in SUM 1757 went well beyond the scope of OS 624. The Judge was of the view that "the OS should be confined to its original scope" and stated that the OS was effectively concluded in fact, since she had dismissed the OS at the earlier hearing. The Judge decided that it was not a suitable case for the appellant's claim to be considered a counterclaim in the OS and for the proceedings to be converted to a writ action. Accordingly, the Judge struck out SUM 1757.

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11 ROA I at p 14 lines 20–24.

12 ROA I at p 14 lines 26–28.

13 ROA I at p 14 lines 28–30.

Issues in this appeal

11 We will now discuss the three grounds stated by the Judge in dismissing SUM 1757.

Issue 1: Whether final relief can be claimed in an interlocutory application in an OS

12 Counsel for the respondent cited *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2016] 2 SLR 366 ("*PNG*") at [27] for the proposition that final reliefs could only be sought by way of an originating process and not through an interlocutory application. In that case, the plaintiff in an OS sought a declaration that it was entitled to inspect and take copies of all true accounts, books of account and/or records of the defendant. The OS was an offshoot of an action in Suit 795 of 2014. A summons in Suit 795, which had prayed for the same relief as the OS, was dismissed on the ground that the relief prayed for, being final, had to be sought by way of an originating process rather than through an interlocutory application in Suit 795. As a result, the OS was commenced.

13 Counsel for the respondent was not aware of any other authority for the above proposition on procedure in *PNG*, which was apparently relied upon by the Judge in this case. Although *PNG* involved an interlocutory application within a writ action, instead of an OS as in this case, we do not think that makes a material difference to the perceived principle relating to procedure. We saw no reason why prayers for final relief could only be brought by way of an originating process. Many claims for final relief can be brought by way of interlocutory processes under the Rules. For example, O 14 r 2(1) provides that applications for summary judgment are to be brought by way of summons. In practice, applications to strike out pleadings under O 18 r 19 are brought by way

of summons. Likewise, in practice, applications for judgments or orders upon admissions under O 27 r 3 are brought by way of a summons. All these applications are capable of resulting in final relief for the applicant. It is clear, therefore, that the Rules as well as practice allow final relief to be claimed by way of interlocutory applications within a writ action. As mentioned above, we do not see why the same procedure should not apply in the case of an OS.

14 Counsel for the respondent also relied on this Court's decision in *Rank Xerox (Singapore) Pte Ltd v Ultra Marketing Pte Ltd* [1991] 2 SLR(R) 912 for the test in determining whether an order is an interlocutory or a final one. However, we think this is irrelevant here as the said test was only for the purpose of determining whether leave to appeal to the Court of Appeal had to be obtained under the then existing version of s 34(2) of the Supreme Court of Judicature Act (Cap 322, 1985 Rev Ed). It is certainly not an authority for the proposition that final reliefs could not be claimed by way of an interlocutory application within a writ action or an OS.

15 Accordingly, we respectfully disagreed with the Judge insofar as she held that the appellant's claim for final relief in SUM 1757 could not be brought by way of a summons within an OS.

Issue 2: Were there substantial disputes of fact

16 Order 28 r 8(1) of the Rules, which governs the conversion of an OS into a writ action, is set out below for convenience:

> **Continuation of proceedings as if cause or matter begun by writ (O. 28, r. 8)**
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> **8.**—(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it

> may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

17 It was common ground that before the court exercises its discretion under O 28 r 8(1) to convert an OS into a writ action, the threshold requirement that a substantial dispute of fact is likely to arise had to be met: see *Singapore Civil Procedure 2018: Vol 1* (Foo Chee Hock, gen ed) (Sweet & Maxwell, 2018) at para 28/8/1.

18 The appellant submitted that there were no substantial disputes of fact because the respondent had not filed a reply affidavit to SUM 1757. What the appellant appeared to be saying was that by not responding to the factual allegations against him, the respondent should be deemed to have accepted those allegations and that there was therefore no dispute of fact.

19 As we pointed out to the appellant, the respondent could choose not to reply in an affidavit to the allegations made against him and instead apply for SUM 1757 to be set aside.[14] The fact that the respondent chose to apply for SUM 1757 to be set aside did not mean that he accepted the appellant's allegations against him.

20 We agreed with the Judge that there were clearly substantial disputes of fact. The appellant accepted that his claims in SUM 1757 overlapped with his claims in S 631, which had been discontinued. The appellant also accepted that the claims in S 631 were not determined because the action was discontinued[15]

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14 ROA I at p 11 line 26.

15 See Appellant's Case at [14].

and that the respondent had not conceded or accepted as valid any of the claims advanced against him in S 631. In the Judge's decision pertaining to OS 624,[16] which was handed down on 7 January 2019, she noted that the appellant and the respondent had made claims against each other in S 631 and there had been no determination of the merits of the claims: at [9]. Accordingly, we agreed with the Judge that the matters raised in SUM 1757 were likely to raise substantial disputes of fact, which could justify the conversion of the counterclaim in SUM 1757 into a writ action.

Issue 3: Whether the counterclaim in SUM 1757 should be struck out under O 28 r 7(3) because it went well beyond the scope of OS 624?

21 Despite being prepared to order the conversion of the counterclaim in SUM 1757 into a writ action, the Judge ultimately exercised her discretion under O 28 r 7(3) of the Rules to strike out the counterclaim. This was on the basis that the matters raised in SUM 1757 went well beyond the scope of OS 624.

22 It is useful to first set out O 15 r 2(1) and r 5(2), which concern counterclaims in the context of a writ action, and O 28 r 7, which governs the situation where a counterclaim is brought in an OS.

> **Counterclaim against plaintiff (O. 15, r. 2)**
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> **2.**—(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.
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> …
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> **Court may order separate trials, etc. (O. 15, r. 5)**

[16] ROA III (3) at p 264.

> **5.**—
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> …
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> (2) If it appears on the application of any party against whom a counterclaim is made that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such other order as may be expedient.
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> …
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> **Counterclaim by defendant (O. 28, r. 7)**
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> **7.**—(1) A defendant to an action begun by originating summons who alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising) may make a counterclaim in the action in respect of that matter instead of bringing a separate action.
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> (2) A defendant who wishes to make a counterclaim under this Rule must at the first or any resumed hearing of the originating summons by the Court, but, in any case, at as early a stage in the proceedings as is practicable, inform the Court of the nature of his claim and, without prejudice to the powers of the Court under paragraph (3), the claim shall be made in such manner as the Court may direct under Rule 4 or 8.
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> (3) If it appears on the application of the plaintiff against whom a counterclaim is made under this Rule that the subject-matter of the counterclaim ought for any reason to be disposed of by a separate action, the Court may order the counterclaim to be struck out or may order it to be tried separately or make such order as may be expedient.

23 The Judge held that even if the counterclaim could be converted into a writ action to deal with the substantial disputes of fact in this case, it remained for her to decide, exercising her discretion under O 28 r 7(3), whether the subject matter of the counterclaim should be disposed of in this manner.

24 We disagreed with the Judge's decision insofar as she considered that the counterclaim in SUM 1757 should not be allowed to continue within OS 624 because it raised matters that went well beyond the scope of OS 624. In

particular, we disagreed with the Judge's statement that "the OS should be confined to its original scope". In our view, nothing in O 28 r 7(1), which mirrors the wording in O 15 r 2(1), imposes such a restriction. This was evident in the words of O 28 r 7(1), which expressly allow a defendant in an OS to make a counterclaim in the action if "he has any claim or is entitled to any relief or remedy against the plaintiff in respect of any matter (whenever and however arising)". There is no need for any nexus in law or in fact between the claim in the OS and the counterclaim besides the parties. It is also apparent from the rule that the mode of bringing the counterclaim is not prescribed. There is therefore nothing to prevent the appellant from bringing his counterclaim by way of a summons and/or by setting it out in an affidavit filed in the OS.

25 It is correct that the court retains the discretion under O 28 r 7(3) to decide whether, in all the circumstances of the case, a counterclaim should be allowed to continue within the OS or that it should be tried separately. Counsel for the respondent drew our attention to case law on O 15 r 5(2), a provision that mirrors O 28 r 7(3). In *Drolia Mineral Industries Pte Ltd v Natural Resources Pte Ltd* [2002] 1 SLR(R) 880 for example, the High Court (at [24]–[25]) applied a two stage test involving, first, a balancing of the considerations of procedural convenience in favour of and against the disposal of the counterclaim by a separate action, and second, a consideration of what the overall justice of the case demanded. However, we found nothing in *Drolia* or any of the other authorities cited by the respondent which supports the point that the subject matter of a counterclaim had to have a nexus with the subject matter of the claim, failing which the counterclaim would be struck out. Where a defendant in an OS brings a counterclaim for a totally different matter from the plaintiff's claim in the OS, there is no legal impediment to having both matters heard together or one after the other. Of course, the fact that the subject matter

of a counterclaim is completely alien to the claim under a writ or an OS would be a relevant consideration for the court in deciding whether the counterclaim ought to be tried separately. Accordingly, to the extent that the Judge based her decision to strike out the counterclaim in SUM 1757 entirely on the consideration that the OS should be confined to its original scope and that the counterclaim went well beyond the scope of OS 624, we do not think that it is correct in law.

26 Nonetheless, it did not necessarily follow that the appeal against the Judge's decision to strike out the counterclaim in SUM 1757 must succeed. It remained for this Court to consider whether there were other relevant circumstances that might justify the Judge's decision.

27 The appellant submitted that all the details of his counterclaim (which mirrored his claims in S 631) were already in the record for S 631.[17] The suggestion appeared to be that the counterclaim in SUM 1757 could now be converted into a writ action and whatever affidavits already filed in S 631 could be ordered to stand as pleadings pursuant to O 28 r 8. In other words, the appellant was saying effectively that the counterclaim in SUM 1757 was ready for trial.

28 We disagreed with the appellant's submissions that all the details of his claims were already in the record for S 631. In fact, the parties in S 631 did not even reach the stage of filing affidavits of evidence in chief for trial.[18] The appellant himself deposed in OS 624 that there was a joint inspection of

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17 Appellant's Case at [14].

18 Respondent's Case at [38].

documents between March and May 2017, during which only four out of 14 boxes of documents were fully inspected and listed.[19] A pre-trial conference for S 631 was fixed for 4 September 2017[20] but this was not held because S 631 had been discontinued by then. It was clear to us that the matter was far from ready for trial.

29 The appellant also submitted that he had given notice in SUM 1757 of his intention to refer to two of his affidavits filed in Originating Summons No 1253 of 2017 ("OS 1253") and that those affidavits could be used in the trial of his counterclaim here. In our view, where the parties before the court are the same as in previous proceedings and the subject matter in the action before the court is similar or related to that in the previous proceedings, whether reference to the affidavits filed in the previous proceedings is sufficient for the proceedings before the court would depend on all the circumstances of the case.

30 In our judgment, the appellant's reference to the two affidavits filed in OS 1253 was not helpful, as those affidavits were not in a position to stand as pleadings for the purposes of the appellant's counterclaim in SUM 1757, even if the counterclaim here was converted into a writ action. The appellant could not pinpoint the parts of those affidavits that particularised the grounds of his claim in SUM 1757. This was not surprising, since OS 1253 sought very different reliefs from those sought by the appellant in SUM 1757. OS 1253 was ITG's application for an injunction to restrain the appellant from the unauthorised use of ITG's confidential banking information as well as an order for delivery up of all confidential information relating to ITG in the appellant's

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19 2 RCB 155 at [20].

20 2 RCB 160–161.

possession. The issues and material facts canvassed in OS 1253 were clearly not relevant for the purposes of the counterclaim in SUM 1757, which was essentially premised on allegations of minority oppression. This was another reason why, in our judgment, the counterclaim in SUM 1757 should not be allowed to continue within OS 624.

31 The appellant submitted that he would have problems serving the relevant papers on the respondent if he had to commence a new writ action for his claims in SUM 1757. In our view, this could not be a sufficient reason in itself to allow the appeal. Further, counsel for the respondent informed us that his firm had all along been the focal point for communications between the parties, even though he could not confirm whether he would have instructions to accept service on behalf of his client should the appellant decide to commence a writ action. He also highlighted to us the fact that the respondent had turned up in court for limited cross-examination in OS 624 in April 2018 even though he was not required to do so. The appellant did not challenge this. In our view therefore, there was nothing to show that the respondent would avoid service or that any difficulties in effecting service of court documents on him would be insurmountable if the appellant had to commence a new writ action.

Conclusion

32 In the light of our reasons above, we agreed with the outcome in the High Court but disagreed with the Judge on two of the three grounds upon which she rested her decision. We therefore thought it fair for the costs ordered against the appellant in the High Court to be reduced from $4,500 to $2,500. We also ordered the appellant to pay the respondent the costs of this appeal fixed at $10,000 inclusive of disbursements.

33 Subsequent to the hearing before us, the respondent's solicitors requested by letter that, since the appellant had not yet paid the costs ordered by the High Court, this Court direct that the costs of $2,500 and $10,000 be paid out of the appellant's security deposit for this appeal and that the balance be returned to the appellant. We thought this arrangement was sensible as it would save time and costs for the parties. We therefore acceded to the request and made the direction sought.

Tay Yong Kwang
Judge of Appeal

Quentin Loh
Judge

The appellant in-person;
Khoo Boo Teck Randolph and Vanessa Chiam Hui Ting (Drew & Napier LLC) for the respondent.