

GLOBAL ROYALTY TRADING SAL v DATIN PADUKA SERI HAJJAH ROSMAH BT MANSOR

CaseAnalysis
| [2024] MLJU 1370

Global Royalty Trading Sal v Datin Paduka Seri Hajjah Rosmah bt Mansor [2024] MLJU 1370

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)
ONG CHEE KWAN J
SUIT NO WA-22NCC-164-03 OF 2023
7 June 2024

*Venothani a/p Raja Gopal (with Divesh a/l Ramani) (David Gurupatham & Koay) for the plaintiff.
Mohamed Reza bin Abdul Rahim (with Nur Aiman bt Sharizal) (Reza Rahim & Rajivan) for the defendant.
Mohammad Al-Saifi Hashim (with Syafiq Affandy) (Federal Counsel, Jabatan Peguam Negara) for the proposed third parties.*

Ong Chee Kwan J:

JUDGMENT

Introduction

[1] This judgment deals with an application (“**Enclosure 70**”) by the Defendant to issue a Third Party Notice against the Ketua Polis Negara and the Government of Malaysia (“**the Proposed Third Parties**”) for an indemnity and or contribution in the event the Defendant is found liable to the Plaintiff in respect of the Plaintiff’s claims for loss and damages arising from the Defendant’s failure and or refusal to return certain jewellery which had been delivered by the Plaintiff to the Defendant.

[2] The Proposed Third Parties contended that there is no legal duty to indemnify and or make any contribution to merit the Third Party Notice to be issued.

[3] I agree with the Proposed Third Parties’ contention and dismissed Enclosure 70 with costs.

Background Facts

[4] For the purpose of determining the application under Enclosure 70, only a brief account of the facts will suffice.

[5] Sometime on 10.2.2018, the Plaintiff handed over to the Defendant 44 pieces of jewellery amounting to a retail price of USD \$14,787,770.00 (“**the Jewellery**”).

[6] It is not in dispute that the Defendant did receive the Jewellery.

[7] It is also not in dispute that sometime on 17.5.2018, the Royal Malaysian Police had conducted a raid at the Defendant’s premises and had seized certain items or valuables found at the Defendant’s premises (“**the Raid**”). In this regard, the Royal Malaysian Police had declared that they had taken in all, 12,009 pieces of items and or valuables from the said premises.

[8] In the present action, the Plaintiff claims against the Defendant for the return of the Jewellery save for one

item that the Plaintiff has since recovered from the Royal Malaysian Police, found to be included among the 12,009 pieces of items or valuables that were seized from the Raid.

[9] Enclosure 70 is the Defendant's Notice of Application under Order 16 rule 2, Order 73 rule 8 and or Order 94 rule 4 of the Rules of Court 2012 seeking to issue a Third Party Notice against the Royal Malaysian Police ("**the Proposed First Third Party**") and the Government of Malaysia ("**the Proposed Second Third Party**") for contribution and or indemnity in the event the Plaintiff is successful in its claims against the Defendant in this action.

[10] It is the Defendant's case that the custody and control over the Jewelleries were lost when the Royal Malaysian Police raided her home on 17.5.2018. It is contended that the Royal Malaysian Police had failed to stipulate the manner in which the Raid had taken place and or provide the detailed list of the items taken and or the safeguards which were put in place during the Raid to protect the Jewelleries from being misappropriated by irresponsible officers and or third parties.

[11] According to learned counsel for the Defendant, only the Royal Malaysian Police is privy to the information and details that are required to determine the issues in connection with the proposed third party proceedings.

[12] More specifically, it is the Defendant's case that when carrying out the Raid, the Royal Malaysian Police essentially owed a duty of care to the Defendant that items or valuables in the premises and or that were seized would not be lost, stolen, damaged and or destroyed in the process.

[13] The Defendant contended that it would be premature for the Proposed Third Parties to argue that they would not be liable to an indemnity or to any contribution as the full facts have yet to be ventilated and the extent of their liabilities, if at all, would only be determined at the trial.

Court's Considerations

[14] As the Proposed Third Parties in this application is the Government of Malaysia, leave of the Court is required as provided Order 73 rule 8 of ROC 2012 which read as follows:

"Third Party Notice

8. (1) *Notwithstanding anything in Order 16, a third party notice, including a notice issuable in accordance with Order 16, rule 9, for service on the Government shall not be issued without the leave of the Court, and the application for grant of such leave must be made by notice of application, and the notice of application must be served on the plaintiff and the Government.*

(2) *Leave to issue such a notice for service on the Government shall not be granted unless the Court is satisfied that the Government is in possession of all such information as it reasonably requires as to the circumstance in which it is alleged that the liability of the Government has arisen and so to the departments and officers of the Government concerned."*

[15] The leave should only be granted if a *prima facie* case is made out. The Court will not, in considering whether to grant leave or not, go into the merits of the case. [See: *Asas Harmoni Property Sdn Bhd v Koperasi Pegawai-Pegawai Kerajaan Bhd (KH Ong & Ng (Peguambela & Peguamcara) (Suatu firma) & Anor, third parties)* [\[2020\] MLJU 1834](#) at [32]-[33], *Muhammad Saleh bin Hashim & Ors v Percon Corp Sdn Bhd* [\[2003\] 6 MLJ 483](#); *Dato'Abdul Hasan bin Mohamed Rashid v Multi-Code Electronics Industries & Anor* [\[2012\] 5 MLJ 176](#); *Edison & Swan United Electric Light Company v Holland* [1886 E. 823.] [\(1889\) 41 Ch.D. 28](#)].

[16] In the present case, the basis of the Defendant's application to issue the Third Party Notice is that the Royal Malaysian Police and or the Government of Malaysia has a legal obligation to indemnify and or contribute to the Defendant's losses and damages in the event that the Plaintiff were to succeed in its claims against the Defendant in this action.

[17] The facts relied upon by the Defendant in support of the aforesaid application are as stated in paragraphs 61 and 62 of the Plaintiffs Statement of Claim. The said paragraphs averred as follow:

"61. The Defendant in the civil proceedings claim that the said jewelleries consigned to her were no longer in her possession but were in fact seized by the Malaysian authorities and is currently in their custody. However, upon conducting physical inspection and verification of approximately 12,000 pieces of jewelleries seized by the Royal Malaysian Police by a qualified personnel appointed by the Plaintiff, only one (1) out of the forty-four (44) pieces of jewellery were identified.

62. In this regard, the Plaintiff pleads that it was confirmed through the forfeiture proceedings that the remaining forty-three (43) pieces of jewelleries belonging to the Plaintiff were not in the possession, custody and control of the Royal Malaysian Police as alleged and pleaded by the Defendant in her Affidavit and Defence in the said civil suit.”

[18] However, learned counsel for the Defendant was unable to produce any legal authorities and or legal justification in support of his contention that the Proposed Third Parties owe the Defendant a duty of indemnity and or an obligation to contribute to the Defendant’s losses in the event the Plaintiff were to be successful in its claims against her.

[19] In *Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam* [2017] 5 MLJ 800 (cited with approval in the case of *BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 MLJ 821, the Court of Appeal made the following observation:

“[20] Rights of indemnity may arise from contract, express or implied, from an obligation resulting from the relation of the parties or by statue. Whether in any particular case any right of indemnity arises, and the extent of any such indemnity, will depend upon the terms of the contract or statue in question, or the nature of the relationship (see *Halsbury’s Laws of Malaysia* Vol 16, at paras 270.190 and 270.191).

[22] On the right to an implied indemnity, in *JH Rayner (Mincing Lane) Ltd v Department of Trade And Industry & Ors and related appeals* [1990] 2 AC 418 ¹, Lord Oliver said at p 520:

‘It is quite clear from the authorities which have been drawn to Your Lordship’s attention as establishing or supporting the general principle of indemnity which the appellants rely that indemnity is not an automatic consequence of a request to do an act. Such a right of indemnity arises only where the **circumstances justify the implication of a contract to indemnify...**’

[23] From the authorities aforesaid, it can be seen that there are many ways in which a right of indemnity may arise. As such, in our view, in order to maintain a claim for indemnity as in the present case, the respondent not only has to plead that the appellant was in breach of its contractual duty or its duty of care to him but also the cause or causes of action for such an indemnity, ie whether founded on an express or implied contract, or on an implied indemnity arising from the relationship between **the parties.**”

[20] In the case *Sime Darby Bhd & Ors v. Dato’ Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)* [2012] 9 MLJ 464, Lee Swee Seng JC (as he then was) succinctly enumerated the categories of relationships which are recognised by law or in equity to give rise to a right to an indemnity as follows:

“[42] There are certain recognised relationships that by law or in equity, may give rise to a right to an indemnity.

[43] As illustrated in *Pinsler on Civil Practice in Singapore and Malaysia*, Vol 2, Chapter XIII at para 43, an obligation to indemnify in law or equity may arise in the following circumstances:

An agent may have the right of an indemnity against his principal in respect of his actions within the scope of his authority. A trustee may be entitled to an indemnity in respect of a breach of trust. A co-guarantor might be entitled to be indemnified by another co-guarantor.

[44] *Halsbury’s Laws of England*, (5th Ed.), Vol 49, para 1260 at p 595 lists the following in regard to indemnities as incidents of legal relationships:

‘**A right of indemnity is an incident of certain legal** relationships, for example those of agency or employer and employee, where an agent or employee is liable to be indemnified by his principal or employer against liabilities incurred in the reasonable performance of his agency or employment. Rights of indemnity may also arise under principles of equity. In case of breach of trust a trustee may be indemnified out of the interest of a beneficiary who has instigated the breach or be entitled to contribution or indemnity from a co-trustee. A personal representative is entitled to be indemnified out of the estate for his proper expenses. A receiver is ordinarily entitled to be indemnified out of the assets against liabilities properly incurred by him. A director of a company regulated by the Companies Act 1985 is entitled to be indemnified by the company for all debts, expenses and liabilities incurred in the ordinary course of

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business, and for money borrowed and applied for those purposes. The trustees or committee of a club are not in general entitled to be indemnified by the members against liabilities incurred on behalf of the club.’

[21] Further, the Privy Council in the case of *Eastern Shipping Company Limited v. Quah Beng Kee* [1924] AC 177 held at pp. 182-183 that:

“A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon’s words in *Waring v. Ward*(1); a case of vendor and purchaser) in cases in which the Court will “independent of contract raise upon his (the purchaser’s) conscience an obligation to indemnify the vendor against the personal obligation” of the vendor. These considerations were all dealt with by the Lords Justices in *Birmingham and District Land Co. v. London and North Western Ry. Co.* (2).”.

[22] Accordingly, a right to indemnity may only arise based on contract, statute or certain recognized relationships in law and in equity. In the present case, learned counsel for the Defendant has not shown to this Court the existence of a contract for indemnity between the Defendant and the Proposed Third Parties, be it express or implied and there is no statutory provision which imposes any obligation on the Proposed Third Parties to indemnify the Defendant or which confers any right on the Defendant to claim indemnity from the Proposed Third Parties. There is also no recognized relationship in law (such as agent-principal and employee-employer) or in equity (such as trustee-beneficiary) which would give rise to a right to indemnity or an obligation to indemnify between the Defendant and the Proposed Third Parties arising from the Royal Malaysian Police’s conduct of the Raid.

[23] Indeed, the Defendant’s grievance with the Royal Malaysian Police appears to be that the Royal Malaysia Police had allegedly breached a duty of care to the Defendant in failing to safeguard the Jewelleries during the enforcement of the raid.

[24] Quite clearly, the Defendant’s aforesaid claim against the Proposed Third Parties has no relevance and is in fact unconnected with the Plaintiff’s claim against the Defendant at all. Indeed, the Defendant has not even demonstrated that the missing 43 pieces of the Jewelleries were in fact at the Defendant’s premises at the time of the Raid.

[25] It is my judgment that whilst the Defendant is at liberty to commence an action against the Proposed Third Parties for the alleged breach of duty, such an action is entire separate and independent from the Plaintiff’s action against the Defendant in this action and cannot constitute an indemnity action for which the Defendant seeks to issue a Third Party Notice under Order 16 rule 2, Order 73 rule 8 and or Order 94 rule 4 of the Rules of Court 2012.

[26] For the aforesaid reasons, the application for a Third Party Notice premised upon a right of indemnity is simply unsustainable.

[27] The Defendant’s alternative ground to issue the Third Party Notice against the Proposed Third Parties on the ground that she has a right to seek contribution from them is also without any merits.

[28] There is simply no legal right for the Defendant to look to the Proposed Third Parties for contribution since a claim for contribution can only arise in situation of “joint tortfeasors”.

[29] In *Datin Paduka Phang Oi Choo @ Phang Ai Tu v. Tan Sri Datuk G Gnanalingam* [2017] 5 MLJ 800, the Court of Appeal explained the distinction between a claim for indemnity and a claim for contribution as follows:

“[37] **A distinction must be drawn between a claim for an**

indemnity and a claim for a contribution. The *Sime Darby Bhd & Ors*’s case, has clearly shown that:

- (a) a legal relationship need only be established in a claim for indemnity from a defendant towards a third party;
- (b) there is no necessity for there to be a relationship (whether in law or equity) to arise between the appellant and the third parties before a claim of contribution can be maintained; and

(c) in so far as a claim for contribution is concerned, all that needs to be shown is this:

Under the Malaysian position the first and second defendants would only be entitled to a contribution if the third parties or any of them are in law, joint tortfeasors with the first and second defendants.”.

[emphasis added]

[30] In fact, I had in *Lim Sze Way v. Allianz General Insurance Company (M) Bhd (Supreme Power Auto Sdn Bhd & Ors, third parties)* [\[2020\] MLJU 2089](#) relied on the Court of Appeal's decision in *Datin Paduka Phang Oi Choo @ Phang Ai Tu v. Tan Sri Datuk G Gnanalingam* when setting aside a Third Party Notice.

[31] In this case, it is not even the Defendant's contention that the Proposed Third Parties are joint tortfeasors with the Defendant in respect of the claims made by the Plaintiff against the Defendant.

[32] Accordingly, I also do not see any legal ground for a Third Party Notice to be issued against the Proposed Third Parties based on the ground of contribution.

Conclusion

[33] For the reasons above, the Defendant's Notice of Application under Enclosure 70 is to be dismissed with costs fixed at RM 5,000.00.