Drolia Mineral Industries Pte Ltd v Natural Resources Pte Ltd
[2002] SGHC 90

Case Number : Suit 1532/2001, RA 16/2002

Decision Date : 29 April 2002

Tribunal/Court : High Court

Coram : Lee Seiu Kin JC

Counsel Name(s) : Davinder Singh SC and Advani Ajay Jiwat (Drew & Napier LLC) (Dixon Ng instructing solicitor) for the appellants/defendants; James Chai (James Chai & Partners) for the respondents/plaintiffs

Parties : Drolia Mineral Industries Pte Ltd — Natural Resources Pte Ltd

Civil Procedure – Striking out – Counterclaim – Two-stage test – Whether to try counterclaim as separate action – Whether counterclaim can be struck off for being embarrassing or prejudicial to fair action of trial – O 15 r 5(2) & O 18 r 19 Rules of Court

Courts and Jurisdiction – Jurisdiction – Whether foreign plaintiff who commences action in Singapore submits to jurisdiction of Singapore court in respect of defendant's counterclaim – s 16(1)(b) Supreme Court of Judicature Act (Cap 322, 1999 Ed)

Judgment

GROUNDS OF DECISION

1 The Plaintiffs' claim in this suit is in damages for breach of contract by the Defendants in respect of a contract ("the Contract") in which the Defendants sold to the Plaintiffs about 15,000 tonnes of low ash metallurgical coke. Delivery was to be made in two shipments at the port of Kandla, India. The Plaintiffs claimed that both shipments of coke did not comply with the specifications in the Contract. In their Defence, the Defendants pleaded that it was a term of the Contract that SGS-CSTC Standards Technical Services Co. Ltd. China ("SGS-China") would certify whether the coke was up to specification. The Defendants claimed that they had obtained certificates from SGS-China in respect of the two shipments for that purpose. However the Plaintiffs claimed that one of those certificates was inadequate in that they did not provide an analysis of the sulphur content of the second shipment. The Plaintiffs engaged their own surveyors, SGS India Ltd ("SGS-India") to analyse the shipments. SGS-India produced certificates in respect of the sulphur and ash contents as well as quantities of the two shipments. Based on these certificates the Plaintiffs claimed liquidated damages as provided under the Contract.

2 The matter before me does not directly concern the Plaintiffs' claim. It relates to one of two causes of action in the counterclaim filed by the Defendants. The first cause of action in the counterclaim concerns a separate contract entered into by the parties in the course of the transaction which the Defendants allege the Plaintiffs had breached. The second cause of action is in libel and is subject of the present application. The Defendants allege that the Plaintiffs had published three letters to SGS-China and to SGS Geneva, all containing statements defamatory of the Defendants. The relevant contents of those letters are as follows:

> (i) The first letter dated 15 January 2001, addressed and sent to SGS-China, contains the following words:
>
> > "... The analysis report issued by SGS India Ltd clearly chows the huge difference in the quality & size of the cargo with the report issued by SGS, China. We have never

> expected that SGS, China report will differ from SGS, India report to such an extent pertaining to analysis of same cargo. The difference clearly shows that either exporter of cargo have issued fake report or managed SGS, China to issue manipulated report …"

(ii) The second letter dated 22 January 2001, addressed and sent to SGS-China and copied and sent to SGS Geneva, contains the following words:

> "… We feel very sorry to state the intentions of issuing such certificate is not fair and we are cheated by issuing such manipulated certificates."

(iii) The third letter dated 6 February 2001, addressed and sent to SGS Geneva and copied and sent to SGS-China, contains the following words:

> "… But this was done purposely by SGS-CSTC people on instruction from their principal M/s Natural Resources Pte Ltd, Singapore to hide the actual size determination of cargo and issued falsified certificate which has resulted in severe losses to our company. We held both Natural Resources Pte Ltd, Singapore & SGS-CSTC Beijing, China responsible for the losses incurred by us in the referred shipment. … We request our goodselves to do justice with us and being the parent company, punish the person found guilty of issuing such false certificate. The certificate was influenced by the principal of SGS-CSTC and we could not treat such certificate as true & fair as it was issued with wrong intentions & ignoring the actual size and quality determination …"

3 The Plaintiffs applied in SIC 24/2001 for the counterclaim in libel to be struck out under O 18 r 19 of the Rules of Court. On 11 January 2002 the Senior Assistant Registrar who heard the application struck out the Defendants' counterclaim in libel. The Defendants appealed and on 6 February 2002, after hearing counsel for the parties, I allowed the appeal and set aside the order below. The Plaintiffs have since appealed and I now give my written grounds of decision.

4 Before the Senior Assistant Registrar, the Plaintiffs based their application on the following grounds:

> (i) There is no allegation in the counterclaim that any of the defamatory statements was published in Singapore; and
>
> (ii) The Plaintiffs had submitted to the jurisdiction on contract but not on defamation as the actions are totally independent.

In respect of the first ground, counsel for the Defendants said that he was able to amend the pleadings to state that the defamatory letters were received by the Defendants in Singapore. In the event, on 18 March 2002 the Defendants applied for and obtained leave to make those amendments. The amended counterclaim alleged that a copy of the third letter was sent by SGS-China to SGS

Singapore around 9 February 2001. This would constitute publication in Singapore. In any event, once jurisdiction is established pursuant to s 16 of the Supreme Court of Judicature Act ("SCJA"), the fact that publication did not take place in Singapore is irrelevant.

5 In respect of the second ground, counsel for the Plaintiffs, Mr Chai, submitted that the Plaintiffs, being a foreign company, had only submitted to the jurisdiction in respect of the matters relating to the contractual claim. Section 16(1) of the SCJA provides for the general jurisdiction of the High Court to hear and try an action in personam. It states as follows:

> The High Court shall have jurisdiction to hear and try any action in personam where -
>
> > (a) the defendant is served with a writ or other originating process —
> >
> > > (i) in Singapore in the manner prescribed by Rules of Court; or
> > >
> > > (ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court; or
> >
> > (b) the defendant submits to the jurisdiction of the High Court.

The question is whether by commencing this present action, the Plaintiffs have submitted to the jurisdiction of the Court within limb (b) of the provision.

6 Mr Chai argued that the Plaintiffs have not submitted to the jurisdiction in respect of the defamation action as it was not properly connected and did not appertain to the main action. He relied on the following passage from *Conflict of Laws in Malaysia* by Hickling and Wu (1995) at p 67:

> "(e) Submission by institution of proceedings. A person who is abroad or not otherwise subject to the jurisdiction of the court, who takes on the role of plaintiff thereby gives the court jurisdiction over a counterclaim by the defendant on any matter related to the plaintiff's claim, but this does not extend to a counterclaim on an independent matter. …"

The footnote to the last sentence cites two authorities to support the proposition, viz.: i) *Union Bank of the Middle East Ltd v Clapham* (The Times Law Report, 20 July 1981); and (ii) *Factories Insurance Co (Ltd) v Anglo-Scottish General Commercial Insurance Co (Ltd)* (1913) TLR 312.

7 The *Union Bank case* establishes the first limb of the proposition, i.e. that a foreign plaintiff submits to the jurisdiction in respect of a valid counterclaim. This was a decision of the English Court of Appeal in which the plaintiffs, a bank resident in the United Arab Emirates, sued the defendants, who were directors of an Emirates company, on personal guarantees they had given to secure the company's debts. The defendants applied to join the company as a party in order to counterclaim against the plaintiffs for wrongful possession of the assets of the company. The following passage from the report paraphrases the judgment of Lord Denning MR in the following manner:

> " His Lordship's answer to that was that by coming here to sue, the bank had submitted to the jurisdiction of the Court, which could deal with any counterclaim connected with the bank's claim: see *Derby & Co Ltd v Larsson* ([1976] 1 WLR 202, 205)."

The Master of the Rolls cited a passage from Dicey and Morris' *The Conflict of Laws* (Vol 1, 10th Ed) which states as follows (at p 164):

> "A submission in respect of any proceedings extends to any appeal, but not to a counterclaim unless it arises out of the same legal relationship or facts as the claim."

Lord Denning MR held that the counterclaim clearly arose out of the same transaction.

8 Lord Denning MR based his proposition on the authority of the decision of the House of Lords in *Derby & Co Ltd v Larsson* [1976] 1 WLR 202. One of the issues there turned on whether the counterclaim was properly brought against the foreign plaintiffs when it was served on their solicitors in England. Lord Russell, with whom the other members of the House concurred, held that a person who chooses to take out proceedings in England exposes himself to any counterclaim that may be made under the rules of court. He said as follows (at p 205):

> "If a person chooses to commence proceedings in this jurisdiction he lays himself open to the possibility of a counterclaim by the defendant as well as to a defence. The rules of court permit it subject to compliance with time requirements."

9 In the *Factories Insurance case*, the plaintiffs, a Canadian company, sued the defendants for losses and the balance of an account under a re-insurance contract. The defendants counterclaimed for damages for breach of contract by the plaintiffs and for rescission. After the counterclaim had been filed, the defendants discovered that the plaintiffs' agent had written a letter to a third party containing a libel in respect of the business of the defendants. The defendants applied for leave to amend the counterclaim to include a claim in libel. The application was dismissed by Scrutton J who said that it was inconvenient to try a libel action in the Commercial Court. The Court of Appeal upheld his decision. Farwell LJ said that *prima facie*, it was quite irregular to allow an action for an account, which was more appropriately heard by the Official Referee, to be mixed with a claim in damages for libel. He said that Scutton J had, in the exercise of his discretion, considered that it would not be proper to mix the counterclaim in libel with the claim in contract. Farwell LJ said that he was not able to interfere with this exercise of discretion by Scrutton J. He went on to consider the decision of an earlier Court of Appeal in *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch 487 and the report continues as follows:

> "… but it was said that the plaintiffs were a foreign corporation, that they had come here and submitted to the jurisdiction for that purpose of getting their own claims tried, and that, inasmuch as the alleged libel was contained in a letter which related, to some extent at any rate, to the matters in dispute in this action, he ought to allow them to bring that under the counter-claim here in order to enable the plaintiffs to be sued here, that not being possible otherwise.
>
> It had been held in this Court in a somewhat similar case that that was not a sufficient ground. That was in the case of the *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch 487. That was

> an action brought by the South African Republic against a French company for the purpose of getting an appointment of a new trustee and securing a trust fund. It was rather more than that, so far as the details of the case were concerned. It was not a very simple case. It was a case of a somewhat hostile claim. The South African Republic wrote a letter to the company, a copy of which was sent by the plaintiffs to the London Stock Exchange. It was certainly a letter upon which proceedings for libel might fairly have been taken with some prospect of success, and the defendants asked in the same way to be allowed to join to their defence a counter-claim for the alleged libel. The application was not allowed by Mr. Justice North, and on the appeal Lord Justice Lindley said, at page 492, "Then it is pointed out, and truly pointed out, that the position of the defendant would be very different if he had an ordinary opponent in the shape of a plaintiff against whom he could bring a cross-action. It is said, and it is true that a cross-action will not lie against the present plaintiffs unless they submit to be sued here, and we are asked to put them upon the terms of submitting to be sued here in an action for libel. But upon what legal principle can we do this? I know none. The order appealed from appears to me to be right, whether the case falls under one or the other of the two rules referred to."
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> Here, he (the Lord Justice) said in the same way that the order appealed from, apart from this question, appeared to him to be right. Even if he did not agree with it as far as he did, he should certainly not feel justified in overruling Mr. Justice Scrutton's discretion. The only mode, therefore, was the one to which Lord Justice Lindley referred. The defendants said, "It is very hard upon us to be sued here by plaintiffs who can come here and we cannot bring an action against them in respect of this." He might say, in Lord Justice Lindley's words, "Upon what legal principle can we put them upon any terms? I know none." He thought that the appeal failed, and must be dismissed with costs."

10 *South African Republic v La Compagnie Franco-Belge Du Chemin De Fer Du Nord* (1897) 2 Ch 487 concerned a fund in England that arose from debentures issued by the defendant company and guaranteed by the plaintiff, the South African Republic. Two trustees were appointed, one of whom was the Republic's Commissioner in Europe, van Blokland, and the other a nominee of the company. When Blokland died, the Republic took out an action in England for a declaration that the fund ought to be held by two trustees one of which was to be nominated by the Republic, and for a new trustee to be appointed on the nomination of the Republic. Unusually, the company put in a defence and a counterclaim. In their defence the company set out various complaints against the Republic and submitted that it would be inequitable for the fund to be placed within the control of the Republic unless it was upon certain terms. One of the complaints was that the Republic had sent a letter to the London Stock Exchange containing statements defamatory of the company. In the counterclaim, the company alleged that the letter had resulted in the Exchange refusing to grant a quotation on the company's shares and they had suffered losses as a result. The Republic applied to strike out the counterclaim on the ground that it would prejudice, embarrass and delay the fair trial of the action. North J allowed the application and the English Court of Appeal upheld his order. Lindley LJ said that the counterclaim was in reality a cross-action, and was one which any judge in the Chancery Division would strike out. He said at p 492:

> "... Now, supposing this were an ordinary action against a private individual, subject to the jurisdiction of the Court, can any one suppose for a moment that this cross-action for libel (for that is what it really is) would be allowed to be tacked on to such an action as this? The question has only to be asked to

> answer itself. Of course it would not. I should think that any judge in the Chancery Division would strike it out and leave the defendant to bring a cross-action. That is precisely what North J. has done."

11 To the submission by the company that the Republic could not otherwise be sued in England, Lindley LJ said:

> "... Then it is pointed out, and truly pointed out, that the position of the defendant would be very different if he had an ordinary opponent in the shape of a plaintiff against whom he could bring a cross-action. It is said, and it is true, that a cross-action will not lie against the present plaintiffs unless they submit to be sued here, and we are asked to put them upon the terms of submitting to be sued here in an action for libel. But upon what legal principle can we do this? I know none. The order appealed from appears to me to be right, whether the case falls under one or the other of the two rules referred to. I should myself say it falls under both, for it appears to me that the joining of an action for libel with this action for the appointment of new trustees and the protection of funds is very seriously calculated to embarrass a fair trial of the action. The case could only be dealt with piecemeal; and I think a judge would be perfectly justified in striking out the counter-claim for damages for libel under Order XXI., r. 15, and if not, then under Order XIX., r. 27. The broad point is whether we ought to allow this claim for libel to go on, because, if we do not, the defendants will be unable to sue the plaintiffs, a foreign government, for libel. I do not think that is a sufficient reason, and the appeal must be dismissed with costs."

Order XIX r 27, which is equivalent to O 18 r 19 of the Rules of Court, relates to striking out of pleadings. Order XIX r 27 provides as follows:

> "The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid between solicitor and client."

Order XXI r 15 is equivalent to O 15 r 5(2) of the Rules of Court and relates to the power of the Court to order that the counterclaim be tried separately. Order XXI r 15 provides as follows:

> "Where a defendant sets up a counter-claim, if the plaintiff or any other person named in manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim, but in an independent action, he may at any time before reply apply to the Court or a Judge for an order that such counter-claim may be excluded, and the Court or a Judge may, on the hearing of such application, make such order as shall be just."

12 The second judge in the Court of Appeal, Lord Ludlow LJ, based his decision on the grounds that it would embarrass, prejudice or delay the fair trial of the action and that the Court would order the defendant to bring a separate action instead of proceeding in the same suit. He had inquired of counsel during submission whether an action for libel ought to be tried by a jury. Lord Ludlow LJ said as follows at p 493:

> "... The principal object in this action is to protect the funds and to obtain the

> appointment of a new trustee. The defendant takes advantage of the Republic having brought itself within the jurisdiction of the Court here to start a counter-claim in respect of an alleged libel, claiming very heavy damages. That portion of the counter-claim which relates to the damages sought to be recovered for libel has been struck out by the learned judge, and the question is whether he was justified in so doing. I express no opinion as to whether a counter-claim which is really a cross-action can be brought against the South African Republic. But for the purposes of the present case I assume that it can, and I treat the Republic as having by coming here brought itself within the jurisdiction of our Courts so as to be in the position of an ordinary litigant. Now, supposing that the plaintiffs here, instead of being a South African Republic, had been an ordinary individual, what course would be adopted by a judge in regard to a counter-claim of this kind? I unhesitatingly say that under Order XIX., r. 27, and probably under Order XXI., r. 15, he would strike it out; and I think that that ought to be done in this case. Probably it would be struck out in chambers, and the learned judge would say, "Bring an independent action." Then it is said, "That is all very well in the case of a private individual; but here the defendant could not bring an action for libel against the Republic. It is the fact that the Republic has submitted to the jurisdiction of this Court that enables us to do what we are now doing." We are asked therefore, because the Republic has submitted to the jurisdiction of the Courts, to give the defendants the advantage of bringing a counter-claim which they could not have brought against an individual. I do not think that is right. I think, therefore, that the learned judge at chambers was perfectly right in striking out so much of this counter-claim as related to the damages sought to be recovered for libel."

13 The third judge, Chitty LJ, was of the view that a counterclaim for libel cannot be maintained in the action, which was for appointment of a new trustee. He said as follows at p 494:

> "… The nature of the action has been already stated by the Lords Justices. The plaintiffs only ask for the appointment of a new trustee; but the defence raises the question which, for the purpose of our present decision, may be shortly stated as a claim that the fund is not a trust fund either in whole or in part. It seems to me it would be wrong on the supposition on which I proceed to allow this counter-claim for libel to be proceeded with. No doubt the issues might be separated, and the issue of libel sent to a jury; but I think, for the reasons that have already been given, that it is not right to allow such a counter-claim as this to stand …"

14 It can be seen that the *South African Republic case* was not decided on the basis that the plaintiff had not submitted to the jurisdiction in respect of the counterclaim in libel, but on the basis that such a counterclaim would be struck off on the grounds that it would prejudice the fair trial of the action and that it ought to be disposed of in an independent action. Lindley LJ was not impressed with the defendants' argument that they could not otherwise sue the plaintiffs in England. He said that if such a counterclaim could not otherwise be brought in that action, he knew of no legal principle upon which the defendants could bring it on the basis that the plaintiffs were a foreign party. In the *Factories Insurance case*, the basis for the refusal of the English Court of Appeal to give leave to include the libel claim in the action was because it was irregular for a claim for damages in libel to be mixed with an action for an account. The judge below having exercised his discretion to disallow the application to amend the counterclaim for this purpose, the Court of Appeal felt that it could not interfere with that decision. The *South African Republic case* was cited in the *Factories Insurance*

case for the purpose of refuting the defendants' submission that the court should not strike out the counterclaim because the defendants could not otherwise pursue their libel action against the plaintiffs.

15 The *South African Republic case* was considered by the English Court of Appeal in *Republic of Liberia v Gulf Oceanic Inc* [1985] 1 Lloyd's LR 539. The second plaintiffs, LPRC, were a corporation owned and controlled by the first plaintiffs, the Republic of Liberia ("ROL"). LPRC entered into a contract with the defendants, Gulf Oceanic Inc ("GOI"), under which LRPC was to provide a minimum quantity of crude oil over a period of three years to be carried by GOI. The contract was to be governed and construed under English law. When disputes arose between the parties, GOI, which doubted the financial viability of LPRC, invoked the arbitration clause against ROL as undisclosed principal and proceeded with appointing an arbitrator. The question whether ROL was a party to the contract and thus bound by the arbitration was not within the jurisdiction of the arbitrator and ROL had several options: (a) ignore the arbitration but risk enforcement proceedings; (b) proceed with the arbitration without prejudice to their contention that they were not parties to the contract but this would incur substantial irrecoverable costs; (c) await the award and, before GOI could enforce it, apply to the Court for a declaration that it was a nullity; or (d) apply to the English Court for a declaration that ROL were not parties to the contract. In the event ROL and LPRC opted for the last option and took out a writ naming GOI and the arbitrators as defendants. The plaintiffs prayed for declarations that LPRC and GOI were the only parties to the contract and that the appointment of the arbitrator was null and void, and for an injunction to restrain the defendants from taking any further step in the arbitration. In response to this GOI served points of defence and counterclaim. The counterclaim prayed for:

> (i) a declaration that ROL were parties to the contract;
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> (ii) damages against ROL for breach of contract; and
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> (iii) in the alternative, if LPRC should be found to be the principal:
>
> > (a) damages against LPRC for breach of contract; and
> >
> > (b) damages against ROL in tort for wrongfully procuring the breach by LPRC of their contract with GOI.

16 The plaintiffs applied to strike out counterclaim (iii)(b) but this was dismissed by Lloyd J. On appeal, one of the grounds advanced by the plaintiffs was that this counterclaim constituted an abuse that would embarrass or delay the trial and, pursuant to O 18 r 19 or the inherent jurisdiction of the Court, ought to be struck out. Alternatively, that it ought to be pursued in a separate action pursuant to O 15 r 5(2) which provides as follows:

> "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 may make such other order as may be expedient."

This is *in pari materia* with the same rule in our Rules of Court.

17 Oliver LJ held that, the plaintiffs having commenced an action, the defendants were entitled under O 15 r 2 to counterclaim subject to O15 r 5(2) and to the Court's inherent power to restrain

proceedings that are abusive or will embarrass the fair trial of the action. But this was a matter of the exercise of the discretion of the judge below, which he could not fault. Oliver LJ gave the following explanation (at p 544):

> "… Once again, it seems to me, one comes back to the Judge's discretion. He concluded that the continued pursuit of the counterclaim would not embarrass the fair trial of the action, and the fact that the plaintiffs' limited object in starting the proceedings in the first place was not treated by him as conclusive of the question whether the counterclaim would embarrass the trial or was an abuse discloses, in my judgment, no error in principle entitling this Court to interfere."

18 The plaintiffs submitted that if, instead of counterclaiming, the defendants had commenced an action in England and applied for leave to serve the writ out of the jurisdiction they would not have obtained such leave in respect of the claim in tort as it was committed abroad. Therefore the defendants should not be permitted to pursue by counterclaim an action that they could never have pursued directly. Oliver LJ disagreed and held that the plaintiffs render themselves liable to all incidents of such litigation, saying as follows at p 544:

> "… it … appears to me to be incontrovertible … that by becoming a litigant within the jurisdiction, a plaintiff submits himself to the incidents of such litigation, including liability to a counterclaim."

19 Three authorities were cited by the plaintiffs, viz. the *South African Republic case*, the *Factories Insurance case* and *Eschger Ghesquirer v Morrison, Kekewich & Co* (1890) 6 TLR 145. Oliver LJ was dismissive of their usefulness on the issue of whether the plaintiffs had submitted to the jurisdiction. He said as follows (at p 544):

> "… I do not, for my part, find these [cases] helpful. They merely illustrate the general principle applicable under R.S.C., O. 15, r. 5 (2) that the Court will not permit the assertion by counterclaim of a claim which ought properly to be dealt with by separate action. Two of the cases were concerned with wholly independent claims for libel, which quite obviously were not appropriately raised by counterclaim, and the third related to the rather special case of an interpleader issue.
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> One comes back once again, as it seems to me, to the simple question of whether the judge was wrong not to strike out the counterclaim under O. 15, r. 5 (2). The mere fact that the substance of the counterclaim could not have been pursued by direct action because of an inability to effect service is not in my judgment a ground of principle compelling the Court to conclude that the matter ought to be dealt with in separate proceedings.
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> The plaintiffs' submission to the jurisdiction gets over the difficulty of service, and the question is then, as it seems to me, exactly the same as it would be in an action between parties resident here."

20 The other judge of the Court of Appeal, Neill LJ, said that the matter turned on the exercise by Lloyd J of his discretion on a matter falling under O 15 r 5(2). He agreed with Oliver LJ that there was nothing about the case that justified overturning the decision below. In respect of the plaintiffs' submission that the plaintiffs ought to be able to obtain declarations in an English Court as to the

proper parties to the agreement without exposing themselves to the risk of a counterclaim which covered matters outside the ambit of the claim, he said as follows (at p 547):

> " I am unable to accept so wide a proposition. There may well be cases where, as O. 15, r. 5 (2) contemplates, the matters in the counterclaim "ought to be disposed of by a separate action", but I know of no general principle which entitles a party to invoke the assistance of the Court but at the same time to seek to confine the Court's jurisdiction to the single question which he himself wishes to have decided."

Neill LJ also endorsed the statement of Lord Russell of Killowen in *Derby & Co v Larsson* that a person who commences proceedings in the jurisdiction exposes himself to a valid counterclaim and said as follows (at p 547):

> "… A person who brings an action in England thereby renders himself liable to be served with a counterclaim even though such counterclaim could not have been made against him if he had not himself invoked the jurisdiction of the English Court. …"

21 It is necessary for me to deal with the following paragraph of the judgment of Neill LJ (at p 548):

> " There may of course be cases where, for example, a foreign sovereign is involved, where the general rule is subject to a special exception. There may also be cases where the nature of the counterclaim entitles the plaintiff to argue that the counterclaim should be dealt with in separate proceedings. The authorities relied upon by [the plaintiffs' counsel], however, to show that counterclaims in tort against foreign plaintiffs can be struck out proved, on examination, to be actions where the proposed counterclaim was based on an alleged libel: see *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487; *Factories Insurance Co. v. The Anglo-Scottish General Commercial Insurance Co.*, (1913) 29 T.L.R. 312.

To the extent that Neill LJ has said that those authorities hold that a counterclaim in libel (as opposed to any other tort) would be struck out, that is in my respectful opinion, inaccurate. As I have shown above, the *South African Republic case* involved an action for a declaration in respect of a trust fund and was decided on the basis that the counterclaim would prejudice the fair trial of the action and that it ought to be the subject of an separate action. The *Factories Insurance case* was decided on the basis that it was irregular for a claim for damages in libel to be mixed with an action for an account. Indeed Oliver LJ had, quite accurately, characterised those cases as decisions under O 15 r 5(2) in which the libel counterclaims in those cases were wholly unrelated to the main actions. I have no doubt that this was also what Neill LJ had meant.

22 From the authorities, it is clear that once a foreign plaintiff commences an action in Singapore, he submits to the jurisdiction in respect of any matter that may properly be the subject of a counterclaim. He cannot be heard to say that he has not submitted to the jurisdiction in respect of a counterclaim properly raised against him.

23 As regards matters that may be raised in a counterclaim, O 15 r 2(1) makes the following provision:

> 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.

The scope of this rule was considered by Lightman J in *Ernst & Young v Butte Mining (No 2)* [1997] Ch D 471 in which he said (at p 479):

> "… r 2(1) opens the door to a counterclaim against any one or more of the plaintiffs in any action for any relief. The subject matter of the counterclaim need not be of the same nature as the original action or even analogous to it. A counterclaim is in substance a separate action: the only limitation is the identical limitation on the inclusion of various different causes of action in the same counterclaim to that imposed on the inclusion of different causes of action in an original action (see Ord 15, rr 1(2) and 2(3)). …
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> The safeguard against any misuse of this procedure is afforded by the overriding discretionary jurisdiction conferred by Ord 15, r 5(2), to which Ord 15, rr 2(1) and 3(1) are expressly made subject. This rule affords the court the ultimate say in what should or should not proceed by way of counterclaim. If the court thinks for any reason that the subject matter of the counterclaim ought to be disposed by a separate action, the court may make such order as may be expedient. Any excess may be curbed in this way.
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> This construction is entirely in accord with the history of the counterclaim and the authorities. Section 24(3) of the Supreme Court of Judicature Act 1873 created the counterclaim for the statutory purpose of enabling all matters in dispute between the parties to be completely and finally determined and all multiplicity of disputes with respect to any of those matters to be avoided. The counterclaim was devised and designed for use for the purposes of procedural convenience, enabling the subject matter of claim and counterclaim to be tried in one action (see eg *Beddall v Maitland* (1881) 17 Ch D 174 and cases cited therein). If this procedure is invoked where there is no such procedural convenience, the court is afforded the means to take the appropriate countermeasures. I should add that the availability of a counterclaim is not intended to affect the substantive rights of the parties, but afford a means for determining those rights (see *Stumore v Campbell & Co* [1892] 1 QB 314 at 316, [1891–4] All ER Rep 785 at 786–787).
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> … The decision … in a number of … nineteenth century decisions all support the view that there is absent any such limitation on the possible subject matter of a counterclaim … but that the court has a discretionary power to limit use of the counterclaim to cases where it is procedurally convenient and that, in the exercise of such discretion, the absence of mutuality may be a weighty factor in favour of striking out the counterclaim in order to protect the plaintiff from the over-complication of the litigation and the resulting delay …"

24 Therefore the only issue is whether the present counterclaim ought to be struck out under O 15 r 5(2) on the ground that it ought to be disposed of by a separate action, or generally under O 18 r 19 on the grounds that it is embarrassing or prejudicial to the fair trial of the action. Lightman J had proposed a two stage test. The first stage is a balancing of the considerations of procedural

convenience in favour of and against disposal in a separate action. Applying that test to the present case, the facts of the claim and counterclaim are intimately linked. The Plaintiffs would need to prove the three letters that contain the allegedly defamatory statements if not as part of their case, then at least as part of its factual matrix. The only additional evidence required of the Defendants in respect of the Counterclaim is evidence of publication. I do not think that this is in dispute given that the allegation is that those letters are published to the addressees named in them but even if it is, I do not see that entailing any procedural inconvenience. It then becomes a matter of fact to be decided by the Court as to whether the words are defamatory of the Defendants and if so, whether the Plaintiffs have any defence to the Counterclaim. If they raise the defence of justification, the Plaintiffs would need to prove that the certificates issued by SGS-India are accurate and those issued by SGS-China are inaccurate. This happens to be exactly the evidence that they would have to give to support their claim. Therefore the same witnesses of fact and same experts, if any, would need to be called to give evidence in one trial instead of two.

25 The second stage test propounded in the *Ernst & Young case* is whether the counterclaim should be struck out or ordered to be tried separately. Citing Neill LJ in *Boocock v Hilton International Co* [1993] 4 All ER 19 at p 29, Lightman J said that the guideline for the exercise of any general discretion is to consider what the justice of the case demands. In respect of the second stage test, he said that it was necessary to bear in mind the statutory object of the creation of the counterclaim and that is procedural convenience. In the present case, because of the similarity of the evidence, there would be considerable savings in cost if the claim and counterclaim were litigated in one trial.

26 At the heart of the matter, it is a balancing exercise. In the *Republic of Liberia case*, Oliver LJ said as follows (at p 545):

> "… The sole question is whether it ought to be dealt with by separate action. It is evident that there is a great deal of common ground in the evidential material which is going to be required in relation to R.O.L.'s claim, the contractual counterclaim and the tortious counterclaim. There are manifest disadvantages to the defendants in having them dealt with separately. Equally, it would, no doubt, be of advantage to the plaintiffs to have them dealt with separately. The learned Judge had to make a balance. He did so, and I can detect no error in principle in his approach. The matter was one for his discretion and I can, for my part, see no ground upon which this Court can properly interfere with his conclusion."

In my view the balance in the present case is overwhelmingly in favour of the Defendants.

27 For completeness I should state that I can see no grounds for striking out the libel counterclaim under O 18 r 19. The Plaintiffs have also submitted that Singapore is not the appropriate forum to try the action. This was done somewhat in passing, probably because this was not the ground of the application in the summons. Nevertheless I see no merit in this submission. As I have said above, the main evidence in the libel action will come from the Plaintiffs should they raise the defence of justification. As for the foreign witnesses that the Defendants would need to bring to prove their case, this is a matter for the Defendants who wish to have the counterclaim tried here. There are few, if any, additional witnesses from the Plaintiffs that they would require to bring in on account of the Counterclaim.

28 I conclude with this parting comment. To hold that a foreign plaintiff commencing an action in Singapore would be deemed to have submitted himself to the jurisdiction in respect of any counterclaim that may properly be made in that action reflects the justice of the situation. A

foreigner who takes advantage of the legal system in Singapore to pursue his legal rights against a person amenable to the jurisdiction should be made to open himself to any claim the defendant might have against him so that as between them their rights and liabilities *inter se* may be squared off in one action rather than a multiplicity of actions in different jurisdictions. It may be argued that the defendant who has a counterclaim that can properly be raised in an action has an advantage over one who has a counterclaim that would be struck out under O 15 r 5(2) or O18 r 19. In the latter case, the local defendant might have no other recourse against a foreign plaintiff in certain circumstances. That would appear to be an inevitable consequence of the law as it stands. But in my view any rectification should address the unavailability of recourse to the defendant whose counterclaim is liable to be struck off. I do not see it as just that a foreign plaintiff is able to sue a resident here and take advantage of our legal system to pursue his rights all the way to enforcement but the resident defendant is powerless to counterclaim against him.

Sgd:

LEE SEIU KIN
JUDICIAL COMMISSIONER