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Objectivity versus practicality: adding a third party to an action



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Introduction

Under Order 10(1) of the Civil Procedure Rules, a defendant in an action may request the court's leave to add another person as a third party where the defendant claims:

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, the Court or a Judge may give leave to the defendant to issue and serve a "third-party notice".

(1)

Once the rights of the plaintiff and the defendant are determined in the context of the principal action, the rights between the defendant and the third party are ascertained and bound by the decision between the plaintiff and the defendant.

Relevant case law on this matter has established that the object of this process is as follows:

in the first place to get the third party bound by the decision between the

plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in the position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions.(2)

The Supreme Court's recent judgment in *Euroklima Ltd v GN Kokkonis & Son Limited* (Civil Appeal E4/2016, 23 April 2019) examined the correctness of the first-instance court's interpretation of Order 10(1) of the Civil Procedure Rules and in particular who can be added as a third party to a process pending before the courts.

Facts

The plaintiff in the principal action (Euroklima) was appointed by the defendant in the principal action (Kokkonis, a building contractor) as a subcontractor responsible for an engineering installation at a building under construction.

Euroklima filed a civil action against Kokkonis claiming the remainder of its fees. Kokkonis's defence to Euroklima's claim was that it had no obligation to pay the remaining amount in light of Euroklima's negligence in carrying out the work and subsequent breach of contract. This line was advanced in the context of Kokkonis's defence and no counterclaim was filed.

On an alternative basis, Kokkonis argued that Euroklima was estopped from claiming this amount following the architect of the project's issuance of the final accounts, which stated that the owner of the building (Pirillides) should pay Euroklima €20,000 and Kokkonis €17,000, an amount that had been paid by Kokkonis and accepted by Euroklima.

On the basis of this line of defence, Kokkonis requested the court's leave, which was granted, to add Pirillides as a third party claiming that it was entitled to compensation due to Euroklima's claim. This resulted in Euroklima making a claim against Kokkonis, which in turn made a claim against Pirillides.

Provided that Euroklima's claim against Kokkonis was unsuccessful, the first-instance court would not have continued with the examination and subsequent determination of the rights between Kokkonis and Pirillides. However, if Euroklima's claim against Kokkonis had been successful with the court reaching its conclusion on all of the disputed facts of the case, including those concerning Euroklima's alleged negligence in carrying out its work, Pirillides as a third party in the process would have been bound by the decision between the plaintiff and the defendant.

Pirillides filed its defence against Kokkonis's claim and at the same time filed a counterclaim against Kokkonis stating that the latter was responsible for the engineering works that had been carried out negligently. In the context of this process, Kokkonis filed its defence to the counterclaim and applied to the court for leave to add a third party, in

the process of the owner's counterclaim, with Euroklima being the plaintiff in the principal action. Kokkonis's claim against Euroklima in the context of the third-party process was that if the owner was successful in its counterclaim against Kokkonis, the party responsible to pay damages would be Euroklima, as it was the party that had acted negligently.

The first-instance court's rejection of Kokkonis's request to add Euroklima as a third party to Pirillides's counterclaim was the subject matter of the appeal brought before the Supreme Court. According to Kokkonis, the first-instance court had wrongly applied the Civil Procedure Rules to the facts of the case. In particular, Kokkonis claimed that the court had wrongly interpreted Order 10(1) and (2) of the Civil Procedure Rules and this had led to incorrect conclusions.

The first-instance court's conclusion was that Order 10(1) does not extend to persons who are already parties to an action. Thus, since the person who had requested to be added as a third party was the plaintiff in the principal action, Order 10(1) could not and should not apply to the facts of the case.

Decision

The Supreme Court overturned the first-instance decision and concluded that the latter had misinterpreted Order 10(1) and (2) of the Civil Procedure Rules, as they do not limit the possibility of notifying the plaintiff in a principal action as a third party if they are not a party to the process between the third party and the defendant. The Supreme Court reached this conclusion on the basis of the principle that the third-party process is a separate process in which the defendant becomes the plaintiff and the third party becomes the defendant⁽³⁾ and cited the following abstract from *Levi v Anglocontinental Gold Reefs* ((1902) KB 487):

I can see no reason in the nature of things why the plaintiff should not have this right. A counter-claim is a means of disposing, in the action in which it is raised, of a dispute between the parties which would otherwise have to be the subject of a separate action, and it is treated throughout the rules as if it were a cross-action...

If so, I can see no difficulty in allowing the plaintiff in the principal action, as defendant in the cross-action to bring in a third party for contribution or indemnity. It was said that this has never been done; but no authority was cited in which there has been a decision to the contrary effect. In my opinion, there is jurisdiction to allow a plaintiff against whom a counter-claim has been brought to bring in a third party under the rules relating to third-party procedure.

Kokkonis also questioned the following first-instance decision:

The dispute between the plaintiff and the defendant will be determined in the context of the action that the plaintiff has filed against the defendant and I am of the opinion that it is in the context of this process that the defendant should advance a claim against the plaintiff as he intends to do through the process intended with the application in issue. In any event I believe that the process to

be taken is a different one, such as the submission of a counterclaim against the plaintiffs, and not the intended process in issue.

The Supreme Court did not share the first-instance court's view. In particular, the Supreme Court concluded that at the stage of the application for leave to add a person as a third party, the court should be satisfied not as to the merits of the claim of the person who requests such leave, but merely of the conditions of Order 10(1) on a *prima facie* basis.⁽⁴⁾ On this basis, the Supreme Court concluded that the third party's counterclaim could not have been foreseen and it would have been wrong to prevent Kokkonis from adding Euroklima in the dispute between it and the third party. The chain of the contractual obligations, *prima facie*, involved the aforementioned persons in simultaneous legal relations and it would have been wrong to prevent Kokkonis from advancing such a relief, even if it would complicate the process.

Comment

The Supreme Court's approach contrasts with that of the first-instance court. However, there is an indirect underlying common element between these two approaches (ie, the indirect acknowledgement of the conflict between the word element of the relevant Civil Procedure Rule and its objectivity versus the practicality in having the plaintiff in the principal action as a third party).

It was established that the courts should look only at the conditions imposed by Order 10(1) of the Civil Procedure Rules on a *prima facie* basis and not the merits of the claim. It was also established that among the objects for adding a third party to a process was binding a third party to the decision between the plaintiff in the principal action and the defendant.

If it is assumed that Euroklima will be successful against Kokkonis and the court concludes, among other things, that Euroklima did not act negligently while carrying out its work, the question arises of whether the owner, being the third party, will be bound by the decision between Euroklima and Kokkonis.

The question also remains as to whether following such a conclusion, the court can examine – in the context of the counterclaim raised by the owner against Kokkonis – the owner's claim that the engineering works had been carried out negligently. What in essence would be the substance, status and element of such a counterclaim and the third-party process added therein?

Considering the approaches adopted by the first-instance court and the Supreme Court, it is clear that the common element is the fundamental rights of the parties, such as the right to be heard, the right to advance their claims, their defence and the right to a fair trial, which should be respected. At the same time, the Civil Procedure Rules should not allow complexity and should not override the object and practicality that they aim to provide.

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Endnotes

(1) Order 10(1) of the Civil Procedure Rules.

(2) *Barclays Bank v Tom* [1923] 1 KB 221 and *Owner of Motor Vessel Normar v British Transport Docks Board* [1968] 1 All ER 753. Reference is also made to the Supreme Court judgment in *Nikita v Medcon Construction Limited* (1997) 1 Jsc 643.

(3) *The Continental Insurance Company of Hampshire v Sac Eugene O Regan* (1998) 1B JSC 1087.

(4) The court referred to the Annual Practice 1955, p 291:

Under the former practice, leave was granted to issue the notice where the applicant made out that he was prima facie entitled to contribution or indemnity (Furness v. Pickering, [1908] 2 Ch.D. 224). It is presumed that if a prima facie case is made out which would bring the matter within any para. of r. 1 this practice will apply, and the Court will not, in granting leave, consider the merits of the claim (Edison & Co . v. Holland, 33 Ch.D. 497; Carshore v. N.E. Ry., 29 Ch.D. p.347), but will leave these matters and objections by the plaintiff to be dealt with upon the application for directions under s.7; see Baxter v. France, [1985] 1 Q.B. 455; Furness v. Pickering, supra.

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