

PROCEDURAL ASPECTS OF CLASS LITIGATION IN BRUNEI DARUSSALAM

MOHD SHAZALE HAJI MAT SALLEH

Advocate & Solicitor

Supreme Court of Brunei Darussalam

INTRODUCTION

The class litigation or class action as it is commonly known in some other countries, most notably the United States, is otherwise known as the representative action in Brunei Darussalam.

There are no reported proceedings in Brunei Darussalam involving representative actions and as such the scope of such actions and the approach of the Brunei courts towards them remains to be seen. This paper therefore is not intended so much as an analysis of the procedural aspects of the representative action in Brunei Darussalam as an overview of the likely issues that the courts in this country will encounter when dealing with such an action.

However, it is very likely that, if and when a representative action makes history in Brunei Darussalam, the courts of Brunei Darussalam will be guided by the applicable practice and procedure in England, Singapore and Malaysia for the simple reason that Order 15 rule 12 of the Rules of the Supreme Court (“RSC”) which govern representative actions in Brunei Darussalam has its equivalent in similar provisions in these three jurisdictions.

Furthermore, by virtue of the Applications of Laws Act (Cap.2), the English common law is applicable in Brunei Darussalam. Section 2 of the Act provides:

“ Subject to the provisions of this Act and save in so far as other provision has been or may hereafter be made by any written law in force in Brunei, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England at the commencement of this Act, shall be in force in Brunei:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Brunei so far only as the circumstances of Brunei and of its inhabitants permit and subject to such qualifications as local circumstances and customs render necessary. ”

Since the Act came into force on 25 April 1951, the English common law and doctrines of equity as of 25 April 1951 became the law of Brunei Darussalam. In practice however, the courts of Brunei Darussalam tend to readily apply English law as they have developed and continue to develop after 25 April 1951. It is more so when there is no body of Brunei case law to guide the courts in determining the applicable law and practice in Brunei Darussalam.

THE GOVERNING RULE

RSC Order 15 rule 12(1) states:

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

In addition, rule 12(2) empowers the court at any time during the proceedings, on the application of the plaintiff, to appoint a representative defendant or defendants from amongst the defendants in an action. Rule 12(2) is in the following terms:

“ At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the

defendants or the other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings, and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.”

By permitting one or more members of a group or class to represent the whole group or class where they have ‘the same interest’, rule 12 is clearly designed to avoid multiplicity of proceedings.

As can be seen from the above, a plaintiff asking to bring proceedings by or against a group can do so without leave, although it is advisable the plaintiff should always seek court approval or an order sanctioning the representation as soon as possible thereafter so that complications can be avoided later, namely in relation to the enforcement of a judgment or order made in the representative proceedings.

Other hand, a defendant asking to defend on behalf of a group always needs the leave of the court [rule 12(2)].

A defendant may apply to the court to object to the continuation of the representative proceedings on the basis that they are improper or to his inclusion therein as a defendant. The court will have to decide whether the representative action is appropriate in the circumstances of the case or whether to strike out the defendant as a party [RSC Order 15 rule 6(2)(a)].

STATUS OF THE REPRESENTATIVE PLAINTIFF AND THE PERSONS REPRESENTED

The representative plaintiff is the party to the action and makes decision on the course of the proceedings including the matter of settlement. The members of the group are in a sense parties, but are not regarded as full parties.

While the members are not in a position to make decisions, they may however challenge the plaintiff's decisions. In this regard, those members may apply to be excepted from the representations and join as parties separately, either in their own names or by their own representatives if they are numerous, or the members may even apply to be joined as a defendant (*Watson v. Cave* (No.1) [1881] 17 Ch. D 19).

If the representative plaintiff is unable or wishes to discontinue the action, one or more members of the group can apply to be substituted as a plaintiff (*Moon v. Atherton* [1972] 2 QB 435, where one tenant in a group of tenants suing an architect successfully applied to be added as a full party in substitution for the named plaintiff when most of the tenants changed their mind).

The judgment or order will be finding on the plaintiff and all the persons represented. However, a judgment cannot be enforced against a represented defendant without leave of the court is required [RSC order 15 rule 12(3)] and furthermore the represented person may dispute liability on the grounds of his own special circumstances. Rule 12(5) provides:

“ Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.”

SCOPE OF THE REPRESENTATIVE ACTION

The main condition of rule 12(1) is that the members of the group or class must have the 'same interest'.

In the English case of *Duke of Bedford v. Ellis* [1901] AC 1, Lord Macnaghten, delivering the main judgment of the court, laid down the requirements for a representative action:

“ Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.”

In other words, a representative action can only be brought where there is a common interest, a common grievance and relief sought which is in its nature beneficial to all.

In *John v. Rees* [1970] Ch 345, Megarry J. stated that “the rule is to be treated as being not a rigid matter of principle, but a flexible tool of convenience in the administration of justice”.

Lord Macnaghten’s pronouncement has since been followed and adopted by the Malaysian courts in the following cases:

a) *Palmco Holding Bhd. v. Sakapp Commodities (M) Sdn. Bhd. & Ors.* [1988] 2 MLJ 624, where the class represented by the plaintiff consisted of purchasers of palm oil under future contracts.

b) *Voon Keng & Ors. v. Syarikat Mazuine Development Sdn. Bhd.* [1990] 3 MLJ 61, where the plaintiff on behalf of himself and 60 other purchasers of properties built by the defendant sued the latter, seeking liquidated damages for late delivery and an injunction to restrain the vendors from obtaining moneys from stakeholders.

c) *Jok Jau Evong & Ors. v. Marabong Lumber Sdn. Bhd. & Ors.* [1990] 3 MLJ 427, where the class consisted of owners of native customary land and who had claimed that a timber licence had been wrongfully granted to the second defendant.

d) *Mohd Latif bin Shah Mohd & Ors. v. Tengku Abdullah Ibnu Sultan Abu Bakar & Ors. and other actions* [1995] 2 MLJ 1, where the plaintiffs represent all members of a club except for the defendants.

In *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.* [1910] 2 KB 1021, the Court of Appeal adopted a restrictive interpretation of the condition of common interest, common grievance and common benefit. Fletcher-Moulton LJ held that:

“ Where the claim of the plaintiff is for damages, the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief, applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action.”

His Lordship went on to say:

“ To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases.”

In *Campbell v. Thompson* [1953] 1 QB 445, an action in tort for damages against the members of a gentlemen’s club was allowed.

The very restrictive interpretation in the *Markt* case was not followed in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd.* [1981] 1 Ch 229, where Vinelott J. took the position that the plaintiff in his representative capacity may join the declaratory relief with a personal claim for damages.

Similarly, in *EMI Records Ltd. v. Riley* [1981] 1 WLR 923, where the court granted an injunction and damages in an action for infringement of copyrights collectively owned by the group. Dillon J. stated:

“ It seems to me that it is appropriate that damages should be recovered by the plaintiffs in the representatives capacity in which they are entitled to sue for an injunction, and it would be a wholly unnecessary complication of our procedure if the court were to insist that for the purposes of inquiry as to damages all members of the BPI must be joined as co-plaintiffs.”

The requirement of common interest is satisfied even if the group members are in conflict between themselves (*John v. Rees*; *Pan Atlantic Insurance Co. and Republic Insurance Co. v. Pine Top Insurance Co.* [1988] 2 Lloyd’s Rep. 505). Megarry J. in *John v. Rees* had this to say:

“ I cannot see that any real harm is done to a person whose part in the action is merely that he is represented by the plaintiff, even if the plaintiff is supporting a different cause, provided that there is a defendant who does stand for the cause espoused by the person being represented; actions are decided by reference to justice according to law, and not by counting heads.... It seems to me that the important thing is to have before the court, either in person or by representation, all who will be affected, and provided that the issue will be fairly agreed out, a mathematical precision in securing that each side is shown as representing the right number of supporters is of little moment ”.

It is worth pointing out that the rules governing the representative action contain sufficient safeguards to protect the members of a class. Rule 12(3) (discussed earlier) provides that a judgment or order cannot be enforced against a represented person without the leave of the court (although the person is bound by it). The represented person can dispute liability on the ground that “ by reason of facts and matters particular to his case he is entitled to be exempted from such liability ”.

In addition, the member of class may of course apply to be excepted from representation and join as parties separately or apply to be withdrawn from the proceedings.

The liberal approach of the English courts in the *Prudential Assurance and EMI* cases continued in *Michaels (Furriers) (M) v. Askew* (1983) 127 SoI Jo 597 where the Court of Appeal granted an injunction against members of an animal rights group who had been picketing on the plaintiff's premises even though not all the members of the group were identified. *Dunn LJ* and *Purchas LJ* in supporting the liberal approach said:

“ While care must be taken to see that Order 15 rule 12 was not abused, where a number of unidentifiable persons were causing injury and damage by unlawful acts, and there was an arguable case that they belonged to a single organisation or class which encouraged actions of the type complained of, and their actions could be linked to that organisation, the rule enabled the court do justice in the particular case.”

In the Singapore case of *Abdul Rahman v. Ling How Doong & Ors.* [1994] 2 SLR 668, the plaintiff sued, on behalf of himself and all the members of a political party, the defendants whose election to the party's Central Executive Committee was disputed. The defendants objected, arguing amongst others, that the plaintiff did not have consent of another faction of the party to commence the action. The court held that it was not a requirement of the representative action that the plaintiff represents the entire group; it was sufficient that there was a common interest that he represented. Therefore the action was properly constituted.

THE POSITION IN BRUNEI DARUSSALAM

Given that representative actions have never arisen in Brunei Darussalam, it remains to be seen how the courts of this country will approach such actions: whether or not they will adopt the broad approach or the rigid approach in determining the common interest between the members of a group or class. If the current trend in England is anything to go by, it is likely that the Brunei courts will follow the broad approach.

While the purpose of a representative action is to avoid a multiplicity of similar actions, there are dangers associated therewith that the courts must be on the look out for.

There may be persons who do not have genuine claims which may not succeed as a single separate action but which stands a far better prospect of success by joining in the action. A representative action can also work as a 'scare' tactic by frightening a defendant into settling the claim not so much by the merits of the plaintiff's case but by the sheer size of the group he is up against and the potential damages he is likely to have to pay in the event that he loses the action.