AXF and others *v* Koh Cheng Huat and another
[2015] SGHC 238

Case Number : Suit No 15 of 2014 (Registrar's Appeal No 109 of 2015)

Decision Date : 14 September 2015

Tribunal/Court : High Court

Coram : Foo Chee Hock JC

Counsel Name(s) : Kuah Boon Theng and Alicia Zhuang (Legal Clinic LLC) for the Plaintiffs; Lek Siang Pheng, Vanessa Lim, Ang Yi Rong and Audrey Sim (Rodyk & Davidson LLP) for the 1st Defendant; Audrey Chiang, Lim Xiu Zhen and Vanessa Tok (Rodyk & Davidson LLP) for the 2nd Defendant.

Parties : AXF — AXG — AXH — DR KOH CHENG HUAT — THOMSON MEDICAL PTE LTD

Civil Procedure – Limitation

Civil Procedure – Striking out

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 123 of 2015 and Summonses Nos 260 and 261 of 2015 was allowed by the Court of Appeal on 6 April 2016. See [2016] SGCA 22.]

14 September 2015

Foo Chee Hock JC:

Introduction

1 The Plaintiffs are appealing against the whole of my decision on 12 May 2015 in Registrar's Appeal No 109 of 2015 ("RA 109/2015") (which was an appeal against the decision of the Assistant Registrar ("AR") in two striking out applications (Summons No 6316 of 2014 ("SUM 6316/2014") filed by the 1st Defendant and Summons No 6178 of 2014 ("SUM 6178/2014") filed by the 2nd Defendant)). On the same day, I had also determined another appeal, Registrar's Appeal No 112 of 2015 ("RA 112/2015"). This was the 2nd Defendant's appeal against the AR's costs order for the hearing below (*ie*, in SUM 6178/2014). I had allowed the appeal and varied the costs order of the AR from $3,500 (excluding disbursements) to $5,000 (excluding disbursements). The Plaintiffs have confirmed that they are not appealing against my decision in RA 112/2015 (see Plaintiffs' letter to the Registrar dated 1 July 2015).

2 As for RA 109/2015, I had dismissed the Plaintiffs' appeal with costs and this Civil Appeal No 123 of 2015 is the Plaintiffs' appeal against this decision only. RA 109/2015 was the Plaintiffs' appeal against the AR's decision on 6 April 2015 ordering portions of the Plaintiffs' Statement of Claim (Amendment No 1) dated 17 October 2014 to be struck out, as follows (see para 1, Plaintiffs' Written Submissions ("WS"); and para 1, AR's "brief oral grounds" found at Notes of Hearing dated 6 April 2015 [note: 1]):

(a) "**Category A Claims**" (as defined in the 1st Defendant's Submissions dated 3 March 2015), *ie*, the Plaintiffs' dependency claims, as time-barred.

(b) "**Category B Claims**", *ie*, the Plaintiffs' "contractual claims", as time-barred.

(c) "**Category C Claims**", *ie*, claims that were allegedly unsustainable at law, or had no legal basis.

(d) "**Category E Claims**", *ie*, claims that allegedly disclosed no reasonable cause of action.

3 Before the AR, there was a Category D, termed as "claims that are embarrassing – these relate mainly to Annex B of the Plaintiffs' Statement of Claim" (see paras 1(d), 17 and 18 of the AR's brief oral grounds). The Plaintiffs did not appeal against the AR's orders relating to Category D Claims.

4 At the hearing before me, the Plaintiffs also clarified that they were not presenting any arguments on the Category B Claims and on para 42 of the Statement of Claim (Amendment No 1) ("the trespass point", which was part of the Category E Claims).

5 The parties' main contentions were on the effect of the time-bar in s 20(5) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("the CLA"). In the event that the Court held that the time-bar was absolute, then the claims in Categories A, C and E above would be struck out as being time-barred. But if the Court decided that they were not time-barred, the 1st Defendant had another ground for the Category E Claims to be struck out, *ie*, that these claims were not sustainable in law as they could only be brought by the estate of the 1st Plaintiff's wife ("the Deceased") (see paras 15–16 of the AR's brief oral grounds).

6 The hearing before me proceeded on the basis that the parties were *ad idem* on the above categories (which were adopted by the AR), and depending on the decisions of the Court on the time-bar and other issues, counsel would work through the categories and agree on the consequential amendments to the Statement of Claim.

7 The 1st Defendant provided a helpful summary which set the context for the Defendants' striking out applications in SUM 6316/2014 and SUM 6178/2014 (paras 2–4, 1st Defendant's WS):

> This Suit was commenced on 6 January 2014 by the 1st, 2nd and 3rd Plaintiffs, who were respectively the husband and two children of [the 1st Plaintiff's wife] (the "**Deceased**") who passed away on 18 September 2007 following the birth of the 2nd Plaintiff.
>
> The 1st Defendant is Dr Koh Cheng Huat, the Deceased's obstetrician and gynaecologist, and the 2nd Defendant is Thomson Medical Pte Ltd, a private medical centre which provides nursing care and delivery facilities.
>
> In short, the Plaintiffs allege that the Deceased's death was caused by the negligence of both the 1st and 2nd Defendants during her labour. In addition to the 2nd Plaintiff's claim for personal injuries sustained in the course of his birth, all three Plaintiffs had made dependency claims. The 1st Plaintiff also brought contractual claims (among others) against both Defendants.

8 The Plaintiffs clarified that "this is not an estate claim, no executors or administrators were appointed, and … none of the Plaintiffs are bringing this suit as administrator or executor of the deceased's estate" (para 3, Plaintiffs' WS).

Interpretation and effect of s 20(5) of the CLA

9 I shall now deal with the interpretation of s 20(5) of the CLA, which applies to dependency claims and which reads:

… every such action shall be brought within 3 years after the death of such deceased person.

10 The Plaintiffs submitted that "[i]n comparison with s24A(2) of the [Limitation Act], s20(5) of the CLA does not absolutely invalidate or bar claims made *after* 3 years" (para 7, Plaintiffs' WS).

11 Section 24A(2) of the Limitation Act (Cap 163, 1999 Rev Ed) ("the LA") states:

> An action to which this section applies, where the damages claimed consist of or include damages in respect of personal injuries to the plaintiff or any other person, shall not be brought after the expiration of—
>
> (*a*) 3 years from the date on which the cause of action accrued; or
>
> (*b*) 3 years from the earliest date on which the plaintiff has the knowledge required for bringing an action for damages in respect of the relevant injury, if that period expires later than the period mentioned in paragraph (*a*).

12 On a plain reading, it would appear that s 20(5) of the CLA imposes a definite time frame within which actions must be commenced notwithstanding that it is expressed in a positive way while s 24A(2) of the LA is expressed in a negative form.

13 I turn first to the case law for guidance on the interpretation of s 20(5) of the CLA. Counsel for the Plaintiffs and Defendants were not able to locate a direct local authority on the interpretation and effect of s 20(5) of the CLA (para 29, 2nd Defendant's WS). However, the Defendants submitted that guidance may be obtained from Malaysian and English cases.

14 The Federal Court in Kuala Lumpur had occasion to deal with s 7(5) of the Civil Law Ordinance 1956 (Ordinance No 5 of 1956) (Malaysia) ("Malaysian Civil Law Ordinance") – whose terms are *in pari materia* [note: 2] with our s 20(5) of the CLA. In *Kuan Hip Peng v Yap Yin & Anor* [1965] 31 MLJ 252 ("*Kuan Hip Peng*"), Thomson LP held in no uncertain language (at 255) that:

> … The terms of section 7(5) of the Civil Law Ordinance are absolute and contain no exceptions. They are that "such action shall be brought within three years after the death of the deceased person". It is true that, as Goddard L.J. said with reference to the corresponding section of the English Act, the section "merely prescribes a period of limitation" (*Lubovsky v. Snelling* [1944] 1 KB 44, 47) and that it does not contain a condition precedent or anything of the sort. *Nevertheless the period is absolute*. There is no room for doubt as to when it begins to run. It runs from the death of the person of whose support the plaintiff has been deprived. The cause of action arises on death (see *Seward v. "Vera Cruz"* (1884–5) 10 App Cas 59, 67, 70) …
>
> [emphasis added]

15 It should be noted that the plaintiff's writ in *Kuan Hip Peng* for loss arising from his father's death in a motor vehicle accident was issued merely *four days after* the expiration of the limitation period in s 7(5) of the Malaysian Civil Law Ordinance (at 253) and the suit was dismissed even though no defence was filed.

16 In *Lee Cheng Yee (suing as administrator of the estate of Chia Miew Hien) v Tiu Soon Siang t/a Tiyor Soon Tiok & Sons Company & Anor* [2004] 1 MLJ 670 ("*Lee Cheng Yee*"), the Court of Appeal in Kuala Lumpur referred to the passage above in *Kuan Hip Peng* and found (at [12]) that s 7(5) of their

Civil Law Act 1956 (Act No 67 of 1972) (Malaysia) ("Malaysian Civil Law Act") (as amended in 1984, which was *in pari materia* with s 7(5) of the Malaysian Civil Law Ordinance) was "absolute in nature" and without exception. The court added, "[h]ence, there is no necessity to plead limitation" (at [12]).

17 In a more recent case of *Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] 3 CLJ 751 ("*Tasja Sdn Bhd*"), the Federal Court in Putrajaya stated (at [25]) that:

> After scrutinizing the authorities above we agree with the submission of the plaintiff that in an application for striking out under O. 18 r. 19(1) RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such application. If it is based on s. 2(a) of PAPA or s. 7(5) of the Civil Law Act, where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence. However, in a situation where limitation is not absolute, like in a case under the Limitation Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under s. 4 of the Limitation Act …

18 The Federal Court accepted (at [27]) the correctness of *Kuan Hip Peng* that s 7(5) of the Malaysian Civil Law Act created an absolute limitation period and the defendant need not even plead the defence of limitation for a striking out application to succeed (see also *Lee Cheng Yee* cited above where "the issue of limitation was not specifically pleaded in the defence of the [defendant]" at [7]).

19 It will be seen that the Malaysian cases have interpreted s 7(5) of the Malaysian Civil Law Act as absolute, notwithstanding that s 7(5) is not expressed in a negative or prohibitive form, unlike s 6(1) of their Limitation Act 1953 (Act No 254 of 1981) (Malaysia) ("Malaysian Limitation Act") which states:

> Save as hereinafter provided the following actions *shall not be brought* after the expiration of six years from the date on which the cause of action accrued …
>
> [emphasis added]

20 Again, it is pertinent to see how the English Court of Appeal had dealt with a similar provision to s 20(5) of the CLA – s 3 of the Fatal Accidents Act 1846 (c 93) (UK) ("the UK 1846 Act") (also known as Lord Campbell's Act). In *Finnegan v Cementation Co Ld* [1953] 1 QB 688 ("*Finnegan*"), the widow of a workman who lost his life in the course of his employment sued his employers for damages under the UK 1846 Act, as amended in 1864. Unfortunately she made the technical error of suing as administrator when she had not taken out letters of administration in England. The limitation period of 12 months having run out, the writ and all subsequent proceedings were set aside.

21 I observed that *Finnegan* was a particularly hard case. Singleton LJ put the matter neatly and eloquently (at 699–700):

> … If she [the plaintiff] had sued merely as the widow of her husband, the point which is now raised could not have been taken. There is no prejudice of any sort towards the defendants. The action was *commenced in due time*, but it was in the wrong form. The plaintiff sued in the wrong capacity, and time had run before the point was raised by the defendants. She cannot now raise an action in a new capacity. I should like to say that she can do so, but this court is bound by authority, and I find myself, as Parker J. found himself, constrained to say that the case is covered by the decision of this court in *Hilton v. Sutton Steam Laundry* [1946] K.B. 65.

[emphasis added]

22 Substantiating the approach to be taken, Singleton LJ quoted (at 698) Lord Greene MR in *Hilton v Sutton Steam Laundry* [1946] KB 65:

> … But the Statute of Limitations is not concerned with merits. *Once the axe falls it falls*, and a defendant who is fortunate enough to have acquired the benefit of the Statute of Limitations is entitled, of course, to insist on his strict rights …
>
> [emphasis added]

23 It is fitting to leave the case of *Finnegan* by echoing the words of Jenkins LJ (at 700), dealing with both the hardship and the strict approach that must be adopted:

> … It seems to me to be a case in which a technical blunder has deprived the plaintiff of her remedy, although the blunder was not such as to affect the substance of the claim in any way, or to prejudice the defendants in defending the action in any degree. Nevertheless, the defendants are entitled to have their objection to the competence of the action dealt with according to law, and if the law supports their objection effect must be given to it, however unmeritorious it may appear to be.
>
> It must be borne in mind that in enacting the Fatal Accidents Act, 1846, the legislature thought fit to impose a limitation period of 12 months. That means that a defendant in such a case is entitled to go scot-free, however negligent he may have been, unless a claim by a competent plaintiff is made in properly constituted proceedings within the prescribed period of 12 months ...

24 The Defendants then submitted on the legislative history. I do not propose to go through the entire legislative history of the relevant provisions leading to their present position. The Defendants' research – which was not seriously challenged by the Plaintiffs – threw light on certain milestones and points which reinforced the Court's approach to interpreting the legislation, in particular s 20(5) of the CLA.

25 Section 20(5) of the CLA (as well as s 7(5) of the Malaysian Civil Law Act) can be traced to s 3 of the UK Fatal Accidents Act 1846 [note: 3], which provided for a limitation period of 12 months for dependency claims. This period under the UK 1846 Act was extended to three years in 1954 via the Law Reform (Limitation of Actions) Act 1954 (c 36) (UK). Singapore tracked the changes in the UK and in 1957 we extended the limitation period for dependents to sue from *12 months to three years*.

26 The Parliamentary debate preceding the 1957 amendment (see *Singapore Parliamentary Debates, Official Report* (13 February 1957) vol 3 at cols 1421–1426) [note: 4] proceeded on the basis of the limitation period under the predecessor to s 20(5) of the CLA, *ie*, s 12(5) Civil Law Ordinance 1955 (Ordinance No 23 of 1955) being mandatory. While this basis was not squarely and expressly debated, the Honourable Members of Parliament conspicuously omitted any reference to the courts having any discretion to extend the limitation period. This was surely a point that one expected to be raised or discussed on an amendment to increase the limitation period from "12 calendar months" to three years. Further, the flow of the debate and the language used by the Members (Mr David S Marshall – "give a reasonable time to the dependents of victims of traffic accidents" (at col 1423); Mr Lee Kuan Yew – "the axe has fallen" (at col 1424)) was consistent with the time-bar being absolute; and after considering that the limitation period was not sufficiently long, the House made a judgment call to extend the period to three years (following the UK's lead).

27 In the UK, subsequent amendments were made culminating in the Limitation Act 1980 (c 58) (UK) ("UK Limitation Act 1980") which contained miscellaneous "knowledge provisions" (see for *eg*, s 14A(4)(*b*) read with s 14A(5) and s 11A(4)(*b*)), including the knowledge provision relevant for our present purposes at s 12(2)(*b*) for dependency claims (see also ss 11(4)(*b*) and 11(5)(*b*) UK Limitation Act 1980 for personal injury claims).

28 Singapore followed this development again in 1992 by introducing s 24A to our LA. However s 24A of the LA was expressly not applicable (see s 3 of the LA) to dependency claims under s 20(5) of the CLA, nor was an equivalent of the UK s 12(2)(*b*) promulgated to affect dependency claims.

29 That our position was different from the UK (for dependency claims) was obvious and noted in a report by the Law Reform Committee of the Singapore Academy of Law in February 2007 titled "Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)" ("the LRC Report") (see Table at p 45 of the LRC Report under "Limitation period").

30 The LRC Report reviewed the work of a previous subcommittee in 1992 and made a considered decision to recommend that the knowledge provision in s 12(2)(*b*) of the UK Limitation Act 1980 be incorporated into our law with the resultant effect that dependency claims will be subject to a more flexible limitation period (see Summary of Recommendations at pp 46-47, paras 178(e) and (f) and also paras 175 and 177).

31 Despite the cogent arguments in the LRC Report, the recommendations to affect the absolute limitation period in s 20(5) of the CLA were not implemented. In this context, we have to take the state of the law as it stands. This was *a fortiori* when in 2009, the CLA was again amended to allow a former spouse to bring a dependency claim (see s 20(8)(*a*) of the CLA). Parliament had clearly expressed its intention not to disturb the position in s 20(5) of the CLA.

32 In the light of the above legislative background, it is easy to appreciate the present position whereby s 3 of the LA makes it plain that the LA "shall not apply to any action … for which a period of limitation is prescribed by any other written law", such as s 20(5) of the CLA. In other words, the knowledge provisions in s 24A of the LA (or for that matter s 29 of the LA) do not apply to s 20(5) of the CLA.

33 In Sujata Balan, "The Limitation Period for a Fatal Accident Claim under Section 7 of the Civil Law Act 1956 of Malaysia: A Case for Reform" [2012] SJLS 1, the learned author reviewed the subject of the limitation period for fatal accident claims (mainly under s 7(5) of the Malaysian Civil Law Act but with references to the position in Singapore) and concluded (at pp 19–20) that:

> This article has demonstrated that the provisions concerning the limitation period for a dependency claim in Malaysia and Singapore have not kept pace with the passage of time and that some of its present features are capable of causing hardship to claimants. One of these unfortunate facets stems from the fact that the limitation period prescribed for the claim is enacted without exceptions. Another regrettable feature of the present law in both Malaysia and Singapore is that time for the purpose of limitation runs immediately from the date of death regardless of the state of the knowledge of the person for whose benefit the action is brought …

34 I should add that I agree with the learned author that, "[o]nce the three-year period has expired the court has no power to extend time, either under statute or *under the court's inherent powers* [emphasis added]" (at p 3). See also Part IV, Section C of the article (at p 7).

35 Further support for the proposition that the Court has no power to extend time under s 20(5) of

the CLA can be gleaned from a plain reading of para 7 of the First Schedule, read with s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") which concerns the powers of the High Court. Para 7 states:

> **Time**
>
> **7**. Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, *but this provision shall be without prejudice to any written law relating to limitation*.
>
> [emphasis added]

36 An attempt was made in the Malaysian case of *Lee Lee Cheng (f) v Seow Peng Kwang* [1960] 26 MLJ 1 [note: 5] to extend time under the then item 12 of the Second Schedule of the Courts Ordinance 1948 (Ordinance No 43 of 1948) (Malaysia) in relation to a cause of action time-barred by s 8(3)(*b*) of the Malaysian Civil Law Ordinance. Item 12 reads:

> … jurisdiction to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed.

37 The absence in item 12 of the limiting provision (see italicised part of para 7 of the First Schedule of the SCJA above at [35]) shows that it is clearly wider in import than the Singapore equivalent. Yet Thomson CJ declined to extend the limitation period. He explained the matter this way (at 2):

> … Moreover if the appellant's contention is correct it will have extremely far-reaching and, in my opinion, calamitous consequences. The period prescribed by section 8(3)(b) of the Civil Law Ordinance is a period of limitation. If the Court has power to extend it then it has power to extend any other period of limitation and it would thus be open to every litigant with a statute-barred grievance to come to the Court and attempt to have the statutory bar removed so that he could be heard …

38 Hence on our present facts, while I had sympathy for the Plaintiffs' predicament, there was nothing the Court could do to bypass the time-bar in s 20(5) of the CLA.

39 In the light of the above analysis of the relevant Malaysian and English cases, legislative history, proposals for reform and academic commentary, I was of the view that the time-bar set out in s 20(5) of the CLA is absolute and mandatory; the Court is not given any powers in this regard to extend time or make any exceptions. The law is clear that there is no room for the exercise of judicial discretion. In particular, the provisions of the LA cannot be used in aid to circumvent the effect of s 20(5) of the CLA.

Unconscionable reliance on time-bar

40 Plaintiffs' counsel then invoked the concept of "unconscionable reliance on time-bar". Reliance was placed on an Australian High Court decision, *Hawkins v Clayton* (1988) 164 CLR 539 ("*Hawkins*"), in particular on the judgment of Deane J. The Plaintiffs relied [note: 6] on the following part (at [42]) which bears careful scrutiny:

> ... It is arguable that the notion of unconscionable reliance upon the provisions of a Statute of Limitations which provides the foundation of the long-established equitable jurisdiction to grant relief in a case of concealment of a cause of action until after the limitation period has expired (cf. s.55(1) of the Limitation Act) should, by analogy, be extended to cover cases such as these *where the wrongful act at the one time inflicts the injury and, while its effect remains, precludes the bringing of an action for damages.* It seems to me, however, that the *preferable approach* is to recognize that it could not have been the legislative intent that the effect of provisions such as s.14(1) of the Limitation Act should be that a cause of action for a wrongful act should be barred by lapse of time during a period in which the wrongful act itself effectively precluded the bringing of proceedings. *On that approach*, the reference in s.14(1) of the Act to the cause of action first accruing should be construed as excluding any period during which the wrongful act itself effectively precluded the institution of proceedings.
>
> [emphasis added]

41 The Plaintiffs then submitted that this notion of unconscionable reliance "upon the provisions of the CLA should be similarly extended to" the facts here because "the acts and/or omissions of the Defendants, *whether intentional or not, precluded* [emphasis added]" the Plaintiffs from bringing the action within the time-bar (see para 22 of Plaintiffs' WS). If the Court could be persuaded to apply *Hawkins* here, the Plaintiffs argued that the Defendants should not be allowed to rely on the defence of time-bar (see heading at Part C at p 9 of Plaintiffs' WS).

42 I found that the Plaintiffs' reliance on *Hawkins* for the notion of unconscionable reliance upon a statute of limitations was misplaced. As a preliminary point, Deane J did not ground his decision on the analogy of the notion of unconscionable reliance on a statute of limitations, but on the "preferable approach" of statutory interpretation based on the "legislative intent" (at [42]).

43 I do not propose to cover all the arguments advanced by both parties as the facts here were ill-suited to fall within the scenario on which Deane J carefully rested his decision. The "wrongful act" referred to by Deane J (at [40] above) was clearly that act giving rise to the cause of action. See also his reasoning in the earlier part of [42]:

> … If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is *doubly injured*. There can be no acceptable or even sensible justification of a law which provides that to sustain the second injury will preclude recovery of damages for the first …
>
> [emphasis added]

44 On our facts, the Defendants' acts or omissions which were alleged to preclude the Plaintiffs' bringing their action within the time-bar were not the same acts or omissions giving rise to the cause of action.

45 Further, Deane J regarded the facts of *Hawkins* as falling in an "anomalous category" (also at [42]) and was interpreting a specific provision (s 14) of the Australian Limitation Act 1969 (NSW). Hence in finding the starting date for time to run, he said (at [42]):

> … On that approach, the reference in s. 14(1) of the Act to the cause of action *first accruing* should be construed as excluding any period during which the wrongful act itself effectively precluded the institution of proceedings.

[emphasis added]

46 It is quite a leap to apply directly and as a general proposition the unconscionable reliance on time-bar concept to s 20(5) of the CLA when the starting date in s 20(5) is clearly and unavoidably the date of death. The Plaintiffs showed no other way to construe s 20(5) of the CLA; presumably the Court was being asked to simply disapply limitation (or allow the matter to proceed to trial first).

47 The Plaintiffs' assertion of this vague notion of unconscionable reliance on time-bar comes dangerously close to importing through the back door the defence of concealment of a cause of action under s 29(1)(*b*) of the LA, or the knowledge provisions under s 24A of the LA. Both these provisions clearly do not apply to claims under s 20(5) of the CLA. What was more remarkable was that the Plaintiffs' conception (see para 22, Plaintiffs' WS) may even be wider than what the two said LA provisions permitted.

48 The 1st Defendant pointed out that in *Hawkins*, only Deane J entertained equitable considerations (even then as [42] of the judgment shows, his views were *obiter*). Two Judges (Mason CJ and Wilson J) dissented and were prepared to find that the plaintiff's case was time-barred. The remaining two Judges (Brennan J and Gaudron J) did not consider any equitable exceptions, having found that the plaintiff's action was commenced within the statutory limitation period.

49 On equitable considerations, the 1st Defendant went further and submitted that the Court did not have the power to override limitation periods on grounds of hardship or equitable considerations, citing the Malaysian case of *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603 (see para 92, 1st Defendant's WS).

50 In considering s 6(1)(*a*) of the Malaysian Limitation Act, which reads:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
>
> (*a*) actions founded on a contract or on tort;
>
> ...

Singham J opined (at [4]) that:

> This court is of the considered view that the period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed on the ground of equitable consideration …

51 He added (at [7]) that:

> … In interpreting a provision in a statute prescribing a period of limitation for instituting a proceeding, questions of equity and hardship are out of place (*Jambekar v State of Gujarat* 1973 SCR (2) 714; AIR 1973 SC 309).
>
> > The construction given by this court may be a "hard and narrow view of the law" but this court cannot decline to give effect to this clearly expressed statute just because this court finds it may lead to apparent hardship or serious consequences to the plaintiffs (Lindley LJ in *Young & Co v Mayor, etc of Leamington* (1882) 8 QBD 579 at p 585; (1983 8 App Cas 517).

52 Finally, the Plaintiffs cited the case of *Lim Siew Bee v Lim Boh Chuan and another* [2014] SGHC

41 ("*Lim Siew Bee*") and specifically [112] to show that our courts have applied the concept of unconscionable reliance on time-bar. The passage at [112] reads:

> "Fraud" in the context of s 22(1)(a) of the Limitation Act (Cap 163, 1996 Rev Ed) ("the LA"), does not mean the common law fraud or deceit but it denotes conduct by the defendant that would be against conscience for him to avail himself of the lapse of time (per Brightman J in *Bartlett and Others v Barclays Bank Trust Co Ltd* [1980] 1 Ch 515 at 537). Brightman J in his decision appropriately cited Lord Denning MR's observations in *Applegate v Moss* [1971] 1 QB 406 at 413:
>
> > The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim.

53 I did not think that *Lim Siew Bee* advanced the Plaintiffs' position or argument any further on our facts. It was clear from the above passage that the court was considering what was "fraud" for the purposes of a particular provision in the LA. Again, the Plaintiffs failed to show how the notion of "hid[ing] from the plaintiff the existence of his right of action" could be extrapolated from s 22 of the LA (which was being discussed in a vastly different factual matrix) and applied to s 20(5) of the CLA.

54 In view of the consequences to the Plaintiffs, I had given their counsel some latitude to find a path around the time-bar. However, the Plaintiffs failed to surmount the many hurdles *in law* that confronted them in applying the concept of unconscionable reliance on time-bar to s 20(5) of the CLA. Without parliamentary intervention, the Plaintiffs unfortunately had no relief through s 20(5) of the CLA, whether or not they had a remedy elsewhere. Hence, I agreed with the Defendants' submissions that the Plaintiffs' *factual* allegations of unconscionable reliance on time-bar were strictly irrelevant.

55 The Plaintiffs' case on the facts centred on two matters. The first related to wrong information concerning one Dr Yvonne Chan, an obstetrician. The 1st Defendant had notified the 1st Plaintiff in a letter dated 17 December 2007 that Dr Chan was present during the resuscitation of the Deceased on 18 September 2007 (para 11 of Plaintiffs' WS). However by 15 September 2010 the Plaintiffs were notified that she was not present and was not involved with the Deceased's medical management. According to the Plaintiffs, "[t]his misrepresentation of facts further delayed and impeded the 1st Plaintiff in his efforts to uncover the truth of what happened to his wife during labour and the subsequent delivery of the 2nd Plaintiff" (para 11, Plaintiffs' WS).

56 The second matter related to the missing CTG Trace for the morning of 18 September 2007. The Plaintiffs were only provided with the CTG Trace covering the period from about 12.05pm/12.10pm to 3.17pm on 18 September 2007 (p 164, 1st Defendant's Bundle of Documents). The Plaintiffs alleged that the 2nd Defendant's solicitors had misled them about the records being complete when they enquired in 2011. This was disputed by the 2nd Defendant's solicitors. On 19 June 2014, the Plaintiffs received the CTG Trace for the morning of 18 September 2007 (para 15 of 1st Plaintiff's Affidavit dated 28 January 2015).

57 The Defendants replied directly to both factual complaints. It is not necessary to wade through each and every allegation and reply, for the reason stated at [54] above. As such, I will only touch on the major stumbling blocks in the way of the Plaintiffs' arguments.

58 With respect to Dr Chan's absence, it is important to point out that by 15 September 2010,

that fact was already known. Yet the Plaintiffs still took more than three years from 15 September 2010 to commence their action.

59 Next, despite the unavailability of the morning CTG Trace (which the Plaintiffs said had deprived them of "complete information" to bring to the expert), the 1st Plaintiff's own evidence showed that the other information available to him was sufficient for him and his advisers to uncover a cause of action against the Defendants (see paras 13 and 8 of 1st Plaintiff's Affidavit dated 28 January 2015; and paras 6 and 8 of 2nd Defendant's Supplemental WS).

60 The missing CTG Trace also did not preclude the Plaintiffs from commencing their claim: it is telling that in the original Statement of Claim, the Plaintiffs relied on the missing CTG Trace (in the particulars of negligence) as evidencing the negligent monitoring of the Deceased (see paras 41(4) to 41(6) of the Statement of Claim dated 16 May 2014).

61 In any event, the Plaintiffs could always have issued a generally endorsed protective writ first to preserve their position if they were indeed hampered by the two factual matters. In litigation, it is the function of the discovery stage to provide a more complete picture than that at the investigation stage.

62 More significantly, the Plaintiffs failed to demonstrate what effect the correct information concerning Dr Chan and the morning CTG Trace would have with regard to a cause of action that they could have founded, and in relation to bringing the action within the limitation period.

63 On the facts, the Plaintiffs also, in my view, failed to raise a triable issue that the Defendants had intentionally committed any wrongful acts with a view to concealing a possible cause of action from them.

64 That being the case, and for all the above reasons, the portions of the Statement of Claim (Amendment No 1) that infringed s 20(5) of the CLA should be struck off forthwith: see *Singapore Civil Procedure 2015* vol 1 (G P Selvam gen ed) (Sweet & Maxwell, 2015) at para 18/19/10(2). It should also be noted that in answer to the Plaintiffs' argument, the 2nd Defendant pointed out that in *Kuan Hip Peng*, *Tasja Sdn Bhd* and *Finnegan*, the claims of the plaintiffs were struck off before trial.

Costs

65 In the event, I dismissed RA 109/2015 with costs to be borne by the Plaintiffs. I should explain briefly why I had fixed costs at $7,500 (excluding disbursements) to each of the Defendants.

66 Underlying my determination are the various relevant matters set out at Appendix 1 to O 59 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

67 The total hearing time for RA 109/2015 and RA 112/2015 was about one and three quarters days. RA 112/2015 was heard immediately after RA 109/2015 but the hearing time for RA 112/2015 was well within half an hour. I was also aware that in RA 112/2015, I had allowed the 2nd Defendant's appeal and increased the costs of the proceedings (excluding disbursements) before the AR to $5,000 (from $3,500). The 1st Defendant did not appeal against the costs order of $3,500 ordered by the AR.

68 Coming back to RA 109/2015, the Plaintiffs conceded that the hearing time was longer than before the AR but submitted that many of the arguments were rehashed. The Plaintiffs also highlighted the fact that in view of the Court's decision on the time-bar issue, no decision was necessary on the issues of *locus standi* and the necessity of an estate claim (with respect to the

Category E Claims) ("arguments on estate claim").

69 This matter had been made laborious by the Plaintiffs' efforts to circumvent the time-bar under s 20(5) of the CLA and the Defendants' counterarguments to prove conclusively that the time-bar was absolute and admitted of no exceptions.

70 In my view, much time had to be spent in exploring and examining the arguments raised by the Plaintiffs under the heading of unconscionable reliance on time-bar. The Plaintiffs did their valiant best, advancing arguments in law and on the facts. Arguments and rebuttals were advanced on the fly and further arguments and supporting materials followed. This was of obvious importance to the Plaintiffs because if there was a path around the time-bar, any court would want to explore that possibility and hear the Plaintiffs out. This issue did not feature prominently before the AR. In fact the overall hearing time and oral argumentation before the AR was substantially less than before me.

71 As for the arguments on estate claim (see [68] above), they were necessary as the Defendants had a second string to their bow if they had lost on the time-bar issue. This part had to be explored in some detail so long as no decision was reached on the time-bar issue.

72 The materials and arguments before me testified to the work done by the parties to nail down the points. Considerable research and professional work were done on how the courts have interpreted the equivalent of s 20(5) of the CLA, the legislative history and proposals for reform. The academic commentary by Balan was relevant and helpful. The position and points taken by the Plaintiffs made it reasonable for the Defendants to prove their case strictly and demonstrate that s 20(5) was absolute. The effort was necessary also because of the importance of the striking out applications to the clients. A substantial part of the Plaintiffs' claims was at risk of being struck out while the reputation of the Defendants was at stake. Substantial damages were at large. The 2nd Defendant added that if the Defendants had lost the appeal before me (*ie*, failed in their striking out applications), they would have no further right of appeal to the Court of Appeal. The Defendants submitted that costs should be fixed at $10,000 to each Defendant.

73 Considering all matters in the round, including the fact that the applications would finally dispose of all the time-barred claims, I fixed costs of RA 109/2015 at $7,500 (excluding disbursements) to be paid by the Plaintiffs to each of the Defendants. The Defendants were also entitled to their reasonable disbursements.

[note: 1] 1st Defendant's Bundle of Documents, p 228.

[note: 2] S 7(5) of the Malaysian Civil Law Ordinance reads, "Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of such deceased person."

[note: 3] 2nd Defendant's WS at [12]; 1st Defendant's WS at [49] and [50].

[note: 4] Tab 18, 1st Defendant's Bundle of Authorities.

[note: 5] Tab 12, 1st Defendant's Bundle of Authorities.

[note: 6] See para 21 of Plaintiffs' WS.

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