

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHCR 10

Suit No 950 of 2015

Between

- (1) Antariksa Logistics Pte Ltd
- (2) Pacific Global (S) Pte Ltd
- (3) Fastindo (Singapore) Pte Ltd

... Plaintiffs

And

- (1) Nurdian Cuaca
- (2) D'League Pte Ltd
- (3) Tan Tzu Wei
- (4) Wee Kian Teck Brendan
- (5) Chan Mui Aye Rosa
- (6) Johnny Abbas
- (7) Radius Arthadjaya
- (8) PT Prolink Logistics Indonesia

... Defendants

GROUND OF DECISION

[**Res judicata** – Extended doctrine of res judicata – Plaintiffs making bona fide decision to litigate incrementally – Whether extended doctrine of res judicata applicable]

[**Civil procedure** – Pleadings – Striking out – Whether action should be struck out]

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Antariksa Logistics Pte Ltd and others

v

Nurdian Cuaca and others

[2016] SGHCR 10

High Court — Suit No 950 of 2015 (Summons No 1978 of 2016)

Chan Wei Sern, Paul AR

9 June; 8 July 2016

27 July 2016

Judgment reserved.

Paul Chan AR:

1 The three plaintiffs in the present application were freight forwarders; they acted for customers who needed their goods shipped to a foreign country. In 2009, arising out of a failed attempt to ship cargo to Indonesia, the plaintiffs suffered loss and damage but were also potentially liable to their customers for any losses their customers may have suffered. The fault for this state of affairs they attributed to various parties. The plaintiffs were then faced with a strategic decision. On the one hand, they could commence a large, complex suit based on various causes of action against multiple defendants in hope of settling all outstanding issues at once. Alternatively, they could adopt a more circumspect, incremental approach. By this latter strategy, the plaintiffs would sue initially only in conversion against the single party actually in possession of the cargo with the primary aim of minimising or eliminating any potential

liability they may owe to their customers. Thereafter, the plaintiffs would then assess if they should proceed with claims in conspiracy, deceit and unjust enrichment against other defendants to recover their own personal losses. As it turned out, the plaintiffs took the latter path and substantially succeeded in their first claim for conversion. This application arose out of the subsequent action for conspiracy, deceit and unjust enrichment.

2 In the present application, the 1st defendant sought to strike out, at a formative stage of the proceedings, the plaintiffs' claims for conspiracy, deceit and unjust enrichment. He argued that the action contravened the extended doctrine of *res judicata*, which has also come to be known as abuse of process. However, this was not a situation where there has been a collateral attack on a prior decision. Nor was it alleged that plaintiffs had been dishonest or that they had commenced the current action for an ulterior or improper purpose. Indeed, the 1st defendant's dissatisfaction stemmed purely from the fact that the plaintiffs had chosen to pursue their claims in an incremental manner. The 1st defendant submitted that as he was not brought or added as a party in the first action, it was no longer open to the plaintiffs to commence a subsequent action against him on the basis of largely similar facts.

3 It is often said that the common law is adversarial in nature. In times not long past, such a judicial system subscribed, amongst other things, to two complementary ideas: party autonomy and party control of the litigation process: see Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, (England: Sweet & Maxwell, 2013) (at [11.7]) ("**Zuckerman**"). The former notion meant that the plaintiff to a dispute is free to choose, *inter alia*, when to litigate, over what issues and against whom. The latter meant that parties are allowed to dictate the intensity and pace of the litigation process. Today, party autonomy is still a prominent feature of the Singapore civil

landscape but much of the control over the litigation process has been re-asserted by the courts. This followed from the civil procedure reforms our courts undertook two decades ago to eliminate a backlog of cases. One consequence of this gradual shift away from a perfectly adversarial system is the possibility of having to weigh between values that are not fully aligned. Such was the case here. In the present application, the court was tasked to answer the following question – under what circumstances would a case management decision by the plaintiffs to manage their claims in an incremental manner rather than all at once amount to an abuse of process? Put another way, when would the court curtail party autonomy in the name of controlling the litigation process?

Background

4 The germane background may be usefully classified into three categories: (i) the ill-fated attempt in 2009 to ship cargo into Indonesia; (ii) the subsequent litigation in Suit No. 856/2009 (the “**2009 Suit**”) where the plaintiffs successfully sued for conversion; and (iii) the present claims in Suit No. 950/2015 (the “**2015 Suit**”). It is important to note that the facts recounted below were as presented by the plaintiffs. For the purposes of the present application, the 1st defendant was content to argue on the basis of these facts but he reserved the right to take issue with them if the action was allowed to proceed further.

The shipping of the cargo to Indonesia and back again

5 As mentioned, the plaintiffs were in the business of providing freight forwarding services. The 1st defendant was an Indonesian businessman engaged in the same industry. Although they had known each other for some time, it was only after a chance encounter in 2005 that the 1st defendant and

one Mr Tie Hari Mulya (“**Mr Hari**”), who was for intents and purposes the plaintiffs’ representative, decided to work together to transport goods between Singapore and Indonesia. Under this business venture, the plaintiffs would engage the 1st defendant’s services, for a fee, to facilitate customs clearance every time the plaintiffs had cargo to ship to Indonesia. If the cargo was denied entry into Indonesia, the 1st defendant would have to reship it back to the plaintiffs in Singapore or pay the total value of the cargo.

6 In early 2009, the plaintiffs managed to consolidate 30 containers worth of goods for transportation to Indonesia. These goods were in the nature of general merchandise and did not belong to the plaintiffs but to their customers who individually appointed one of the plaintiffs to provide door-to-door freight forwarding services. Accordingly, the plaintiffs shipped these 30 containers to Jakarta, Indonesia whereupon, pursuant to the earlier agreement, the 1st defendant was to arrange for the entry of the cargo into Indonesia.

7 As it turned out, the 1st defendant had difficulties with importing the cargo into Indonesia. Parties agreed for the cargo to be redelivered back to Singapore and the 1st defendant was supposed to make the necessary arrangements. However, some months later, the cargo still had not been re-exported to Singapore. When Mr Hari pursued this matter, the plaintiffs were asked to pay demurrage fees and other costs incurred for re-exportation. In order to procure the release of the cargo, the plaintiffs paid the sums of USD 170,000 and Indonesian Rp 1.2 billion (about USD 140,000) (collectively, the “**Transportation Expenses**”).

8 On 18 September 2009, a representative of the plaintiffs’ attempted to collect original bills of lading which would allow the plaintiffs to collect the goods in Singapore as named consignees. To their surprise, the plaintiffs were

informed that a company known as McTrans Cargo (S) Pte Ltd (“**McTrans**”) had been named consignees instead pursuant to the instructions of, *inter alia*, the 1st defendant. Consequently, upon its arrival back in Singapore, the cargo was received by McTrans and transported to McTrans’ premises. It was later asserted by the plaintiffs that McTrans was acting on the instructions of the 1st defendant. Naturally, Mr Hari demanded to know why the 1st defendant did not return the cargo to the plaintiffs. To this question, the 1st defendant counter-demanded, apparently without justification, that the plaintiffs pay a further sum of RP 45 billion or USD 5 million the following day, failing which the cargo would not be released. Mr Hari rejected this demand outright.

9 After failing to extort money from the plaintiffs, the 1st defendant used the second string to his bow. The defendants and/or their agents approached the plaintiffs’ customers or their customers’ suppliers to demand the payment of money and/or the issuance of Powers of Attorney in favour of companies under the control of the 1st defendant in order for the customers to obtain the release of their goods. This strategy found more success. At least two of the cargo owners caved in to such demands. PT Erajaya Swasembada, Tbk (“**PT Erajaya**”) paid sums of Rp 50,266,056,000 and SGD 282,586.85 while PT Teletama Artha Mandiri (“**PT Teletama**”) paid sums of Rp 34,523,316,300 and SGD 26,100.02 to the 1st defendant (collectively, the “**Extortion Monies**”). The plaintiffs claim that these sums were monies owing from these companies to the plaintiffs for freight forwarding services previously rendered. In the result, the plaintiffs would be unable to recover debts properly owed to them from PT Erajaya and PT Teletama.

The 2009 Suit

10 On 13 October 2009, the plaintiffs commenced an action for conversion against McTrans. It is necessary to go into the procedural history of the 2009 Suit in some detail for the 1st defendant relied upon aspects of it for some of his arguments.

11 When the 2009 Suit was commenced, the only named parties were the plaintiffs and McTrans as the sole defendant. The 1st defendant was not named as a party in that action at that point or at any other point. A writ was filed but it was not initially endorsed with a statement of claim. Rather, the endorsement of claim merely stated that the plaintiffs claim against McTrans for conversion and/or wrongful interference.

The interim injunction application

12 On the same day as the writ was filed, the plaintiffs filed Summons No 5358/2009 to apply for an injunction for delivery up of the 30 containers (the “**2009 Injunction Application**”). In support of this application Mr Hari filed affidavits on two separate occasions. In these affidavits, Mr Hari averred essentially to the basic facts stated at paragraphs [5] to [9], above, relating to the unlawful detention of the cargo and the attempts at extortion. He then additionally and categorically alleged that the 1st defendant and McTrans had “clearly intended to defraud the Plaintiffs and destroy the Plaintiffs’ business” and that it was unclear if McTrans had any other assets beyond its paid-up capital of S\$25,000.

13 The 2009 Injunction Application was adjourned on various occasions thereafter, pending the addition of some cargo owners as co-plaintiffs. A separate application was eventually made to this end and a further 13

plaintiffs, who were owners of various portions of the cargo, were added to the 2009 Suit on 20 January 2010. The 2009 Injunction Application was eventually restored for hearing and at the restored hearing, it was recorded that, by consent of the parties, no order be made on the application.

The substantive action

14 On 26 February 2010, a Statement of Claim was finally filed in respect of the 2009 Suit. In their Statement of Claim, the plaintiffs (together with the other 13 additional plaintiffs) recounted all the material events recounted earlier. That initial Statement of Claim alleged that McTrans and/or the 1st defendant and/or various other personalities had converted or wrongfully detained cargo to their own use. At that point, the losses which the plaintiffs particularised included the Transportation Expenses stated in paragraph [7]. The plaintiffs then prayed, *inter alia*, for damages to be assessed and a declaration that the plaintiffs be indemnified for all claims arising from the conversion. The plaintiffs did not at this point seek delivery up of the containers. This was only done at a later point in time by way of an amendment to the initial Statement of Claim.

15 The trial for the 2009 Suit was heard over 21 days from the end of October 2011 to February 2012. In her grounds of decision, recorded in *Antariksa Logistics Pte Ltd and oths v McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250, Justice Belinda Ang Saw Ean (“**Justice Belinda Ang**”) did not pull her punches. She held, *inter alia*, that:

- (a) The history revealed a striking absence of ordinary commercial behaviour on the part of McTrans;
- (b) McTrans adopted inconsistent defences;

- (c) McTrans' conduct at different stages of the proceedings contradicted its proclaimed role as an innocent agent;
- (d) By the end of the trial, it was patently clear that McTrans' claim of lien to justify the detention of the containers was illusory.

Unsurprisingly, Justice Belinda Ang gave judgment for the plaintiffs. Insofar as the three plaintiffs in the current action were concerned, she granted them a declaration that McTrans was to indemnify them for all liabilities and losses incurred arising from the conversion. However, she did not grant them the Transportation Expenses that they had sought.

The 2015 Suit

16 In the 2015 Suit, the plaintiffs sued, *inter alia*, the 1st defendant for conspiracy, deceit and unjust enrichment. In general, it may be said that the plaintiffs again pleaded all the material events as he did in the 2009 Suit, save that he now did so with even greater particularity. Moreover, the plaintiffs added in its 2015 Statement of Claim the following:

- (a) McTrans was wound up on 21 November 2014 and that, as at the date of the filing of the Statement of Claim, the plaintiffs had not recovered any damages or legal costs from McTrans;
- (b) In the course of the 2009 Suit, the plaintiffs discovered that: (i) the 3rd defendant, a former director of McTrans, was on familiar terms with the 1st defendant, (ii) McTrans' initial legal fees were funded by the 2nd defendant, a company in which the 1st defendant was a director; and (iii) McTrans was still accepting

instructions from the 8th defendant, a company controlled by the 1st defendant, as late as 5 September 2011; and that

- (c) The 4th and 5th defendants, as directors and shareholders of McTrans knowingly allowed McTrans to be used as a vehicle for the 1st defendant to wrongfully gain control over the cargo.

The intended upshot of these allegations was that the 1st defendant was an active participant, if not the mastermind, of a nefarious scheme to defraud the plaintiffs.

17 Ultimately, the plaintiffs prayed in the 2015 Suit for a declaration that the defendants indemnify the plaintiffs for all liabilities, losses and expenses arising from the alleged conspiracy and/or fraud and repayment of the Transportation Expenses. In addition, the plaintiffs also sought for damages to be assessed or, alternatively, the Extortion Monies to be paid on the ground of unjust enrichment.

Parties' arguments

The 1st defendant's case

18 The 1st defendant contended that the plaintiffs' claim was an abuse of process. This was so for three reasons. First, the plaintiffs *could* have brought their claims against the 1st defendant in the 2009 Suit. As the 1st defendant saw it, the facts that formed the basis of the 2015 Suit against the 1st defendant were essentially the same facts that formed the basis of the claim in the 2009 Suit. Insofar as additional facts were pleaded in the 2015 Suit, the plaintiffs had knowledge of these additional facts by 26 February 2010 - which was when the plaintiffs filed their initial Statement of Claim in the 2009 Suit - and

had sufficient evidence to bring the claims that they were now making in the 2015 Suit.

19 Secondly, the plaintiffs *should* have brought their claims against the 1st defendant in the 2015 Suit. The issues that the plaintiffs sought to raise in the 2015 Suit were clearly part of the subject matter of the 2009 Suit. By the 1st defendant's reckoning, the plaintiffs were under a duty to bring forward their whole case at once so that all aspects of it could be finally decided once and for all. It was not open to the plaintiffs to bring their claims incrementally.

20 Finally, it was submitted on behalf of the 1st defendant that there were no *bona fide* reasons to explain the plaintiffs' failure to bring their claims against the 1st defendant in the 2009 Suit and that there was no fresh evidence or new circumstances which justified bringing an independent action. Rather, the plaintiffs consciously chose in 2009 to pursue their claims against McTrans, a defendant which the plaintiffs knew was unlikely to be able to satisfy any judgment they may obtain. Having taken that risk, the plaintiffs should not be heard to complain about not obtaining any damages or recovering any losses.

The plaintiffs' case

21 There were four distinct strands to the plaintiffs' resistance of the present application. First, it was submitted that the facts in the 2015 Suit were not identical to the facts in the 2009 Suit. This was because the facts pleaded in the 2015 Suit included the judgment against McTrans in the 2009 Suit as well as facts relating to the exact debts owned by PT Erajaya to the plaintiffs. Such facts were not raised in the 2009 Suit. Indeed, the plaintiffs in the 2015 Suit would have to prove that the monies that were paid to the 1st defendant by PT Erajaya and/or PT Teletama were in fact owed to the plaintiffs instead and

that the 1st defendant procured the payment of such sums through duress, extortion and other illegal means.

22 Further, the pertinent issues in the two suits were also legally and conceptually different. The 2009 Suit concerned the unlawful detention of cargo by McTrans. On the other hand, the main thrust of the 2015 Suit was the return of monies due to the plaintiffs but which were wrongfully paid to the 1st defendant by PT Erajaya and PT Teletama. The causes of action were entirely distinct. The plaintiffs emphasised that they were entitled to sue on every cause of action available to obtain recovery and that they were not claiming for the same set of losses.

23 In addition, the plaintiffs explained why they did not bring the present claims within the ambit of the 2009 Suit. To begin with, although the plaintiffs had suspected that the 1st defendant had conspired against the plaintiffs, the plaintiffs did not have any documentary evidence to that effect at the relevant time. It was also, to them, the most pressing matter in 2009 to try and have the cargo released or at least to obtain an indemnity for any liabilities they may owe to their customers. The plaintiffs repeated that if the cargo was not released in a timely manner, the plaintiffs could have been liable for resulting damages which would increase the longer the goods were wrongfully detained. By the plaintiffs' reckoning, the claims of fraud and conspiracy in the 2015 Suit were far harder to prove than the claim for conversion in the 2009 Suit. It was not unreasonable for the plaintiffs to take time to weigh the evidence available for the fraud and conspiracy claims against the present defendants while proceeding first with the conversion claim against the party in actual possession of the cargo.

24 Finally, the plaintiffs pointed to the fresh evidence that has arisen since the 2009 Suit. Specifically, the plaintiffs have, following the 2009 Suit, obtained evidence relating to the connection between the 1st defendant and the 3rd defendant, who was McTrans’ representative, thereby establishing the link between the 1st defendant and the unlawful retention of the cargo. This was not known to the plaintiffs previously. Moreover, the plaintiffs intended to rely on the observations of Justice Belinda Ang relating to McTrans’ uncommercial conduct. The last piece of fresh evidence has to do with the 6th defendant in the 2015 Suit. The plaintiffs managed to obtain a copy of a statement by the 6th defendant to the Indonesian police in which the 6th defendant essentially admitted that he was acting under the instructions of the 1st defendant and that it was the 1st defendant who had control of the cargo that was unlawfully detained.

Issue and preliminary points

25 The central issue in the present application was whether the plaintiffs’ decision and act of bringing their claims in an incremental manner constituted an abuse of process. This involved examining the plaintiffs’ decision in 2009 to only sue McTrans for conversion without including the 2015 claims of conspiracy, deceit and unjust enrichment within that action. However, before delving into that topic, two preliminary points ought to be addressed.

26 First, the nature of the application before the court. The matter before me was a striking out application and I bore that well in mind. The striking out of pleadings is an important part of the court’s arsenal of case management tools. As this is a relatively draconian step to take, the court’s use of this power ought to be exercised sparingly and only in exceptional instances. Hence, “it is only in plain and obvious cases that the power of striking out

should be invoked”: *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 (at [18]). Insofar as the present application was based on an allegation of abuse of process, the conduct of the plaintiffs must admit of only one credible conclusion which was that the plaintiffs had abused the process of the court. If there was any other explanation for the conduct of the plaintiffs which was not inherently incredible, they must be accorded the benefit of the doubt.

27 Secondly, mention must be made of the correct approach to analyse applications invoking the extended doctrine of res judicata. The litmus test, as will be further explained, should be the single question of whether there has been an abuse of process. This is a broad, merits-based assessment that is determined by looking at all the circumstances of the case: *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 (“**Goh Nellie**”) (at [53]). Within this test, one may consider all relevant factors, some of which will be referred to later in this judgment. That said, the test for abuse of process must, as a matter of reason, be preceded by the threshold question of whether the issues in the later proceedings *could* have been raised earlier. If such issues could not have been raised earlier, there would be no question of an abuse of process taking place, whatever else may be the circumstances. This is a threshold question as it is logically prior but, after it has been determined, would not factor into the broad, merits-based assessment.

28 In the present case, the threshold question was one that was a non-issue. The plaintiffs appeared to have conceded that they could, as a matter of theoretical possibility, have included claims for conspiracy, deceit and unjust enrichment in the 2009 Suit when the 2009 Suit was first commenced or, at the latest, when the Statement of Claim for the 2009 Suit was filed on 26 February 2010. I use the phrase “appeared to” because counsel did not

expressly state so. However, the plaintiffs readily admitted that they already had suspicions in 2009 of the conspiracy that they were now pleading in the 2015 Suit against the 1st defendant. Indeed, such suspicions would naturally and readily arise from the manner in which the events unfolded. The only uncertainty in 2009 was the strength of the evidence to support the claim of conspiracy. Hence, counsel for the plaintiffs rightfully focused on the issue of whether the 2015 claims *should* have been brought in 2009 and this judgment will do likewise.

The law

29 In discussing the extended doctrine of res judicata, this judgment will explore the following topics in turn: (i) the origins of the rule and policy considerations; (ii) the test as set out in *Johnson v Gore Wood & Co* [2002] 2 AC 1 (“*Johnson*”); and (iii) the scope of the doctrine.

Origins and policy considerations

30 The extended doctrine of res judicata is today well-established both in England and in Singapore. Its roots may be traced to the 19th century but it really only gained a clear juridical footing in the last two decades. As a result, one may observe a gradual increase in the utilisation of that doctrine as the common law feels out its edges. To the extent that it is important not to step off the edge, it is essential that we understand this area of law in context before applying it.

31 As Zuckerman outlined (at [11.239]), “[o]ne of the principal aims of the abuse of process jurisdiction is to enable the court to deal with problems to which the rules either provide unsatisfactory solutions, or altogether fail to address.” Accordingly, the extended doctrine of res judicata operates in the

shadow of two other principles of substantive law - cause of action and issue estoppel. Resort is usually had to the extended doctrine only when the estoppel doctrines are not applicable. As the Court of Appeal explained in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 (at [101]):

Strictly speaking, cause of action estoppel and issue estoppel apply only in situations where a litigant seeks to re-argue points which have already been the subject of a previous judicial decision in earlier proceedings between the same parties. There is then the litigant who seeks to argue points which were not previously determined by a court or tribunal because they were not brought to the attention of the court or tribunal in the earlier proceedings even though they ought properly to have been raised and argued then. The law recognises that in this latter situation, the litigant – in the absence of “special circumstances” – should also not be permitted to argue those points in order that there might be finality in litigation, and this is where the “extended” doctrine of *res judicata* comes in.

32 Cause of action and issue estoppel, as principles of substantive law, operate within the confines of strict rules which dictate the result. Satisfy the legal requirements and estoppel, save in very exceptional circumstances, applies. However, the extended doctrine of *res judicata* is “no more than a procedure rule based on the need to protect the process of the court from abuse and the defendant from oppression”: see *Johnson* (at 59). This point has a significant implication. As with the application of any other procedural rule, one must be wary of missing the wood for the trees. The wood, in the context of the extended doctrine, is the fact that the issues which are being sought to be raised in the later action are being litigated *for the first time*, at least as between the parties in question. Hence, the extended doctrine must invariably be applied against the looming shadow of an individual’s common law right of access to justice and protection of the law. As was observed, “[i]t is one thing

to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon”: *Johnson* (at 59). The court must tread cautiously before denying an individual a chance to litigate an issue for the first time.

33 That said, there is undoubtedly a proper place for the operation of the extended doctrine of *res judicata*. The birth of this doctrine is usually attributed to the case of *Henderson v Henderson* (1843) 3 Hare 100 (“*Henderson*”), although that case should properly be understood as involving a cause of action estoppel. Be that as it may, Sir James Wigram V-C did in *Henderson* hold (at 115-116) as follows:

[W]here a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject matter of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

By this pronouncement, it is clear that the extended doctrine of *res judicata* was targeted at the raising of issues which were not previously litigated but which nevertheless *ought to have been* as they “properly belonged to the subject of litigation”.

34 The rationale for the *Henderson* rule was explained in *Barrow v Bankside Members Agency Ltd* [1996] 1 WLR 257 (“**Barrow**”) as follows (at 260):

It is a rule of public policy based on the desirability, in the general interest, as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed at.

The doctrine is then underpinned by concerns that have a private as well as a public aspect. The private aspect is that “a party should not be twice vexed in the same matter”: see *Johnson* (at [31]). Interestingly, a feature of the extended doctrine of res judicata is the fact that the parties in the two actions need not be identical. One must therefore examine the case at hand to determine if the private aspect is operative. The public aspect has often been expressed as the need to have “finality in litigation”: *Johnson* (at [31]). The use of that phrase calls for some explanation for there is, without more, no reason why an unlitigated issue should be treated as “final”. The better way to express this concern is by reference to the policy that there be “efficiency and economy in the conduct of litigation”: *Johnson* (at [31]). As a general policy preference, the civil procedure system encourages all involved to dispose of disputes in the most comprehensive and economical way possible, given that finite public funds and resources are being used.

A broad, merits-based judgment

35 Given that the extended doctrine of res judicata prohibits a litigant from raising an issue that has never been determined, it must only be applied in very limited circumstances. The only justification for such a course of action would be where there has been an abuse of process. However, how is

the court to determine if there has been an abuse of process? In *Johnson*, the English House of Lords set out (at 31) that the appropriate approach was:

... a broad, merits-based judgment which takes into account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

36 This approach has been followed in our local jurisprudence, not in the least in *Goh Nellie* where the High Court emphasised (at [53]) the importance of a holistic and balanced approach:

In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant.

37 Hence, insofar as the extended doctrine of *res judicata* is concerned, the litmus test is that there must be an abuse of process. After one moves beyond the threshold question of whether the issues in the later proceedings *could* have been raised earlier, there are no strict, indispensable requirements in determining whether there has been an abuse of process. Rather, all relevant factors may be considered and each case is necessarily fact-specific. In examining the conduct of the plaintiff or defendant (as the case may be), the court must not adopt a rigid, unyielding approach. The determination should be a broad, merits-based one, with the different and often competing policy considerations acting as side rails to aid in guiding the court to the single conclusion of whether there has or has not been an abuse of process.

The scope of the doctrine

38 While the origins of the extended doctrine of res judicata may be traced to the 19th century, many aspects of the rule required evolution and modern resolution. In particular, this judgment will, with reference to caselaw, briefly touch upon the following issues relevant to the present application: (i) matters that “properly belonged to the subject of litigation”; (ii) identity of parties; (iii) additional elements or aggravating factors; and (iv) the making of case management decisions by litigants. Given the importance of not missing the wood for the trees, it is not surprising that there are very few sacred cows in this area of law beyond the broad, holistic approach advocated in *Johnson* and *Goh Nellie*.

Matters that “properly belonged to the subject of litigation”

39 One important issue that needed determination was what sort of matters “properly belonged to the subject of litigation”. In particular, were parties expected to raise all issues that *could* have been raised? For a time, the answer was in the affirmative. In *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581 (“*Yat Tung*”) (at 589), Lord Kilbrandon held that “there is a wider sense in which the extended doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.” Although the decision in *Yat Tung* was, in my view, ultimately correct, Lord Kilbrandon’s “could and therefore should” principle was quickly seen as being too wide. The retreat from this principle began in 1978 and was finally put to rest in *Johnson* where it was held (at 31) that:

“[i]t is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach...”

Consequently, it does not suffice that an issue could have been raised earlier. More is required to trigger the operation of the extended doctrine of res judicata. As I outlined earlier, whether an issue could have been raised in earlier proceedings should be no more than a threshold question.

Identity of parties

40 Another issue that required resolution was whether the doctrine may be utilised by or against a non-party to the initial action. It is one thing to say that a plaintiff ought to have raised all relevant issues against a defendant in a single action. It is a step removed to argue that a plaintiff ought to raise all relevant issues and *include* additional defendants so that issues against the additional defendants may also be determined. Older cases have not always spoken with one voice on this issue. In *C. (a minor) v Hackney London Borough Council* [1996] 1 WLR 789 the English Court of Appeal held (at 794) that the *Henderson* rule only applied where the parties to both sets of proceedings were identical. Yet, the contrary position was adopted by the same court just three years later in *Bradford & Bingley Building Society v Seddon Hancock and others (Third Parties)* [1999] 1 WLR 1482 (“**Bradford**”) where it was held (at 1491) that the rule “is capable of application where the parties to the proceedings in which the issue is raised are different from those in earlier proceedings.”

41 It is, today, fairly established that the *Bradford* position is to be preferred. In our local jurisprudence, for instance, it has been held that the fact that one party to the later proceedings was not a party to the earlier litigation is no bar to the operation of the *Henderson* rule: see *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 (at [62]) and *Then Khek Koon v Arjun Permanand Samtani* [2014] 1 SLR 245 (at [100]). Equally, one must not be

too quick to swing to the other extreme. Just because a party could have been joined in earlier proceedings did not without more make it an abuse of process for that party not to have been joined: *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 (at [27]). In short, the presence or lack of identity of parties is neither necessary nor sufficient.

Additional elements or aggravating factors

42 In the course of the development of the extended doctrine of res judicata, there was a suggestion in some quarters that to find an abuse of process some aggravating factor is necessary. In *Bradford*, for instance, the English Court of Appeal held (at 1493) that “[s]ome additional element is required, such as a collateral attack on a previous decision..., some dishonesty..., or successive actions amounting to unjust harassment...” The requirement of an “additional element” was laid to rest in *Johnson*. Lord Bingham of Cornhill unequivocally held that it is not necessary “to identify any additional element such as a collateral attack on a previous decision or some dishonesty” before abuse of process may be found (at 31). However, this is not to say that the presence or absence of such elements is inconsequential. In his view, “where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party.” Put simply, the court should be slow, or at any rate slower, to find an abuse of process where there has been no collateral attack on a previous decision, unjust harassment, dishonesty or where the action was not being used for an improper purpose.

Case management decisions by litigants

43 Turning now to the most germane issue of the making of case management decisions by litigants, this area of law has been illuminated by three English cases that have dealt with this very topic: *Johnson, Aldi Stores Ltd v WSP Group plc and others* [2007] EWCA Civ 1260 (“**Aldi**”) and *Stuart v Goldberg Linde (a firm) and others* [2008] EWCA Civ 2 (“**Stuart**”). The question that faced each of these courts was whether a case management decision by the plaintiff to litigate one action first before others constituted an abuse of process. In this regard, four main points may be extracted.

44 First, that the plaintiff may have a private interest in or may derive some personal benefit from conducting litigation incrementally is a relevant factor to consider. In *Johnson*, for instance, the plaintiff was a businessman who conducted his business through a company. As a result of a property transaction that went awry, the plaintiff had causes of action against the defendants both personally as well as in the name of his company. As it turned out, he chose to sue in the name of his company first before commencing an action in his personal name. The House of Lords held that this was not improper. This was because the company needed a quick and favourable resolution of the litigation in order to survive. However, advancing the personal claim of the plaintiff would have substantially delayed the progress and resolution of the corporate action because the personal claim was more complicated and therefore more costly and time-consuming: *Johnson* (at 18).

45 Secondly, there is no requirement that a plaintiff must make a case management decision that would result in *the* most efficient and economical use of the court’s resources. In *Aldi*, the plaintiff held off suing two other parties in hope of obtaining full relief from the defendant that the plaintiff had

sued. Had the plaintiff obtained recovery against the defendant, there would be no further need to sue the other two parties. The English Court of Appeal held (at [18]) that “that was a decision which was open to [the plaintiff] as a sensible and cost effective way of proceeding...”

46 Some commentators have understood this case as relaxing the test for abuse of process: see Zuckerman (at [25.122]). This is based on the following passage found in *Aldi* (at [24]):

I do not see how the mere fact that this action may require a trial and hence take up judicial time (which could have been saved if Aldi had exercised its right to bring an action in a different way) can make the action impermissible. If an action can be properly brought, it is the duty of the state to provide the necessary resources; the litigant cannot be denied the right to bring a claim... on the basis that he could have acted differently and so made more efficient use of the court's resources.

To this extent, Zuckerman was of the view (at [25.124]) that the decision in *Aldi* ought to be revisited. In his view, “[i]t seems only fair that a party should be required to use the resources that the court has allocated to him in the most effective way.”

47 I do not read *Aldi* as lowering or in any way altering the standard set out in *Johnson*. On the contrary, it goes too far to require a litigant to elect the route that represents the most efficient or effective use of the court's resources. In the first place, it may not always be possible, at the time when the decision is to be made, to identify this route. Hence, such a standard may put a litigant in an impossible position. Further, efficient use of the court's resources, while important, is not the only laudable goal. To give this public interest primacy regardless of the circumstances would be to subordinate other worthy values such as party autonomy. This may not produce a just result.

48 In my view, the broad, merits-based test established in *Johnson* and adopted in *Goh Nellie* simply requires that the course of action adopted by a litigant be given appropriate weight and measured against other material factors. If a litigant had acted wholly unreasonably by litigating in a manner that unduly taxes the court's resources without any corresponding benefit to himself, that ought to be considered in the test for abuse of process without necessarily being conclusive of the issue. If a litigant had elected a course of action that may be deemed to be the most efficient use of the court's resources, that too ought to be noted without foreclosing the primary question of whether there had been an abuse of process. If a litigant had adopted one of many reasonable courses of action but which may not necessarily represent the most efficient use of court's resources, that too ought to be properly weighed, thrown into the pot and stirred with other relevant factors to produce a just determination. In short, the broad, merits-based test eschews the establishing of any sacred cow, even one as desirable as efficiency in litigation.

49 Turning now to the third point, another relevant factor to consider would be whether adding the claims in the later proceedings to the earlier one would "transform" the action. In *Stuart*, the plaintiff had a choice of several causes of action against a firm of solicitors: breach of an undertaking, inducement of breach of contract and misrepresentation. The plaintiff chose to sue only for breach of an undertaking at first instance before subsequently taking out a second action against the same defendants for the latter two claims. The English Court of Appeal rejected the defendants' contention that there had been an abuse of process because adding the latter claims of inducement of breach of contract and misrepresentation to the initial claim for breach of an undertaking would have "transformed the whole proceedings" by turning a relatively simple action to one much wider in scope: *Stuart* (at [55]).

50 This leads me neatly to the final, broader point. Amongst the many public interests that have to be balanced in a claim of abuse of process, there is one that is particularly pertinent in a situation where the plaintiff had made a genuine, *bona fide* case management decision. In such cases, the court must be cognisant of the fact that “there is a real public interest in allowing parties a measure of freedom to choose whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings”: see *Aldi* (at [25]).

The decision

51 With the above in mind, I now turn to the matter at hand. The 1st defendant’s dissatisfaction with the 2015 Suit may be distilled simply. To the 1st defendant, the plaintiffs had abused the process of the court by choosing to sue only McTrans in 2009 and then subsequently bringing the 2015 Suit against the 1st defendant when the two actions were based on largely similar facts. To examine the strength of this argument, I begin with the broader public interest considerations before turning to the private interests of the parties.

Public interests

52 In my consideration of the present application, it was not inconsequential that no “additional element” or “aggravating factor” such as a collateral attack against a prior decision or harassment was alleged against the plaintiffs. In like manner, it was not without significance that this was not a case where the failure to bring the later claims was a result of negligence or inadvertence. While the lack of these elements did not, as explained above, foreclose the finding of an abuse of process, their absence was telling in

another way. Essentially, there was no reason to doubt that the plaintiffs had made a *bona fide* case management decision in 2009. In other words, the plaintiffs made a decision that it thought would be the best way of prosecuting its claims, all things considered. If so, it followed that two public interest considerations ought to be accorded full weight.

53 First, it was in the wider public's interest to protect the plaintiffs' ability to raise unlitigated issues in a court of law. This must be so if the common law right of access to justice and protection of the law held any real meaning. This is not to say that this interest was overriding and trumped all other considerations; however, it ought to be and was fully factored into the equation.

54 Secondly, the principle of party autonomy – the plaintiffs' ability to decide when and who to sue and over what issues – remains a cherished virtue in the Singapore judicial tradition. This principle ought to be defended in the present application, not just because of its general worth as an operating principle of the civil procedure landscape but also because this was the very principle that the plaintiffs were utilising in 2009 in choosing to sue only McTrans and only for conversion. Put another way, the plaintiffs' ability to choose who and when to sue was precisely the very idea that was being challenged by the 1st defendant in this application and if the principle of party autonomy was to be accorded more than lip service, it ought not be lightly abandoned in its very hour of need.

55 As regards efficiency and economy of litigation, this public interest did not, contrary to the 1st defendant's submission, strongly militate towards a finding of abuse. This was so for the following reasons. First, I accepted the contention by counsel for the plaintiff that this factor must not be assessed

with hindsight. Rather, it ought to be assessed at the time when the plaintiffs had to make the case management decision of whether to bring all their claims at once or to do so incrementally. In my view, there would be three relevant points in time: (i) when the writ was filed for the 2009 Suit; (ii) when the Statement of Claim was filed for the 2009 Suit; and (iii) when the Statement of Claim was amended for the 2009 Suit. At all three moments, the plaintiffs had the option of adding the 1st defendant to the 2009 Suit.

56 With this in mind, and leaving aside the private interests of the plaintiffs for the moment, it was not clear to me that any reasonable litigant in the shoes of the plaintiffs would come to the certain conclusion that it would be a more efficient use of the court's resources to commence a single action rather than two separate suits. For one, it was my view that adding the later claims of conspiracy, deceit and unjust enrichment to the earlier claim for conversion would significantly "transform" the first action, even more so than was the case in *Stuart*. Not only would there be a need to include an additional eight other defendants to the 2009 Suit, it could not be reasonably gainsaid that the complexity, length and cost of the proceedings would increase dramatically. It was at least arguable that prosecuting one complex action may not necessarily be more advantageous than two leaner suits.

57 In this regard, I must address the 1st defendant's contention that there was a substantial overlap of facts between the two actions. Indeed there was. This was made manifestly clear in a table provided by the 1st defendant's counsel comparing the two statements of claim. However, any similarity between the actions ought to be "assessed by reference to the substance of the respective claims, not by a literal comparison of the two statements of case": *Stuart* (at [47]). On this point, I accepted the submission by the plaintiffs' counsel that the two actions were conceptually distinct, factual similarities

notwithstanding. While the 2009 Suit was principally aimed at stemming losses arising out of the conversion of the cargo, the 2015 Suit was aimed at obtaining redress for the wider conspiracy of which the conversion was but a part, albeit a crucial one.

58 There was a second compelling reason why it was not obvious, in 2009, that commencing a single omnibus action would be more efficient than two separate ones – it was not a foregone conclusion in 2009 that a second action would be required. On behalf of the plaintiffs, it was submitted that, while the plaintiffs had suspected as early as 2009 that there was a larger conspiracy taking place, the plaintiffs had absolutely no documentary evidence to link the 1st defendant to the conspiracy. All the plaintiffs had then was inconclusive circumstantial evidence and inchoate intuitions. Any attempt to prosecute the claims for conspiracy, deceit and unjust enrichment then may have been futile. Were it not for the fact that the plaintiffs had, by their reckoning, since gathered more direct evidence linking the 1st defendant to the conspiracy, the plaintiffs may well not have pursued these claims at all by way of a subsequent suit.

59 Counsel for the 1st defendant contended that the plaintiffs should never have commenced the 2009 Suit as the plaintiffs knew all along that the plaintiffs would not be able to recover anything against McTrans. I was not quite so sure. It was true that the plaintiffs had averred on affidavit in the 2009 Injunction Application that they were unaware if McTrans had any assets beyond its paid up capital of S\$25,000. However, that was a far cry from being certain that McTrans was on the verge of being wound up and that recovery would be fruitless. Indeed, had the plaintiffs known what they now knew, it was rather doubtful that they would have proceeded with the 2009 Suit.

60 Ultimately, it could not be concluded with any degree of certainty that the plaintiffs’ decision to proceed incrementally was, in the circumstances, a wholly unreasonable one, even if one were to ignore the private interests of the plaintiffs. The public interests of access to justice and party autonomy were compelling while the interest of efficiency and economy of litigation did not necessary lead to a conclusion that the plaintiffs had abused the process of the court.

Private interests

61 I now turn to private interests. I start by stating the obvious but significant - there was in the present matter no question of the 1st defendant being “twice vexed”. The 1st defendant was not a party to the 2009 Suit. In fact, I was given to understand that he did not participate in the first action at all. Hence, the 1st defendant had no legitimate private interest that ought to be accorded weight.

62 On the other hand, I accepted the contention that the plaintiffs had legitimate reasons for not taking out the conspiracy, deceit and unjust enrichment claims in 2009. As was held in *Johnson*, this was a factor that may reasonably be taken into consideration. It was argued that the most pressing matter in 2009 was to try and have the cargo released as the plaintiffs may potentially be liable to their customers for the non-return of the cargo. The longer the cargo was retained, the greater the potential liability the plaintiffs may owe to their customers. Hence, there was, relatively speaking, greater urgency for the conversion claim to be resolved than there was for the conspiracy, deceit and unjust enrichment claims.

63 It was also undeniable that adding the claims in the 2015 Suit to the 2009 Suit would invariably complicate matters and result in the issue of

conversion taking more time to resolve. This would run counter to the plaintiffs' private interest of resolving the conversion issue as quickly as possible. It bears repeating that I was of the view that the two actions were conceptually distinct.

64 Counsel for the 1st defendant submitted that this argument - that the plaintiffs wanted the conversion claim to be resolved quickly - was an after-thought, pointing out that the plaintiffs did not seek delivery up of the cargo in the first Statement of Claim filed for the 2009 Suit and added it only as an alternative when the Statement of Claim was subsequently amended. However, in my view, it was wrong to focus solely on the relief of delivery up, although that was surely one way for the plaintiffs to reduce any potential liability to their customers. The point was that the plaintiffs were concerned about protecting themselves from potential liability and they had acted consistently, if not exclusively, to that end – they had prayed for a declaration that they be indemnified from any future liabilities and had applied for an early interim injunction for delivery up of the cargo. I accepted that the plaintiffs, in 2009, were particularly worried about potential liability to their customers and worked to reduce or eliminate such liability as quickly as possible. This was to my mind not an unreasonable decision.

65 There was also the question of evidence. Counsel for the 1st defendant argued that no fresh evidence had turned up between 2009 and 2015 that made the claims for conspiracy, deceit and unjust enrichment more sustainable. As I stated earlier, the plaintiffs submitted that there was new evidence, including the testimonies of the 3rd and 6th defendants which largely corroborated the plaintiffs' initial suspicions as well as the findings in the 2009 Suit. If it were necessary to make a finding in this regard, I would have come down on the side of the plaintiffs. However, it sufficed that as at 2009, there was a

possibility that more evidence for the conspiracy, deceit and unjust enrichment claims could turn up, not in the least because a factually related matter would go to trial. It was then highly probable that evidence would be led that may have some bearing on the claims for conspiracy, deceit and unjust enrichment. Given that the evidence in 2009 in respect of these claims was far from satisfactory, it was not improper for the plaintiffs to take time to assess their options and to try and gather more evidence for these claims.

66 All in all, stepping back from the individual factors, both public and private, and assessing the entire matter in a broad, holistic manner, I could not come to any certain conclusion that the plaintiffs' conduct amounted to an abuse of process. There was every reason for them to pursue the claim in conversion first and commence a second action later, if necessary.

Giving notice of second proceedings

67 Finally, I would like to address a point that was not argued, if only to provide the impetus for this point to be resolved in a different setting. In the cases of *Johnson* and *Aldi*, the fact that the defendant or defendants knew that there was a possibility of a second set of proceedings had some bearing on the result. Similarly, the court in *Stuart* advised that in a situation where a plaintiff is contemplating suing the same defendant in two different actions, it would be beneficial for the plaintiff to put the defendant on notice of that possibility. This is best accomplished by raising the matter in court in the earlier proceedings as it would allow the court to consider if the claims should be combined. As the English Court of Appeal explained in *Stuart* (at [96]):

The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge.

68 Insofar as practice is concerned, I would not go so far as to provide any such generally applicable advice. While “cards on the table” is undoubtedly the court’s prevailing case management sentiment, it seems to me a different policy altogether to require a litigant to lay down his cards in respect of a later hand upfront. In my view, the English position has the effect of elevating the principle of efficiency and economy of litigation at the expense of other competing values, primarily party autonomy. This is so because adopting the English position for all cases would invariably mean that some private interests of the plaintiff would have to be sacrificed. At the very least, the usual tactical advantage of being able to choose when to sue that would normally accrue to the plaintiff would have to be relinquished. In some cases, the advantage lost may be more serious, such as time to gather supporting evidence. To Sir Anthony Clarke MR, “parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future”: *Stuart* (at [96]). I am not sure that Singapore should strike the same balance between competing values without considering the circumstances of each individual case.

69 However, insofar as the law is concerned, I would venture to agree with the English Court of Appeal in *Stuart* – there is no general proposition of law that a failure to put the other party on notice will necessarily render the subsequent action an abuse of process. I echo the sentiment that “[d]ifferent facts might lead to a different conclusion”: *Stuart* (at [71]). Ultimately, if this point is argued, the court should consider this factor against other relevant factors in applying the broad, merits-based assessment established in *Johnson*. As has been reinforced many times over the years, there should not be any sacred cows in this area of law.

Conclusion

70 I end with the question with which I begun: when would the court curtail party autonomy in the name of controlling the litigation process? The general answer is when there has been an abuse of the court's process. Where a litigant has made a *bona fide* case management decision that is not wholly unreasonable in the circumstances, it may safely be said that the door to a successful argument based on the extended doctrine of res judicata, while not shut, is not very wide. This is because the full weight of the principles of access to justice and party autonomy comes to bear.

71 For all of the above reasons, the application was dismissed with costs. All that remains is for me to record my appreciation to counsel who provided invaluable assistance.

Paul Chan
Assistant Registrar

Avinash Vinayak Pradhan, Lim Zhi Ming, Max and Muslim Albakri
(Rajah & Tann Singapore LLP) for the plaintiff;
Pardeep Singh Khosa and Chen Chi (Drew & Napier LLC) for the
first defendant.
