Chia Kok Kee *v* Tan Wah and others
[2012] SGHC 36

Case Number	: Suit No. 97 of 2011 (Registrar's Appeal No 273 of 2011, No 274 of 2011 and No 275 of 2011)
Decision Date	: 21 February 2012
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: The plaintiff in person; Wong Yao Fang (Fabian & Khoo) for the first and second defendant; The third defendant in person.
Parties	: Chia Kok Kee — Tan Wah and others

Civil Procedure – Striking Out

21 February 2012

Tay Yong Kwang J:

1 The plaintiff, Chia Kok Kee, appealed against the decision of the Assistant Registrar ("the AR") in Summonses No 1111 of 2011, 1645 of 2011 and 1658 of 2011. In Summons No 1111/2011, the AR dismissed the plaintiff's application to strike out the first, second and third defendant's defences. In the latter two summonses, *i.e*, No 1645 of 2011 and No 1658 of 2011, the AR granted the applications by the defendants to strike out the plaintiff's action.

2 The plaintiff was not represented by solicitors. He spoke in English during the hearing before me. After hearing the parties' arguments, I dismissed the plaintiff's appeals.

Facts

Parties

3 The plaintiff is an investor in a hydroelectric power plant joint venture in Dujiangyan, Sichuan Province, People's Republic of China (the "Chinese Investment").

4 The first defendant is similarly an investor in the Chinese Investment. A company, HX Investment Pte Ltd ("HX"), was set up to be the investment vehicle through which the parties participated in the Chinese Investment. The directors and shareholders of HX comprised the plaintiff's mother and the first defendant.

5 The second defendant was the auditor and corporate secretary of HX. He assisted with the capitalisation of HX in its early years.

6 The third defendant was the solicitor acting for the first defendant in the previous related matters, namely, Suit No 558 of 2005, Civil Appeal No 127 of 2005 and Originating Summons No 331 of 2010.

Background to the case

7 As mentioned above, the plaintiff and the first defendant were both investors in the Chinese Investment and both contributed monies towards the venture using HX as their investment vehicle. In 1995, an oral agreement was made between them as to their respective shares but the terms of this agreement were greatly disputed. The plaintiff's version was that it was agreed that he would invest $300,000 and obtain a 40% shareholding together with a 10% bonus for his efforts in facilitating the investment, his mother would invest $100,000 and obtain a 10% shareholding, while the first defendant would invest $600,000 and obtain a 50% shareholding.

8 The plaintiff said while his mother put in the $100,000 as planned, he eventually poured in $326,467 of his monies and the first defendant invested $640,000 in the Chinese Investment. The plaintiff alleged however that his investment of $326,467 was left unaccounted for and unrecorded in HX's books, with the first defendant recording the total investment as $831,098 instead of $1,066,467.

9 He further alleged that the first defendant had wrongly accused him of mishandling dividend payouts from the Chinese investment and had those dividend payouts stopped in 2004.

10 According to the plaintiff, this triggered him to institute action against HX in Suit 558 of 2005 to affirm his share in the Chinese Investment and to obtain his share of dividends.

11 The plaintiff failed to prove his case in Suit No 558 of 2005, where he claimed a 40% share of the Chinese Investment (comprising a 30% investment by the plaintiff and 10% investment by his mother), facilitation fees of 10% and a further 10% as bonus for successfully securing the joint venture on the basis of the prior oral contract made (see [7]). The High Court judge held that the shareholdings in the Chinese Investment were 40% in favour of the plaintiff and his mother and 60% in favour of the first defendant. She dismissed the claims for facilitation fees and the bonus. [note: 1]

12 The appeal against this decision in Civil Appeal No 127 of 2007 was dismissed with costs. [note: 2] The plaintiff's application for a new trial in Originating Summons No 331 of 2010 was similarly dismissed with costs. [note: 3]

13 In Suit No 97 of 2011, in which the present appeals arose, the plaintiff alleged fraud against the first defendant, accusing her of deliberate omission to record in HX's books his investment monies of $326,467. As for the second defendant, the plaintiff alleged that he had assisted the first defendant with the fraud because he was involved in the initial capitalisation of HX when the above-mentioned sum was omitted. As regard the third defendant, the plaintiff alleged that in the conduct of Suit No 558 of 2005, the third defendant colluded with the first defendant and other witnesses to give false evidence at the trial causing an unfavourable judgment to be given against him.

14 Simply put, the plaintiff alleged that the defendants worked together to perpetrate fraud against him, to conceal the incorrect accounts of HX and to deliberately omit his investment contribution in HX.

15 In response, the defendants argued in their respective defences that the plaintiff was in effect re-litigating his former claims in respect of the Chinese Investment and the dividend payouts, since these have been dealt with and dismissed by the High Court (see [11]) and the Court of Appeal (see [12]) previously. They argued that his present claims are *res judicata* and/or an abuse of process of court and further, that the plaintiff's allegations of fraud were not supportable on the facts.

The Striking out applications

16 The plaintiff proceeded to take out an application under Summons No 1111 of 2011 to strike out the defendants' defences pursuant to Order 18 rule 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The defendants responded by applying to strike out the plaintiff's claim: Summons No 1645 of 2011 was taken out by the first and second defendants while Summons No 1658 of 2011 was taken out by the third defendant for this purpose.

The AR's decision

17 The plaintiff argued before the AR that the respective defences of the defendants failed to address his fraud claim and reiterated that his claim for dividends and his investment monies remain unaddressed. [note: 4] The defendants' response in brief was that that the proceedings in Suit No 97 of 2011 were a re-litigation of concluded matters and the plaintiff's claims were therefore an abuse of process. [note: 5]

18 The AR dismissed the plaintiff's application to strike out the defendants' defences. She granted the defendants' applications to strike out the plaintiff's claims pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of Court.

19 Her reasons were that if the plaintiff's claims of fraud were to be proceeded with, that would amount to a re-litigation of issues tried previously in Suit No 558 of 2005 and Originating Summons No 331 of 2010. Additionally, she found that in the light of the procedural history of this matter, no reasonable cause of action could be sustained for the plaintiff's claim for future dividends and damages for fraud. [note: 6]

20 She ordered costs of $25,000 on an indemnity basis to be paid by the plaintiff to the first and second defendants. She made the same costs order between the plaintiff and the third defendant.

Parties' arguments

21 On appeal before me, the plaintiff's argument was in essence that because of the allegedly fraudulent actions of the defendants in misleading the court and thus obtaining judgment against him wrongfully, he ought to be allowed now to pursue the present suit so that he could obtain an account of his investment monies of $326,467 and his entitlement to his share of future dividends.

22 The plaintiff emphasized that his investment monies remained unaccounted for despite having gone through proceedings in Suit No 558 of 2005 and argued that the *res judicata* doctrine could not be used to uphold a judgment obtained by fraud.

23 The first and second defendants submitted that the plaintiff's claim amounted to an abuse of process and ought to be struck out as these claims concerning the Chinese Investment and future dividends have already been adjudicated previously in Suit No 558 of 2005, Civil Appeal No 127 of 2007 and Originating Summons 331 of 2010. They argued that the plaintiff was merely launching a collateral attack against the previous decisions without having adduced any fresh evidence in support. [note: 7] They also highlighted that presently the plaintiff still retained a 40% share in the Chinese Investment and thus could not argue that he had lost his investment.

24 The third defendant echoed the first and second defendants in arguing that the plaintiff's claim was an abuse of process as it was a re-litigation of issues which had already been dealt with in the

previous proceedings. He also submitted that the plaintiff's allegations against him and the other defendants did not constitute fraud at all. He submitted further that the plaintiff's claim for future dividends had no basis in law as it was not due and owing to the plaintiff yet.

The decision of the court

25 The court may strike out a pleading under any one of the four grounds under O 18 r 19 which provides:

> (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ action, or anything in any pleading or in the endorsement, on the ground that –
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).
>
> (3) This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

26 The court's power to strike out a pleading would only be exercised in "plain and obvious" cases: *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 ("*Gabriel Peter*") at [18]; *The Osprey* [1999] 3 SLR(R) 1099 at [6]. While the court does not seek to deprive a plaintiff of his day in court, it would grant applications to strike out pleadings to prevent harassment of parties or to avoid putting them to expense by frivolous, vexatious or hopeless litigation and also to stop an abuse of process: Singapore Court Practice 2009 (Jeffrey Pinsler gen ed) (LexisNexis, 2006) ("Singapore Court Practice") at paragraph 18/19/9.

27 Considering the circumstances of this case, ground (d), *i.e.*, abuse of process, constituted a compelling basis for striking out the plaintiff's statement of claim. I will thus discuss this ground before turning to examine grounds (a) and (b).

28 It has been observed that the ground of abuse of process in striking out applications is a rather general one which overlaps with the other grounds found in O 18 r 19 in so far as they touch on an improper use of the court's process: Singapore Court Practice at paragraph 18/19/14.

29 This ground seeks to ensure that the court's process is used only for proper and *bona fide* purposes. It will be useful to set out the observations of the Court of Appeal in *Gabriel Peter* at [22] on this point:

> The term, 'abuse of the process of the Court', in O 18 r 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used bona fide and properly and

must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case …

30 In determining whether proceedings are an abuse of process, the approach to be taken is that of a "broad, merits-based judgment": *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1. This approach was followed by the Court of Appeal in *Lai Swee Lin Linda v AG* [2006] 2 SLR(R) 565. In *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [53], Sundaresh Menon JC explained that the court ought to:

> … *(look) at all the circumstances of the case*, including whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision; whether there is fresh evidence that might warrant re-litigation; whether there are bona fide reasons why an issue that ought to have been raised in the earlier action was not; and whether there are some other special circumstances that might justify allowing the case to proceed. The absence or existence of these enumerated factors (which are not intended to be exhaustive) is not decisive. *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. …*
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> (emphasis added)

31 Considering the procedural history of this litigation and the parties against whom the plaintiff is presently proceeding, this is a clear instance of an abuse of process of court. In 2005, the plaintiff filed Suit No 558 of 2005 against HX, where he sought to claim a 40% share of the Chinese Investment (this comprised a 30% investment by the plaintiff and 10% investment by his mother), 10% facilitation fees and a further 10% as bonus for successfully securing the investment on the basis of a prior oral contract made between the plaintiff and the first defendant. The first defendant, on behalf of HX, disputed the terms of the oral contract and filed a counterclaim against the plaintiff for restitution of dividend payments which the plaintiff had received from the Chinese Investment previously. HX then joined the plaintiff's mother for an indemnity and/or a contribution alleging that she had breached her fiduciary duties as HX's director and had unjustly enriched herself by receiving dividend payments rightfully belonging to HX. The plaintiff then filed a Third Party claim against the first defendant averring that if HX's counterclaim should succeed, the first defendant would be a constructive trustee of monies that she received from the Chinese Investment in favour of HX. Eventually, the High Court dismissed the plaintiff's claims. The judge held that an analysis of the oral agreement showed that the plaintiff's and his mother's shareholding in the Chinese Investment and also their dividend entitlement only amounted to 40%. The first defendant's shareholding was held to be 60%. The plaintiff's claims for facilitation fees and the bonus also failed.

32 The Court of Appeal hearing the plaintiff's appeal in Civil Appeal No 127 of 2007 dismissed it with costs.

33 Dissatisfied with the outcome of the appeal, the plaintiff applied again to the Court of Appeal in Originating Summons No 331 of 2010 for a new trial. He argued that the judge in Suit No 558 of 2005 failed to fully account for his investment contribution in the Chinese investment because it was misled by the first defendant at the trial. The Court of Appeal found that the plaintiff's arguments were without merit and dismissed his application with costs.

34 In the above-mentioned previous proceedings, the plaintiff has repeatedly alleged that his investment contribution in the Chinese Investment was unaccounted for and not recorded accurately in HX's accounts. This allegation was again reiterated in the statement of claim in the present suit. [note: 8] Indeed, the claims made in the plaintiff's written submissions in Originating Summons No 331 of 2010 [note: 9] bore substantial resemblance to his allegations here.

35 It would thus appear that the plaintiff was simply repackaging his claim in various forms and putting them before the court time and again, in the hope that he would eventually succeed in one. This was in spite of his claims having already been dismissed previously by the court on several occasions. His present claim took the form of fraud but, as the defendants rightly pointed out, the essence of his complaint remained the same: that his investment monies of $326,467 be accounted for and be recognised accordingly in HX's books. Re-litigating his claim repeatedly despite the judicial determinations of its lack of merit was a clear abuse of process of court.

36 Additionally, I agreed with the defendants that no fresh evidence has been placed before the court in the present proceedings. The two points that the plaintiff raised, *i.e.*, that he had received financial statements from accountants showing HX was a dormant company contrary to what the first defendant had allegedly testified to in Suit No 558 of 2005 and that HX's company secretary was charged by the Inland Revenue Authority of Singapore for aiding tax evasion, did not assist him in his allegations of fraud against the defendants. On his first point, this was not new evidence which could not have been discovered with reasonable diligence in the previous proceedings and, on his second point, the company secretary was in fact charged for aiding another company evade tax and that was wholly unconnected to HX and therefore irrelevant to the present proceedings.

37 The present proceedings amounted to a collateral attack on the earlier decisions given by the High Court and the Court of Appeal. By alleging in this action that the High Court judge was misled by the defendants' fraud into giving judgment when there was no apparent factual justification for this serious allegation constituted a clear abuse of the judicial process. Indeed, the learned authors in Spencer Bower and Handley, *Res Judicata* (Lexis Nexis, 4th Ed, 2009) ("*Res Judicata*") at paragraph 26.16(a) recognised that these were strong grounds for finding abuse, *i.e.*, where a party who was unsuccessful in earlier proceedings in which he had a proper opportunity of being heard now launches a collateral attack on the earlier decision by instituting a new action in the absence of fresh evidence.

38 The learned authors in *Res Judicata* at paragraph 26.16(h) also observed that an abuse of process may also be found where a claimant dissatisfied with the result in the original proceedings seeks further relief or seeks it from a different defendant. They cite the case of *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198 ("*Rippon*") for this proposition. In that case, a purchaser sued a vendor for breach of warranties of the accounts annexed to the contract and misrepresentation to the same effect. As the purchaser had only relied on the warranties, he failed in his claim for misrepresentation. The purchaser then sued the accountants who drew up the accounts for misrepresentation seeking a different finding on reliance on the misrepresentation above. While the facts of the present case do not strictly mirror those of *Rippon*, the essence of the abuse is the same. The plaintiff sued the accountant of HX and the counsel who represented the first defendant in the previous actions, bringing them in as the second and third defendants here respectively. His allegations against them were, respectively, assisting with the first defendant's fraud and colluding with the witnesses, causing the plaintiff to fail in his legal action and depriving him of an account of his share in the Chinese Investment. Bringing in both these parties, who have little to do with the underlying dispute, to answer to claims which have no factual foundation constituted an improper use of the court's adjudicatory process.

39 As regard the first defendant, it was clear that the present proceedings against her were an abuse of process. The learned authors in *Res Judicata* at paragraph 26.15 noted that it was highly likely that abuse would be found where a subsequent action was instituted against the original defendant. Here, the first defendant was brought in as a third party in the counterclaim in Suit No 558 of 2005 and was the respondent in both Civil Appeal No 127 of 2007 and Originating Summons No 331 of 2010. In the present action, as in all the previous actions, the allegations made against her remained the same and involved the same factual matrix. She was therefore made to answer to similar allegations on various occasions even though the original dispute had already been adjudicated upon. This was a wholly improper use of the court's process and it would certainly be unfair to the first defendant to allow the oppression to continue.

40 The rationale of the abuse of process doctrine is to prevent a party who could have litigated an issue in previous proceedings but did not do so from initiating a new action to determine that issue where there are no clear and justifiable reasons for allowing this: *Henderson v Henderson* [1843-1860] All ER Rep 78; *Goh Nellie* from [51]. Therefore, considering all the circumstances of this case as required by the broad merits-based test, the plaintiff's present action was patently an abuse of process and there could be no justification to allow him to continue with his claim.

41 While it is sufficient to establish just one out of the four grounds under O 18 r 19 to successfully strike out a pleading, these grounds are in reality not mutually exclusive. I now proceed to discuss briefly grounds (a) and (b) of O 18 r 19 as alternative bases for striking out the plaintiff's statement of claim.

42 Ground (b) of O 18 r 19 addresses instances where parties are not *bona fide* in bringing an action but merely bring it to annoy or embarrass their opponent: *Goh Koon Suan v Heng Gek Kiau* [1990] SLR 1251. It has been noted that a clear example of a "frivolous or vexatious" case would be one where a person is unjustifiably made a party to an action: Singapore Court Practice at paragraph 18/19/12. The plaintiff's act of bringing in the second and third defendants was such an instance. As mentioned above at [38], both these parties were drawn into the present suit even though they had nothing to do with the underlying dispute and this was made worse by the fact that there was no real evidence supporting the plaintiff's claim of fraud against them. As for the first defendant, by instituting fresh proceedings against her without reasonable basis on the facts and effectively disregarding previous court decisions, the plaintiff's conduct was clearly vexatious.

43 In ground (a) of O 18 r 19, a 'reasonable cause of action' refers to one which has some chance of success when only the allegations in the pleading are considered: *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094. If the alleged cause of action is bound to fail on examining the allegations, the court ought to exercise its power to strike it out: Singapore Court Practice at paragraph 18/19/1. The courts require that it be "patently clear" that there is no reasonable cause of action or defence: Singapore Court Practice at paragraph 18/19/9.

44 It was difficult to see how the plaintiff's claim of fraud against the defendants amounted to a 'reasonable cause of action' given the facts set out in his statement of claim. An allegation of fraud is a very serious one and the gravity of such allegation requires more evidence to establish it despite the standard of proof in civil proceedings still being one of a balance of probabilities: *Chua Kwee Chen and others (as Westlake Eating House) and another v Koh Choon Chin* [2006] 3 SLR(R) 469 at [22].

45 The plaintiff argued that the first defendant deliberately omitted his investment monies from HX's books and obscured the parties' true contributions during the trial process, thus perpetrating the fraud. However, on an examination of the facts set out in paragraphs [12]-[14] of his statement of claim, [note: 10] it is clear that the plaintiff has not discharged the high standard of proof required to

establish a claim for fraud. The plaintiff simply made bare allegations against the first defendant which could find no support factually, given the High Court judge's findings in Suit No 558 of 2005 regarding the parties' agreement on their shares in the Chinese Investment and the dividends. The plaintiff's claims against the second and third defendants for allegedly assisting and colluding with the first defendant to perpetrate fraud were similarly without basis. In particular, the third defendant had simply defended his client's rights as counsel for the first defendant in the conduct of the previous proceedings. Just because witnesses there testified against the plaintiff did not constitute grounds for finding collusion between them and the third defendant. These were totally unjustifiable allegations by the plaintiff. There was thus no sustainable cause of action in fraud against the defendants on the face of the facts here.

46 Further, the plaintiff's claim for future dividends was without legal basis. As the third defendant rightly pointed out, these future dividends have not accrued yet nor have they been paid out in the Chinese Investment itself. As such, the obligation to pay them to the plaintiff did not arise at this point in time. It follows that the plaintiff's appeals against the striking out of his claims must be dismissed.

47 On the other hand, an examination of the defences put forth by the first, second and third defendants showed that they did not fall within any of the four available grounds for striking out under O 18 r 19. There were good reasons for them to plead that the plaintiff was re-litigating his claims and abusing the court's process in the light of the history of the proceedings set out above. I therefore dismissed the plaintiff's appeal against the AR's decision not to strike out the defendants' defences.

Conclusion

48 For the reasons set out above, I dismissed all three appeals from the AR's decision.

49 On the issue of costs, the third defendant informed me that an offer to settle dated 18 October 2011 was served on the plaintiff some weeks before the hearing. The terms of the offer to settle were that each party would bear its own costs if the plaintiff withdrew the appeals before the hearing of the appeals. Before me, the third defendant suggested that costs be fixed at $30,000 since the AR ordered $25,000 for each set of defendants below. The plaintiff submitted that this was way too high. The first and second defendants left the question of costs to the court.

50 The costs orders made by the AR were in respect of the dismissal of the entire action. For these appeals before me, which were quite straightforward and took slightly more than one and a half hours due largely to the fact that the plaintiff was not represented by solicitors, I ordered costs of $1,500 to be paid by the plaintiff to the first and second defendants and another $1,500 to be paid by the plaintiff to the third defendant.

51 The plaintiff has filed an appeal to the Court of Appeal against my decision in respect of the dismissal of his appeals in the defendants' two striking out applications (see [16]).

[note: 1] *Chia Kok Kee v HX Investment Pte Ltd (So Lai Har (alias Chia Choon), third party in issue) (Tan Wah, third party in counterclaim)* [2007] SGHC 164

[note: 2] Order of Court dated 13 March 2008, exhibited in Tan Wah's affidavit in reply to Summons No 1111/2011 and in support of Summons No 1658/2011

[note: 3] Order of Court dated 8 July 2010, exhibited in Tan Wah's affidavit in reply to Summons No 1111/2011 and in support of Summons No 1658/2011

[note: 4] Plaintiff's written submissions for Summons 1111 of 2011 dated 16 Aug 2011, and Plaintiff's oral submissions as recorded in the AR's Minute Sheets dated 15 July 2011 and 16 August 2011.

[note: 5] First and second defendants' written submissions for Summons No 1111 of 2011 and Summons No 1658 of 2011; Third defendant's written submissions for Summons No 1111 of 2011 and Summons No 1645 of 2011

[note: 6] AR minute sheet dated 16 Aug 2011

[note: 7] First and second Defendants' submissions filed on 20 Oct 2011

[note: 8] Plaintiff's writ of summons for S 97 of 2011 filed on 17 February 2011

[note: 9] Plaintiff's written submissions for OS No. 331 of 2010 before the Court of Appeal filed on 30 June 2010

[note: 10] *Supra*, n 8