Low Tuck Kwong *v* Sukamto Sia
[2010] SGHC 159

Case Number : Suit No 703 of 2008 (Registrar's Appeal No 104 of 2010)

Decision Date : 25 May 2010

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Tony Yeo, Dk Rozalynne Pg Dato Asmali and Meryl Koh (Drew & Napier LLC) for the plaintiff; Chandra Mohan and Mark Tan (Rajah & Tann LLP) for the defendant.

Parties : Low Tuck Kwong — Sukamto Sia

Civil Procedure – Pleadings – Striking out

25 May 2010 Judgment reserved.

Andrew Ang J:

Introduction

1 This is an appeal against assistant registrar ("AR") Jeyendran Jeyapal's dismissal of the plaintiff's application to strike out the defendant's counterclaim in Summons No 6399 of 2009 ("SUM 6399") on 23 February 2010. This was the plaintiff's second attempt to strike out the defendant's counterclaim after his earlier application in Summons No 1822 of 2009 ("SUM 1822") had been dismissed by the same AR on 8 May 2009.

2 After hearing parties' arguments on 7 April 2010, I upheld the AR's decision and ordered costs of the appeal to be in the cause.

3 Dissatisfied with my decision, the plaintiff wrote in with a request for further arguments on 14 April 2010. I granted the plaintiff's request and heard the parties again on 27 April 2010.

4 After due consideration, I find no reason to vary the order that I had made on 7 April 2010. I now provide my reasons for my decision after stating the facts.

Background

5 The plaintiff is a permanent resident of Singapore and the controlling shareholder of PT Bayan Resources Tbk ("PT Bayan Resources"), a public-listed company incorporated in Indonesia. The defendant is also a permanent resident of Singapore.

6 The present action arises out of an allegedly defamatory letter, which was written by the defendant and sent to a number of parties in Indonesia (one of them being the Head of the Indonesian Capital Market and Financial Institutions Supervisory Agency) when PT Bayan Resources was in the midst of an international initial public offering and was to be listed on the Indonesia Stock Exchange. In that letter, the defendant alleged that he had a share in PT Bayan Resources and sought to prevent the company from being listed. As a result, the allegations contained in the letter were required to be disclosed by the plaintiff to potential investors worldwide, including Singapore and

Indonesia.

7 The plaintiff then commenced the present proceedings in Singapore on 3 October 2008 by filing a writ of summons, claiming damages in defamation and malicious falsehood. This was followed by the filing of the defendant's defence and counterclaim on 9 January 2009. The facts that the defendant is relying upon in his Defence and Counterclaim (Amendment No 3) are set out in detail below.

The defendant's defence and counterclaim

8 According to the defendant, sometime in late 1995, the plaintiff had approached him with a business proposition involving the establishment of a coal mining business in Indonesia which entailed the acquisition of coal mining concessions and the generation of revenue from coal mining. It is the defendant's case that the plaintiff orally represented to him that this coal mining business, if established, would be worth US$500m in seven to eight years' time if listed on the Indonesian Stock Exchange. The defendant also claims that the plaintiff told him that in exchange for a sum of S$3m that would be used to facilitate the establishment of this business, the defendant would obtain a 50% share of the entire shareholding in the coal mining business.

9 The plaintiff and the defendant then allegedly entered into an oral agreement or "common understanding" that in the event that the coal mining business became established, the S$3m provided by the defendant would be translated into a 50% share in the entire shareholding in this coal mining business; otherwise, the plaintiff would return the sum of S$3m to the defendant ("the Coal Mining Arrangement"). The defendant further claims that the plaintiff subsequently issued a post-dated cheque dated 25 April 1996 for the sum of S$3m as "comfort" for the money provided by the defendant.

10 Based on this version of events, the defendant pleaded the defence of justification and further claims against the plaintiff in contract and, in the alternative, on the basis of proprietary estoppel or constructive trust for, *inter alia*, 50% of the shareholding of PT Bayan Resources or for the return of the sum of S$3m.

The first application to strike out in SUM 1822

11 In SUM 1822, the plaintiff applied to strike out the defendant's counterclaim on the grounds that the defendant's allegations were false and without documentary evidence, and that his counterclaim was time-barred or barred as a result of delay, laches or acquiescence.

12 After hearing arguments, the AR was of the opinion that there were a number of disputes of fact and law that needed to be scrutinised further, and he concluded that the defendant's counterclaim ought to be allowed to proceed to trial. The plaintiff did not file an appeal because he felt that it was simply his word against the defendant's and conceded that the issues were better suited for resolution at trial.

The second application to strike out in SUM 6399 before the AR

13 The present application of SUM 6399 was the plaintiff's second bid to strike out the defendant's counterclaim. This time, the plaintiff sought to rely on two statements that were filed in proceedings in Hong Kong in which both the plaintiff and the defendant were involved. One of the statements was a signed witness statement filed by the defendant on 13 June 2000 ("the 2000 Statement") and the other was a sworn affirmation filed by the defendant on 14 January 2008 ("the 2008 Affirmation") (collectively, "the defendant's Hong Kong statements").

14 In the hearing below before the AR, the defendant objected to the plaintiff's application on the ground that it amounted to an abuse of process under the extended doctrine of *res judicata*. The defendant submitted that the plaintiff, in his second attempt to strike out the defendant's counterclaim, was essentially re-litigating the same issues which had arisen in SUM 1822, and the fact that the plaintiff has produced additional evidence in the form of the defendant's Hong Kong statements did not alter that position because this evidence was available to the plaintiff when he first applied to strike out under SUM 1822 and could have easily been produced at that time.

15 In response to the defendant's objection, the AR pointed out that he was willing to accept, at face value, the plaintiff's explanation that he had earlier forgotten about the defendant's Hong Kong statements. The AR also found that the statements "were of assistance and provided further insight into the case". Hence, he concluded that the plaintiff's second application to strike out in SUM 6399 "did not fall foul of the *res judicata* rule".

16 The plaintiff then referred the AR to a number of paragraphs in the defendant's Hong Kong statements in an attempt to show that the defendant's counterclaim was a sham and ought to be struck out on that basis. In his Hong Kong statements, the defendant had alleged that there was a "mutual understanding" whereby the "advance" of S$3m (see [8] above) would be set-off against certain moneys owed by him to the plaintiff. The fact that the defendant had failed to mention anything about a coal mining business at that time meant that the present counterclaim was really a sham, the plaintiff submitted.

17 In addition, the plaintiff referred to paragraphs in the defendant's Hong Kong statements in which the defendant asserted that the plaintiff had never repaid any of the alleged "advances". The plaintiff's case was that, as a result of those assertions, any claims the defendant had against the plaintiff, whether for the S$3m "advance" or the alleged investment in a coal mining business would be time-barred by now.

18 The AR, however, was not persuaded by the plaintiff's arguments in reliance on the defendant's Hong Kong statements. He was of the opinion that the paragraphs in question were sufficiently ambiguous such that it did not warrant a striking out at this stage, and that it was proper to give the defendant an opportunity at trial to explain his version of events and his interpretation of the paragraphs in his Hong Kong statements. With this, he dismissed the plaintiff's second application to strike out.

The defendant's Hong Kong statements

19 As the plaintiff's application to strike out was entirely dependent on the defendant's Hong Kong statements, it is necessary for me to first set out the background in which the statements were made and the relevant paragraphs in full.

The defendant's 2000 Statement and the relevant background facts

20 In 1996, the defendant approached the plaintiff to buy the plaintiff's shares in a listed company in Hong Kong called China Development Corporation ("CDC"). A sale and purchase agreement was subsequently entered into whereby the plaintiff and the other shareholders of CDC (collectively, "the Vendors") agreed to sell their shares to a private company, Dynasty Line Limited ("Dynasty"), which was controlled by the defendant.

21 After Dynasty failed to pay for the CDC shares, the Vendors commenced a suit (Action No 9505 of 1999) against Dynasty in the High Court of Hong Kong sometime in 1999 ("the Hong Kong

proceedings"). The defendant, as director of Dynasty, filed the 2000 Statement and claimed, as his defence, that he had earlier entered into a mutual understanding with the plaintiff to set off the purchase price of the CDC shares against moneys owed by the plaintiff to him. According to the defendant, the plaintiff owed him a total of approximately US$8.5m (which included the S$3m referred to in his present counterclaim). However, the Hong Kong court eventually found against the defendant's company, Dynasty, and entered judgment in favour of the plaintiff.

22 For the purposes of the present application, the plaintiff referred to paras 4 and 13 of the defendant's 2000 Statement ("Para 4/2000" and "Para 13/2000"), which read as follows:

> 4. [The plaintiff] was first introduced to me about 15 years ago. It appeared that we had much in common and quickly developed an open and enjoyable relationship which lasted until late 1997/early 1998 when the matters forming the subject matter of this dispute first came into issue between the parties. During the time of our friendship, the [plaintiff] and I shared common business and personal interests, and from time to time, even conducted business together. In addition, the [plaintiff], as a friend, joined me on gambling trips. Unfortunately, the [plaintiff] was not much of a gambler and regularly made losses, and I made several advances to him of gambling chips and cash to help him out on the understanding that he would repay them to me at a later date. In addition, from time to time, the [plaintiff] would ask me for help in relation to his business transactions. *For example, in late 1995, I advanced S$3,000,000 to the [plaintiff] which was secured by a post dated cheque issued by the [plaintiff] in my favour. (A copy of that cheque is attached as Annexure 'A'.) I was never able to present that cheque for payment because the [plaintiff] informed me that there were insufficient funds in his bank account to honour that cheque*. In total, my advances to the [plaintiff] amounted to approximately 8.5 million US Dollars. *Despite assurances received from the [plaintiff] as to his intention and ability to repay me, I have never received the money back*.
>
> …
>
> 13. There was also a mutual understanding that part of the said purchase price to be received by the [plaintiff] would be applied towards setting-off the outstanding personal advances that he still owes to me.
>
> [emphasis added]

The defendant's 2008 Affirmation

23 In 2007, the balance of the purchase price remaining outstanding, the plaintiff filed a petition to have Dynasty wound-up. The defendant proceeded to file his 2008 Affirmation in a bid to halt the winding-up proceedings (Companies Winding Up Proceedings No 382 of 2007).

24 The plaintiff referred to paras 11 and 18(iii) of the defendant's 2008 Affirmation:

> 11. The [plaintiff] has not in any way suggested I carried out my previous relationship with him in a dishonest or less than frank manner. Indeed, the [plaintiff] at one stage owed me personally some US$8.5 million which debt in fact led to the discussions, dealt with in more detail below, resulting in [Dynasty] purchasing shares from the [plaintiff] (and others) which led to the events underlying this proceeding. I would like to elaborate on the monies owed to me by [the plaintiff]. As admitted by him during the trial against Dynasty in Hong Kong in 2001, [the plaintiff] accompanied me on several gambling trips. On those trips, [the plaintiff] regularly made losses and I would advance to him gambling chips and cash to help him out,

on the understanding he would repay me at a later date. In addition, the [plaintiff] would from time to time ask me to help him out in relation to his business transactions. *For example, in late 1995, I advanced S$3,000,000 (around HK$16,000,000 at that time) to the [plaintiff], which advance he 'secured' by issuing a post-dated cheque in my favour. I was never able to present that cheque for payment as the [plaintiff] informed me that there were insufficient funds in his account to honour it*. In total, I made advances to the [plaintiff] of some US$8.5 million. *Despite numerous assurances from the [plaintiff] that he had the intention and ability to repay me, I have never received the money*. There is now produced and shown to me marked 'SS-4' a copy of the Chase Manhattan Bank cheque issued by the [plaintiff].

…

18. In the evidence filed on behalf of the Provisional Liquidators, there is a suggestion that the price agreed between [the plaintiff] and me was artificially high. They use this to suggest that I must have known Dynasty was insolvent because the market price for the CDC Shares (the only asset ever held in the name of [Dynasty] was less than that at which Dynasty had contracted to buy the shares. However, the Provisional Liquidators conveniently overlook (or at least do not state in their ex-parte affidavit requiring full and frank disclosure) the following:

…

(iii) These discussions and the SPA were entered into in 1996. At this time there was very bullish sentiment in South East Asia and to have a controlling interest of a listed company was considered a very valuable asset. It may be considered naïve to now look at the matter with the benefit of hindsight to suggest the price was too high but I suspect that, around the same time, a great many business ventures were entered into at valuations which, 18 months or so after the Asian Financial Crisis, would seem somewhat foolish. At this state, I also wish to emphasise that the reason the consideration due under the SPA was not paid in full was a result of the difficulties caused by the Asian Financial Crisis and not through any pre-meditated plan to obtain the shares for nothing. I do not believe the Asian Financial Crisis is mentioned once in the evidence filed by the [plaintiff] and Provisional Liquidators, a fact I find astonishing given the timing and nature of the background events. Although I do not believe it is stated this boldly, the inference is that there was never any intention to make payment for CDC shares. That is a nonsense and I deny it categorically. Had the economy and business proceeded as I (and a vast number of others in this region) had hoped and envisaged, payment would have been made. *I would also like to point out that there was also a mutual understanding between the [plaintiff] and me that part of the consideration would be by way of set-off in relation to the monies owed to me personally by the [plaintiff]*.

[emphasis added]

Issues raised before this court

25 On appeal, the defendant again objected to the plaintiff's application on the ground that it was barred under the extended doctrine of *res judicata*. Counsel for the defendant, Mr Chandra Mohan ("Mr Mohan"), also pointed out that, curiously, the plaintiff had only applied to strike out the defendant's counterclaim but not his defence. Mr Mohan submitted that because both the defence

and counterclaim refer to the same set of facts, to allow the striking out of the defendant's counterclaim while leaving his defence intact would amount to a meaningless exercise.

26 Relying again on the defendant's Hong Kong statements, counsel for the plaintiff, Mr Tony Yeo ("Mr Yeo"), raised the exact same two arguments before me as was raised before the AR below: first, that the defendant's counterclaim was a sham; and second, that the defendant's counterclaim was time-barred.

27 I first address the defendant's objection on the ground of *res judicata* before I proceed to deal with the plaintiff's striking out claim proper.

Issue 1: Whether the plaintiff's application is barred by the extended doctrine of *res judicata*

28 The extended doctrine of *res judicata* (also known as the rule in *Henderson v Henderson* (1843) 3 Hare 100) is founded on the wider doctrine of abuse of process and, generally, precludes parties from raising subject matter that could have been raised in earlier proceedings. Sir Thomas Bingham MR, sitting in the English Court of Appeal, stated the rule as follows (*Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 at 260):

> The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of *res judicata* in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. 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 for ever 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.

29 However, the mere finding that a claim could have been raised in earlier proceedings does not automatically render the raising of the claim in later proceedings an abuse of process under the doctrine of extended *res judicata*. The court needs to adopt a broad merits-based approach in deciding whether there was any abuse of the court's process, as explained by Lord Bingham of Cornhill in the House of Lords decision of *Johnson v Gore Wood & Co* [2002] 2 AC 1 (at 31):

> … But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but 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. *It 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 to what should in my opinion be a broad, merits-based judgment which takes 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. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. …

[emphasis added]

30 This broad, merits-based approach has been adopted by the Singapore courts in *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 in which Sundaresh Menon JC also provided a suitable reminder of the policies at play behind the rule (at [53]):

… 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* …

[emphasis added]

31 On the facts of the present case, I was of the opinion that the plaintiff's application to strike out in SUM 6399 was not an abuse of the court's process under the doctrine of extended *res judicata*. Although the defendant was correct to say that his Hong Kong statements were available to the plaintiff and could have been adduced when the first application to strike out in SUM 1822 was filed, this in itself did not render the second application an abuse of process, following the broad, merits-based approach. This is because the defendant's Hong Kong statements were highly relevant to the main action and especially pertinent to the question of whether there was any oral agreement or "mutual understanding" as alleged by the defendant. In my view, the defendant's Hong Kong statements, if unaddressed, had the potential to raise serious doubts as to the plausibility of the defendant's counterclaim. Balancing the plaintiff's right to press his case if he has a genuine claim against the defendant's right to be protected from repeated and oppressive applications, I found that the plaintiff's second application in SUM 6399 was not abusive.

32 Before I turn to address the issues raised in the plaintiff's striking out application, I first set out the legal principles for striking out.

The law on striking out

33 The court's exercise of its jurisdiction to strike out pleadings is essentially an exercise in striking the right balance between a litigant's right to institute a *bona fide* claim before the courts and to prosecute it in the usual way (*Tan Eng Khiam v Ultra Realty Pte Ltd* [1991] 1 SLR(R) 844 at [31]) and the need to prevent parties from being harassed and put to expense by frivolous, vexatious or hopeless litigation (*Riches v Director of Public Prosecutions* [1973] 1 WLR 1019 at 1027).

34 This balance has found expression in myriad ways but they all emphasise the same point, which is that the courts are usually reluctant to strike out claims summarily, and thus an applicant seeking to strike out a claim has to cross a very high threshold.

35 A number of different expressions were recently restated in the Court of Appeal decision of

Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd [2009] 2 SLR(R) 814 (at [171]–[173]). First, it has been said that the court can only exercise its power to strike out pleadings if the case for striking out was "*plain and obvious*" (*The "Osprey"* [1999] 3 SLR(R) 1099 at [6]). Similarly, the courts will let a party proceed with an action unless his case is "*wholly unarguable*" (*Blue Town Investments Ltd v Higgs and Hill plc* [1990] 1 WLR 696 at 701). As a result, the court's jurisdiction to strike out "ought to be very sparingly exercised, and *only in very exceptional cases*" (*Dow Hager Lawrance v Lord Dorreys* (1890) 15 App Cas 210 at 219).

36 Some other similar expressions are also found in the High Court decision of *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 whereby V K Rajah J made clear what in his view was the standard that had to be met before a striking out application would be allowed (at [40]):

> To succeed in striking out the instant proceedings, the AG has to show that the claim is frivolous or vexatious because it is *obviously unsustainable*and/or an abuse of the process of court with *absolutely no prospect of success* in the event of a full hearing. *It must be shown with clarity and certainty* that the police had the power to intervene in the protest and duly seize the T-shirts. There should be no basis or latitude for arguing that such a power was arbitrarily exercised and in any manner susceptible to judicial scrutiny. A court should only strike out a claim "*when it is manifest that there is an answer immediately destructive of whatever claim to relief is made*": *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 at 408.
>
> [emphasis added]

37 It is with these principles in mind that I now address the issues raised by the plaintiff.

Issue 2: Whether the counterclaim was a sham

38 On the issue of whether the defendant's counterclaim was a sham that ought to be struck out, the plaintiff basically repeated the argument that he had advanced before the AR below (see [16] above).

39 The plaintiff's argument on this point, as I understood it, can simply be summarised as follows: the fact that the defendant had asked for repayment of the S$3m and had attempted to set-off the S$3m against the purchase price of the CDC shares (which was the defendant's case in his Hong Kong statements: see [22] and [24] above) without any mention of the Coal Mining Arrangement *contradicted* his assertion that there was a Coal Mining Arrangement between them whereby the S$3m was advanced by the defendant to the plaintiff for the establishment of a coal mining business (which is the defendant's case in the present action: see [8] above). This supposed contradiction, the plaintiff submitted, showed that the defendant's present counterclaim was a sham and ought to be struck out.

40 However, the defendant had a ready explanation for omitting the Coal Mining Arrangement from his Hong Kong statements. The defendant claimed that he had not been kept apprised by the plaintiff of progress of the coal mining business and, additionally, had reason to believe that it had not taken off because he was under the impression that the plaintiff was facing financial difficulties for a number of years between 1995/1996 and 1999. It was only in or about June or July of 2008, the defendant explained, that he found out through "market talk" and the Indonesian Offering Memorandum for PT Bayan Resources that an initial public offering of the coal mining business through PT Bayan Resources would be conducted. The defendant explained that as he was under the mistaken impression that the coal mining business had not taken off, he had fully expected to receive credit for the S$3m and his Hong Kong statements merely reflected that expectation.

41 As I considered the evidence, I was mindful that it was not my role to scrutinise the evidence in minute detail to determine whether the defendant had a cause of action as, in so doing, I would be usurping the role of the trial judge and conducting a trial of the case in chambers (*Wenlock v Moloney* [1965] 1 WLR 1238 *per* Danckwerts LJ at 1244; adopted in *Low Fong Mei v Ko Teck Siang* [1989] 1 SLR(R) 514 at [31]). All that was required of me at this stage was to determine whether the defendant in the present case has disclosed a cause of action in his counterclaim or whether he can raise some question fit to be decided at trial, regardless of the strength of his case (see *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure 2007*") at para 18/19/10, p 311).

42 Like the AR below, I could understand why the plaintiff brought a second application to strike out on the basis of the defendant's Hong Kong statements. On a plain reading of the defendant's Hong Kong statements, it was certainly possible for one to *argue* that the defendant's counterclaim was simply an afterthought; for that reason, I agreed that there was a need for the defendant to clarify his Hong Kong statements in the light of his counterclaim. However, I was of the view that the defendant's Hong Kong statements were not *ipso facto* fatal to his counterclaim at the striking out stage because the defendant had provided a *possible* explanation for reconciling his Hong Kong statements with his counterclaim, and I was of the opinion that it raised a question fit for trial at which the defendant's Hong Kong statements would be scrutinised and tested. For me to delve any further into the questions raised regarding the meaning of the defendant's Hong Kong statements would involve "lengthy and serious argument" by both parties and would be tantamount to adjudicating upon those arguments on the merits based on affidavit evidence alone (*Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [18]).

43 The two cases cited by Mr Yeo on this point did not assist the plaintiff's case in any way. In the English Court of Appeal case of *Critchell v London and South Western Railway Company* ("*Critchell*") [1907] 1 KB 860, the defendants there had delivered, along with their defence to an action in negligence, a letter (which was not written "without prejudice") to the plaintiff in which they unreservedly admitted to liability and that their traverse of negligence in their defence was a technical plea merely to secure that the money they had paid into court would remain there until the trial. Cozens-Hardy LJ described the letter as "an admission of the most formal and complete kind" and, not surprisingly, held that the defence was plainly a sham (at 863). The case of *Critchell* is distinguishable on the facts. In *Critchell*, the defence could not stand alongside the letter because it was clear that they wholly contradicted each other *and there was really nothing more to explain*; whereas in the present case, the defendant's Hong Kong statements were not an irreconcilable contradiction of his counterclaim but rather, in my opinion, were amenable to explanation.

44 Similarly, the plaintiff's reliance on the Malaysian decision of *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 was, in my opinion, misplaced. In that case, the plaintiffs had applied, *inter alia*, for a declaration that eight possession orders earlier made by the Magistrate's Court had been procured by fraudulent misrepresentation on part of the defendant. The defendant applied to strike out the plaintiff's statement of claim. Edgar Joseph Jr J held that since there was no duty on the defendant to put forward a plea of want of title on behalf of his opponent in the earlier Magistrate's proceedings there was no question of wilful concealment amounting to deliberate fraud (at 420F–G). The striking out application by the defendant was therefore allowed on the basis that there was "not an iota of evidence of fraud" as alleged by the plaintiffs in their statement of claim (at 420I). It can be seen that the case was actually decided on the point that the plaintiffs' claim had no legal basis because there was no duty on the defendant in the first place.

45 Accordingly, I dismissed the plaintiff's argument that the defendant's counterclaim ought to be struck out on the ground that it was a sham.

Issue 3: Was the counterclaim time-barred

46 The plaintiff submitted that, by virtue of s 6 of the Limitation Act (Cap 163, 1996 Rev Ed), the defendant's counterclaim was out of time, in accordance with the relevant limitation period of six years. It is not disputed that a claim is liable to be struck out on the ground that it is conclusively time-barred (*Singapore Civil Procedure 2007*, at para 18/19/10, p 311) ([41] *supra*):

> If the defendant pleads a defence under the Limitation Act (Cap. 163, 1996 Ed.), he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of process of the court (see *per* Donaldson L.J. in *Ronex Properties Ltd. v. John Laing Construction Ltd. & Ors*. [1983] Q.B. 398; [1982] All E.R. 961, CA). Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act (Cap. 163, 1996 Ed.) *and there is nothing before the court to suggest that the plaintiff could escape from that defence*, the claim will be struck out as being frivolous, vexatious and an abuse of process of the court …
>
> [emphasis added]

47 The plaintiff's argument on the limitation issue was that, even if it were true that the defendant had provided an advance of S$3m to the plaintiff, time for the defendant to bring his claim for the S$3m had begun to run, at the latest, from the year 2000 on the following two grounds:

> (1) The defendant had claimed in his 2000 Statement that he had asked the plaintiff for repayment of the alleged advances; and
>
> (2) The defendant had claimed, also in his 2000 Statement, that there was an agreement for the alleged advances to be set-off against the purchase price of the CDC shares.

48 The defendant countered that his counterclaim was founded on an oral agreement entered into sometime in late 1995 on the terms as set out in the counterclaim (see [9] above). Therefore, the defendant's position was that the coal mining business was only established on 7 October 2004, and any right of action pursuant to that oral agreement would only have accrued on such date.

First ground of argument: the defendant's assertion that he had asked the plaintiff to repay would result in the defendant's counterclaim being time-barred

49 On the first ground of argument, Mr Yeo relied on the following portion of Para 4/2000 (set out in full at [22] above):

> … Despite assurances received from the [plaintiff] as to his intention and ability to repay me, I have never received the money back.

It was argued that because the defendant had asserted that he had asked for repayment on or before 2000, then, by his own admission, he would be time-barred from claiming the S$3m now.

50 I found it difficult to understand how the defendant's claim that he had asked for repayment establishes that the defendant's counterclaim is now conclusively time-barred and ought to be struck out on that basis. In Para 4/2000, the defendant also admitted that the plaintiff gave assurances of his intention to *repay him*. It is trite that an acknowledgment of a debt results in a fresh accrual of action from the date of acknowledgment as provided in s 26(2) of the Limitation Act:

> Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, ... and the person liable or accountable therefor *acknowledges the claim* or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment.
>
> [emphasis added]

It would seem, at the most, that the defendant's assertion in Para 4/2000 would have set time running afresh for a claim in debt for the sum of S$3m. Moreover, the defendant was bringing his counterclaim pursuant to an oral agreement on the terms set out at [9] above, as to which there was a dispute as to when the defendant's cause of action pursuant thereto had accrued.

51 Therefore, there was no basis for me to strike out the defendant's counterclaim as being conclusively time-barred on the facts available before me.

Second ground of argument: the defendant's assertion that there was a collateral set-off agreement and the plaintiff's denial of any such agreement would result in the defendant's counterclaim being time-barred

52 Secondly, Mr Yeo relied on the defendant's allegation in Para 13/2000 (that there was a collateral set-off agreement (see [22] above) and the plaintiff's own witness statement filed for the purpose of the Hong Kong proceedings, in particular para 18, which read:

> 18. *I further deny having entered into an oral collateral agreement with [the defendant] in relation to his purchase of CDC shares from me and the other Plaintiffs*. In particular, I deny any agreement with [the defendant] under which the purchase consideration owed by Dynasty to those Plaintiffs, save for the initial deposits, would be paid to me and that the Second to Seventh Plaintiffs would then look to me for satisfaction of Dynasty's obligations to them under the agreements.
>
> [emphasis added]

53 Mr Yeo's second line of argument was built on the following two premises: first, that the S$3m advance formed part of the collateral set-off agreement; and second, that, as a matter of law, a party's unequivocal intention not to perform his contractual obligations would set time running for the other party to bring a claim founded on anticipatory breach of that agreement. It was argued that because the plaintiff's denial of the existence of the collateral set-off agreement in the Hong Kong proceedings amounted to anticipatory breach and had set time running, the defendant ought to have brought an action for the S$3m advance, such action being founded upon the collateral set-off agreement.

54 In an effort to establish the first premise, Mr Yeo sought to use the defendant's 2000 Statement to characterise the advance of S$3m as consideration for the CDC shares or for the collateral set-off agreement. I found that to be a confusing argument.

55 From a reading of the defendant's 2000 Statement, it appeared to me that the defendant was asserting two separate matters: the first matter asserted was that the S$3m had been advanced sometime in late 1995 and had not been repaid by the plaintiff; and the second matter asserted was that there was a collateral set-off agreement whereby part of the purchase price of the CDC shares would be set off against the outstanding personal advances owed by the plaintiff to the defendant, which included the S$3m in question. In other words, this collateral set-off agreement, as claimed by

the defendant, would have been a wholly distinct and separate agreement premised upon an existing and outstanding S$3m advance from the defendant to the plaintiff. I could not discern, from the defendant's Hong Kong statements, how, as Mr Yeo claims, the S$3m advance became part of the collateral set-off agreement. When pressed, Mr Yeo could only say that the S$3m advance had somehow "morphed" into the collateral set-off agreement.

56 As the plaintiff had failed to show me, on the facts, that the S$3m advance had formed part of the collateral set-off agreement, the plaintiff therefore failed in this second line of argument. This is because, even if the plaintiff could show that he had denied the existence of any collateral set-off agreement in his 2000 Statement, there was nothing in there to suggest that the plaintiff had denied an outstanding advance of S$3m owed to the defendant and, thereby, set time running for the defendant to bring his present counterclaim. Counsel noted, however, that the plaintiff did deny owing the defendant US$ 8.5m in his affidavit filed for the winding-up proceedings in Hong Kong, but that denial was of no assistance to the plaintiff's present argument because it was made in the year 2008 and therefore raised no question of time-bar.

57 Although counsel managed to raise some interesting points of law, I found it unnecessary to consider them in the light of my conclusion that the plaintiff had failed to raise any question of limitation on the facts.

Conclusion

58 For the foregoing reasons, I dismissed the plaintiff's appeal and ordered costs in the cause. I will hear parties on costs in respect of further arguments.