IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 60

Civil Appeal No 200 of 2018

Between

TMT Asia Limited

… *Appellant*

And

(1) BHP Billiton Marketing AG (Singapore Branch)
(2) BHP Billiton Marketing Asia Pte Ltd

… *Respondents*

In the matter of Suit No 580 of 2013

Between

TMT Asia Limited

… *Plaintiff*

And

(1) BHP Billiton Marketing AG (Singapore Branch)
(2) BHP Billiton Marketing Asia Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Offer to settle]

[Civil Procedure] — [Striking out]

[Res Judicata] — [Issue estoppel]

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v
BHP Billiton Marketing AG (Singapore Branch) and another

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Court of Appeal — Civil Appeal No 200 of 2018
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21 August 2019

7 November 2019

Tay Yong Kwang JA (delivering the judgment of the court):

Introduction

1 The appellant was the plaintiff and the respondents were the defendants in the action in the High Court. The respondents applied to strike out the appellant's claim on the grounds that continued prosecution of the claim would be an abuse of process because (i) the respondents had made a settlement offer which would give the appellant all the reliefs it sought in the claim and (ii) the proceedings had been commenced for a collateral purpose. At the hearing of the respondents' application to strike out, the High Court Judge ("the Judge"), instead of proceeding under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), directed that pursuant to O 14 r 12 and/or O 33 r 2, a preliminary point or issue be decided first. That preliminary point mirrored the issue in the striking out application: *ie*, whether the appellant was entitled to

continue with the action in the light of the settlement offer. The Judge answered the issue in the negative and struck out the appellant's claim.

2 There were two key issues in the appeal. The first was whether the respondents were estopped from applying to strike out the appellant's claim for being an abuse of process by an earlier decision of an assistant registrar ("the AR") declining to strike out the appellant's claim on those same grounds ("the *res judicata* issue"). The second was whether the Judge was correct in holding that the appellant's continued prosecution of its claim in the light of the respondents' offer to settle was an abuse of process ("the abuse of process issue").

3 On 21 August 2019, we heard the matter and dismissed the appeal. We now give the reasons for our decision.

Background

4 The appellant, TMT Asia Limited ("TMTA"), is a shipping company. The respondents, BHP Billiton Marketing AG (Singapore Branch) and BHP Billiton Marketing Asia Pte Ltd (collectively, "BHPM"), are part of the BHP Billiton Group ("BHPB"), one of the world's leading producers of iron ore.[1] The parties were involved in trading forward freight agreements ("FFAs"), which are forward contracts on freight commonly used to hedge against market fluctuations and thereby manage freight price risk.[2]

5 Sometime between September and November 2012, TMTA purchased

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1 ROA II 11–12 at paras 2–3; ROA III(A) 4–5 at paras 5, 8–9.

2 ROA II 16 at paras 20–22.

various FFAs based on the Baltic Capesize Index Time Charter Basket Average 4 Routes ("BCI").[3] The purchases were made through brokers using multilateral trading facilities ("MTFs") and were cleared on the Singapore Exchange.[4] According to TMTA, BHPM manipulated freight prices for Capesize vessels by procuring contracts for fixtures of Capesize vessels in such quantities as to artificially inflate the freight rates reported on the BCI, thereby manipulating iron ore prices and causing TMTA to suffer loss.[5] Among other things, TMTA claimed that BHPM was in breach of s 208(*a*) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA"), which prohibited manipulation of (or attempts to manipulate) the price of a "futures contract" in a "futures market".[6]

6 BHPM denied the claim and the loss. In particular, BHPM denied that the FFAs were "futures contract[s]" for the purposes of the SFA.[7]

7 The procedural history leading up to this appeal is set out in the table below:

Date	Event
22 February 2013	**Commencement:** TMTA commenced its action against BHPM in the District Court.[8]
12 June 2013	**Transfer:** The suit was transferred to the High Court as Suit 580 of 2013 ("Suit 580") on BHPM's application, on the basis that it raised

3 ROA II 14–15 at para 19.

4 ROA II 30 at para 55; ROA III(A) 6 at para 14.

5 ROA II 20–25 at paras 29–36.

6 ROA II 29–31 at paras 54–58.

7 ROA II 38 at para 21(a).

8 ROA III(E) 5 at para 9.

	issues of public interest pertaining to the interpretation of s 208(*a*) of the SFA.[9]
5 August 2013	**1st Striking Out Application:** BHPM applied under O 14 r 12 of the ROC for determination of questions of law. One of these questions was whether FFAs were "futures contract[s]" under the SFA, and if not, whether the claim should be struck out.[10] BHPM also applied to strike out TMTA's claim pursuant to O 18 r 19 and/or the inherent jurisdiction of the Court.
31 December 2013	The 1st Striking Out Application was heard at first instance by an assistant registrar, who determined that the FFAs were not "futures contract[s]" under the SFA, and, on that basis, struck out TMTA's claim.[11] TMTA appealed.[12]
28 January 2015	Prakash J (as she then was) allowed TMTA's appeals and declined to strike out TMTA's claim, holding that the questions of law raised matters of public importance and that the case was a test case which would resolve issues pertaining to whether FFAs are "futures contract[s]" for the purposes of the SFA.[13]

9 ROA III(E) 5–7 at paras 10–14.

10 ROA III(E) 8–9 at paras 21–23.

11 ROA III(E) 11 at para 29.

12 ROA III(E) 11 at para 32.

13 Appellant's Bundle of Authorities IV, Tab 28 at [36]–[37].

2015–2016	The parties prepared for the trial. BHPM made several requests for further and better particulars of TMTA's statement of claim as well as for security for costs.[14] In August 2015, BHPM registered in Singapore a judgment of the English High Court given in its favour against TMTA for about US$115m ("the English Judgment"). TMTA applied unsuccessfully to set aside the registration.[15]
25 January 2016	**The Offer:** By way of letter, Rajah & Tann Singapore LLP ("R&T"), counsel for BHPM, communicated a settlement offer ("the Offer") to KhattarWong LLP ("KW"), counsel for TMTA.[16] The relevant terms of the Offer are reproduced in full at [12] below.
3 February 2016	TMTA responded to the Offer. TMTA did not accept the Offer but expressed its interest to reach a "global settlement" of all disputes between the parties, including the English Judgment, in relation to which TMTA alleged that a "miscarriage of justice" had occurred.[17] On 6 February 2016, BHPM responded, alleging that TMTA had commenced the present action for an improper purpose.[18]

14 ROA III(E) 7 at paras 15–16; ROA III(E) 12–15 at paras 37–40.

15 ROA III(D) 108–113.

16 ACB II 175–176.

17 ACB II 178–179.

18 ACB II 180–181.

	On 16 February 2016, TMTA responded, denying the allegations.[19]
2 March 2016	**2nd Striking Out Application:** BHPM applied to strike out TMTA's claim on account of the Offer.[20]
26 May 2016	An assistant registrar ("the AR") declined to strike out TMTA's claim ("the AR's decision"). Among other things, the AR considered that the action raised issues of public importance (see [29] below).[21] BHPM did not appeal against the AR's decision.
2016–2018	Over the next two years, various interlocutory applications for discovery of documents were made, contested and heard.[22]
9 January 2017 / 8 October 2018	**Amendments to the SFA:** On 9 January 2017, the Securities and Futures (Amendment) Act 2017 (No 4 of 2017) was passed and subsequently came into operation on 8 October 2018 (see [28] below).
25 June 2018	**3rd Striking Out Application:** BHPM applied by way of Summons No 2887 of 2018 ("SUM 2887") to strike out TMTA's claim under O 18 r 19 of the ROC on account of the Offer to settle the claim in full, among other matters.

19 ACB II 182–183.

20 ROA III(E) 16–17 at para 44.

21 ROA III(E) 19 at para 46; ACB II 135–136.

22 ROA I 12–13 at [14]–[15].

3 August 2018	SUM 2887 was heard before the Judge. The Judge directed that a preliminary issue be decided pursuant to O 14 r 12 and/or O 33 r 2 of the ROC (see [1] above). The preliminary point effectively mirrored the striking out inquiry as follows: *Whether TMTA is entitled or should be permitted to continue with the action in the light of the Open Offer and, if not, what the appropriate order should be*.[23]
29 August 2018	The parties returned before the Judge for the hearing of the preliminary issue. The Judge noted that an alternative way of framing the preliminary point was: *Whether the continuance of the action was an abuse of the process of the court in the light of the Offer*.[24] Having heard the parties, the Judge determined that TMTA's continuance of the action was an abuse of process and struck out the claim.[25]

Decision of the High Court

8 As noted at [2] above, there were two main issues before the Judge: (i) whether the AR's decision gave rise to an issue estoppel precluding litigation of the abuse of process issue; and (ii) if not, whether TMTA's continuance of its claim was an abuse of the court's process in light of BHPM's Offer.

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23 ACB II 166 at lines 7–15.

24 ACB II 167 at lines 22–25.

25 ACB II 173 at lines 8–21.

9 On the *res judicata* issue, the Judge held that the AR's decision did not give rise to any issue estoppel. He noted that four cumulative elements must be satisfied before an issue estoppel arises (*Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 ("*Lee Tat*") (at [14]–[15])): (a) there must be a final and conclusive judgment on the merits; (b) the judgment must be of a court of competent jurisdiction; (c) there must be identity between the parties; and (d) there must be identity of subject matter. The Judge found limbs (b)–(d) met but not limb (a). He considered that the AR's decision was not final and conclusive, at least not in relation to the preliminary point before him because the AR's decision was in respect of an application to strike out under O 18 r 19 of the ROC whereas the preliminary issue before him was to be determined under O 14 r 12 and/or O 33 r 2, which have a different threshold from O 18 r 19. The AR did not decide that there was no abuse of process but rather that the point was arguable and hence did not merit a striking out. Therefore, the AR's decision was not final and conclusive on the abuse of process issue which remained open for the Judge to determine pursuant to O 14 r 12 and/or O 33 r 2 of the ROC (GD at [31]).

10 The Judge also noted that there were new developments in the legislative scheme of the SFA since the AR's decision. In particular, the provisions of the SFA which were engaged in Suit 580 have been amended substantially so that the significance of the action as a test case for the interpretation of those previous provisions was diminished. The Judge observed that the interpretation of those previous provisions remained relevant to causes of action that arose before the amendments came into operation as the amendments would not have retrospective effect (GD at [26] and [29]).

11 On the abuse of process issue, the Judge held that the continuance of TMTA's claim would be an abuse of the court's process because it would serve

no useful purpose in the light of the Offer, under which TMTA would receive all the reliefs it was seeking in its claim, applying the decision of the English Court of Appeal in *Balk v Otkritie International Investment Management Ltd and others* [2017] EWCA Civ 134 ("*Balk*"). In *Balk*, the claimant had obtained an order against Balk for the payment of about US$37m in damages. In separate proceedings, Balk claimed that certain deductions should be made from the sum awarded to the claimant to account for recoveries which the claimant had already made. Balk was unsuccessful at first instance but obtained leave to appeal. By the time the appeal was heard, the claimant had made an open offer to give Balk credit for the sums that the appeal was concerned with. Balk did not respond substantively to the offer. The English Court of Appeal dismissed the appeal in light of the offer. Balk should have accepted the offer as the claimant was ready to concede all it had asked for and more. In those circumstances, a hearing on the merits would have been an exercise in futility and would have run counter to all the modern principles of case management which include encouraging the settlement of disputes and making the best use of scarce judicial resources. The court therefore found that Balk was abusing the process of the court by her refusal to engage with the claimant's open offer and insisting on proceeding with the appeal (GD at [46]–[49]).

12 In the present appeal, the relevant terms of the Offer were as follows:

> 5. … our clients are prepared to make an open offer to your client (without any admission of liability whatsoever) on the following terms:
>
> (a) subject to paragraph 5(b) below, our clients shall make a payment to your client of an amount equivalent to all the damages, compensation, interest and costs which your client is seeking to recover in Suit 580, comprising:
>
> (i) the sum of US$81,500;

> (ii) interest on the sum of US$81,500 to be fixed at 5.33% from the date of the writ to the date of your client's acceptance of this offer; and
>
> (iii) costs of Suit 580 to be taxed or agreed;
>
> (b) the payment referred to in paragraph 5(a) above shall be made by way of set-off against the judgment sum owed by your client to BHP Billiton Marketing AG under the English Judgment;
>
> (c) your client shall file and serve a notice of discontinuance of Suit 580 within 7 business days of the date of acceptance;
>
> (d) the set-off shall be effected in full and final settlement of all claims between the parties in Suit 580 and strictly without any admission of liability; and
>
> (e) such settlement shall be subject to contract between the parties.
>
> 6. … Please note that this offer is open for acceptance in writing until 4:00pm, 1 February 2016, failing which it will be deemed to have been withdrawn.

13 In essence, BHPM offered to pay TMTA (without any admission of liability) the entire sum of US$81,500 plus interest and costs by way of a set-off against sums owed by TMTA to the first respondent under the English judgment for about US$115m registered in Singapore.[26] The Offer was expressed to be subject to contract (see para 5(e)), but that clause was withdrawn by BHPM at the hearing before the Judge.[27]

14 The Judge rejected all five of TMTA's reasons for refusing to accept the Offer (GD at [50]–[65]). On appeal, the reasons were reduced to three. TMTA's reasons and the Judge's decision on each are set out below:

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26 ROA III(D) 43 at para 11; ROA III(D) 45–46 at para 21.

27 ACB II 168 at lines 18–21.

(a) First, the Judge rejected TMTA's contention that it was entitled to a finding on the liability of BHPM (since the Offer was made without admission of liability). A finding of liability was not the relief sought by TMTA. It was the basis on which TMTA was seeking relief in the sum of US$81,500 (GD at [51]–[54]).

(b) Second, the Judge rejected TMTA's contention that the Offer had, on its own terms, expired on 1 February 2016; BHPM had in subsequent affidavits stated that the offer remained open for acceptance and it was clear that TMTA did not intend to accept it (GD at [55]–[57]).

(c) Third, the Judge rejected TMTA's contention that it would have been unreasonable to have expected TMTA to accept an Offer that remained subject to contract. The Judge was of the view that this was a mere excuse as KW could have asked R&T to remove the requirement for a formal contract if indeed TMTA was genuine about accepting the offer (GD at [58]–[60]).

15 The upshot of all this is that there was no practical benefit of proceeding to trial, since TMTA would have received all the reliefs it sought by simply accepting the Offer. If the claim proceeded to trial, more time and costs would be incurred and there was a public interest that the court's resources should not be used for a claim that had become academic in view of the Offer (GD at [67]). The Judge therefore determined that continuation of TMTA's claim would be an abuse of process and struck out the claim accordingly.

The parties' cases

Appellant's case

16 TMTA's case on appeal was that (a) the AR's decision that there was no abuse of process warranting a striking out was *res judicata* and, in any case, (b) it was not an abuse of process for TMTA to continue with its claim without accepting the Offer.

17 On the *res judicata* issue, TMTA submitted that the AR's decision was final and conclusive on the issue of whether there had been an abuse of process warranting a striking out (*ie*, limb (a) of *Lee Tat*). There was no real distinction between the threshold for striking out under O 18 r 19 (considered by the AR) and under O 14 r 12 and/or O 33 r 2 read with O 33 r 5 of the ROC (considered by the Judge).[28] TMTA also submitted that there was a complete identity of subject matter (*ie*, limb (d) of *Lee Tat*) as the same arguments that BHPM raised in relation to the effect of the Offer had all been raised before the AR for the purpose of arguing that there had been an abuse of process. Having considered all of those arguments, the AR decided that there was no abuse of process and BHPM could have but did not appeal against the AR's decision. The parties were therefore estopped from re-opening the issue of abuse of process and the Judge was wrong to have done so through the backdoor using O 14 r 12 and/or O 33 r 2.[29]

18 On abuse of process, TMTA submitted that its maintenance of the proceedings in Suit 580 was not an abuse of process. First, it was not an abuse of process to continue with the action in the light of the Offer because the Offer

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28 Appellant's Case ("AC") at paras 65–68.

29 AC at paras 48–51, 56, 61–63; ROA III(E) 16–19 at paras 44–46.

remained subject to contract[30] and was too uncertain for acceptance because it could be withdrawn at will without advance notice.[31] Further, and in any case, the Offer was made without admission of liability and TMTA was entitled to proceed to trial to vindicate its claim that BHPM had engaged in market manipulation.[32] Concerns about whether the costs involved in continuing with the action were proportionate should take into account the public importance of the issues raised, notwithstanding that the SFA had been amended by the time of the hearing before the Judge.[33] Second, TMTA did not commence the Suit for collateral purposes. Nothing untoward could be inferred from the mere fact that TMTA was interested in reaching a global settlement.[34]

Respondents' case

19 BHPM submitted that the appeal should be dismissed because: (a) the AR's decision did not create any issue estoppel and (b) TMTA's refusal to engage with and accept the Offer made the continuation of proceedings an abuse of process.

20 On the *res judicata* issue, BHPM echoed the Judge's finding that limb (a) of *Lee Tat* (final and conclusive) was not made out. It argued further that limb (d) (identity of subject matter) was also not made out.[35] There was a marked difference in the issues before the AR and the Judge. The issue before the AR

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30 AC at paras 94–99.

31 AC at para 100.

32 AC at paras 104–105.

33 AC at paras 90–91.

34 AC at paras 109, 111; AS at para 57.

35 Respondents' Case ("RC") at para 70.

was whether it was so plain and obvious that TMTA's claim was an abuse of process that it warranted a striking out, whereas the Judge was concerned simply with whether TMTA's claim was an abuse of process.[36] Further, there could be no *res judicata* where there had been a material change in circumstances and the amendments to the SFA were such a material change in that they diminished the public importance of the issues raised.[37]

21 On the abuse of process issue, BHPM submitted that TMTA's continuance of the proceedings was an abuse of process for two reasons. First, it was an abuse of process to continue with the claim because the Offer, if accepted, would have placed TMTA in a position equivalent to that which it would have achieved had it succeeded entirely in the action.[38] In response to TMTA's point that it wished to continue with the suit in order to obtain a finding of liability (since the Offer was made without admission of liability), BHPM submitted that the costs involved would be all out of proportion in relation to the vindicatory relief that TMTA stood to gain.[39] Second, Suit 580 was clearly commenced for collateral purposes. It was disingenuous of TMTA to say that it wished to continue with the claim for the issues of public importance that would be raised and then say, in the same breath, that it was willing to settle the claim on the condition that the various foreign judgments against it be revisited.[40]

Issues to be determined

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36 RC at para 78.

37 RC at paras 86–88.

38 RC at para 24.

39 RC at para 121(a).

40 RC at paras 25–27.

22 It should be clear from the foregoing that two key issues fall for determination:

(a) The *res judicata* issue: Whether the abuse of process issue was *res judicata* as a result of the AR's decision.

(b) The abuse of process issue: Whether the TMTA's continuation of its action was an abuse of the court's process in the light of the Offer.

The *res judicata* issue

Limb (a) – final and conclusive

23 It was undisputed that the first striking out application (which was eventually dismissed on appeal by Prakash J) did not give rise to any issue estoppel because the Offer had not yet been made at that time. It was the second striking out application (filed after the Offer was made) which TMTA relied on for issue estoppel as this application was dismissed by the AR and BHPM did not appeal.

24 As mentioned, the Judge's approach was to direct that the abuse of process issue be framed as a preliminary point for determination pursuant to O 14 r 12 and/or O 33 r 2 of the ROC. The Judge then held that continuance of TMTA's claim would be an abuse of process and struck out the claim. The Judge considered that the AR's decision did not preclude his determination of the abuse of process issue (now framed as a preliminary point) because the thresholds for determination under O 18 r 19 and O 14 r 12 and/or O 33 r 2 were different. He was of the view that the AR only decided, pursuant to O 18 r 19, that this was not a plain and obvious case of abuse of process which warranted a striking out, not that there was no abuse of process.

25 We respectfully disagree. The question before the AR and the preliminary point before the Judge entailed essentially the same inquiry, which was whether continuance of TMTA's action would be an abuse of the court's process. In our view, there is no difference in the threshold applicable for a finding of abuse of process under O 18 r 19 and a preliminary determination of that same issue made pursuant to O 14 r 12 and/or O 33 r 2 of the ROC. When a court strikes out (or declines to strike out) an action for abuse of process under O 18 r 19, that is a final and conclusive finding on the issue of abuse of process. The threshold for striking out is that the facts disclose a "plain and obvious" case of abuse of process. This same threshold applies whether the issue of abuse of process is decided as a preliminary point under O 14 r 12 and/or O 33 r 2 or determined in an application to strike out under O 18 r 19 of the ROC. In our view, the Judge ought not to have invited BHPM to file an application under O 14 r 12 or under O 33 r 2 and should have dealt with BHPM's application under O 18 r 19 instead.

26 We therefore held that the AR's decision (under O 18 r 19) that TMTA's continuation of the action was not an abuse of process was a final and conclusive determination in respect of the abuse of process issue as there was no appeal against that decision. Limb (a) of *Lee Tat* was therefore made out.

Limb (d) – identity of subject matter

27 However, we were of the view that no issue estoppel arose because limb (d) of *Lee Tat*, that there be identity of subject matter, was not satisfied. The general principle in respect of this limb is that there will not be identity of subject matter if the prior decision cannot be said to have traversed the same ground as the subsequent proceeding owing to a change in the facts and circumstances which gave rise to the earlier decision (*Goh Nellie v Goh Lian*

Teck and others [2007] 1 SLR(R) 453 at [34]).

28 The key difference between the situations that existed at the time of the second and the third striking out applications respectively was the fact that amendments were made to the SFA some seven months after the AR's decision in the second striking out application. With these amendments, s 208 of the SFA was repealed and replaced by s 201B, thereby removing the terms "futures contract" and "futures market" and replacing them with new terms like "derivatives contract" and "organised market" with their own definitions. The effect of these amendments was that the issues of whether an FFA is a "futures contract" and whether the MTFs they are traded on are a "futures market" were no longer relevant to causes of action arising after the amendments came into operation.

29 Whether or not the proceedings raised issues of public interest (*ie*, the questions of interpretation of the SFA) was clearly a relevant and material factor in the AR's analysis of the abuse of process issue. In her brief oral grounds, the AR acknowledged that BHPM had offered to settle the claim in full but considered this overshadowed by the fact that the case would raise issues of public interest or important questions of law:[41]

> I have heard parties and considered both parties' written subs and authorities. … The difference in the circumstances when [BHPM] failed in their previous striking out application and the present circumstances is that [BHPM] have now offered to settle the matter with the amount of damages and interest claimed by [TMTA]. However, the fact remains that [BHPM] had applied to transfer this case to the High Court on the very basis that it raises issues of public interest and/or important questions of law. …

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41 ACB II 135–136.

30 Because the facts and circumstances forming the backdrop to the abuse of process issue were changed materially by the SFA amendments, it could not be said that the subject matter of the dispute before the AR was identical to that which was before the Judge. Accordingly, in our view, the abuse of process issue was not *res judicata*.

The abuse of process issue

31 We agreed entirely with the Judge that there was no defect in the Offer which would justify TMTA's refusal to accept it and that TMTA's various complaints were mere afterthoughts. TMTA's main complaints, that the Offer was subject to contract and that it could be withdrawn at will, were not raised at the material time. The true stumbling block seemed instead to be TMTA's insistence on a "global settlement" encompassing the English Judgment, among other things. Moreover, TMTA's concerns were undoubtedly addressed by the time of the hearing before the Judge when R&T confirmed that the Offer was still open for acceptance as it stood. The fact that TMTA remained unwilling to accept the Offer even after its purported concerns were taken care of was, in our view, quite telling. Had TMTA accepted the Offer, it would have received all the reliefs that it sought, namely, the claimed amount of US$81,500 plus interest and costs. There was no practical benefit to be gained from continuing the action. As the Judge stated, the claim had become "academic" in view of the Offer. It appeared to us therefore that TMTA's continuation of the action, in the light of the Offer, was for the collateral purpose of seeking a global settlement which included the English Judgment.

32 Against this, TMTA argued that the continuation of its claim was not an abuse of process because of the important issues of public interest which it raised. However, this submission was premised on the expectation that the

court's determination as to whether FFAs are "futures contract[s]" and whether the MTFs on which they were traded are "futures market[s]" would be of interest beyond the parties to the present dispute. This consideration effectively disappeared when the SFA was amended and those terms were replaced with new statutory terms, the "derivatives contract" and the "organised market".

33 At the hearing before us, counsel for TMTA, Ms Deborah Barker SC, argued that the present case would still be of interest to potential litigants with causes of action that arose before the amendments to the SFA came into operation on 8 October 2018. However, Ms Barker was unable to point to any potential or pending litigation which involves the repealed statutory terms.

34 Ms Barker also suggested that, despite the change in terminology resulting from the SFA amendments, the court's interpretation of the terms "futures contract" and "futures market" might nonetheless be of guidance in the interpretation of the new statutory terms. We did not see why this should be so especially when the issues raised in Suit 580 do not involve a comparison of the pre- and post-amendment statutory regimes. Any determination made in Suit 580 on the scope of the terms in the pre-amendment SFA would therefore be unlikely to be authoritative or of assistance to cases which are subject to the post-amendment regime.

35 After the Offer was made, it was clear that the primary benefit of proceeding to trial could no longer be that of TMTA obtaining compensatory relief. That relief could have been obtained by TMTA simply by accepting the Offer. It became incumbent on TMTA to point to other reasons why it should be allowed to continue with its action despite the Offer.

36 TMTA attempted to show some other reason why it was entitled to continue with its action. With a trial, it could obtain vindicatory relief since the Offer was made without any admission as to liability. The Judge rejected this submission and held that a finding of liability was not an independent relief sought by TMTA but was instead the basis on which compensatory relief was sought (GD at [53]).

37 In our view, seeking vindicatory relief in the form of a formal finding of liability or a declaration of non-liability, in the face of an open offer to agree to all reliefs sought in an action without any admission of liability, may be justified in only very special circumstances. For example, let us consider a claim for damages resulting from a very grave defamation, where the defendant pleads justification but subsequently makes an offer to pay damages while refusing to withdraw the pleaded justification. In such a situation, if the plaintiff could show that he may suffer serious practical consequences, for instance, that the defamation would affect his professional status, it is arguable that the plaintiff should be allowed to continue with the action in order to vindicate his reputation completely at trial and remove all the stains resulting from the defamation. TMTA's action certainly did not come within this sort of very special circumstances as it was essentially a commercial claim. It should therefore not be permitted to carry on with its action for the professed reason of obtaining vindication.

Conclusion

38 We therefore dismissed TMTA's appeal although for reasons which differ from those given by the Judge. In summary:

(a) The issue of abuse of process was not *res judicata*. Although the AR's decision was a final and conclusive decision on the issue of abuse

of process, it could not be said that there was complete identity of subject matter because the facts and circumstances which prevailed at the time of the hearing before the AR had changed materially by the time the matter came before the Judge. In particular, the statutory provisions in the SFA on which the legal issues in the trial were based had been repealed, thereby diminishing significantly or even totally the public interest in proceeding with the trial as a test case for those issues.

(b) TMTA's continuation of its action in the light of BHPM's Offer was an abuse of the court's process. There was no practical benefit to be gained from proceeding to trial, with the attendant time needed and the costs to be incurred, given that the Offer would have given TMTA all the compensatory reliefs that it sought in the action.

39 On the issue of costs, we ordered TMTA to pay BHPM the costs:

(a) of the hearing before the Judge fixed at $10,000 inclusive of disbursements;

(b) of the application for leave to appeal (because of the amount in dispute in the action) fixed at $5,000 inclusive of disbursements;

(c) of the appeal fixed at $30,000 inclusive of disbursements.

In respect of the costs of Suit 580, at the hearing before the Judge on 29 August 2018, BHPM gave an undertaking that if TMTA accepted the Offer, the first respondent would implement the settlement by setting off the sums stated in para 5(a) of the Offer from the amount awarded in the English Judgment.[42] We therefore ordered that the costs of Suit 580 be taxed or agreed.

Tay Yong Kwang
Judge of Appeal

Steven Chong
Judge of Appeal

Deborah Evaline Barker SC and Hewage Ushan Saminda Premaratne
(Withers KhattarWong LLP) for the appellant;
Poon Kin Mun Kelvin, On Wee Chun Derek and Ang Tze Phern
(Rajah & Tann Singapore LLP) for the respondents.

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[42] ACB II 168 at line 23 – ACB II 169 at line 3.