IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 60

Suit No 950 of 2015
(Registrar's Appeal Nos 196, 197, 272 and 273 of 2016)

Between

(1) ANTARIKSA LOGISTICS PTE LTD

(2) PACIFIC GLOBAL (S) PTE LTD

(3) FASTINDO (SINGAPORE) PTE LTD

… *Plaintiffs*

And

(1) NURDIAN CUACA

(2) D'LEAGUE PTE LTD

(3) TAN TZU WEI

(4) WEE KIAN TECK BRENDAN

(5) CHAN MUI AYE ROSA

(6) JOHNNY ABBAS

(7) RADIUS ARTHADJAYA

(8) PT PROLINK LOGISTICS INDONESIA

… *Defendants*

JUDGMENT

[Civil Procedure] — [Striking out]

[*Res judicata*] — [Extended doctrine]

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Antariksa Logistics Pte Ltd and others
v
Nurdian Cuaca and others

[2017] SGHC 60

High Court — Suit No 950 of 2015 (Registrar's Appeal Nos 196, 197, 272 and 273 of 2016)
George Wei J
3, 4 November 2016

28 March 2017 Judgment reserved.

George Wei J:

Introduction

1 Does a case management decision to litigate incrementally constitute an abuse of process under the extended doctrine of *res judicata*? This is the fundamental question that arises in these appeals.

2 The plaintiffs in the present suit had previously brought an action in conversion against only one defendant in 2009. They then commenced the present suit six years later, relying on substantially the same facts to bring three other causes of action against eight different defendants for conspiracy, deceit and unjust enrichment.

3 The 1st to 5th defendants brought applications to strike out the claims against them pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2014

Rev Ed), alleging, *inter alia*, that the present suit constituted an abuse of process under the extended doctrine of *res judicata*, or that the plaintiffs' pleadings did not contain sufficient particulars. The Assistant Registrar ("the AR") held that he could not conclude with certainty that the present suit constituted an abuse of process. He also found that the particulars given by the plaintiffs were sufficient. He thus declined to strike out any of the plaintiffs' claims. The 1st to 5th defendants appealed.

4 The appeals were heard before me over two days on 3 and 4 November 2016. At the end of the hearing, I reserved judgment. I now deliver my decision.

Background facts

Dramatis personae

5 The 1st Plaintiff, Antariksa Logistics Pte Ltd, the 2nd Plaintiff, Pacific Global (S) Pte Ltd, and the 3rd Plaintiff, Fastindo (Singapore) Pte Ltd (collectively, "the Plaintiffs") are companies incorporated in Singapore and are in the business of freight forwarding and other related logistics services. They act for customers that require their goods to be shipped to foreign countries, including Indonesia. Mr Tie Hari Mulya ("Hari") is a director of the 2nd and 3rd Plaintiffs. Ms Linda Irawaty Lim ("Linda"), Hari's wife, is the sole director and shareholder of the 1st Plaintiff.[1]

6 The 1st Defendant, Mr Nurdian Cuaca, is an Indonesian national who is also in the business of freight forwarding and logistics in Indonesia. The

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[1] Statement of Claim ("SOC") (Amendment No 1) (2015 Suit) paras 1-2.

1st Defendant is the director and shareholder of the 2nd Defendant, D'League Pte Ltd.

7 The 2nd Defendant is a company incorporated in Singapore and is in the business of retail sale of watches, clocks and general wholesale trade.[2]

8 The 3rd to 5th Defendants are related to a company known as McTrans Cargo (S) Pte Ltd ("McTrans"), which is incorporated in Singapore and is in the business of air cargo services. A winding up order has been made against McTrans. It was the sole defendant in an earlier action commenced by the Plaintiffs, Suit No 856 of 2009 ("the 2009 Suit"). More details on the relevance of McTrans to the proceedings will be discussed later. The 3rd Defendant, Mr Tan Tzu Wei (also known as Fabian), was a former sales director of McTrans. The 4th and 5th Defendants, Mr Wee Kian Teck Brendan and Ms Chan Mui Aye Rosa, are both directors and shareholders of McTrans.[3]

9 The 6th and 7th Defendants, Mr Johnny Abbas and Mr Radius Arthadjaya, are Indonesian nationals in the business of freight forwarding and logistics. The Plaintiffs allege that the 6th and 7th Defendants worked for and/or under the instructions of the 1st Defendant at all material times.

10 The 8th Defendant, PT Prolink Logistics Indonesia, is an Indonesian company that is also in the business of freight forwarding logistics.

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2 SOC (Amendment No 1) (2015 Suit) paras 3 and 6.

3 SOC (Amendment No 1) (2015 Suit) paras 7–8.

The 2009 Suit

The Plaintiffs' case on the events leading up to the 2009 Suit

11 According to the Plaintiffs, in or around January 2009, the Plaintiffs consolidated 30 container loads of goods for transportation from Singapore to Jakarta, Indonesia.[4] These goods, which belonged to the Plaintiffs' customers, consisted of general merchandise such as fabrics, perfumery products, mobile phones, apparel, healthcare products, liquor, toys, electronic goods and stationery (collectively "the Cargo").[5]

12 Sometime in or around February 2009, the 1st Defendant entered into an oral agreement with Hari (acting on behalf of the Plaintiffs) to effect transhipment of the Cargo to Indonesia. Under the agreement, the 1st Defendant was, *inter alia*, supposed to obtain the necessary permits and to facilitate customs clearance in Indonesia.[6]

13 On or about 18 February 2009, the Plaintiffs shipped the Cargo from Singapore to Jakarta.

14 The Cargo was consigned to PT Texmaco Micro Indoutama and PT Hegar Mulya, two Indonesian companies nominated by the 1st Defendant, under three Bills of Lading, namely, B/L No. APLU 057309975, B/L No. APLU 057309976 and B/L No. SSLSGJK1CHB682.[7]

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4 SOC (Amendment No 1) (2009 Suit) paras 5 and 8.

5 SOC (Amendment No 1) (2009 Suit) para 3; see also SOC (Amendment No 1) (2015 Suit) para 11.

6 SOC (Amendment No 1) (2009 Suit) para 7.

7 SOC (Amendment No 1) (2009 Suit) para 10.

15 As things turned out, after arriving at the port in Jakarta, the Cargo could not be cleared for import into Indonesia.[8] The 1st Defendant informed Hari that the Cargo was to be returned to Singapore and to the Plaintiffs upon the payment of certain charges and expenses. The Plaintiffs duly paid two sums of money to (*inter alia*) the 6th Defendant and the 7th Defendant:

(a) US$170,000 for costs incurred in the course of re-exportation; and

(b) Indonesian Rp 1.2 billion (about US$140,000) for store rent and related expenses.

(Collectively, "the Transportation Expenses").[9]

16 On 17 September 2009, one of the Plaintiffs' representatives, Ms Kim Sutandi ("Sutandi"), was issued with two pro-forma Bills of Lading in respect of the shipment of the Cargo from Jakarta to Singapore. These Bills of Lading named the 1st Plaintiff as the consignee of the Cargo. The 8th Defendant in the present suit, PT Prolink Logistics, was named as the forwarding agents. Another company not involved in the present proceedings, PT Prolink Clare Indonesia ("PT Prolink Clare"), was named as the shippers.

17 However, the next morning, on 18 September 2009, when Sutandi wanted to collect the original Bills of Lading as formally signed and issued, she discovered that contrary instructions had been provided by the 1st, 6th, 7th and/or 8th Defendants and/or PT Prolink Clare, with the result that the Cargo

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8 SOC (Amendment No 1) (2009 Suit) para 11.

9 SOC (Amendment No 1) (2009 Suit) paras 12 and 34.

was consigned to McTrans instead. This was allegedly done without the Plaintiffs' consent or authorisation.[10]

18 Hari contacted the 1st Defendant in the late afternoon of 18 September 2009 and received assurance that although the Cargo had been consigned to McTrans, he would arrange for the Cargo to be returned to the Plaintiffs.[11]

19 On or about 19 September 2009, the Cargo arrived in Singapore. McTrans received the Cargo and transported it back to its premises.[12]

20 On 25 September 2009, one of the representatives of the Plaintiffs, Mr Charles Lie ("Mr Lie"), witnessed the un-stuffing of the Cargo. McTrans purportedly broke the seals of the 30 containers without the Plaintiffs' consent and authorisation.[13]

21 On 8 October 2009, Hari met the 1st Defendant in Jakarta, where the latter allegedly made an extortionate demand of Rp 45 billion in return for the release of the Cargo, which Hari refused outright.[14]

22 Subsequently, the 6th Defendant, the 8th Defendant and/or one Mr Eugen Chua ("Eugen") of the 2nd Defendant approached the Plaintiffs' customers (*ie*, the Cargo owners) directly to demand the payment of unspecified sums of money and/or the issuance of Powers of Attorney in favour of the 8th Defendant and PT Prolink Clare, in order to obtain the release of their goods.[15]

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10 SOC (Amendment No 1) (2009 Suit) paras 13–16.

11 SOC (Amendment No 1) (2009 Suit) para 18.

12 SOC (Amendment No 1) (2009 Suit) para 19.

13 SOC (Amendment No 1) (2009 Suit) paras 20–21.

14 SOC (Amendment No 1) (2009 Suit) para 23.

23 On 12 October 2009, the 1st Plaintiff, through their solicitors, sent a letter of demand to McTrans, demanding the confirmation of the delivery up of the Cargo by 3pm on that day. No response was received from McTrans by the stipulated time.[16]

The commencement of the 2009 Suit

24 The next day, on 13 October 2009, the Plaintiffs commenced the 2009 Suit against McTrans as the *sole defendant*. On the same day that the writ was filed, the Plaintiffs filed Summons No 5358 of 2009 for a mandatory injunction for delivery up of the Cargo ("the injunction application"). The injunction application was adjourned on various occasions thereafter, pending the addition of some other Cargo owners, whose cargo was also detained by McTrans, as co-plaintiffs. I will come back to this point shortly.

25 In their Statement of Claim in the 2009 Suit, the Plaintiffs recounted all the material events stated at [11]–[23] above.

26 The Statement of Claim in the 2009 Suit alleged that McTrans, the 1st Defendant, the 6th Defendant, the 7th Defendant, the 8th Defendant and/or PT Prolink Clare had converted or wrongfully detained cargo to their own use, and deprived the Plaintiffs of the use of the same. These individuals had, therefore, acted in a manner that was inconsistent with the rights of the Plaintiffs to the Cargo.[17] Nevertheless, *only* McTrans was named as a defendant to the 2009 Suit.

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15 SOC (Amendment No 1) (2009 Suit) para 28.

16 SOC (Amendment No 1) (2009 Suit) para 25; 1st Defendant's Core Bundle of Documents vol 1 Tab 1.

17 SOC (Amendment No 1) (2009 Suit) para 33.

27 At that point in time, the Plaintiffs claimed, *inter alia*, for damages to be assessed and a declaration that the Plaintiffs be indemnified by McTrans for all claims arising from the conversion. However, the Plaintiffs did not initially seek the delivery up of the Cargo. This was only done at a later point in time by way of an amendment to the initial Statement of Claim. The amendments also added a claim for the Transportation Expenses.[18]

28 In its defence, McTrans denied liability for conversion and alleged, *inter alia*, that (a) it was an innocent agent who acted in good faith in relation to the Cargo and it was the named consignee appointed by the 8th Defendant to receive the subject containers from the carriers, handle the customs clearance process and store the subject containers in Singapore; (b) the detention of the Cargo was in lawful exercise of a possessory lien until storage and ancillary charges were paid; and (c) the plaintiffs were not entitled to the reliefs claimed as their claims were tainted with illegality.[19] For the purposes of this judgment, I shall focus on the first defence raised by McTrans.

29 Shortly after the commencement of the 2009 Suit, nearly 84% of the Cargo ("Group A Cargo") was returned to the cargo owners. 16% of the Cargo remained in McTrans' possession ("Group B Cargo"). A separate application was made for a further 13 plaintiffs, who were owners of the Group B Cargo, to be added to the 2009 Suit. This was done on 20 January 2010.

30 The injunction application was eventually restored for hearing. At the resumed hearing, it was recorded that, by consent of the parties, no order be made on the application.

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[18] SOC (Amendment No 1) (2009 Suit) para 34(i) and (ii).

[19] Defence (Amendment No 1) (2009 Suit) as summarised in Ang J's decision at [1].

31 The trial for the 2009 Suit was heard over 20 days from October 2011 to February 2012.

The grounds of decision in the 2009 Suit

32 In her grounds of decision released on 30 July 2012 (*Antariksa Logistics Pte Ltd and others v McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250 ("Ang J's decision")), Belinda Ang Saw Ean J first stated at [44] that to succeed in a claim for conversion, the plaintiff must show that:

(a) It has actual possession of, or the right to immediate possession of, the chattel converted;

(b) The right to sue for conversion existed at the time of the conversion; and

(c) The defendant acted in a manner inconsistent with the plaintiff's superior possessory title.

33 Ang J found that the Plaintiffs were responsible for sending back the Cargo to Singapore after the carriers could not deliver the Cargo to Indonesia, as the Plaintiffs were head bailees under the door-to-door service agreement with their customers, and were entitled, if not obliged, to protect and preserve the Cargo. The 1st Defendant and the 8th Defendant had acknowledged the Plaintiffs' rights and interests in the Cargo (at [56]).

34 Ang J further found that the Plaintiffs had initially appointed the 8th Defendant (whom Hari believed was the 1st Defendant's company) as their receiving agent to make the necessary arrangements for customs clearance of the Cargo and other services for which the Plaintiffs had undertaken

responsibility *vis-à-vis* their customers. The 8th Defendant was a sub-bailee of the Plaintiffs (at [55]).

35 After permission to ship back the Cargo was obtained, it was incumbent upon the 8th Defendant to ensure that the Cargo was properly consigned to the 1st Plaintiff, and not unilaterally sent to a different consignee (at [57]).

36 However, by reason of the unauthorised switch of the name of the consignees in the Bills of Lading, the sub-bailment between the Plaintiffs and the 8th Defendant ended, and the right to possession re-vested in the Plaintiffs as the head bailees *vis-à-vis* their customers. By contrast, McTrans, as the named consignee on the bill of lading, merely had a bare possessory title to the Cargo. The Plaintiffs, which stood in a bailor-bailee relationship with their customers, had a superior possessory title to the Cargo as compared to McTrans, with a right to the immediate possession of it. The Plaintiffs therefore had standing to bring the action in conversion against McTrans (at [57]–[61]).

37 Further, Ang J rejected McTrans' defence that it was a mere intermediary carrying out its principal's (*ie,* the 8th Defendant's) instructions without notice of any of the competing claims. Instead, Ang J found that McTrans knew at all material times that the Plaintiffs were entitled to the Cargo and that the 8th Defendant had no authority to give lawful instructions in relation to the Cargo. McTrans nevertheless assisted the 8th Defendant to interfere with and undermine the Plaintiffs' right to immediate possession of the Cargo. McTrans' acts and conduct were intentional, and had the effect of denying the Plaintiffs of their superior possessory title to the Cargo (at [74]).

38 Insofar as the Plaintiffs were concerned, Ang J granted them a declaration that McTrans was to indemnify them for all liabilities and losses

arising from the conversion (at [9]). However, she did not grant them the Transportation Expenses that they had sought, although the reasons for this was not explained (at [155]).

39 I note that Ang J also found that:

(a) The 2nd Defendant, in whom the 1st Defendant was a director with 70% beneficial interest, provided S$15,000 for McTrans' legal fees (at [86]).

(b) The 1st and 3rd Defendants were no strangers to each other. The 3rd Defendant admitted that the 1st Defendant was previously his boss in 1996 or 1997. The 3rd Defendant was also on familiar terms with the 1st, 6th and 7th Defendants (at [87]).

Events subsequent to the 2009 Suit

40 McTrans appealed the whole of Ang J's decision, arguing that the Plaintiffs had no standing to bring the claim for conversion, and that Ang J erred in finding that the Plaintiffs had an immediate right of possession to the Cargo. On 5 February 2013, the Court of Appeal dismissed the appeal without written grounds.

41 On 16 July 2013, the Plaintiffs applied to tax their costs for the 2009 Suit, following which McTrans was ordered to pay them S$858,077.38.[20]

42 On 8 October 2014, the Plaintiffs (together with the other plaintiffs in the 2009 Suit) served a statutory demand on McTrans for S$908,488.97 (comprising the taxed costs and interest). When they did not receive payment,

[20] 1st Defendant's submissions para 38.

they applied to wind up McTrans on the basis that it was unable to pay its debts. McTrans was wound up on 21 November 2014.[21] It appears that the Group B Cargo was never released and to date remains in the possession of McTrans.[22]

The present suit

43 On 16 September 2015, Suit No 950 of 2015 ("the present suit") was commenced by the Plaintiffs against the eight Defendants. Many of the material facts outlined in the Statement of Claim of the 2009 Suit (see [11]-[23] above) relating to the conversion of the Cargo and the payment of the Transportation Expenses are repeated in the present suit, but with greater particularity.

44 However, the Plaintiffs add in their Statement of Claim for the present suit the following:

(a) McTrans was wound up on 21 November 2014 and as at the date of the filing of the Statement of Claim, no damages or legal costs have been recovered from McTrans;[23]

(b) Details of at least two of their customers that caved in to demands for payments of money in exchange for the release of the Cargo (see [22] above):[24]

(i) PT Erajaya Swasembada, Tbk paid sums of Rp 50,266,056,000 and S$282,586.85 or part thereof; and

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21 3rd Defendant's submissions para 6(k).

22 3rd Defendant's submissions para 48(b)(vi).

23 SOC (Amendment No 1) (2015 Suit) para 34.

24 SOC (Amendment No 1) (2015 Suit) paras 38 and 40.

(ii) PT Teletama Artha Mandiri paid sums of Rp 34,523,316,300 and S$26,100.02 or part thereof.

(Collectively, "the Extortion Monies"). The Extortion Monies were paid to the 1st Defendant and/or his agents, who purported to be Hari's business associates and authorised to receive the monies. The Plaintiffs claim that the sums were in fact owed by these companies to the Plaintiffs for freight forwarding services previously rendered. Because of the payments to the 1st Defendant and/or its agents, the Plaintiffs were unable to recover debts properly owed to them.

(c) It discovered "in the course of the proceedings in [the 2009 Suit]" that:[25]

(i) the 3rd Defendant was on familiar terms with the 1st Defendant since 1996 or 1997 and the 6th and 7th Defendants since 2002 or 2003, as they were colleagues or had business dealings;

(ii) McTrans' initial legal fees were funded by the 2nd Defendant, a company in which the 1st Defendant was a director; and

(iii) McTrans was still accepting instructions from the 8th Defendant as late as 5 September 2011.

45 The Plaintiffs further plead that the 4th and 5th Defendants, as directors and shareholders of McTrans, knowingly allowed McTrans to be used as a vehicle for the 1st Defendant to wrongfully gain control over the Cargo. By doing so, they abetted the 1st Defendant and/or his agents in their elaborate

[25] SOC (Amendment No 1) (2015 Suit) para 35.

scheme to defraud the Plaintiffs. In the alternative, the 4th and 5th Defendants were wilfully blind to the facts and matters that led to the loss suffered by the Plaintiffs.[26]

46 The causes of action in the present suit are also different from the 2009 Suit. They are based on deceit, conspiracy to defraud and unjust enrichment:

(a) In relation to the claim in *deceit*, the Plaintiffs allege that they had been victims of a fraudulent and/or unlawful scheme whereby the 1st Defendant, acting in concert with the other Defendants and/or any of them, unlawfully and dishonestly gained possession and control over the Cargo and, by gaining such possession and control and detaining the Cargo, coerced the payment of the Extortion Monies and the Transportation Expenses;[27]

(b) In relation to the claim for a *conspiracy to defraud*, the Plaintiffs claim that the Defendants (or any two or more of them) conspired together wrongfully with the sole or predominant intention of defrauding and/or injuring the Plaintiffs. Pursuant to this conspiracy, the Plaintiffs were coerced to pay the Transportation Expenses, and the consignees of the cargo were wrongfully or unlawfully switched to McTrans, who then wrongfully or unlawfully detained the Cargo;[28] and

(c) In relation to the claim for *unjust enrichment*,[29] the Plaintiffs assert that there has been a failure of the basis upon which the Plaintiffs

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26 SOC (Amendment No 1) (2015 Suit) para 36.

27 SOC (Amendment No 1) (2015 Suit) para 41.

28 SOC (Amendment No 1) (2015 Suit) para 44.

29 SOC (Amendment No 1) (2015 Suit) paras 47–50.

> transferred the Transportation Expenses, as the 1st, 6th and 7th Defendants have failed to apply the monies in the agreed manner, by failing to name the 1st Plaintiff as the consignee to receive the Cargo in Singapore and/or failing to return the Cargo to the Plaintiffs in Singapore. Further and/or alternatively, the Extortion Monies had been procured through duress, extortion or illegal means, and the 1st Defendant has been unjustly enriched.

47 Ultimately, the Plaintiffs seek a declaration that the Defendants indemnify them for all liabilities, losses and expenses arising from the alleged conspiracy and/or fraud, with damages to be assessed or, alternatively, the Transportation Expenses and the Extortion Monies to be paid to them on the ground of unjust enrichment, with interest and costs.

48 I note in passing that as at the date of the hearing of the appeals, only the 1st to 5th Defendants have been served in the present suit and are defending the Plaintiffs' claims.[30] The 6th to 8th Defendants have not been served, and were unrepresented and absent from the hearing.[31] No explanation was provided by the parties as to why the latter three Defendants were not served. However, for the purposes of these appeals, nothing turns on the lack of service.

The applications to strike out

49 In December 2015 and April 2016, the 1st to 5th Defendants brought applications to strike out the Plaintiffs' claims against each of them, pursuant to O 18 r 19 of the Rules of Court. The following table contains a summary of the applications brought:

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30 Plaintiffs' submissions for RAs 196, 197 and 272/2016 para 13.

31 Notes of Evidence ("NOE") 3 November 2016 p 3 line 5–p 4 line 17.

Summons No	**Date**	**Defendant**
SUM 6007/2015	14 December 2015	4th and 5th Defendants (jointly)
SUM 6135/2015	21 December 2015	3rd Defendant
SUM 1978/2016	25 April 2016	1st Defendant
SUM 2021/2016	26 April 2016	2nd Defendant

50 As evidenced by the supporting affidavits, the striking out applications of the 1st, 3rd and 4th and 5th Defendants, are mainly brought under O 18 r 19(1)(*b*) and/or O 18 r 19(1)(*d*) of the Rules of Court, namely, that the Statement of Claim is scandalous, frivolous or vexatious, or is otherwise an abuse of the process of the Court.[32]

51 It was apparent from the course of the proceedings that the 1st, 3rd and 4th and 5th Defendants' positions are broadly aligned. Their applications are focused on the ground of abuse of process pursuant to the extended doctrine of *res judicata.*

52 The 1st, 3rd and 4th and 5th Defendants essentially take issue with the Plaintiffs' decision to bring their claims in an *incremental* manner, in particular, the decision to (i) name McTrans as the only defendant in the 2009 Suit and not the other Defendants; and (ii) only bring claims for conversion and unlawful

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[32] Affidavit of Nurdian Cuaca dated 25 April 2016 para 10 (1st Defendant); Affidavit of Tan Tzu Wei dated 21 December 2015 para 4 (3rd Defendant); Affidavit of Wee Kian Teck Brendan dated 11 December 2015 para 4 (4th and 5th Defendants).

interference in the 2009 Suit, without including the claims of deceit, conspiracy and unjust enrichment which are raised in the present suit.

53 The 2nd Defendant's application is based on all four grounds under O 18 r 19(1) of the Rules of Court.[33] However, its underlying gripe is different from the other Defendants. The 2nd Defendant does not raise any issues relating to the extended doctrine of *res judicata*. Instead, the 2nd Defendant's case is based on an alleged *lack of particularity* in the Plaintiffs' pleadings for the claim in conspiracy to defraud. In particular, the 2nd Defendant alleges that the Plaintiffs have not provided sufficient particulars as to how the 2nd Defendant was involved in the alleged conspiracy. These defects in the Plaintiffs' claims cannot be cured by amendments, as a formal request for further and better particulars ("F&BPs") had already been made but the F&BPs filed on 8 January 2016 did not add any other substantive factual allegations to clarify the Plaintiffs' claim against the 2nd Defendant.[34]

The decision below

SUM 6007/2015 and SUM 6135/2015: The 3rd to 5th Defendants' applications to strike out

54 On 13 May 2016, the AR heard the 3rd Defendant's, and the 4th and 5th Defendants' applications to strike out (SUM 6007/2015 and SUM 6135/2015) together. He dismissed both applications. In his brief grounds appended to the certified transcript of the hearing, he reasoned that in light of all the circumstances, he could not conclude with any certainty that the present suit constituted an abuse of process. He accepted the Defendants' arguments that

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33 Affidavit of Lee Choon Yong dated 26 April 2016 para 3 (2nd Defendant).

34 Affidavit of Lee Choon Yong dated 26 April 2016 paras 5-9 (2nd Defendant).

many of the facts relied upon by the Plaintiffs in the present suit were substantially similar, although not perfectly identical, to those presented in the 2009 Suit, and that the Plaintiffs may be said to be trying to recover the same set of losses in both actions (although the causes of action are different). Nonetheless, he held, *inter alia*, that:[35]

> (a) When the 2009 Suit was commenced, it was not unreasonable for the Plaintiffs to focus on the release of the Cargo converted. The Plaintiffs were merely bailees of Cargo, which was owned by its customers. If the goods were not released in a timely manner, the Plaintiffs might have been liable for resulting damages which would increase the longer the goods were wrongfully retained.
>
> (b) Although the Plaintiffs *could* have brought the present claims in the earlier proceedings in 2009, it was not unreasonable that the Plaintiffs did not do so. Adding the present claims of fraud and conspiracy would have meant that the 2009 Suit would have taken a longer time to conclude, which was adverse to the Plaintiffs' interest of having the Cargo released as soon as possible. Further, the present claims of fraud and conspiracy are far harder to prove than that of conversion. It was questionable if the Plaintiffs had sufficient evidence then to commence claims for fraud and conspiracy.
>
> (c) There is no rule against trying to recover a single set of losses from one defendant first and only suing other defendants if that fails. Although it would have been preferable for the claims in the present suit to have been tried together with the claim for conversion, the weight of these considerations must be balanced against the fact that the Plaintiffs

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[35] Certified Transcript of hearing on 13 May 2016, pp 4-10 (Appendix).

should not be prohibited from pressing genuine claims, especially when there were understandable reasons for the Plaintiffs proceeding with the claim for conversion first.

(d) The claim for Transportation Expenses would not amount to a collateral attack on the decision in the 2009 Suit. In the 2009 Suit, while the point is unclear, Ang J most likely approached the claim by awarding expectation damages, so that the Plaintiffs were put in the position they would have been in if the contract for delivery of the Cargo had been properly performed. This may explain why she dismissed the Plaintiffs' claim for Transportation Expenses in the 2009 Suit. But in the present suit, it is not impossible for the trial judge to choose to award a *different measure of damages* if the claims for fraud and conspiracy are made out. If so, the trial judge in the present suit can award Transportation Expenses without impinging on the propriety of the earlier decision (in which Transportation Expenses were *not* awarded).

55 The 3rd Defendant was ordered to pay costs of S$6,000 and a fixed disbursement to the Plaintiffs. An identical cost order was also made against the 4th and 5th Defendants collectively.

SUM 1978/2016: the 1st Defendant's application to strike out

56 On 9 June 2016, the AR heard the 1st Defendant's application to strike out (SUM 1978/2016) and reserved judgment. At the resumed hearing on 8 July 2016, the AR dismissed the application. The 1st Defendant was ordered to pay the Plaintiffs costs of S$8,000 plus disbursements to be agreed.

57 On 27 July 2016, the AR issued his written grounds of decision ("GD") setting out a comprehensive analysis of the issues and legal principles. The GD

is recorded in *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2016] SGHCR 10. In the AR's GD, he similarly concluded that he could not come to any certain conclusion that the Plaintiffs' conduct amounted to an abuse of process (at [66]). The AR considered both the public interest and the private interests of the parties.

58 With regard to the public interest (see [52]–[58]), he held that it was in the wider public's interest to protect the plaintiffs' ability to raise unlitigated issues in a court of law. Further, the principle of party autonomy, *ie*, the Plaintiffs' ability to decide when and who to sue and over what issues, should be upheld. Third, he reasoned that this was not a case where the failure to bring the later claims was a result of negligence or inadvertence. Instead, the Plaintiffs had made a *bona fide* case management decision in 2009 to bring the 2009 Suit only against McTrans, based on the information they had at that time. Further, it was not necessarily more efficient for the additional claims to be brought then, as the 2009 Suit would have been transformed if the claims in the present suit were added, and the complexity, length and cost of proceedings would increase dramatically.

59 As for private interests (see [61]–[69]), the AR held that there was in the present matter no question of the 1st Defendant being "twice vexed", as he was not a party to the 2009 Suit. The Plaintiffs had good reasons not to bring the present claims then, as the most pressing matter was to try and have the Cargo released; otherwise, the Plaintiffs may potentially be liable to their customers for the non-return of the Cargo. A claim in conversion was the most direct avenue of relief. In addition, the evidence in 2009 in respect of the other claims (in the present suit) was unsatisfactory; it was necessary to bring a further action to obtain further evidence. Although it was not argued by parties, the AR said it was not necessary for the Plaintiffs to have laid all their cards upfront. A failure

to put the other party on notice will not necessarily render the subsequent action an abuse of process.

SUM 2021/2016: the 2nd Defendant's application to strike out

60 On 9 June 2016, the AR also heard the 2nd Defendant's application to strike out (SUM 2021/2016). After hearing the 2nd Defendant's objections on the pleadings, the AR gave the Plaintiffs an opportunity to amend the pleadings and/or F&BPs, and fixed a further hearing on 8 July 2016.[36]

61 At the resumed hearing on 8 July 2016, counsel for the 2nd Defendant informed the AR that they were still objecting to the Plaintiffs' proposed amended F&BPs on the basis that there were various inconsistencies between the amended F&BPs and the Statement of Claim. The AR held that the amendments proposed by the Plaintiffs in the amended F&BPs were sufficient to save the claim against the 2nd Defendant. However, he made no order as to SUM 2021/2016, to reflect the fact that the application was not improperly brought by the 2nd Defendant. Directions were given for the Plaintiffs to file and serve the amended F&BPs by 11 July 2016.[37] The Plaintiffs were also ordered to pay costs of S$3,000 plus reasonable disbursements to the 2nd Defendant.

The Registrar's Appeals

62 The 1st to 5th Defendants appealed the AR's decisions, which form the subject of the present appeals. The applications and appeals are summarised in the following table:

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36 Certified Transcript of the hearing on 9 June 2016.

37 Certified Transcript of the hearing on 8 July 2016.

Summons No	**Registrar's Appeal No**	**Date**	**Defendant**
SUM 6007/2015	RA 196/2016	25 May 2016	4th & 5th Defendants (jointly)
SUM 6135/2015	RA 197/2016	27 May 2016	3rd Defendant
SUM 1978/2016	RA 272/2016	21 July 2016	1st Defendant
SUM 2021/2016	RA 273/2016	22 July 2016	2nd Defendant

The parties' submissions on appeal

The 1st, 3rd and 4th and 5th Defendants' appeals

63 In relation to the appeals by the 1st, 3rd and 4th and 5th Defendants, the Plaintiffs' main submissions are that:[38]

(a) At the time of the 2009 Suit, the Plaintiffs did not have sufficient evidence to launch a claim based on deceit, conspiracy and unjust enrichment against the Defendants. As a result of the 2009 Suit, the Plaintiffs were able to gather new evidence showing the connection between various Defendants which surfaced shortly before or during the trial for the 2009 Suit. The Plaintiffs were also able to rely on significant findings in relation to McTrans' conduct in the events.

(b) Even if the Plaintiffs could have made a claim against the Defendants, it was reasonable for the Plaintiffs not to have done so earlier but to now commence a separate litigation for these claims. This was a *bona fide* case management decision to avoid a lengthy and

[38] Plaintiffs' submissions for RA 196, 197 and 272/2016 paras 92, 113, 116.

complex claim. There was no collateral attack by the Plaintiffs on the decision of the 2009 Suit, or harassment of the Defendants. There was thus no abuse of process under the extended doctrine of *res judicata*.

64 In response, the 1st Defendant's main argument is that the same ultimate issues are at the centre of the 2009 and 2015 Suits, namely, whether the Plaintiffs were indeed head bailees of the Cargo (and thus had superior possessory title), and whether there was an unauthorised switch of the Bills of Lading.[39] Therefore, allowing the present suit to proceed would mean that a different court will need to re-consider the documents and re-assess the evidence of the witnesses, which would result in a duplication of time, costs and efforts.

65 More importantly, it is entirely possible that the court might assess these differently from Ang J (and the Court of Appeal in the appeal from Ang J's decision), which would undermine the principle of finality of judicial determination. Instead, there would be a risk of inconsistent judgments, which would bring the administration of justice into disrepute. This is especially given that Ang J had already made findings that were adverse to the 1st Defendant.[40] Alternatively, the 1st Defendant may be treated as a privy of McTrans, with the consequent result that he is bound by Ang J's decision.[41] This is unfair because he did not even testify in the 2009 Suit. Further, the 1st Defendant argues that the Plaintiffs have failed to explain to the Court why the matters now alleged were not brought forward in the 2009 Suit, and refuted the Plaintiffs' assertions that there was insufficient evidence to bring the claims in the present suit in 2009.[42]

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39 1st Defendant's submissions para 43.

40 1st Defendant's submissions paras 65–73.

41 NOE 3 November 2016 p 68 lines 1–17.

66 The 3rd Defendant's main argument is that the Plaintiffs ought to have brought their claims in fraud and/or conspiracy against the 3rd Defendant in the 2009 Suit. He argues that the Plaintiffs had already made allegations of fraud and/or conspiracy against McTrans in the 2009 Suit and had ample time to add in a cause of action in fraud and/or conspiracy against the 3rd Defendant, as the sales director of McTrans. This is especially because the Plaintiffs were already aware of the 3rd Defendant's alleged role in the alleged conspiracy to defraud. Further, the present suit arises out of "identical facts" and the current claims were merely an extension of the claims in the 2009 Suit. The remedies sought also significantly overlap with those sought in the 2009 Suit. The 3rd Defendant argues that the Plaintiffs appear to be bringing the present claims in an attempt to recover the same set of losses because they were unable to recover any money from McTrans, which has been wound up.[43]

67 The 4th and 5th Defendants' arguments are largely the same. They maintain that the Plaintiffs already had all the relevant facts and evidence in 2009, yet consciously sued only McTrans rather than the current Defendants to the present suit. They must not now be allowed to have a second bite of the cherry, as public policy demands that there be finality in litigation.[44]

The 2nd Defendant's appeal

68 In relation to the 2nd Defendant's appeal (based on insufficient particulars), the Plaintiffs submit that they have pleaded the essential elements of unlawful conspiracy to defraud, including the presence of an agreement, the presence of an intention to defraud, and material facts about the unlawful acts

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42 1st Defendant's submissions paras 44–64.

43 3rd Defendant's submissions paras 31–45.

44 4th and 5th Defendants' submissions paras 31–39, 44.

carried out in furtherance of the conspiracy.[45] Even if the 1st and 2nd Defendants were not found to be co-conspirators of a fraud, the acts and knowledge of the 1st Defendant could still be attributed to the 2nd Defendant and the 2nd Defendant would still be a liable party to the conspiracy. In this regard, more than sufficient particulars have also been pleaded.[46]

69 In response, the 2nd Defendant argues that the AR erred in failing to appreciate that even the amended F&BPs could not rescue the Plaintiffs' defective claim against it. Most significantly, the 2nd Defendant highlights two new areas raised in the F&BPs, which, it submits, do not salvage the Plaintiffs' case against the 2nd Defendant:

(a) First, paras 2.1(a) and (b) of the amended F&BPs allege that the 2nd Defendant had knowledge of the alleged fraud by reason of the attribution of the 1st Defendant's knowledge to the 2nd Defendant, because the *1st Defendant was the agent of the 2nd Defendant*.[47] The 2nd Defendant submits that this contradicts the Plaintiffs' own plea that the *2nd Defendant was the agent of the 1st Defendant*.

(b) Second, paras 2.1(c) and 2.2(b) of the amended F&BPs state that Eugen was at all material times the authorised representative or agent of the 2nd Defendant, and therefore acts done by him were attributable to the 2nd Defendant. However, these allegations contradict the Plaintiffs' own pleadings and evidence, relate to losses suffered after the time period in the Plaintiffs' claim, and in any case do not form part of the alleged acts carried out pursuant to the pleaded conspiracy.[48]

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45 Plaintiffs' submissions for RA 273/2016 para 72.

46 Plaintiffs' submissions for RA 273/2016 paras 75–76.

47 2nd Defendant's submissions at para 8.

Issues

70 In light of the foregoing, the following factual and legal issues emerge for determination:

(a) Does a case management decision to litigate incrementally constitute an abuse of process under the extended doctrine of *res judicata*?

(b) Should the Plaintiffs' claims against the 1st, 3rd and 4th and 5th Defendants be struck out on the facts?

(c) Should the Plaintiffs' claims against the 2nd Defendant be struck out on the basis that the Plaintiffs' pleadings lack sufficient particulars?

71 Before delving into each of the issues, I will first set out some of the general legal principles that are relevant in this case.

Applicable legal principles

General principles on the extended doctrine of res judicata

72 The extended doctrine of *res judicata* has its roots in the English decision of *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson*") at 115 in which Sir James Vigram V-C stated the general principle as follows:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, *the Court requires the parties to that litigation to* ***bring forward their whole case****, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter[s] which might have been brought forward as*

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48 2nd Defendant's submissions para 9.

> *part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.* The plea of *res judicata* applies, except in special cases, *not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment,* ***but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.***
>
> [emphasis added in italics and bold italics]

This was recently endorsed in the local case of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [101].

73 In the words of Somervell LJ in *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257:

> …res judicata for this purpose is not confined to the issues which the court is actually asked to decide but (…) it covers issues or facts which are *so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*
>
> [emphasis added]

74 It should be noted that the doctrine is not limited to re-litigation or sequential litigation between the *same parties*. In other words, it is not necessary for the defendant in the later proceedings to have been a party to the earlier suit before the doctrine can apply: see *Michaels and another v Taylor Woodrow Developments Ltd and Others* [2001] Ch 493 ("*Michaels*") at [69] and *Kwa Ban Cheong v Kuah Boon Sek* [2003] 3 SLR(R) 644 ("*Kwa Ban Cheong*") at [32].

75 In some instances, the courts have held that if litigation is pursued, it should be pursued by and against all interested parties at the same time. It may

be an abuse to sue some defendants in one piece of litigation and then sue others in another, when they could more conveniently have been sued all at the same time: *Michaels* at [69]. Against this, it has also been said when the original action was brought by the plaintiff against one party and the second action is brought against completely different parties, the defendants in the second set of proceedings cannot be said to be vexed for a second time: see *Aldi Stores Ltd v WSP Group plc and others* [2007] EWCA Civ 1260 ("*Aldi Stores*") at [26]. In the round, these are not rigid rules and in all cases where the court is being asked to strike out subsequent proceedings on these grounds, it must decide whether in all the circumstances, multiple proceedings against different defendants are acceptable: *Michaels* at [69]; see further [77] below.

76 In this regard, where a party, A, is involved in a first set of proceedings in which an issue was determined, and then employs his servant or agent, B, in an attempt to re-litigate the same issue in a second set of proceedings, *both A and B* are bound by the earlier decision: see *Spencer Bower and Handley, Res Judicata* (LexisNexis, 4th Ed, 2009) ("*Res Judicata*") at paras 9.44–9.45. B is known as a "privy" of A, in the sense that there is a privity of interest between the two parties. In my view, this must also apply in the converse situation, *ie*, if B (the agent) is involved in the first set of proceedings, with A (the principal) involved in the later proceedings. The test is whether there is a sufficient degree of identity between the two parties to make it just to hold that the decision to which one (A) was party should be binding in proceedings to which the other (B) was party: *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Johnson*") at 32, citing *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 515.

77 In applying the extended doctrine of *res judicata*, it is well-established that the question of whether a litigant should be prevented from taking a point that could have been raised in earlier proceedings is not a "dogmatic" inquiry,

but rather, a "broad, merits-based judgment" which takes account of the public and private interests involved as well as all the facts of the case (*Johnson* at 31). The focus is on whether, in all the circumstances, a party is abusing the process of the court by seeking to raise before it an issue which could have been raised before: *Johnson* at 31, cited in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [52] and *TT International* at [104]. In *Goh Nellie* at [53], it was stated that the relevant (non-exhaustive) factors the court should consider include:

(a) Whether the later proceedings in substance is nothing more than a collateral attack upon the previous decision;

(b) Whether there is fresh evidence that might warrant re-litigation;

(c) Whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not; and

(d) Whether there are some other special circumstances that might justify allowing the case to proceed.

78 It should be noted that in relation to factor (a) above, Lord Bingham of Cornhill in *Johnson* (at 31) disavowed an approach that requires any collateral attack on a previous decision, or some element of dishonesty, before an abuse can be found. However, he added that where those elements are present, the later proceedings would much more obviously be abusive. At the end of the day, the categories of abuse of process are not closed, and what is required is an "intense focus on the facts of the case": *Angeli Luki Kotonou v National Westminster Bank plc* [2015] EWCA Civ 1106 ("*Kotonou*") at [45].

Some observations on the Court's role in applications to strike out

79 The Court's powers to strike out a claim on the four grounds under O 18 r 19(1) of the Rules of Court have been extensively considered and it is not necessary for me to re-state them here. It suffices for me to say that in coming to my decision, I have borne in mind that the Court should only exercise its power to strike out in "plain and obvious" cases. This power is to be exercised with caution, as striking out will have the effect of depriving a litigant of the opportunity to have his claim tried by the court: *Kwa Ban Cheong* at [29], citing *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547 at 553. I am fully cognisant that the role of the Court at this stage is not to carry out a minute and protracted examination of the documents and the facts of the case: see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [18] and *The "Osprey"* [1999] 3 SLR(R) 1099 at [6]. Otherwise, the Court hearing the striking out application would effectively be usurping the proper function of the trial court, and conducting a trial of the case in chambers on affidavits only, without discovery and without evidence tested by cross-examination in the ordinary way: see *Ko Teck Siang and another v Low Fong Mei and another and other actions* [1992] 1 SLR(R) 22 at [15], citing *Wenlock v Moloney* [1965] 2 All ER 871 at 874. Instead, the correct question for the Court to ask is whether the commencement of the present suit constitutes a *plain and obvious case* of an abuse of the process of the Court.

80 Bearing in mind the general principles, I turn to the substantive issues in this case.

Does a case management decision to litigate incrementally constitute an abuse of process under the extended doctrine of *res judicata*?

Policy reasons underpinning the extended doctrine of res judicata

81 It is helpful to begin with a consideration of the broad public policy grounds underpinning the extended doctrine of *res judicata*. As the AR below noted at some length, there are multiple, often competing, policy reasons for the doctrine.

82 Fundamentally, the doctrine aims to bring finality to litigation and to avoid multiplicity of proceedings: *Johnson* at 31. This serves at least two functions. First, it promotes the *public interest* of efficiency and economy in the conduct of litigation as a whole. It prevents "wasted time and cost, duplication of effort [and] dispersal of evidence": *Kotonou* at [50], citing *Divine-Bortey v Brent LBC* [1998] ICR 886 at 898. Second, it also enhances the *private interest* of the other party to the proceedings by avoiding oppression and unfair harassment to it: *Johnson* at 31 and *State Bank of New South Wales Ltd v Alexander Stenhouse Ltd and another case* (1997) Aust Tort Rep 81-423 ("*Stenhouse*") at 64,089.

83 Further, the doctrine aims to avoid bringing the administration of justice into disrepute: *Hunter v Chief Constable of the West Midlands Police* [1981] 3 All ER 727 at 729; *Stenhouse* at 64,089. This would occur if the re-litigation constitutes a collateral attack on the outcome of previous proceedings, leading to the risk of an inconsistent judgment especially if "different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation": *Kotonou* at [50].

84 However, these aims must be balanced against a party's indisputable right of access to justice and protection of the law. As observed by Lord Millett in *Johnson* at 59, "[i]t is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon".

Case law

85 I turn to the case law on the specific question of whether a case management decision by a plaintiff to litigate incrementally constitutes an abuse of process. In this regard, I was not pointed to any local case authority but was directed to three English authorities on point. These cases will be analysed as they may assist the Court in setting out some general principles for future cases in Singapore.

86 The first case is the English House of Lords decision of *Johnson*. The plaintiff in that case was a businessman who conducted his business through a number of companies, including company W, in which he held most of the shares. As a result of a property transaction that went awry, the plaintiff had causes of action against the defendant, a firm of solicitors that acted for him in the transaction, both personally as well as in the name of company W. As it turned out, the plaintiff chose to sue the defendant in the name of company W first (on 8 January 1991), for professional negligence in connection with the exercise of an option to purchase. On 17 January 1991, solicitors representing company W informed the defendant that the plaintiff had a claim against the defendant in his personal capacity which he would pursue in due course. The claim by company W against the defendant was eventually settled during the trial in late 1992.

87 On 7 April 1993, the plaintiff, acting *in his personal capacity*, issued a writ against the defendant, on the basis that the defendant also owed the plaintiff a duty of care in respect of the exercise of the option. The defendant applied to strike the action out on the ground of abuse of process in December 1997. In one of the plaintiff's affidavits, he deposed his reasons for not enforcing his personal claims at the initial stage. These included the fact that advancing his personal claim would have substantially delayed the progress and resolution of company W's action against the defendant, and that the more complicated nature of his personal claims would have had an adverse effect on the costly and time-consuming work required to prepare company W's case for trial.

88 After a comprehensive survey of the authorities, Lord Bingham noted (at 34) that it would have been "preferable" and indeed "efficient and economical" for the judge who tried the action by company W to also, at about the same time or shortly thereafter, rule on the plaintiff's personal claim (as the judge would be familiar with the relevant details and evidence). Nevertheless, there were reasons implicitly accepted by both parties for not proceeding in that way. The Court of Appeal below had adopted too mechanical an approach in giving little or no weight to the considerations which led the plaintiff to act as he did, and failed to weigh the overall balance of justice. The appeal was allowed and the bringing of the personal action was held not to be an abuse of process.

89 The second relevant case is the English Court of Appeal decision of *Aldi Stores*. In that case, the plaintiff first brought an action against Holmes Building Ltd ("Holmes"), the main contractor in the building of certain retail premises, for breach of warranty and negligence. Although the plaintiff was entitled to warranties from three other entities (the defendants in *Aldi Stores*), namely WSP Group plc, WSP London Ltd and Aspinwall & Co Ltd ("the three defendants"),

in the first action the plaintiff pursued its claims only against Holmes. Holmes, in turn, brought third party claims against the three defendants

90 Subsequently, the plaintiff brought another action for damages for breach of warranty and negligence against the three defendants. The three defendants applied to strike out the claims on the basis of the extended doctrine of *res judicata,* or the rule in *Henderson* and *Johnson*.

91 The Court of Appeal made the following important findings:

(a) The plaintiff had not behaved in any way that was culpable or improper. Instead, it had made a judgment that it would be in its interests to conduct proceedings in this way, as it was "sensible and cost effective", in light of the length, costs and complexity of bringing claims against other parties (at [18], *per* Thomas LJ). Agreeing, Wall LJ stated (at [34]) that the course steered by the plaintiff through the complex litigation was (a) commercially reasonable; (b) forensically legitimate; and (c) reasonably transparent. He thus held that the plaintiff's conduct in launching the second set of proceedings did not constitute an abuse of process.

(b) The mere fact that the new action may require a trial and hence take up judicial time does not make the action impermissible. If an action can be properly brought, it is the duty of the state to provide the necessary resources; the litigant cannot be denied the right to bring a claim on the basis that he could have acted differently and so made more efficient use of the court's resources (at [24], *per* Thomas LJ).

(c) There is a "real public interest in allowing parties a measure of freedom to choose whom they sue in a complex commercial matter and

> not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings" (at [25], *per* Thomas LJ). Although it may be desirable that all possible actions arising from the same state of facts should be brought at the same time, this can be "a recipe for complex and unwieldy litigation" (at [39], *per* Longmore LJ).

In light of all the circumstances, Thomas LJ concluded (at [27]) that there were good reasons why the plaintiff acted as it did, and bringing the second action was not a misuse or abuse of the process of the Court.

92 The third decision I was referred to is another English Court of Appeal case, *Stuart v Goldberg Linde (a firm) and others* [2008] EWCA Civ 2 ("*Stuart*"). In *Stuart*, the plaintiff successfully sued G and L, who were partners in a solicitor's firm, for breach of an undertaking to pay him US$350,000 in connection with a proposed business venture in Mongolia. Later, the plaintiff issued further proceedings against G, L and a third defendant V, arising out of the same facts, in which he claimed damages, *inter alia*, for misrepresentation and inducing a breach of contract. The particulars of claim, which repeated many of the assertions in the earlier action, alleged that in reliance on L's misrepresentations, the plaintiff had concluded a contract with V, which V had been induced to breach as a result of derogatory and untrue statements made about the plaintiff by L. The plaintiff had known, before the trial of the earlier action, of the facts relevant to the inducement claim and had been aware of the falsity of some but not all of the statements on which the misrepresentation claim was based.

93 G and L applied to strike out the second action as an abuse of the process of the court, on the basis that all the claims against them arising out of the same

transaction should have been asserted in the earlier action. This was allowed at first instance.

94 The Court of Appeal allowed the plaintiff's appeal. In particular, it held that:

(a) It was not significant that the plaintiff, when preparing the particulars of claim in the second action, had copied large parts of the particulars of claim from the earlier action which set out the factual background to the matters at issue, as there was much common ground between the subject matter of the two actions (at [47]). It should, however, be noted that one relevant consideration weighing on the court's mind was that the plaintiff was a litigant-in-person.

(b) The Court of Appeal rejected the argument that the statement of case of the earlier proceedings should simply have been amended to include the claim in inducement. Such an amendment would have transformed the whole proceedings, by introducing issues which were irrelevant to the claim for a breach of undertaking, and thereby expanding substantially the scope of the necessary evidence (at [55]).

(c) There is no general principle that a potential plaintiff, who has not yet brought proceedings asserting a particular claim, is under a duty to exercise reasonable diligence to find out the facts relevant to whether he has or may have that claim (at [59]).

Requirement to give notice of other impending actions

95 Before drawing some principles for Singapore law, I make some final observations in relation to whether there is, or should be, a requirement to give notice to the other party of other potential impending actions. If the plaintiff is aware of the possibility that he may bring other claims related to the subject matter of the first action, is he required to inform the defendants or the Court of

this during the proceedings for the first action? In *Johnson,* the defendant knew that the plaintiff was contemplating bringing further proceedings in his own name well before the trial of the action brought by company W. Lord Millett said (at 61) that it would have been "unconscionable" for the plaintiff to have stood by without disclosing his intentions and to have knowingly allowed company W to settle the action in the (mistaken) belief that the defendant was dealing finally with all liability arising from its alleged negligence. In *Aldi Stores* (at [39]), Longmore LJ also refers to the fact that the plaintiff had made its position clear to the parties which it later sued in the second set of proceedings. This appeared to have weighed on his mind in concluding that the second action was not an abuse of process.

96 Sedley LJ in *Stuart* (at [77]) held that "a claimant who keeps a second claim against the same defendant up his sleeve while prosecuting the first is at *high risk* of being held to have abused the court's process" [emphasis added]. In this respect, "putting his cards on the table does not simply mean warning the defendant that another action is or may be in the pipeline. It means making it possible for the court to manage the issues so as to be fair to both sides". Elaborating, Sir Anthony Clarke MR (as he then was) stated in *Stuart* (at [96]):

> …I do not think that parties should keep future claims secret merely because a second claim might involve other issues. *The proper course is for parties to put their cards on the table so that no one is taken by surprise and the appropriate course in case management terms can be considered by the judge.* In particular parties should not keep quiet in the hope of improving their position in respect of a claim arising out of similar facts or evidence in the future. Nor should they do so simply because a second claim may involve other complex issues. *On the contrary they should come clean so that the court can decide whether one or more trials is required and when.* The time for such a decision to be taken is before there is a trial of any of the issues. In this way the underlying approach of the [Civil Procedure Rules], namely that of co-operation between the parties, robust case

> management and disposing of cases, including particular issues, justly can be forwarded and not frustrated.
>
> [emphasis added]

97 The necessity or desirability of notifying the court was also raised by Thomas LJ in *Aldi Stores* (at [30]-[31]). Thomas LJ was of the view that if parties had informed the Court of its wish to pursue other proceedings, the Court would at least be able to "express its view as to the proper use of its resources and on the efficient and economical conduct of the litigation". He stated in no uncertain terms that:

> …if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seized of the proceedings. It is plainly not only in the interest of the parties, but also in the public interest and in the interest of the efficient use of court resources that this is done. There can be no excuse for failure to do so in the future.

Wall and Longmore LJJ concurred on this point (see [36] and [42] of *Aldi Stores*).

98 Thus, the learned authors of *Res Judicata* at para 26.15(i) draws the following principles from case law in relation to this issue:

> A claimant who elects to bring some claims against a defendant, and defer others until later should, as a general rule, *inform the defendant of his intention.* A claimant who does not *faces an increased risk that later proceedings will be abusive*, but only if he then knew the facts which entitled him to bring the later claim. A claimant should generally *inform the court* that he intends to bring other proceedings.
>
> [emphasis added]

99 Nonetheless, I note the more nuanced view of Lloyd LJ in *Stuart* (at [77]) that it is *not* a general proposition of law that it would necessarily be an abuse of process if the claimant does not inform the defendant of the fact that he is contemplating bringing such a claim in future, before the trial of the first

set of proceedings. Instead, "different facts might lead to a different conclusion".

Some general principles for Singapore law

Is a case management decision to litigate incrementally an abuse of the process of the court?

100 Although this specific question is novel, I agree with the AR that it essentially involves the same general approach of a "broad, merits-based test" (see the AR's GD [57] *supra*) at [48]), coupled with an "intense focus on the facts of the case" (see *Kotonou* ([78] *supra*) at [45]). As a matter of general principle, I am of the view that a reasonable and *bona fide* case management decision by a plaintiff to bring his claims incrementally does not amount to an abuse of the process of the court.

101 The fundamental reason for this is the public policy consideration of access to justice. A litigant ought not, as a general rule, to be deprived of his chance to litigate a *bona fide* claim, or of his autonomy in deciding when, how and against whom he wishes to bring his claim. As stated by Thomas LJ in *Aldi Stores* at [25], there is a "real public interest in allowing parties a measure of freedom to choose whom they sue in a complex commercial matter and not to give encouragement to bringing a single set of proceedings against a wide range of defendants or to complicate proceedings by cross-claims against parties to the proceedings". Nonetheless, this autonomy conferred upon a plaintiff is not without limitation. In particular, I highlight the following.

102 First, as caveated at [100] above, the decision to bring the claims incrementally must be both *reasonable* and *bona fide*. The failure to bring the later claims in an earlier set of proceedings should not be the result of negligence

or inadvertence. It stands to reason that as a general rule, the decision should be deliberate, reasoned, and sensible (both from a commercial and practical perspective). The reasons should be sufficient to override the competing public interest consideration of economy of litigation, under which it would generally be preferable and more efficient for a litigant to bring all his claims at the same time (see Lord Bingham in *Johnson* at 34, summarised at [88] above).

103 Some plausible reasons could include, for example, the discovery of new evidence after the first set of proceedings have concluded, the urgency of the situation which militates against commencing a complicated set of proceedings, or the lack of funds to proceed with the other claims in the first instance. The list of reasons is not exhaustive. Whether a particular reason is sufficient in the circumstances is a factual inquiry for the Court to undertake. On the other hand, if the litigant had acted wholly unreasonably by litigating in a manner that unduly taxes the court's limited resources, without any plausible countervailing benefit, this would weigh in favour of concluding that the incremental litigation is an abuse of process. This is especially if the claim is, on its face, without merit, scandalous, frivolous or vexatious, and would have been capable of being struck out on other grounds under O 18 r 19(1) of the Rules of Court (for example, if the party bringing the claim merely wishes to harass the opposing party with successive litigation).

104 Second, the incremental litigation pursued must not undermine another aim of the extended doctrine of *res judicata*, which is to avoid bringing the justice system into disrepute. The two sets of proceedings must not, therefore, require the duplicative determination of the same underlying issues of fact, as this would give rise to the possibility of inconsistent judgments between different courts examining the same matter.

105 As stated by the English Court of Appeal in *Smith v Linskills (a firm) and another* [1996] 1 WLR 763 at 773, it would be an affront to any coherent system of justice if there subsisted two final but inconsistent decisions of courts of competent jurisdiction. This must also be the position in Singapore. Indeed, the efficacy of the judicial system substantially depends on the finality that is accorded to judicial determinations, which should not easily be reopened.

106 I conclude on this section with a succinct and helpful summary outlined by the learned author of *Res Judicata* at para 26.21:

> A claimant is *not required to pursue all available remedies against all possible defendants in one proceeding*. Provided he ***acts reasonably*** he may *choose between available alternatives* ***subject to the res judicata doctrine, and the need to avoid inconsistent judgments***, so long as any ***later proceedings are not without merit, frivolous or vexatious, in the light of an earlier decision.***
>
> [emphasis added in italics and bold italics]

Is there a requirement to give notice of further proceedings to the defendant or to the court?

107 I turn now to consider the issue of whether a plaintiff who intends to make a case management decision to prosecute his claims incrementally ought to give notice to the defendant or to the court. The AR considered this at [67]–[69] of his GD, and agreed with Lloyd LJ in *Stuart* (see [99] above) that there is there is no general proposition of law that a failure to put the other party on notice will necessarily render the subsequent action an abuse of process. The AR's view was that the court should consider this factor against other relevant factors in applying the broad, merits-based assessment established in *Johnson*.

108 I agree with the AR and am similarly hesitant to adopt the general position that a plaintiff who keeps a second claim up his sleeve while prosecuting the first is at a "high risk" of being held to have abused the court's

process. I also agree with the AR that at the most, this would be one factor in the court's consideration of whether the second action was an abuse of process. It should not (automatically) be treated as a "special factor" that holds particular or enhanced significance. As the AR astutely observed (at [68] of his GD), while the requirement of notice would have the effect of promoting efficiency and economy of litigation, this would be at the expense of the principle of party autonomy.

109 In coming to this conclusion, I am cognisant that there is another well-established principle underlying case procedure, which is to prevent unfair surprise to the other party, or what is sometimes called "litigation by ambush". The latter is a broad term. It can refer to many different things. In some cases, it may describe a party's conduct within particular proceedings, such as late disclosure of relevant documentary evidence during trial. In other cases, it may concern the apparent decision of a litigant to institute legal proceedings on an incremental and sequential basis. The prevention of unfair surprise is the reason that there are procedural rules undergirding amendments of pleadings. In this regard, it is not uncommon for a plaintiff to amend his claim to include new causes of action against the defendant especially at early stages. But in some cases, it may be permissible to amend even at late stages of the proceedings. Much may depend on the timing and substance of, and reasons for, the amendment. An application shortly before trial to add new causes of action which would alter the character of the case between the parties is rather different from an amendment to add a subsidiary cause of action between the same parties and based on the same facts, especially if this is done early and before the close of pleadings.

110 In the present context, it stands to reason that whether a decision to litigate incrementally should be disallowed on the ground of an abuse of process

may well depend on whether the plaintiff was in a position, at the relevant time, to make a reasonably informed decision on whether it had other causes of action available to it.

111 In some cases, the plaintiff may be fully aware of his causes of action at the material time. In other cases, he may only have a suspicion that other causes of action may come to light. In the latter situation, the decision not to inform the defendant that some other actions may be brought is understandable. To require the disclosure of a subsequent action in such circumstances would inevitably mean that the plaintiff is required, at a very early stage in the first set of proceedings, to investigate all the facts and be reasonably certain that they are capable of forming the basis of the subsequent action. This would be contrary to the holding in *Stuart* (at [59]) that there is no general principle that a plaintiff who has not yet brought proceedings asserting a particular claim is under a duty to exercise reasonable diligence to find out the facts relevant to whether he has or may have such a claim (see [94(c)] above). In some cases, merely informing the defendant that some "other action" may be brought in the future may even be viewed as a form of "badgering."

112 In short, litigation often involves making strategic decisions on a broad range of issues such as the causes of action to be brought, the parties to include, and the forum to commence the action in. The timing of the suit could also be important in some cases. Doubtless there will be many other factors to be considered as well. In the context of the present question (whether there needs to be disclosure of intent to bring further proceedings), there is a need to balance the interests of the plaintiff, the defendant and the public. The mere fact that the plaintiff did not reveal his intention to bring further proceedings does not mean the further proceedings are necessarily abusive. The overall circumstances must be considered, including (but not limited to) factors such as:

(a) Whether the plaintiff is, at the time of the first set of proceedings, already able to make a reasonable decision as to whether a further cause of action is available (see [110]-[111] above).

(b) How closely connected the further causes of action are to the original proceedings in terms of the required supporting facts;

(c) Whether the further cause of action is against the same defendant, either on his own or together with other parties. Sedley LJ's remarks in *Stuart* (see [96] above) on the importance of disclosure appear to have been directed at a second claim "against the *same defendant*" [emphasis added].

(d) Whether the parties are in negotiation over a possible settlement and, if so, whether this was intended to be an omnibus settlement of all present and potential future suits. For example, in *Johnson*, it may have been particularly important for the defendant to be informed of another impending action by the plaintiff because otherwise, non-disclosure could mislead the defendant into agreeing to settle the first action on the erroneous basis that it would be relieved of all liability whatsoever.

Should the Plaintiffs' claims against the 1st Defendant be struck out on the facts?

113 Bearing in mind the legal principles outlined above, I now turn to consider whether, on the facts of the present case, the Plaintiffs' decision to bring the present suit against the current Defendants after suing only McTrans in the 2009 Suit amounts to an abuse of process under the extended doctrine of *res judicata*.

114 I begin by noting that the 1st Defendant has set out in Annex A to its submissions a detailed comparison of the Statement of Claim in the present suit, and the facts raised in the Plaintiffs' pleadings, affidavits and cross-examination in the 2009 Suit. This has also been done to varying extents by the 3rd, 4th and 5th Defendants.[49] While the comparisons highlight the overlap in facts between the pleadings and other documents in both suits, I stress that a point-for-point comparison of the documents in the two sets of proceedings is not appropriate in this context. Instead, as earlier alluded to, a "broad, merits-based approach" should be adopted in such cases to examine whether the bringing of the later action is nothing more than an abuse of process of the Court. As was stated in *Stuart* at [47], any overlap between the two actions needs to be assessed by reference to the *substance* of the respective claims, not by a literal comparison of the two statements of claim.

115 Upon consideration, I am of the view that the Plaintiffs' claims against the 1st Defendant in the present suit amount to an abuse of process. This is for the following reasons.

The risk of inconsistent judgments

116 One significant reason I have considered is the similarity of the key issues that arise for determination both in the 2009 Suit and the present suit. In this regard, two foreign cases cited by the 1st Defendant in similar contexts are instructive.

117 The first is the English High Court decision in *Michaels*. In that case, the plaintiff initially brought an action against four defendants who allegedly entered into a scheme to transfer the freehold of a block of flats to a certain

[49] 3rd Defendant's submissions para 45; 4th & 5th Defendant's submissions para 12.

company, without complying with the landlord's requirement to give notice to a qualifying tenant under s 5 of the Landlord and Tenant Act 1987 (c 31) (UK) ("the Act"). The plaintiffs (who were qualifying tenants) argued, *inter alia*, that the scheme was defective and that a s 5 notice should have been served. However, the Court of Appeal nonetheless declined to exercise its discretion to grant relief to the plaintiffs because of their delay in bringing the action. The plaintiffs then commenced a second set of proceedings in which they sought damages from three of the four defendants for a conspiracy to injure them by unlawful means. The defendants applied to strike out the claim. Laddie J duly struck out the claim, reasoning (at [73]) that the second action would attack the fundamental issue of whether the scheme was a breach of s 5 of the Act, which the Court of Appeal had already decided in the first action. If the plaintiffs' claim were allowed to continue, this issue would either be re-litigated, with the possibility of inconsistent decisions, or the defendants would be bound by the outcome of the previous proceedings, with the result that they would be deprived of an effective opportunity to show that nothing they did was wrongful. If the claims were re-litigated, the second court would need to "consider again all the documents, listen to all the witnesses and hear all the arguments which it heard before". There was a possibility that the second court might "assess those documents, witnesses and arguments differently [from] the way they were assessed before". This would result in a major duplication of costs and effort. For these reasons, Laddie J was of the view (at [77]) that the second set of proceedings constituted an abuse of process under the extended doctrine of *res judicata*.

118 The next relevant case is the decision of the Supreme Court of New South Wales in *Paul Rippon v Chilcotin Pty Ltd & ors* (2001) 53 NSWLR 198 ("*Rippon*"). In that case, the purchasers contracted to acquire a business under contracts which contained warranties of the reliability and accuracy of certain

financial statements. Dissatisfied with their purchase, the purchasers brought proceedings against the vendor in the Supreme Court, pleading breach of warranty and fraudulent misrepresentation. Damages for a breach of warranty were awarded to the purchasers. However, the judge dismissed the claim based on misrepresentation, holding that the purchasers did not rely on any representations made. The purchasers then commenced a second set of proceedings in the District Court against the *vendor's accountants* who prepared the financial statements, claiming damages for negligent misrepresentations which they had relied on in entering into the contracts. These alleged misrepresentations were in substance the same as those made in the first set of proceedings. The accountants applied to strike out the second set of proceedings on the basis that the purchasers were seeking to re-litigate the issue of reliance which they had lost in the Supreme Court. The claims were ultimately struck out. The Supreme Court of New South Wales reasoned that the second set of proceedings were "[i]n substance, ignoring the camouflage", an attempt to "re-litigate issues which were either decided in or barred by the earlier proceedings" (at [28]), *viz*, whether the purchasers relied on the figures provided by the accountant. It held (at [36]) that although there was no question of oppression and unfairness because the accountants were not parties to the earlier action, the new proceedings threatened the integrity of the administration of justice and raised the prospect of conflicting judgments.

119 Like the plaintiffs in *Michaels* and *Rippon*, the present case is also one in which the same ultimate issues are essentially being re-litigated, albeit between different parties. In relation to the Plaintiffs' claims in *deceit* and *conspiracy to defraud* (see [46(a)] and [46(b)] above), the question of whether the 1st Defendant (and/or the other Defendants) unlawfully or dishonestly gained possession and control over the Cargo, and thereafter detained or withheld the delivery of the Cargo, turns on whether the possession and control

of the Cargo was wrongful or unlawful in the first place. This, in turn, heavily depends on findings of fact in relation to the Plaintiffs' arrangements of freight forwarding with their customers, the question of whether they were head bailees and had a superior possessory title to the Cargo entitling them to immediate possession, and an examination of the same sequence of events leading to the switch of the consignee in the Bills of Lading to determine if this switch was unauthorised. All these findings of fact were dealt with in Ang J's decision and affirmed on appeal.

120 In relation to the Plaintiffs' claim in unjust enrichment based on the Transportation Expenses, this is grounded on a failure of basis of the payments (*ie*, a failure to name the 1st Plaintiff as consignee or to return the Cargo to the Plaintiffs in Singapore). This similarly requires the determination of whether the Plaintiffs were entitled to the Cargo in the first place, which depends on the same findings of fact highlighted in the previous paragraph.

121 On analogy with *Michaels* (see [117] above), allowing the Plaintiffs' claims against the 1st Defendant to proceed could lead to two alternative scenarios. The first is that the 1st Defendant would be allowed free rein to try to establish his defence. However, as the 1st Defendant's counsel submits, this would put the 1st Defendant "in the invidious position of having to establish the facts necessary for his Defence in circumstances where Ang J has made findings to the contrary and had made adverse observations about him and the Court of Appeal has affirmed Ang J's decision".[50] In such a case, a second court will need to "consider again all the documents, listen to all the witnesses and hear all the arguments which it heard before". There was a possibility that "[the] second court might assess those documents, witnesses and arguments

[50] 1st Defendant's submissions para 70.

differently [from] the way they were assessed before" (see *Michaels* at [75]), which would bring the system of justice into disrepute. This is especially given that, in coming to her decision in the 2009 Suit, Ang J did not have the opportunity to hear the testimony of various key witnesses such as the 1st, 6th and 7th Defendants: see Ang J's decision at [15] and [16]. I should add that any possibility of producing inconsistent decisions would be particularly undesirable in this case, given that, in reliance on Ang J's judgment (including the findings of fact which are issues in the present suit), the Plaintiffs successfully brought an application to have McTrans wound up.

122 The alternative scenario is that, if the second court finds that the 1st Defendant is behind McTrans and was effectively running McTrans' defence in the 2009 Suit, it could hold that the 1st Defendant is bound by Ang J's decision as a privy for the purpose of *res judicata* (see [76] above). This alternative would be equally undesirable, as the 1st Defendant would not have had the opportunity to put forth his arguments concerning the issues decided in the 2009 Suit in his absence.[51]

The Plaintiffs could and should have brought the claims in the present suit against the Defendants in the 2009 Suit

123 The second reason that I consider the Plaintiffs' claims against the 1st Defendant to be an abuse of process is that nothing of substance has been put forward to justify the sequential litigation course adopted by the plaintiffs (see the analogous reasoning in *Michaels* at [76]). In other words, this is not a case management decision which is reasonable or *bona fide*. Instead, the claims against the 1st Defendant *could and should* have been brought by the Plaintiffs in the 2009 Suit. In this respect, I am unable to accept the Plaintiffs' reasons for

[51] See NOE 3 November 2016 p 67 line 3–p 68 line 17.

not bringing the claims in the present suit against the 1st Defendant at the time of the 2009 Suit.

124 First, the Plaintiffs argue that their immediate priority in the 2009 Suit was the return of the Cargo to meet customer demands, especially because the owners of the Cargo had been pressing the Plaintiffs for news of their goods. It is true that bringing a relatively simple claim in conversion against only one defendant (McTrans) avoided the complication and time expense of litigating multiple claims against a large number of defendants. However, on balance, I do not consider this a legitimate reason on the facts. I accept that the Plaintiffs did appear to be pressured by some of their customers for news of the Cargo (for example on 28 September and 10 October 2009,[52] just before the commencement of the 2009 Suit). In that regard, the expeditious return of the Cargo may have been the Plaintiffs' priority at the time of the *commencement* of the 2009 Suit. Indeed, it will be recalled that the writ was issued in tandem with the Plaintiffs' application for a mandatory injunction for delivery up of the Cargo (see [24] above).

125 However, it is the events *after* the issuance of the writ that I find curious. It is undisputed that shortly after the commencement of the 2009 Suit, a large proportion of the Cargo (nearly 84%) (*ie,* the Group A Cargo) was released by McTrans. Although the balance (around 16%) (*ie,* the Group B Cargo) remains in McTrans' possession, as Counsel for the 1st Defendant submits, there was no need for the Plaintiffs to obtain a return of the Group B Cargo because the owners of the Group B Cargo had joined in the 2009 Suit to recover the Group B Cargo on 20 January 2010 (see [29] above).[53] Further, on 28 June 2010, *by*

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52 Hari's affidavit for SUM 1978/2016 dated 23 May 2016 pp 28–30.

53 1st Defendant's submissions at para 48.

consent of the parties, no order was made on the injunction application, which means that the order for delivery up was not obtained. Yet, it was only more than a year later, on 29 August 2011, that the Plaintiffs amended the Statement of Claim in the 2009 Suit to include an *alternative* remedy for delivery up. Hari's explanation in his affidavit was that the omission to seek the relief of delivery up was *inadvertent*, as the mandatory injunction application was still ongoing at that time. He pointed out that the error was corrected by way of an amendment application later.[54] This is puzzling: if the Plaintiffs' immediate priority was in fact the delivery up of the Cargo, this would have been operating on their minds. It would only be natural for them to amend their Statement of Claim to include a prayer for such relief *immediately* after they consented to have no order made on the injunction application, rather than to let more than a year elapse before doing so. Indeed, it bears repeating that the 2009 Suit was not even brought in detinue but conversion. As Ang J stated at [156] of her decision, the relief of delivery up is not strictly available in a claim for conversion; see also Gary Chan Kok Yew and Lee Pey Woan, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) ("*The Law of Torts in Singapore*") at para 11.067. As matters stand, I am doubtful about the urgency and importance of the delivery up of the Cargo to the Plaintiffs. Consequently, I cannot accept that this is a proper basis for not bringing the claims against the 1st Defendant in the 2009 Suit.

126 Second, Hari asserts in his affidavit that he had no knowledge of the 1st Defendant's whereabouts in or around August 2009, and that "for all intents and purposes he had disappeared and was uncontactable".[55] However, it is clear on the face of the Statement of Claim in the 2009 Suit (*ie*, on the Plaintiffs' *own*

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54 Hari's affidavit for SUM 1978/2016 dated 23 May 2016 para 16.

55 Hari's affidavit for SUM 1978/2016 dated 23 May 2016 paras 18, 42 and 43.

case) that Hari continued to be in touch with the 1st Defendant even after August 2009. On 18 September 2009, Hari contacted the 1st Defendant and the latter assured the former that the Cargo would be returned to the Plaintiffs (see [18] above).[56] Even around the time of the commencement of the 2009 Suit on 13 October 2009, this continued to be the case. For example, on 8 October 2009 (just five days before the commencement of the 2009 Suit), the 1st Defendant met Hari in Jakarta, where the further Rp 45 billion was allegedly demanded (see [21] above).[57] Even if I accept that the 1st Defendant could not be found, there is also no evidence of any attempts whatsoever by the Plaintiffs to try and locate the 1st Defendant at his last known address. Indeed, the letter of demand (see [23] above) was sent only to McTrans. It appears that the Plaintiffs simply had no intention of bringing in the 1st Defendant at all.

127 Third, the Plaintiffs state that they have, since the 2009 Suit, discovered "fresh evidence" which strengthen the 1st Defendant's links to the other Defendants, in particular, the 2nd Defendant, the 3rd Defendant and the 6th Defendant. I am again unable to accept this argument. Instead, I agree with the 1st Defendant that any new evidence linking the 1st Defendant to the other Defendants is relevant only to the claims against the other Defendants, who can be separately sued in conspiracy. The 1st Defendant could already have been sued *independently* in deceit in the first place.

128 In any event, I am not convinced that the Plaintiffs could not have brought the claim of conspiracy at the point of the 2009 Suit. In particular, the acts of Eugen (of the 2nd Defendant) were known and stated in the Statement of Claim in the 2009 Suit:[58] see [22] above. The Plaintiffs' own documents in

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56 SOC (Amendment No 1) (2009 Suit) para 18.

57 SOC (Amendment No 1) (2009 Suit) para 23.

the 2009 Suit also made many references to the close links between the 1st Defendant and the 6th, 7th and 8th Defendants, and even contained allegations on the purported conspiracy to defraud the Plaintiffs. For example, in Hari's affidavit dated 9 November 2009 at para 22, he states that "I believe the facts speak for themselves. *[The 1st Defendant] and the Defendants have clearly intended to defraud the Plaintiffs and destroy the Plaintiffs' business.*" [emphasis added]. Similar statements were also made in Linda's affidavit dated 19 May 2010 at para 18; Hari's affidavit of evidence-in-chief ("AEIC") dated 31 May 2011 at para 44; Hari's supplementary AEIC dated 23 June 2011 at para 7(c) and the Plaintiffs' Opening Statement dated 23 September 2011 at para 42.[59] It is inexplicable that the 1st Defendant was not sued at that time. Even without the established links to *some* of the Defendants in the present suit, the Plaintiffs were not precluded from suing the 1st Defendant and the *other Defendants to whom links had been established*. Indeed, the Plaintiffs were entitled to sue whosoever they wish, since liability in conspiracy is joint and several; they were not obliged to sue *all* the co-conspirators: *Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR(R) 85 at [20].

129 Finally, the AR was of the view that including claims of fraud and conspiracy would have made the 2009 Suit more complex,[60] and would have changed the complexion of the case by transforming the claim in conversion into a more complex suit (see *Stuart* at [55]). These are fair points, given that liability for conversion is strict and it is no defence for the defendant to assert that he honestly and reasonably believed the goods to be his own property: see

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58 SOC (Amendment No 1) (2009 Suit) para 28.

59 3rd Defendant's submissions at Tabs 1–4; 4th & 5th Defendants' Bundle of Documents at Tab 11.

60 Certified Transcript of the hearing on 13 May 2016 p 8 lines 7–8.

The Law of Torts in Singapore at para 11.003. However, as the learned authors go on to state, liability is strict only in the sense that there is no requirement for evidence of the defendant's intention to interfere *specifically with the claimant's interests*. The defendant's state of mind is nonetheless relevant when deciding whether the act complained of amounted to an act of conversion in law: namely the act of denying the claimant of his superior possessory title to the goods: see *Law of Torts in Singapore* at para 11.004. Further, where bailments of the goods have taken place, care may be needed in determining who has the immediate right to possession.

130 The point I make is that an action for conversion is not necessarily simple and straightforward. Indeed, it appears that the 2009 Suit in conversion was far from being a simple action. The 2009 Suit was originally set down for a 15-day hearing but it in fact was extended to 20 days. Ang J commented at [2] of her decision that the proceedings had a "lengthy procedural history". I note in passing that both the Plaintiffs and McTrans were criticised for the manner in which the 2009 Suit was conducted. In the case of McTrans, Ang J commented at [2] that a reasonable and commercially minded party in McTrans position would have been anxious to extricate itself from the legal proceedings as soon as possible. Instead, McTrans "entrenched itself" in the proceedings. As for the Plaintiffs, Ang J observed at [2] that by the same token, there were opportunities whereby the Plaintiffs could have adopted a more robust attitude to rein in matters so that a full-blown trial for a case of this nature could be averted. While these observations by Ang J do not mean that the action for conversion was complicated (there may be several reasons why the Plaintiffs did not choose to adopt a more robust attitude), the point remains that the case appears to have been heavily contested on a complex weave of facts involving numerous individuals.

131 It is readily apparent that the claim in conversion raised by the Plaintiffs in the 2009 Suit stood on the back of allegations in respect of the conduct of the 1st Defendant and assertions of his involvement in the conversion and fraud. Given the manner in which the Plaintiffs chose to conduct the 2009 Suit, it is far from obvious that adding in claims against the 1st Defendant would have dramatically changed the complexion of the case (in terms of the evidence) and rendered the proceedings much more complex. Indeed, the present suit with causes of action in conspiracy, fraud and unjust enrichment flow from the same complex weave of facts and evidence.

132 In cases where the causes of action are relatively simple and straightforward, the passage of time is unlikely to place the defendant in the second suit in a more difficult position. In other cases, such as the present suit, the underlying facts are highly contentious and complex. The events complained of took place some seven years ago. With the passage of time, it may well be harder for the 1st Defendant to marshal the documents and witnesses to support its position given the nature of the claims being brought.

133 I should also add that it appears that as early as 6 November 2009, long before the trial of the 2009 Suit, the Plaintiffs had known that there was a risk that they were unlikely to obtain satisfaction from McTrans for the damages they were seeking. This is because in an *ex parte* injunction application (Summons No 5358 of 2009), Hari had exhibited in his second supporting affidavit the audited accounts of McTrans, which stated that its total liabilities substantially exceeded its total assets (which meant that it was balance sheet insolvent) and that McTrans has made a net loss in the financial year ending in 2008.[61] If that were the case, there was good commercial reason for the Plaintiffs

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[61] Affidavit of Hari dated 6 November 2009 in support of Summons No 5358 of 2009

bring in at least the 1st Defendant at that stage, if only to increase the chances that any money judgment would be satisfied.

Conclusion on the Plaintiffs' claims against the 1st Defendant

134 In sum, it is true, as the Plaintiffs' counsel stresses, that 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 litigant": *Goh Nellie* ([77] *supra*) at [53]. However, the margin that can be afforded to the litigant seeking to bring such a claim to court is not unlimited. In this case, the two caveats outlined at [102]-[104] above have not been met. First, the incremental litigation strategy undermines one of the aims of the extended doctrines of *res judicata*, in that there is a risk of inconsistent judgments on the same set of facts, which would bring the justice system into disrepute. Second, the decision to sue incrementally is not reasonable. In particular, since the claims against the 1st Defendant in the present suit are based on facts which were within the Plaintiffs' knowledge at the time of the 2009 Suit, there is no reason the Plaintiffs could or should not have sued the 1st Defendant and added in other causes of action at the time of the 2009 Suit. It is far from clear that these would have dramatically changed the complexion of the 2009 Suit. In these circumstances, I am of the view that the present suit against the 1st Defendant is abusive and is to be struck out as an abuse of process pursuant to the rule in *Henderson*.

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para 24 and pp 84–115

135 In reaching my decision, I considered two other factors but they *did not* affect my decision. First, I have noted the substantial delay between the commencement of the 2009 Suit and the present suit. As explained earlier, the Plaintiffs commenced the 2009 Suit against McTrans on 13 October 2009. The decision of Ang J was released on 30 July 2012. The Court of Appeal dismissed the appeal on 5 February 2013. The Plaintiffs do not appear to have made any attempt to claim or enforce the indemnity granted to them against McTrans.[62] Instead, on 8 October 2014, the Plaintiffs (together with the other plaintiffs in the 2009 Suit) served a statutory demand on McTrans for S$908,488.97 (comprising, not the indemnity, but the taxed legal costs and interest thereon). When they did not receive payment, they applied to wind up McTrans on the basis that it was unable to pay its debt. McTrans was wound up on 26 November 2014. It was only on 16 September 2015, that is, *after* McTrans was wound up, that the present suit was commenced by the Plaintiffs.

136 However, the fact that substantial time has elapsed between the two suits (about two and a half years from the dismissal of the appeal to the commencement of the present suit) does not *in itself* mean that the present suit is necessarily abusive. Counsel for the 3rd Defendant submits that it was because the Plaintiffs were unable to recover monies from McTrans that the present suit was instituted.[63] Even assuming (without deciding) that this is the case, the AR rightly comments that there is no rule against trying to recover a single set of losses from one defendant and to sue other defendants only if that action failed.[64] I accept that an action cannot be abusive on this ground alone.

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62 1st Defendant's submissions at para 94.

63 3rd Defendant's submissions at para 33.

64 Certified Transcript of the hearing on 13 May 2016 p 9 lines 7–16.

As I have earlier stated, the Court must stand back and look at all the circumstances including the nature of the cause(s) of action.

137 Secondly, I have also noted that in the present case, it is evident that the Plaintiffs never gave McTrans and the 1st Defendant notice that proceedings would be taken out against the 1st Defendant. This was so even though it was clear that the Plaintiffs knew all along that their position was that the 1st Defendant was heavily involved in the conversion and fraud. The same is true of the 3rd, 4th and 5th Defendants. However, as I have earlier stated, the mere fact that the Plaintiffs did not reveal their intention to bring further proceedings does not mean the further proceedings are necessarily abusive, especially when McTrans was not even a defendant in the present proceedings.

Should the Plaintiffs' claims against the 3rd, 4th and 5th Defendants be struck out on the facts?

138 To recapitulate, the 3rd, 4th and 5th Defendants are persons related to McTrans. The 3rd Defendant was its former sales director, while the 4th and 5th Defendants are directors and shareholders. The allegations against them are that:

> (a) The 3rd Defendant was on familiar terms with the 1st Defendant since 1996 or 1997 and with the 6th and 7th Defendants since 2002 and 2003;
>
> (b) The 4th and 5th Defendants knowingly allowed McTrans to be used as a vehicle for the 1st Defendant to wrongfully gain control over the Cargo. By doing so, they abetted the 1st Defendant and/or his agents in their scheme to defraud the Plaintiffs. Alternatively, the 4th and 5th Defendants were wilfully blind to the facts and matters that led to the loss suffered by the Plaintiffs.[65]

139 The main explanation given by the Plaintiffs for only bringing in these Defendants in the present suit, instead of suing them earlier, is that the links between these Defendants were only discovered in the course of cross examination in the 2009 Suit. However, from a look at the pleadings, it is clear that the involvement of the 3rd, 4th and 5th Defendants in relation to the Cargo were clear before or shortly after the commencement of the 2009 Suit. In relation to the 3rd Defendant, the Plaintiffs themselves pleaded that their representative, Mr Lie, was told to leave the unstuffing of the Cargo by the 3rd Defendant (and the 7th Defendant) on 12 October 2009,[66] the day before the 2009 Suit was commenced. In the F&BPs filed on 23 June 2010, McTrans also acknowledged that the 3rd Defendant received oral instructions from the 6th Defendant to release the Cargo from about the first week to the third week of November 2009.[67] Indeed, the 3rd Defendant was a witness for McTrans and testified at trial.[68] Nothing prevented the Plaintiffs from naming the 3rd Defendant as a party to the 2009 Suit from the onset, or amending their Statement of Claim to include claims against the 3rd Defendant after the commencement of the 2009 Suit. The Plaintiffs must have known that he was involved in the unlawful possession and/or detention of the Cargo.

140 In relation to the 4th and 5th Defendants, it must have been a publicly known fact that they were the directors and shareholders of McTrans. Any allegation against McTrans was therefore essentially an assertion that the directors and shareholders of the company are part of that conspiracy, as the

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65 SOC (Amendment No 1) (2015 Suit) para 36.

66 SOC (Amendment No 1) (2009 Suit) para 24.

67 F&BPs dated 23 June 2010, 3rd Defendant's submissions at Tab 5.

68 Ang J's decision at [17].

controlling minds behind the company. There is no new evidence that the Plaintiffs did not already possess at the time of the 2009 Suit.

141 Although the main allegations in the 2009 Suit were against the 1st, 6th, 7th and 8th Defendants, it is clear that the Plaintiffs were aware of the roles of the 3rd, 4th and 5th Defendants in respect of the same series of events, and could and should have brought the claims against them at the time of the 2009 Suit. The claims against the 3rd, 4th and 5th Defendants were "so relevant to the subject matter of the first action that it was unreasonable for the [plaintiffs] not to rely upon them in that action" (*Rippon* at [23]). The Statement of Claim in the 2009 Suit should simply have been amended to include the claims against them. Given that the acts of the 3rd, 4th and 5th Defendants that the Plaintiffs would have had to rely on are relatively contained, such amendments would not have transformed the whole proceedings, or have introduced significant new issues or widened the scope of the necessary evidence (see *Stuart* at [55]).

142 Further, for largely the same reasons analysed in relation to the 1st Defendant, if these Defendants are allowed to defend the present suit, they would have to challenge the fundamental unlawfulness of the detention of the Cargo, and many of the crucial findings in Ang J's decision. This would again lead to the risk of inconsistent decisions by the second court examining the matter. Alternatively, the 4th and 5th Defendants may be found to be bound by Ang J's decision as privies because they were essentially directors of McTrans (see [76] above). This would be in spite of the fact that the 4th and 5th Defendants apparently did not testify in the 2009 Suit and had no opportunity to put forth their version of events. Looking at the matter in the round this would be unfair.

143 For these reasons, I am of the view that the claims against the 3rd, 4th and 5th Defendants should also be struck out as an abuse of process. Given my finding, there is no need to go on to consider the Defendants' alternative arguments for striking out *ie*, whether the claims are scandalous, frivolous and vexatious.

Should the Plaintiffs' claims against the 2nd Defendant be struck out on the basis of insufficient particulars in the amended F&BPs?

144 The Plaintiffs' claims against the 2nd Defendant in the present suit, as outlined in the amended F&BPs, are essentially limited to (a) the 2nd Defendant paying part of McTrans' legal fees (about S$15,000) in the 2009 Suit and (b) the acts of Eugen, allegedly an authorised representative and/or agent of the 2nd Defendant. Eugen apparently contacted one Ms Serene Ng of Flowserve Pte Ltd, one of the suppliers of the Plaintiffs' customers, and demanded payment of an unspecified sum of money and an issuance of release cargo letters to the 2nd Defendant, in return for the release of their goods.[69] As explained earlier, the 2nd Defendant's case is based largely on the alleged lack of particulars in the Plaintiffs' pleadings in relation to its claim of conspiracy.[70]

145 The absence of, or defects in, the particulars of pleadings can be a basis for striking out when the error is major, and the error cannot be made good by an amendment providing those particulars: Jeffrey Pinsler SC, *Singapore Court Practice 2014* (LexisNexis Singapore, 2014) at para 18/19/11. The relevant question is whether the defendants would know what the case they are supposed to meet is. This requires the pleadings to set out the details on how each element of the claim is met: *Kim Hok Yung and others v Cooperatieve Centrale*

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69 F&BPs (Amendment No 1) dated 13 July 2016 paras 1(a) and 2.2(b).

70 See also NOE 4 November 2016 p 59 lines 7–15.

Raiffeisen-Boerenleenbank BA (trading as Rabobank) (Lee Mon Sun, third party) [2000] 2 SLR(R) 455 at [6].

146 Unlawful means conspiracy occurs when two or more persons combine to commit an unlawful act with the intention of injuring or damaging the plaintiff, the act is carried out and the intention achieved: *The "Dolphina"* [2012] 1 SLR 992 ("*The 'Dolphina'*") at [202] (citing *Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637 at [45]). The defendants must also have knowledge that they are part of an agreement, combination or common design: *The 'Dolphina'* at [204]. Further, although a company, being a legal person, can be a party to a conspiracy, it is an artificial construct. In order for it to be fixed with the requisite intention or state of mind, it is necessary to pinpoint some human actor with that state of mind and to determine whether, as a matter of law, that state of mind may be attributed to the company: *The 'Dolphina'* at [205].

147 To support the claim that the 2nd Defendant (a company) had knowledge of the alleged conspiracy to defraud, the Plaintiffs rely on an attribution of knowledge based on the principle in *The 'Dolphina*' above.

148 The 2nd Defendant takes issue with the pleading of these particulars. On one hand, para 2.1(a) of the amended F&BPs states that the *1st Defendant is the agent of the 2nd Defendant* and/or is to be identified with the 2nd Defendant such that the knowledge of the 1st Defendant can be attributed to the 2nd Defendant. This is because the 1st Defendant was a director and shareholder of the 2nd Defendant holding about 70% beneficial interest in the latter. On the other hand, para 2.2(d) of the amended F&BPs states that the acts done by the 2nd Defendant were carried out "at or under the instructions of the 1st Defendant". The 2nd Defendant argues that this suggests the converse of what

the Plaintiffs earlier alleged, namely, that the *2nd Defendant is the agent of the 1st Defendant*. Thus, the 2nd Defendant's counsel submits that the two paragraphs are "fundamentally contradictory" and would "affect how [the 2nd Defendant] defends its case in terms of imputation of knowledge."[71] However, I agree with the Plaintiffs' counsel that para 2.2(d) does not state that the 2nd Defendant is an agent of the 1st Defendant, and that this is only what the 2nd Defendant "shorthands" the pleading to mean.[72] Instead, a careful reading of the amended F&BPs reveals that para 2.1(a) is a response to the request for "facts supporting the Plaintiffs' allegation that the 2nd Defendant *knew of the alleged scheme*" [emphasis added]. The Plaintiffs' position in this respect is clear: they rely on the attribution of the 1st Defendant's knowledge to the 2nd Defendant.

149 On the other hand, para 2.2(d) is in response to a *different* request for particulars on "the *overt acts* carried out by the 2nd Defendant pursuant to or in furtherance of the alleged scheme" [emphasis added]. Para 2.2(a)-(b) therefore details the *overt acts* done by the 2nd Defendant (outlined at [144] above). Para 2.2(d) then states that there was no proper or legitimate commercial basis for the overt acts done by the 2nd Defendant, upon which the inference can be drawn that it was involved in the conspiracy. The two paragraphs therefore focus on and answer two completely different parts of the request for particulars, and cannot be said to be inconsistent.

150 For completeness, I deal with the 2nd Defendant's argument that there was no basis for the Plaintiffs' allegation that Eugen's acts were done in the course of employment with the 2nd Defendant, rather than in his own capacity. This is because the relevant emails were sent to his personal email address,

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71 NOE 3 November 2016 p 103 lines 16–18.

72 NOE 4 November 2016 p 62 lines 1–20.

eugenchua@yahoo.com, rather than a company email address. Eugen was also referred to as "[the 1st Defendant's] people", and not as the staff of the 2nd Defendant.[73] However, in my view, these arguments go towards the merits of the case and require evidence to be led (for example, on whether Eugen used his personal email address for business matters). It is not appropriate to go into the substance of the case in an application for striking out, especially at such a nascent stage of the proceedings. As I have earlier stated, the power of the court to strike out should only be done in a plain and obvious case; there cannot be a trial in chambers involving an assessment of the merits of the case.

151 For the abovementioned reasons, the 2nd Defendant's appeal is dismissed.

Conclusion

152 In conclusion, the appeals by the 1st, 3rd, and 4th and 5th Defendants are allowed and the Plaintiffs' claims against these Defendants are struck out in their entirety. However, the appeal by the 2nd Defendant is dismissed. The Plaintiffs' claims against the 2nd Defendant stand.

153 Costs and reasonable disbursements are to be paid by the Plaintiffs to the 1st, 3rd and 4th and 5th Defendants, to be taxed if not agreed. The cost orders below in relation to these Defendants (see [55] and [56] above) are reversed. If these costs have already been paid by the respective Defendants to the Plaintiffs, they are to be returned by the respective Defendants.

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[73] 2nd Defendant's submissions para 9(b).

154 Costs and reasonable disbursements are to be paid by the 2nd Defendant to the Plaintiffs, to be taxed if not agreed. The cost order below in relation to the 2nd Defendant (see [61] above) stands.

155 The Court records its appreciation to the learned counsel for their very helpful submissions.

George Wei
Judge

N Sreenivasan SC, Lim Min (Straits Law Practice LLC) (instructed) and Manickam Kasturibai (East Asia Law Corporation) for the Plaintiffs;
Davinder Singh SC, Pardeep Singh Khosa and Chen Chi (Drew & Napier LLC) for the 1st Defendant;
Siraj Omar and See Chern Yang (Premier Law LLC) for the 2nd Defendant;
Tan Boon Yong Thomas and Loh Chiu Kuan (Haridass Ho & Partners) for the 3rd Defendant;
Gurbani Prem Kumar (Gurbani & Co LLC) for the 4th and 5th Defendants;
the 6th, 7th and 8th Defendants absent.