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Defining the limits to abuse of process: Lim Geok Lin Andy v Yap Jin Meng Bryan

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Lim Geok Lin Andy v Yap Jin Meng Bryan [2017] SGCA 46

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Abstract

The abuse of process jurisdiction, which forms part of the doctrine of res judicata, is meant to uphold finality of litigation and prevent abusive litigation. While the jurisdiction has been applied to the original parties of earlier court proceedings, it could also prevent a person who was not part of earlier court proceedings from litigating his claim. In such circumstances, the abuse of process doctrine has to be cognisant of the commercial realities and motivations driving choices to advance separate rather than consolidated proceedings, while also protecting litigants from repeated litigation. A recent Singapore Court of Appeal decision imposed constraints to applying the abuse of process jurisdiction to persons not involved in earlier proceedings. It also departed from the UK jurisprudence in its assessment of a person's decision to defer his action till the completion of a closely related case. This note discusses the impact of the decision on the future ambit of the abuse of process jurisdiction, and highlights the crucial interests that should be balanced in determining whether abuse of process applies to new parties.

Introduction

Abuse of process, which is part of the doctrine of res judicata, is founded on the need to ensure finality of litigation and to guard against abusive litigation: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*.[2] It is usually raised as an alternative argument when strict res judicata – issue estoppel and cause of action estoppel – cannot be established. However, the jurisdiction for abuse of process is discretionary, hinging on the court's assessment of all the interests and circumstances of the case. When exercised liberally, the abuse of process jurisdiction may shut out a person's opportunity to a day in court. When applied very narrowly, it could render the doctrine meaningless by allowing oppressive litigation to continue unchecked.

While finding abuse of process is ultimately a balancing exercise, a lack of clarity in defining the interests being balanced potentially causes great uncertainty to litigants. This is particularly so when abuse of process could prevent a person who was not part of earlier court proceedings from litigating his claim. The Singapore Court of Appeal in *Lim Geok Lin Andy v Yap Jin Meng Bryan*[3] recently found that abuse of process existed in such a situation. In doing so, it imposed strict constraints to applying abuse of process to persons not involved in earlier proceedings. This decision also departed from the UK jurisprudence in its assessment of a person's decision to defer his action till the completion of a closely related case, a common scenario in commercial disputes involving multiple parties. This note discusses the impact of the decision on the future ambit of the abuse of process jurisdiction, and highlights the crucial interests that should be balanced in determining whether abuse of process applies to new parties.

The brief facts

The respondent Bryan Yap (Yap), the appellant Andy Lim (Lim), and their mutual friend Lim Koon Park (Park) formed a joint venture vehicle to acquire and resell two properties at a profit. Only Yap provided the initial capital for the investment. There was an alleged agreement to split the profits from the sale proceeds in a 2:1:1 ratio. The investment vehicle subsequently had difficulty maintaining a loan used to fund the purchases, leading to a restructuring of the parties' shareholdings. Yap, who injected additional capital, then asked Lim and Park to transfer their shares to him. Only Lim did so, while Park held on to his shares.

After the properties were sold, Park commenced an action in 2010 claiming a 25% share of the profits. Lim's testimony in this suit supported Park's case concerning the agreed distribution of profits. He also stated that he had a separate agreement with Yap to maintain a share in the profits despite his divesting of his shares. Park's claim was unsuccessful in the first instance, but the Court of Appeal decided in his favour and ordered an inquiry to determine his share of the profits. Lim then commenced proceedings against Yap to claim for a share of the profits. He also made an unsuccessful attempt to intervene in the inquiry on profits, arguing that his claim was the same as Park's.

Lim asserted in his suit that Yap had assured him that the divestment of his shares would not affect his entitlement to the profits. In addition, he raised two arguments concerning the quantum of profits. First, he alleged that Yap promised him profits of at least S$1.55m. Secondly, he contended that there was an agreement for Yap to bear the holding costs of the property for at least 18 months after the date of purchase. A full trial on these issues took place in the High Court. The High Court rejected Lim's arguments, and also held that his entire suit was an abuse of process. Lim was deemed a privy to Park and allowing his claim would thus be tantamount to a collateral attack on the earlier decision of Park's claim.

The Court of Appeal affirmed the decision that Lim's claim amounted to an abuse of process. The apex court found that he and Park had privity of interest, and that his suit amounted to a collateral attack on the Court of Appeal's decision on Park's claim. Further, given Lim's knowledge and involvement in Park's claim, his claim should have been heard together with Park's. Nevertheless, Lim gave no *bona fide* reason for not advancing his suit earlier. Although the court found abuse of process, it proceeded in the alternative to consider the merits of Park's arguments and rejected them.

Is abuse of process applicable to a "stranger" to the earlier proceedings?

The court endorsed the approach in *Johnson v Gore Wood* (*Johnson*) in determining whether there is abuse of process – making a broad, merits-based judgment taking into account the public and private interests involved, and all the facts of the case. The court summed up this discretionary approach as striking a balance "between allowing a litigant with a genuine claim his day in court, and ensuring that the litigation process is not…unduly oppressive to the defendant". Some of the circumstances to be considered include whether the later

proceedings were a collateral attack on the previous decision; whether there were *bona fide* reasons for not raising the issue earlier; whether there was fresh evidence warranting re-litigation; and whether there were special circumstances justifying allowing the case to proceed.[4] This stance mirrors the UK approach of considering all the relevant interests, including preventing collateral attacks and putting the administration of justice in disrepute: *Arthur J.S. Hall & Co v Simons* and *Hunter v Chief Constable of West Midlands*.[5]

Abuse of process, while overlapping with the res judicata doctrine, has generally been applied only when issue estoppel or cause of action estoppel cannot be found. The court, citing *Henderson v Henderson,* affirmed that this jurisdiction applied to points that may not have been decided earlier but "properly belonged to the subject of litigation", which the parties might have brought forward earlier.[6] Prior to this case, the Singapore courts have limited the application of abuse of process to such situations only. The court has thus termed abuse of process as the extended doctrine of res judicata, because it extends the reach of issue and cause of action estoppel "to cases where the point was not previously decided because it was not raised in the earlier proceedings even though it could and should have been raised in those proceedings": *Royal Bank of Scotland NV v TT International Ltd*.[7]

The court now faced a new situation of applying abuse of process to parties who were not part of the earlier court action. Seven years ago, the English and Wales Court of Appeal in *Aldi Stores Ltd v WSP Group Plc* (*Aldi*) decided that abuse of process could apply when the plaintiff was suing a party who was not a defendant in the earlier suit. Thomas LJ held that there was no rule that no abuse could be found unless the defendant in the subsequent suit had sufficient identity with the defendant in the earlier action. While the fact that the defendants were different could be a powerful factor to be considered, identity of parties was not a pre-condition to the courts' application of abuse of process.[8] Notably, the plaintiff in *Johnson v Gore* was different from the claimant in the earlier action, but this also did not prevent the court from considering the applicability of the abuse of process jurisdiction.[9]

In contrast to the *Aldi* decision, the Singapore court appeared to require privity before abuse of process could apply to parties not involved in the earlier proceedings. It observed that in many abuse of process decisions concerning the same plaintiff suing different defendants, there was generally no abuse unless the defendants were related by "privity of interest", connoting a close or special relationship, or commonality of interest according to *Gleeson v J Wippell & Co Ltd* (*Gleeson)*.[10] It reasoned that this defence could similarly apply when a defendant was sued twice by different plaintiffs. In summation, the court seemed to require a "connection" between the parties:[11]

> In our judgment, the rule in *Henderson* is applicable where *some connection* can be shown between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, which would make it unjust to allow that party to reopen the issue. There is no reason in principle why the rule in *Henderson* ought to be confined only to repeated claims by the same plaintiff or to repeated claims against the same defendant. It is important to also emphasise not only the *fact-*

> *sensitive* nature of the inquiry that is entailed in applying the rule in *Henderson* but also the *strict limits* within which such a rule will be applied.

What such "connection" entails will be discussed below. It is significant here that the requirement of a connection invariably results in a stricter applicability of the abuse of process jurisdiction, thus restraining the exercise of the court's discretion to fetter the litigation activity of individuals not involved in earlier proceedings. The current approach in England and Wales is more lenient. Although Thomas LJ in *Aldi* highlighted the need to take into account the presence of a different defendant, this factor did not ultimately weigh heavily in the court's balancing exercise. After weighing the interests of Aldi against the interests of the new defendants, the court decided that Aldi's needs prevailed particularly since Aldi had earlier made known to the defendants the potential pursuit of its claim.[12] In *Johnson*, Lord Millett appeared to doubt the correctness of the new plaintiff's concession that it was in privity with Johnson, the first plaintiff. In doing so, he highlighted the need to specifically consider the needs of the new party before concluding that the action was an abuse of process. In this regard, there could well be legitimate reasons for the second plaintiff to defer his claim. Having a second plaintiff commence a suit also did not necessarily amount to double vexation, since the defendant was always liable to be sued by two different plaintiffs, each with their own causes of action and heads of losses.[13]

Accordingly, it is not inconceivable how the abuse of process doctrine can be overextended in multi-party disputes if there were no limits imposed. The balance between the interests of preventing oppressive litigation and a new party's interest of litigating his claim may not be properly struck. In this connection, Zuckerman has argued that there has to be some factor which connects the stranger with the earlier proceedings and which could render it unjust to allow the proceedings to proceed under the abuse of process jurisdiction. He referred to a few cases that illustrated the sufficient connection that must be established.[14] His suggested approach is strikingly parallel to the Singapore court's approach of requiring privity between the original party and the new party.

What if the stranger allows his battle to be fought by someone else?

In deciding whether there was privity of interest that justified finding abuse of process, the Singapore court referred to the Privy Council decision in *The Nana Ofori Atta II (Nana Ofori)*.[15] In this appeal from a West African court, the Orikro of Muranam (Muranam) earlier made an unsuccessful claim against the Stool of Banka for a title in certain lands. Subsequently Muranam joined the Stool of Abuakwa (Abuakwa) to claim title to the same land. The Privy Council upheld the West African Court of Appeal's decision to disallow the claim based on estoppel by conduct. Lord Denning approved of the West African court's application of a principle articulated in *Wytcherley v Andrew*[16] –

> "…if a person, knowing what was passing, was content to stand by and see his battle

> fought by somebody else in the same interest, he should not be allowed to re-open the case".

Lord Denning took the view that Abuakwa should have applied to be joined earlier as co-plaintiff to Muranam, since his interest in the land was same as Muronam's. However, Abuakwa was content to stand by and let Muronam fight his battle, and then try to re-open the same question five years later.

How appropriate is the *Wytcherley* principle to finding abuse of process? It is significant to recognise two elements embedded within this principle. First, the principle implicitly assumed that the two parties have "the same interest", an idea associated with privity and finding a connection between the parties. Secondly, the principle reflects disapproval of the person's conduct of waiting and letting another fight his case, despite his interests being aligned with the earlier claimant. This aspect is more associated with the court's assessment of litigation conduct and other circumstances under the abuse of process jurisdiction.

Both these aspects have been merged within *Wytcherley v Andrew*, resulting in a lack of clarity concerning which doctrine the principle relates to. In the UK, the *Wytcherley* principle has been subsumed under the concept of "privity of interests". Privity of blood, title or interest has conventionally been used to establish identity of parties for issue or cause of action estoppel: *Carl Zeiss Stiftung v Rayner & Keeler Ltd.*[17] Unlike the first two types of privity, privity of interest is a more amorphous concept, its oft-cited test being the "existence of a sufficient degree of identification between the two parties to make it just to hold that the decision to which one was party should be binding in proceedings to which the other was party": *Gleeson*.[18]

The *Wytcherley* principle has been applied in relation to this test of finding privity of interest. Although the principle originated in the probate jurisdiction (*In the Estate of Langton, decd*[19]), the English and Welsh Court of Appeal in *House of Spring Gardens Ltd v Waite* extended its application for the general purpose of finding privity of interest in res judicata.[20] Incidentally, Spencer Bower and Handley, when commenting on these cases, stated that parties who could intervene in earlier proceedings but did not, are considered parties *in personam* to the action, thus reinforcing the concept of privity.[21] The Court of Appeal in *Resolution Chemicals Ltd v H Lundbeck A/S* (*Resolution Chemicals*) also endorsed *Waite's* approach by stating:[22]

> "One type of case where privity is recognised is where C knows of proceedings between A and B in which his rights are being tested but stands back and does nothing."

Here, the testing of C's rights by a related party amounts to "sufficient connection" for the purpose of satisfying the *Gleeson* test. As to whether it is just to hold C bound to the suit between A and B, the principle seems to conclude that it is unjust for C to stand back when he knows of the earlier proceedings.

Unlike the above English and Welsh decisions, the Singapore court alluded to the *Wytcherley* principle in relation to the doctrine of abuse of process, and not in determining whether there was privity of interests. With reference to the latter issue, the court, in reliance on *Gleeson*, focused on finding a close connection in the form of a special relationship or commonality of interests. Having found that such a connection existed because Lim's claim arose from the same agreement and backdrop as Park's, the court's decision then focused primarily on evaluating the interests involved under the *Henderson* abuse of process jurisdiction. The *Wytcherley* principle was alluded to in this context. The court considered that Lim's action was tantamount to a re-litigation of the parties' entitlement to profits and consequently a collateral attack on the court's earlier decision. Furthermore, Lim was clearly aware of his claim being potentially precluded by abuse of process. Given Lim's alignment of interests, knowledge of Park's suit and involvement as a witness, it was inexplicable why he could not have commenced his action earlier and consolidated it with Park's.[23]

There may, on first blush, seem to be little difference between evaluating a person's litigation conduct under privity of interest and under abuse of process. It is, however, submitted that there are significant challenges when considering conduct under privity of interest. The *Gleeson* articulation of privity of interests has been criticised as being circuitous. It does little to shed light on the nature and degree of interest required to find privity.[24] Instead it directs the inquiry to the justice of the circumstances, which is effectively the court's exercise of its discretion under the abuse of process jurisdiction. In the context of this ambivalent test, the *Wytcherley* principle can be potentially misapplied to find privity of interests; the mere finding that the person waited and allowed someone else to fight a closely related claim could be construed against him or her. The other relevant interests that the court usually considers under the *Johnson* approach, such as the reasons for waiting, may be inadvertently overlooked. There are serious consequences when such a broad understanding of privity of interest is then applied also to strict res judicata in the form of issue or cause of action estoppel. As observed by Briggs J in *Secretary of State for Business Innovation and Skills v Potiwal*, the law should be slow to recognise privity of interest between different persons because of the automatic and far-reaching effects it would have when cause of action or issue estoppel is found.[25]

It is noteworthy, in this regard, that the Court of Appeal in *Resolution Chemicals* deemed it necessary to impose some constraints to finding privity of interest. It underscored the importance of inquiring "whether it is just that the new party should be bound by the outcome of the previous litigation", apart from determining whether the new party had an interest in the litigation outcome and was in reality a party to the earlier proceedings because of the particular relationship.[26] Interestingly, Zuckerman interpreted *Resolution Chemicals* to be a decision on abuse of process, though it was ostensibly made concerning privity of interests in finding cause of action and issue estoppel. He suggested that when the concept of privity is used widely, it is better dealt with under the abuse of process jurisdiction, citing *Resolution Chemicals* as providing the relevant guiding principles.[27] Perhaps the entire concept of privity of interests (including the *Wytcherley* principle) ought to be considered not in relation to

strict res judicata but in abuse of process, as suggested. Under the abuse of process jurisdiction, one factor considered would be the new party's act of waiting when he or she could have commenced action earlier. It will, however, not be the sole factor taken into account in the court's exercise of its broad merits-based discretion.

It is crucial for the *Wytcherley* principle to be applied within the broad framework of abuse of process. In this regard, the Singapore court stressed that the inquiry into abuse hinges on the particular facts of the case, and that it had to balance the new party's interests in having his day in court with the need to protect the earlier party from abusive litigation. An undue emphasis of the *Wytcherley* principle tends to focus disproportionately on the latter as the principle concentrates on the person's conduct of waiting. However, the Singapore court stressed the importance of considering the reasons why the person acted the way he did.[28] This is similar to Lord Millett's call in *Johnson* to consider whether there are legitimate reasons to defer the claim, rather than to automatically deem the person's decision to wait as abusive behaviour.

On the present facts, the court could not be persuaded that Lim had good reasons to wait. On the contrary, it agreed with the lower court that Lim's behaviour in advancing a belated claim was opportunistic. The court probably thought this way because Lim raised new arguments to specifically circumvent the basis for the court's earlier decision concerning the distribution of profits. This belated attempt to introduce new arguments to change the quantum of profits and the way it was distributed was deemed to be a collateral attack. Additionally, the court appeared to find it even more reprehensible that Lim had earlier argued that his claim was the same as Park when trying to intervene in the inquiry of profits, but now alleged that his claim was different due to additional evidence and arguments. Such inconsistency probably played no small part in resulting in the balance being tilted against Lim's favour.[29]

Lim could arguably have a valid reason to wait since his claim rested on a slightly different factual background from Park's; he alleged that he had a separate agreement with Yap to retain the agreed share of profits despite divesting his shares. However, Lim's other arguments concerning the minimum amount of profits promised to him and the costs Yap would bear directly inpinged on the court's earlier decision on the distribution of profits. It is very likely that Lim's entire claim would not be deemed a collateral attack if he had simply advanced his first argument about the separate agreement, without arguing against the court's earlier decision on profits. His act of waiting was deemed reprehensible because of his overall conduct of taking inconsistent positions and advancing new arguments to directly contravene the court's earlier decision.

Conclusion

Multi-party disputes are increasingly common in many commercial spheres such as the construction industry. The doctrine of res judicata has to be cognisant of the commercial realities and motivations driving choices to advance separate rather than consolidated proceedings, while also protecting litigants from repeated litigation. Although each decision concerning abuse of process necessarily hinges on the specific facts, it is important to

articulate the exact interests being balanced, as well as the particular factors to be carefully considered when a new party is involved in subsequent litigation. Otherwise the delicate balance which the abuse of process jurisdiction is meant to maintain may be go awry.

This Singapore decision has imposed limitations to the abuse of process jurisdiction by requiring privity of interests before different parties are prevented from advancing their claim, thus preventing the abuse of process jurisdiction from being over-extended. Additionally, the conduct of waiting to advance one's claim was considered in conjunction with all other factors weighed in the broad, merits-based inquiry of the interests involved. Given how the Singapore courts have allowed very few exceptions to cause of action and issue estoppel, it is prudent that it has now circumscribed the ambit of abuse of process jurisdiction. Res judicata should, after all, have stringent application to the original parties to the earlier proceedings. Circumspection is needed before extending res judicata to other parties who have tenuous connections with the original disputants, and who have valid reasons for commencing their action later.

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[1] Assistant Professor, Singapore Management University School of Law.
[2] Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] UKSC 46 at 185.
[3] [2017] SGCA 46.
[4] [2017] SGCA 46 at [36] – [38].
[5] Arthur J.S. Hall & Co (a firm) v Simons [2002] 1 AC 615; [2000] 3 All ER 673. *Hunter v Chief Constable of West Midlands* [1982] AC 529; [1981] 3 All ER 727.
[6] Henderson v Henderson [1832] 3 Hare 100; 67 ER 313; [2017] SGCA 46 at [39] – [401].
[7] [2015] 5 SLR 1104 at [102].
[8] [2007] EWCA Civ 1260; [2008] 1 WLR 748 at [10] and [26].
[9] [2002] 2 AC 1.
[10] [1977] 1 WLR 510 at 515.
[11] [2017] SGCA 46 at [43].
[12] [2007] EWCA Civ 1260; [2008] 1 WLR 748 at [16] – [27].
[13] [2002] 2 AC 1 at 60.
[14] Adrian Zuckerman, Zuckerman on Civil Procedure: Principles of Practice (Sweet & Maxwell, 2013) at [25.139].
[15] [1957] 3 WLR 830.
[16] [1871] LR 2 P&D 327
[17] [1967] 1 AC 853.
[18] [1977] 1 WLR 510 at 515.
[19] [1964] P 163.
[20] [1991] QB 241; [1990] 2 WLR 347.
[21] Spencer Bower and Handley, *Res Judicata* (LexisNexis Butterworths, 2009) at [9.12].
[22] [2013] EWCA Civ 924; [2014] RPC 5 at [26].
[23] [2017] SGCA 46 at [43], [52] – [54].
[24] Dadourian Group International Inc v SiMiss and ors [2006] EWHC 2973 (Ch) at [723].
[25] [2012] EWHC 3723 (Ch) at [20].
[26] [2013] EWCA Civ 924; [2014] RPC 5 at [32].
[27] Adrian Zuckerman, Zuckerman on Civil Procedure: Principles of Practice (Sweet & Maxwell, 2013) at [25.92].
[28] [2017] SGCA 46 at [44].
[29] [2017] SGCA 46 at [52] – [54].