AXF and others *v* Koh Cheng Huat and another and other matters
[2016] SGCA 22

Case Number	: Civil Appeal No 123 of 2015 and Summonses Nos 260 and 261 of 2015
Decision Date	: 06 April 2016
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Tay Yong Kwang J; Steven Chong J
Counsel Name(s)	: Kuah Boon Theng, Chain Xiao Jing Felicia, Yong Kailun Karen and Soo Gerald Eng Siang (Legal Clinic LLC) for the appellants in Civil Appeal No 123 of 2015 and the respondents in Summonses Nos 260 and 261 of 2015; Lek Siang Pheng, Vanessa Lim, Yvonne Ong and Audrey Sim (Rodyk & Davidson LLP) for the first respondent in Civil Appeal No 123 of 2015 and the applicant in Summons No 261 of 2015; Audrey Chiang Ju Hua, Calvin Lim Yew Kuan and Vanessa Tok Xiu Xian (Rodyk & Davidson LLP) for the second respondent in Civil Appeal No 123 of 2015 and the applicant in Summons No 260 of 2015.
Parties	: AXF — AXG (a minor, suing by his litigation representative, AXF) — AXH (a minor, suing by her litigation representative, AXF) — DR KOH CHENG HUAT — THOMSON MEDICAL PTE LTD

Civil Procedure – Striking Out

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2015] 5 SLR 819.]

6 April 2016 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the oral judgment of the court):

1 This is a tragic case. The 1st appellant's wife passed away during childbirth, leaving behind her husband and two children who are the 1st to 3rd appellants, respectively. In 2014, the appellants filed Suit No 15 of 2014 ("the suit") alleging that the death had been caused by the respondents' negligence. The respondents applied to strike out the bulk of the statement of claim on the basis that much of it related to a claim for dependency which was time-barred under s 20(5) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("s 20(5)"). The Assistant Registrar who heard the matter allowed the applications and her decision was affirmed by the High Court Judge ("the Judge"). The appellants now appeal to this court.

Summonses Nos 260 and 261 of 2015

2 Before we turn to the substantive appeal, we will first consider Summonses Nos 260 and 261 of 2015 ("SUM 260" and "SUM 261", respectively), which are the respondents' applications to strike out the 2nd appellant's appeal. As a preliminary point, we note that in their written submissions, the appellants have raised a preliminary objection, arguing that the applications should not even be heard because they were filed out of time. During the oral hearing, Ms Kuah Boon Theng ("Ms Kuah"), who appeared for the appellants, did not press this issue and instead proceeded to argue the merits of the application. Thus, we will not say much about this save to say that while the applications might technically have been filed out of time, the delay was not significant and we were satisfied that it had not caused the appellants any prejudice.

3 Having perused the Record of Appeal, it is plain that the 2nd appellant was never a party to

the Registrar's Appeal before the Judge. This is clear both from the Notice of Appeal against the Assistant Registrar's decision which was filed to the Judge as well as the engrossed order of court extracted following the Judge's decision. The latter, in particular, is telling because *all* the operative paragraphs of the order are directed towards the 1st and 3rd appellants (who are, respectively, the 1st plaintiff and 3rd plaintiff in the suit), whose appeals were dismissed and who were ordered to pay the respondents' costs. Further, we note that the preamble of the order of court for the hearing before the Assistant Registrar states "… UPON HEARING counsel for the 1st ***to*** 3rd Plaintiffs …", but the preamble for the order of court for the hearing before the Judge states "UPON THE APPLICATION on the part of the abovenamed 1st ***and*** 3rd Plaintiffs, made by Registrar's Appeal …" [emphasis added in bold italics].

4 It bears mention that the orders of court were approved by the appellants' solicitors. It was thus clear to all parties in the appeal before the Judge that only the 1st and the 3rd plaintiffs were appealing the Assistant Registrar's decision. In the circumstances, it is clear to us that the respondents are correct in saying that the 2nd appellant, having elected not to appeal the Assistant Registrar's decision to the Judge, is now precluded from being a party to this appeal.

5 In response, Ms Kuah contended that this court should look to substance and not to form and that the matter "goes beyond one or two words in the [Notice of] Appeal". She argued that even though the 2nd appellant's name was not on the Notice of Appeal, it was always clear that he was a party.

6 We have no hesitation in rejecting this argument. In our judgment, the omissions in this case are neither as casual nor as trifling as Ms Kuah makes them out to be. The rule is that where there are multiple parties to a proceeding, the onus lies on *each* dissatisfied party to bring an appeal in his own name and to put the issues which he is dissatisfied with into contention. There are two important corollaries to this. First, if a party elects not to appeal, then the decision made at first instance is binding on him and he cannot later seek to benefit from the fruits of his fellow appellants' appeals. Second, if multiple and sequential tiers of appeal are provided for, then a party who has elected not to appeal the first instance decision cannot later seek to bring an appeal at a tertiary stage. Having elected not to appeal the Assistant Registrar's decision to the Judge, the 2nd appellant cannot now seek to bring an appeal directly to this court. This is an impermissible attempt at a "leapfrog appeal" which is not provided for under our Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court"). In our judgment, we do not have the jurisdiction to entertain the 2nd appellant's appeal.

7 In the alternative, Ms Kuah submits that the respondents must be taken to have waived any procedural irregularity in the Notice of Appeal when they addressed the Judge on all the impugned paragraphs without making a distinction between those which pertained to the claims of the 2nd appellant and those which did not. In our judgment, this submission, with respect, turns the matter on its head. The onus did not lie on the respondents to clarify that they were only addressing the dependency claim brought by the 1st and 3rd appellant – this must be taken to be implicit, given the way the notice of appeal was framed. Rather, the onus was on the 2nd appellant, as the aggrieved party, to bring an appeal in his own name and to put the issues with which he is dissatisfied into contention. The 2nd appellant plainly failed to do so.

8 We therefore allow the respondents' applications to strike out the 2nd appellant's appeal. We will deal with the costs of these applications after we have dealt with the substantive appeal.

Civil Appeal No 123 of 2015

9 We now turn to Civil Appeal No 123 of 2015 ("CA 123"). Section 20(5) provides that all claims

for dependency "shall be brought within 3 years after the death of… [the] deceased person." Relying on this, the respondents have pleaded the defence of limitation and successfully relied on it to strike out the bulk of the appellants' claims under O 18 r 19 of the Rules of Court. The central issue in this appeal is whether the appellants' dependency claims should be struck out on the ground that they, being time-barred, are frivolous, vexatious and an abuse of process.

10 We will state from the outset that the appellants' arguments proceeded on a slightly different footing than it did in the court below. Before the Judge, the appellants argued: (a) first, that s 20(5) did not create an absolute time-bar; (b) second, that s 24A of the Limitation Act (Cap 163, 1996 Rev Ed) should apply here to the effect that time should not begin to run until the plaintiff had gained the knowledge required for bringing an action; and (c) third, that the doctrine of "unconscionable reliance" articulated in the decision of the High Court of Australia in *Hawkins v Clayton* (1988) 164 CLR 539 should apply to bar the respondents from relying on the defence of limitation. The Judge ruled against the appellant on each of these issues and that was why he upheld the Assistant Registrar's decision to strike out the claim. In so far as these three issues are concerned, we agree substantially with the Judge's decision and the reasons he gave for his conclusions.

11 Before us, however, the appellants put their arguments differently. They now accept that their claim is time-barred under s 20(5) but they argue that this court should nevertheless exercise its inherent power, not to extend time, but to prevent the respondents from *pleading limitation as a defence* on the ground that there has been *fraudulent concealment*. They allege that the respondents have acted fraudulently by concealing the cause of action through the withholding of essential medical records. In order to succeed, the appellants will eventually have to show *both* that this court has the legal power to bar the respondents from relying on the defence of limitation *and* that there is a factual basis for its exercise. But given that this is an appeal against a striking out application, all the appellants have to show *for now* is that their claim is neither legally nor factually unsustainable. In our judgment, they have done so. We will take each in turn.

Legal sustainability

12 On the legal issue, the respondents continued to contend, as they did before the Judge, that s 20(5) constitutes an absolute legal bar to the appellants' claim. They argued that s 20(5) admits of no exceptions, whether by reason of the plaintiff's lack of knowledge, mistake, or even fraud. However, as we noted during the course of the oral hearing, the authorities and arguments put forward by the respondents do not address the precise issue which the appellants have now put into contention, which is whether this court has the equitable jurisdiction – *not to abrogate or extend the limitation period* in s 20(5) – but to *bar a defendant from raising a limitation defence* in the event of fraud or fraudulent concealment.

13 Both Ms Vanessa Lim, who appeared on behalf of the 1st respondent, and Ms Audrey Chiang ("Ms Chiang"), who appeared on behalf of the 2nd respondent, very fairly conceded that none of the cases which they cited was directly on point. Further to that, we observe:

(a) First, none of these cases they cited concerned allegations of fraud or fraudulent concealment.

(b) Second, the specific question that the courts were concerned with in those cases was whether the court could either disapply or extend the limitation periods. None of those cases concerned an application to bar reliance on a limitation defence.

14 At this juncture, it is neither possible nor would it be necessary for us to say definitively if we

have such a jurisdiction. It bears repeating that this is just a striking out application. The question we have to answer is whether the appellants' argument that such a residual equitable jurisdiction exists is so plainly and obviously unsustainable as a matter of law that it is bound to fail. In our judgment, it is not.

Factual sustainability

15 On the factual issue, the respondents contend that the allegations of fraudulent concealment are baseless and raise no triable issues. Having examined the materials in respect of this point, we are unable to agree. It seems to us that the reasons proffered by the respondents for the delay in the release of the second set of medical records and the CTG scan for the morning, in particular, are not altogether convincing. It may well be that there are reasonable explanations for these lapses and that the respondents' position will eventually be vindicated at trial, but these are matters which can and should be tested forensically. It would be premature for determinations to be made on these disputed issues at this juncture, based purely on affidavit evidence, without the benefit of the discovery process, and without oral evidence being tested by cross-examination.

16 Ms Chiang submitted that the second set of medical reports was ultimately immaterial and so its belated disclosure, even if improper, had resulted in "no detriment" and therefore did not result in the concealment of the cause of action. In support of this contention, she drew our attention to the amendments made by the appellants to their statement of claim following the disclosure of the second set of medical records. She submitted that the amendments were "not substantive" and disclosed neither a "new complaint" nor a "new cause of action".

17 Having carefully considered the statement of claim, we are unable to agree with this submission. At para 41(1) of their original statement of claim, the appellants pleaded that the respondents were negligent because:

> The oxytocin infusion that was started at 8.45am was not made with proper medical indication.

We understand this to mean, as Ms Kuah submitted, that the appellants' case then was that the respondents' negligence consisted of the *administration of oxytocin in the absence of continuous monitoring*. This was consistent with the position taken by the appellants at other parts of the statement of claim where they had likewise pleaded that the respondents had been negligent in failing to monitoring the condition of the deceased in the morning through the use of a CTG machine.

18 However, once the second set of medical records was released, para 41(1) of the statement of claim was amended to read as follows (the portions which were struck through were deleted while the underlined portions were new additions):

> The oxytocin infusion ~~that was~~ started at 8.45am was not made with proper medical indications as the Deceased was already having contractions at a frequency of one in every two to three minutes, and hence there was no necessity to augment contractions at that time. [strikethrough and underlining in original]

It is plain to us that their case had now changed. Where their claim had originally been that the respondents were negligent in *administering oxytocin in the absence of adequate monitoring*, the appellants now contend that the negligence consisted of the *administration of oxytocin where it was not required* and when the administration of oxytocin predisposed her to the development of Acute Amniotic Foetal Embolism, which she eventually succumbed to (see para 41(32) of the statement of claim). In the circumstances, it seems to us that there is an arguable case on the facts that the late

disclosure of the second set of medical reports might have resulted in the concealment of the cause of action and resulted in the late commencement of the suit.

19 In our judgment, therefore, this matter should proceed to trial. At that point, the court will have to decide if, as a matter of law, it has the power to bar reliance on the limitation defence on the ground that there has been a fraudulent concealment of the cause of action. Of course, even if the court rules in the appellants' favour on that point, it may still be contended, on behalf of the respondents, that there is no factual basis for its exercise. Both these questions deserve the benefit of fuller ventilation and it would be inappropriate for them to be decided in a summary fashion at this stage.

Conclusion

20 We therefore allow the appeal with costs, the quantum of which we shall fix presently, and with the usual consequential orders. As a result of our decision on the substantive issue, it is unnecessary for us to consider the appellants' appeal against the costs order made by the Judge as that costs order will now have to be varied.

21 We should clarify, for avoidance of doubt, that given our decision that the 2nd appellant is not a proper party to this appeal, our decision on the substantive appeal cannot enure to his benefit. Therefore, he is still precluded from pursuing his dependency claim at trial. However, we note that the 2nd appellant has brought a claim for personal injury which was not part of the subject matter of this appeal. Our decision today does not affect his entitlement to pursue that claim against the respondents should he so wish.

22 We will now hear parties on the issue of costs, beginning first with the costs to be awarded in SUM 260 and SUM 261 followed by the costs of CA 123.