IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC(A) 14

Originating Summons No 42 of 2021

Between

Engine Holdings Asia Pte Ltd

… *Applicant*

And

JTrust Asia Pte Ltd

… *Respondent*

In the matter of Suit No 1000 of 2020 (Registrar's Appeal No 209 of 2021)

Between

JTrust Asia Pte Ltd

… *Plaintiff*

And

(1) Engine Holdings Asia Pte Ltd
(2) APF Holdings Co Ltd

… *Defendants*

JUDGMENT

[Civil Procedure] — [Striking out] — [Extended doctrine of res judicata]

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Engine Holdings Asia Pte Ltd
v
JTrust Asia Pte Ltd

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Appellate Division of the High Court — Originating Summons No 42 of 2021
Woo Bih Li JAD and Chua Lee Ming J
15 September 2021

18 October 2021 Judgment reserved.

Woo Bih Li JAD (delivering the judgment of the court):

Background

1 AD/OS 42/2021 ("the present OS") is an application by Engine Holdings Asia Pte Ltd ("Engine") for leave to appeal against the decision of the High Court judge ("the Judge") in HC/RA 209/2021 ("RA 209"). In RA 209, the Judge had affirmed the decision of an Assistant Registrar ("the AR") in HC/SUM 2413/2021 ("the Striking Out Summons") *not* to strike out HC/S 1000/2020.

2 The respondent to the present OS is JTrust Asia Pte Ltd ("JT"). In 2017, JT filed HC/S 1212/2017 ("the 1st Action") against eight defendants, alleging that they had unlawfully conspired to defraud JT into investing in Group Lease Public Co Ltd ("GL"). JT sought to recover sums which it had invested in GL via three investment agreements (see *JTrust Asia Pte Ltd v Group Lease*

Holdings Pte Ltd and others [2020] 2 SLR 1256 ("CA Judgment") at [13]). The High Court judge in the 1st Action had dismissed the claim (see *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] SGHC 29 ("HC Judgment") at [25]), but this was overturned by the Court of Appeal which held that the first and second defendants had deceived JT, and that the first to seventh defendants had conspired to defraud JT (see CA Judgment at [202] and [257]). However, the Court of Appeal only granted JT's claim in part, finding that JT's claim for US$130 million in damages in relation to the second investment agreement ("2IA") was premature as the 2IA stipulated that the investment was only due for repayment on 1 August 2021 and it had not been shown that GL would not repay (CA Judgment at [13(b)], [244] and [245]).

3 In October 2020, JT filed HC/S 1000/2020 ("the 2nd Action") against Engine and APF Holdings Co Ltd ("APF"), claiming that they were part of the same unlawful means conspiracy as the defendants in the 1st Action.[1] The 2nd Action is the action which is the subject of the present OS for leave to appeal. In the 2nd Action, JT sought to recover the moneys which it did not recover in the 1st Action.[2] In May 2021, Engine filed the Striking Out Summons to strike out the 2nd Action.[3] At the hearing of the summons, Engine advanced three grounds on which to strike out the 2nd Action: (a) the claim is an abuse of process as it should have been brought together with the 1st Action;[4] (b) the claim is legally unsustainable as the loss to JT has not yet accrued, since 2IA had yet to mature;[5] and (c) the claim is factually unsustainable as JT has not

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1 ABOD at p 3 para 87; HC/S 1000/2020.

2 SOC for the 2nd Action at paras 91 to 93.

3 HC/SUM 2413/2021.

4 Transcript of AR hearing at p 14 lines 27-28, p 2 lines 14-16.

5 Transcript of AR hearing at p 14 lines 21-22, p 12 lines 15-21, p 43 lines 22-26.

asserted that Engine committed any act prior to the date 2IA was concluded, which induced JT to enter into 2IA.[6]

The decisions of the AR and the Judge

4 The AR dismissed the Striking Out Summons. First, applying the law that a claim could only be struck out on grounds of abuse of process if such abuse was "plain or obvious" (applying *Beyonics Asia Pacific Ltd and others v Goh Chan Peng and another and another appeal* [2021] SGCA(I) 2 ("*Beyonics*")[7] at [50] to [53] and *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2018] 3 SLR 117 ("*Antariksa (HCJ)*") at [74] to [79]), he found on the facts that it was not plain or obvious that the 2nd Action constituted an abuse of court process.[8] This was because: (a) JT's conduct of suing the defendants in the 2nd Action is permitted by s 17 of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA") which expressly permits successive actions against joint tortfeasors;[9] and (b) the documents relied upon by Engine did not prove that JT knew about its involvement in the conspiracy early enough such that JT should reasonably have joined Engine as a defendant in the 1st Action.[10] Instead, JT most likely did not know about Engine's involvement until September 2019 (one month before the trial of the 1st Action), and it was reasonable not to have joined Engine into the 1st Action at that time.[11]

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6 Transcript of AR hearing at p 43 lines 22-31.

7 RBOA Tab 1.

8 Transcript of AR hearing at p 38 lines 27-28, p 2 lines 14-16.

9 Transcript of AR hearing at p 38 lines 22-24.

10 Transcript of AR hearing at p 39.

11 Transcript of AR hearing at pp 40 to 41.

5 Second, the AR found that the claim was legally sustainable despite the fact that 2IA had not matured, because the *risk* that JT would be unable to recover its moneys under the agreement gives rise to a good arguable case that JT has suffered pecuniary loss which constitutes actionable damage.[12]

6 Third, the claim is factually sustainable despite Engine's argument to the contrary (see [3] above) as JT's case is not only that they were induced to *enter into* 2IA but also that they were induced by Engine to subsequently *complete payment obligations* under 2IA.[13]

7 Engine then filed RA 209 to appeal the AR's decision, but the Judge dismissed the appeal, without providing any reasons.[14]

8 Thereupon, Engine filed the present OS, seeking that:

(a) It be granted leave to appeal RA 209;

(b) It be granted leave to file an affidavit in support of its leave to appeal application (and if allowed, the substantive appeal), to address the following three matters:

(i) JT's commencement of HC/OS 780/2021 ("the 3rd Action") on 3 August 2021 against six of the eight defendants in the 1st Action claiming damages for a conspiracy to defraud, arising out of transactions similar to those that were the subject of the 1st Action;

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12 Transcript of AR hearing at p 44 lines 7-21.

13 Transcript of AR hearing at p 44 lines 21-27.

14 Minute Sheet of RA 209 dated 18 August 2021.

(ii) various cause papers, affidavits, applications, and submissions made in the 3rd Action; and

(iii) an invitation to JT to respond to paragraphs 11 to 27 of the 5th affidavit of one Muneo Tashiro (filed under solicitor's cover affidavit dated 13 July 2021); and

(c) Upon the grant of leave to file an affidavit, that directions be given for the filing of the said affidavit, for the filing by JT of an affidavit in response, and for the filing by Engine of an affidavit in reply.

Issues

9 Engine relies on the usual three grounds to seek leave to appeal to this court – namely, that there is:

(a) a *prima facie* case of error;

(b) a question of general principle decided for the first time; and

(c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

10 With respect to the first ground of a *prima facie* error, Engine seeks to appeal on the basis of errors of both law *and* fact. However, this is misconceived as the general principle is that the *prima facie* error must be one of law and not of fact (see *IW v IX* [2006] 1 SLR(R) 135 at [20] and *Hwa Aik Engineering Pte Ltd v Munshi Mohammad Faiz and another* [2021] 1 SLR 1288 at [8]). It may be that in exceptional circumstances leave to appeal may also be granted if there is an error of fact which is obvious from the record but it is unnecessary for us to consider this exception because, as we elaborate later, there was no such error in this case.

11 With respect to the second and third grounds, we note that they are disjunctive but Engine in its written submissions ("EWS") addressed both grounds together and we will do likewise as it serves no purpose in the present circumstances to address them separately.

12 In so far as the alleged errors of law that Engine relies on in respect of the first ground overlap with the questions that Engine raises with respect to the second and third grounds, we will address them together. The questions that Engine relies on with respect to the second and third grounds are:

(a) Whether the "plain and obvious" test, which applies generally to striking out applications, also applies specifically to the striking out of an action on the ground of abuse of process based on the extended doctrine of *res judicata* as stated in *Henderson v Henderson* (1843) 67 ER 313 ("the 1st Issue"). We will refer to this type of abuse as the *Henderson* abuse of process.

(b) How the guidelines from the English case of *Aldi Stores Ltd v WSP Group plc and others* [2008] 1 WLR 748 ("*Aldi*") should be applied in Singapore ("the 2nd Issue").

(c) What the legislative intent behind s 17 of the CLA is ("the 3rd Issue").

13 At the outset, we mention a preliminary point. The main thrust of Engine's application before the AR was that it was a *Henderson* abuse of process for JT to commence the 2nd Action when it ought to have included Engine as a defendant in the 1st Action. However, according to JT, this

argument on *Henderson* abuse of process had already been raised by Engine in two earlier applications in the 2nd Action.[15]

14 The first application was HC/SUM 4532/2020, which was JT's application for a Mareva injunction ("MI") against Engine filed on 16 October 2020. At an opposed *ex parte* hearing of that application, Engine had already argued that the 2nd Action was a *Henderson* abuse of process to resist the application.[16] JT's point is that as the Judge had granted the MI, this must mean that she was of the view that the 2nd Action was not a *Henderson* abuse of process.

15 The second application was HC/SUM 4970/2020 which was an application by JT filed on 13 November 2020 to seek leave to disclose Engine's affidavit of assets in related proceedings, among other things. At a contested hearing, Engine again argued that the 2nd Action was a *Henderson* abuse of process.[17] The Judge granted leave to disclose the affidavit in related proceedings.[18]

16 The Striking Out Summons is hence the third time in which Engine has raised the argument of *Henderson* abuse of process. JT thus seems to be implying that the doctrine of issue estoppel applies to estop Engine from raising the same argument in the Striking Out Summons and related appeals or applications. The AR did not rule on the issue estoppel point, and as mentioned, no reasons were given by the Judge for her decision in RA 209. Before us, JT's

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15 RS at pp 3 to 4.

16 Transcript dated 21 October 2020 at p 12 to 14.

17 Transcript dated 9 December 2020 at p 7.

18 RS at p 3; Transcript dated 9 December 2020 at p 9.

written submissions ("JTWS") merely mentioned the previous instances when Engine had raised the *Henderson* abuse of process argument and stopped short of explicitly asserting issue estoppel. In the circumstances, we will say no more about it.

The 1st Issue

17 Turning to the 1st Issue, it seems to us that Engine has wrongly assumed that the observations made in the English case of *Angeli Luki Kotonou v National Westminster Bank plc* [2017] 1 All ER (Comm) 350 ("*Kotonou*"), which were endorsed by a judge in the High Court case of *Antariksa (HCJ*) at [78], were contrary to the "plain and obvious" test established in Singapore cases such as *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].

18 In *Kotonou*, a defendant had applied to strike out a claim on the basis of *Henderson* abuse of process. After referring to what Buxton LJ had said in *Laing v Taylor Walton (a firm)* [2007] EWCA Civ 1146 at [11] and [12], Gloster LJ said, at [45], that what was required was "an intense focus on the facts of [the] case" to determine whether in broad terms the new proceedings could be said to fall under the broad rubrics of unfairness and/or the bringing of the administration of justice into disrepute. We will refer to this approach as the "intense focus approach". Gloster LJ said that this approach involved not merely concentrating on findings of fact but also addressing the much wider question of whether the *Henderson* abuse of process is engaged (at [45]).

19 Engine suggests that the intense focus approach is contrary to the "plain and obvious" test as the latter would encourage a court to engage in only a

cursory examination of the materials before it, which is what the AR and the Judge allegedly did. It then argues that its application for leave to appeal would give this court the opportunity "to clarify the law to public advantage".[19]

20 In our view, Engine's argument is not valid. First, it is clear that the "plain and obvious" test applies in Singapore. What Engine is trying to do is to ask this court to change the law and not to clarify it.

21 Second, there is no contradiction between the intense focus approach and the "plain and obvious" test.

22 Engine disingenuously submitted that *Antariksa (HCJ*) had endorsed the intense focus approach in *Kotonou* (at [78]) but omitted to mention that *Antariksa (HCJ*) had then applied the "plain and obvious" test (at [79]). Engine tried to create the impression that the two approaches are inconsistent and did not mention that the court in *Antariksa (HCJ*) had no such difficulty.

23 As mentioned in *Antariksa (HCJ*) at [79], in applying the "plain and obvious" test at the stage of an application to strike out a claim summarily, the court is not to carry out a minute and protracted examination of the documents and the facts of the case. That is different from saying that the court should not focus intensely on the facts. There is thus no general principle decided for the first time or a question of importance which would materially affect the present case.

24 Indeed, the AR did not suggest that the intense focus approach was contrary to the "plain and obvious" test. More importantly, it is unfair for Engine

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[19] EWS at p 9 para 11.

to suggest that the AR (and the Judge) had only conducted a cursory examination of the materials before them. What the AR did was to apply the law to the materials before him bearing in mind the stage of the proceedings. He considered the materials carefully. After doing so, he was not able to conclude at that stage that there was a *Henderson* abuse of process. He did not engage in a minute and protracted examination of the materials as that would usurp the role and function of the trial court.[20] Accordingly, he could only reach a tentative conclusion that JT did not know about Engine's alleged involvement in the conspiracy until around or slightly before September 2019.[21] This was in line with what JT contended, and militated against Engine's contention that JT knew much earlier about Engine's involvement and that JT should hence have taken steps to include Engine as a defendant in the 1st Action. Engine submits that the Judge affirmed the AR's decision and reasoning.[22] In our view, there was no *prima facie* error of law (or fact) made by the AR or the Judge.

25 Engine also submits that the AR's "tentative conclusion" suggested that he had failed to discharge his duty to determine whether the 2nd Action was a *Henderson* abuse of process or not.[23] We are of the view that this is an unwarranted submission. It is not in every case that a court will reach a definite conclusion on such an issue at this stage of the proceedings. Indeed, it is the other way round, *ie*, that it is quite often the case that a court is not able to reach a definite conclusion on the issue at this stage of the proceedings and the court may then emphasise that its conclusion is tentative so as not to tie the hands of

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20 Notes of Arguments of 21 July 2021 ("21/7/21 NA") at p 38.

21 21/7/21 NA at p 40.

22 EWS p 3 para 1.

23 EWS p 5 at para 4.

the trial court. The AR's remark was appropriate and fair to the contesting parties and it is a pity that Engine has sought to make something out of it.

26 Engine also submits in the alternative that if the court below had taken an intense focus on the facts, then it would have used its wide range of inherent powers to direct the trial of a preliminary issue concerning *Henderson* abuse of process.[24] This is another suggestion of a *prima facie* error but again it is not an error of law. At best, this is an error (if at all) concerning an *application* of the law to the materials. Besides, Engine has not been able to establish why a court in these circumstances would necessarily direct the trial of a preliminary issue. No such direction was sought before the AR. In any event, it is not possible to say that such a direction should have been made. On the contrary, it may be argued that such a direction would be inappropriate as it would mean that the taking and construing of evidence would be split into two tranches with overlapping of witnesses, first for the preliminary issue and the second for the rest of the claim. It is also questionable whether it is appropriate to split the evidence between two stages as the evidence for the preliminary issue might overlap with the evidence for the rest of the claim. Engine's argument about the absence of such a direction is a distraction which clearly does not come within any of the three grounds for which leave to appeal should be granted.

The 2nd Issue

27 We come now to the 2nd Issue. It raises the question of whether and when a claimant who is aware that it may have another claim (whether against an existing party to the proceedings or another person who is not yet a party) is to raise this issue with the court hearing the existing proceedings for the claim,

[24] EWS p 7 at para 7.

the existing defendant and/or the potential defendant ("the Raising Requirement"), and the consequence of an omission to do so. In the present case, it is common ground that JT did not disclose to the court or to Engine before the trial of the 1st Action that it might have a claim against Engine based on similar facts as in the 1st Action.

28 Engine refers to the principles in *Aldi* and suggests that *Aldi* is authority for the proposition that the Raising Requirement is mandatory. In *Aldi*, Thomas LJ mentioned at [29] that the proper course for a claimant in such a situation is to raise the issue with the court (hearing the existing proceedings). The learned judge went on to suggest at [31]:

> However, for the future, if a similar issue arises in complex commercial multi-party litigation, it must be referred to the court seised 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.

29 Engine argues that there are at least three different ways in which the *Aldi* principle has been treated by the courts: (a) it has been endorsed in English and Australian cases stemming from the case of *Stuart v Goldberg Linde (a firm) and others* [2008] 1 WLR 823 ("*Stuart*"); (b) the *Aldi* principle was doubted in *Antariksa Logistics Pte Ltd and others v Nurdian Cuaca and others* [2016] SGHCR 10 ("*Antariksa (HCAR)*") which is a decision by an assistant registrar; and (c) the decision of *Antariksa (HCJ)* which held that a plaintiff who failed to include a defendant in an earlier action had to have good reason for doing so.

30 Engine submits that the Raising Requirement is mandatory. This implies, without explicitly stating, that the consequence of failure to comply with the Raising Requirement is that a subsequent action will be construed as a

Henderson abuse of process. This must be what Engine means as otherwise, the Raising Requirement would not truly be mandatory. Yet, neither *Aldi* nor the English cases that Engine refers to in support of its argument bear out this proposition. For the present purposes, we need refer only to some of the English cases.

31 First, while it may be said that the views expressed by Thomas LJ in *Aldi* itself suggests that the Raising Requirement is mandatory, it is important to bear in mind that the learned judge did not go on to say that an omission to meet that requirement would necessarily mean that the subsequent action is a *Henderson* abuse of process.

32 Next, in *Stuart*, the claimant had successfully sued two defendants for breach of an undertaking to pay a certain sum. Subsequently, the claimant issued proceedings against the same two defendants for misrepresentation and inducing breach of contract. The defendants applied to strike out parts of the particulars of claim on the basis that it was a *Henderson* abuse of process.

33 Sir Anthony Clarke MR sitting in the Court of Appeal said (in *Stuart* at [96] to [97]):

> 96 For my part, 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.
>
> 97 While these considerations have been highlighted in the *Aldi Stores Ltd* case [2008] 1 WLR 748, they have been relevant considerations at least since the CPR came into force in 1999. …

34 At [101], he also said:

> I only add by way of postscript that litigants and their advisers should heed the points made by this court in the *Aldi Stores Ltd* case and underlined here that the approach of the CPR is to require cards to be put on the table in cases of this kind or run the **risk** of a second action being held to be an abuse of the process. [emphasis added]

35 Sedley LJ said, at [77]:

> Secondly, as the *Aldi Stores Ltd* case again makes clear and as Sir Anthony Clarke MR stresses, 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. Moreover, 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. [emphasis added]

36 However, Lloyd LJ expressed a more nuanced view, which was also noted in *Antariksa (HCJ)* at [99]. At [70] of *Stuart*, Lloyd LJ said that the claimant should have written a warning letter (to the defendants) and that this would have been a prudent and proper course to take. The question was whether the omission to do so was an abuse of process. He then said at [71]:

> In my judgment to hold that this fact makes the bringing of the 2005 action an abuse of process would be a substantial and unjustified extension of the law in this respect. It is not right, in my view, to say, as a general proposition of law, that where the claimant in existing proceedings comes to know, in the course of those proceedings, from information provided by the defendant, of an additional cause of action against the

> defendant, which is quite different from that asserted in his existing claim and one which it would not be reasonable, in the circumstances, to expect him to seek to combine with that existing claim, he must inform the defendant of the fact that he is contemplating bringing such a claim in future before he brings his existing proceedings to trial. **Different facts might lead to a different conclusion**. … [emphasis added]

37 Next, in *Gladman Commercial Properties v Fisher Hargreaves Proctor and others* [2013] EWCA Civ 1466 ("*Gladman*"), a claimant in a second action was a defendant in an earlier action. In the earlier action, it had made counterclaims against certain parties only. Thereafter it commenced the second action against other parties in respect of the same misrepresentations that had been alleged in the earlier action. In the earlier action, it had been alleged that some of the other parties (in the second action) had made the misrepresentations on behalf of the defendants to the counterclaim in the first action.

38 Briggs LJ referred to the judgment of Thomas LJ in *Aldi* and the judgments of Sedley LJ and Sir Anthony Clarke MR in *Stuart* and said, at [64]–[66]:

> [64] By contrast, his observations about avoiding these difficulties by a prompt application for pro-active case management were directed mainly at the future rather than the past. He plainly regarded the requirement to refer a contemplated future claim for case management directions in the earlier claim as mandatory, and as serving the public interest in the efficient use of court resources. He described a failure to do so as inexcusable. Furthermore, in the *Stuart* case, both Sedley LJ and Sir Anthony Clarke MR spelt out in express terms that a failure to follow the *Aldi* guidelines involved the Claimant running a **risk** that the pursuit of a second claim would constitute an abuse.
>
> [65] As has been repeatedly stated, the conduct of civil proceedings is a process in which the stakeholders include not merely the parties, but also other litigants waiting for their cases to be tried, and the public at large, who have an interest in the efficient and economic conduct of litigation. I consider that Arnold J was correct to treat a failure by the Appellant to

> follow guidelines laid down as mandatory future conduct in two successive reported decisions of this court as **relevant matters pointing to a conclusion** that the Second Claim constituted an abuse of the process of civil litigation.
>
> [66] The shocking consequence of permitting the Second Claim to continue would be that precisely the same issues would fall to be litigated at two successive trials involving the waste of between four and six working weeks of court time and, no doubt, millions of pounds of wasted costs and lost management time, quite apart from the double jeopardy faced by Mr Bishop and Mr Hargreaves to which I have referred. The judge's conclusion was that compliance with what were by then mandatory guidelines could have entirely avoided that wasteful duplication of time, money and effort. I agree that the failure was, as described in the *Aldi* case, inexcusable. An inexcusable failure to do something which would have contributed so substantially to the economy and efficiency with which this dispute might have been resolved seems to me to be a **primary candidate for identification as an abuse.**
>
> [emphasis added]

39 We turn to the decision of *Antariksa (HCAR)* which also involved the question of *Henderson* abuse of process. The assistant registrar said, at [67]–[69]:

> 67 Finally, I would like to address a point that was not argued, if only to provide the impetus for this point to be resolved in a different setting. In the cases of *Johnson* and *Aldi*, the fact that the defendant or defendants knew that there was a possibility of a second set of proceedings had some bearing on the result. Similarly, the court in *Stuart* advised that in a situation where a plaintiff is contemplating suing the same defendant in two different actions, it would be beneficial for the plaintiff to put the defendant on notice of that possibility. This is best accomplished by raising the matter in court in the earlier proceedings as it would allow the court to consider if the claims should be combined. As the English Court of Appeal explained in *Stuart* (at [96]):
>
> > 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.

> 68 Insofar as practice is concerned, I would not go so far as to provide any such generally applicable advice. While 'cards on the table' is undoubtedly the court's prevailing case management sentiment, it seems to me a different policy altogether to require a litigant to lay down his cards in respect of a later hand upfront. In my view, the English position has the effect of elevating the principle of efficiency and economy of litigation at the expense of other competing values, primarily party autonomy. This is so because adopting the English position for all cases would invariably mean that some private interests of the plaintiff would have to be sacrificed. At the very least, the usual tactical advantage of being able to choose when to sue that would normally accrue to the plaintiff would have to be relinquished. In some cases, the advantage lost may be more serious, such as time to gather supporting evidence. To Sir Anthony Clarke MR, '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': *Stuart* (at [96]). I am not sure that Singapore should strike the same balance between competing values without considering the circumstances of each individual case.
>
> 69 However, insofar as the law is concerned, I would venture to agree with the English Court of Appeal in *Stuart* – 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. I echo the sentiment that '[d]ifferent facts might lead to a different conclusion': *Stuart* (at [71]). Ultimately, if this point is argued, the court should consider this factor against other relevant factors in applying the broad, merits-based assessment established in *Johnson*. As has been reinforced many times over the years, there should not be any sacred cows in this area of law.

40 The assistant registrar dismissed an application to strike out a second action against a defendant who was not a party in the first action (at [71]). The assistant registrar also dismissed similar striking out applications made by other defendants who were also not parties in the first action (see *Antariksa (HCJ)* at [3] and [54]). The unsuccessful defendants appealed to a judge of the High Court which resulted in the decision in *Antariksa (HCJ)*. There the learned judge said at [100] to [101]:

> ***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* ([75] *supra*) 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.

41 For present purposes, it is unnecessary to set out his elaborations at [102] to [106]. He went on to say at [107] to [112]:

> *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* … 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* ([76] *supra*).

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'. …

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 … 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. …

42 On the facts, the judge allowed the appeals of the unsuccessful defendants seeking to strike out the claim (at [152]) on the ground of *Henderson* abuse of process. The further appeals of the plaintiffs to the Court of Appeal were dismissed without written grounds of decision.

43 Engine submits that the observations of the judge at [100] and [108] of *Antariksa (HCJ)* were different from those of the assistant registrar at [69] of *Antariksa (HCAR)*.[25] We disagree with that submission. The judge had explicitly stated that he was in agreement with the assistant registrar (at [100] and [108]). The factors laid out by the judge at [112] to determine when a second action would be an abuse of process did not deviate from the overall proposition that the failure by a claimant to give notice of a potential claim to the court and to the other party does not necessarily render the subsequent action an abuse of process.

44 As for a comparison of the English approach and the Singapore approach, there was in substance more agreement than disagreement. While it could be argued that there is a difference in approach on the question whether there is a duty to make disclosure in all circumstances, there is no difference on the more important question, *ie*, the consequence of an omission to disclose.

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[25] EWS pp 9 and 10 at paras 14 and 15.

45 It will be remembered that notwithstanding the strong language used by Thomas LJ in *Aldi*, he stopped short of saying that it was mandatory in every circumstance for a claimant to disclose that he has a potential claim (either against the same party or another party) based on similar facts as in the existing proceedings. Neither did he say that the omission to do so would necessarily mean that the subsequent action is an abuse of process.

46 Likewise, in *Stuart,* Sir Anthony Clarke MR had only said that the approach in the English Civil Procedure Rules was that an omission to put cards on the table would mean that the claimant would run the "risk" that his second action would be held as an abuse of process. It was Sedley LJ who used the expression "high risk", while Lloyd LJ took a more nuanced view, as we have mentioned (see [33] to [36] above). In any event, it was clear that none of the three judges even remotely suggested that an omission would necessarily mean that the second action is an abuse of process.

47 That was also the position of Briggs LJ in *Gladman*. While he said that it was "mandatory" to disclose, he only said that failure to do so would mean that a claimant runs "a risk" that the second claim would constitute an abuse of process (see [37] and [38] above).

48 Thus, for all Engine's emphasis on a mandatory requirement to disclose, there was really no suggestion even by the English authorities that an omission to do so would necessarily mean that the second claim would be an abuse of process. It is a fact-sensitive inquiry and the omission is only a factor to be taken into account. The weight of the factor depends on the circumstances in which the disclosure was not made. It is not helpful to describe an omission as giving rise to a high risk that the second claim would constitute an abuse of process

without appreciating why the omission occurred in the first place. Therefore, there is no material general principle which is disputed and to be decided either for the first time or which would be to public advantage.

49 In the present case, the AR had applied the law to the facts based on the stage of the proceedings before him, and the Judge affirmed the AR's decision. Having considered the notes of arguments before the AR and the Judge, and EWS and JTWS, there was no *prima facie* error, whether of law or fact.

The 3rd Issue

50 We now come to the 3rd Issue. Engine highlights that there is at present no reported decision on whether s 17 of the CLA should be considered in determining whether there is a *Henderson* abuse of process and how that provision interfaces with s 18 of the CLA.[26] It argues that this will be a question of general principle decided for the first time and on which clarification of the law will be to public advantage. Engine also argues that the AR and the Judge erred in attributing significant weight to s 17 of the CLA.

51 It is clear to us that Engine is being disingenuous in its argument. Section 17 of the CLA states:

> **Proceedings against persons jointly liable for same debt or damage**
>
> **17**. Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage.

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[26] EWS at para 18.

52 Section 18 of the CLA states:

> **Successive actions against liability (jointly or otherwise) for same damage**
>
> **18**. If more than one action is brought in respect of any damage by or on behalf of the person by whom it was suffered against persons liable in respect of the damage (whether jointly or otherwise) the plaintiff shall not be entitled to costs in any of those actions, other than that in which judgment is first given, unless the court is of the opinion that there was reasonable ground for bringing the action.

53 All that the AR had said in respect of s 17 of the CLA was that the mere fact of successive actions against joint tortfeasors did not necessarily mean that the 2nd Action was a *Henderson* abuse of process. This is because such actions are contemplated by s 17 of the CLA. The AR in fact accepted Engine's contention that *Henderson* abuse of process is not abrogated by s 17 of the CLA.[27]

54 As for s 18 of the CLA, it is not inconsistent with s 17. Depriving a claimant of costs for the successive action is not inconsistent with allowing a claimant to commence and continue a successive action. Indeed, by stipulating that such a claimant may still be awarded costs in the successive action if the court is of the opinion that there is reasonable ground for bringing the successive action, s 18 of the CLA implicitly acknowledges that the successive action is not in itself necessarily an abuse of process.

55 Indeed, Engine itself does not suggest that s 17, when read with s 18 of the CLA, means that a claimant will necessarily be precluded from commencing successive actions based on substantially the same facts whether as against the

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[27] 21/7/21 NA at p 38.

same defendant in the first action or another defendant. Accordingly, its third issue regarding 17 of the CLA is a contrived one. There is no general principle decided for the first time or a question of importance which would materially affect the present case.

56 As for the point that the AR said that significant weight must be placed on s 17 of the CLA, nothing material turns on this. That was his way of emphasising that the mere existence of a successive action is not enough to constitute a *Henderson* abuse of process. We are also satisfied that, based on the notes of argument in RA 209,[28] it cannot be said that the Judge placed undue weight on s 17 of the CLA. There was no *prima facie* error of law or fact.

57 We now come to Engine's other allegations of *prima facie* errors. We have already addressed some of them above. Engine argues that other errors had been made because:

(a) the claim against Engine is legally unstainable as JT had not suffered any accrued loss at the time it commenced the 2nd Action;

(b) the claim is factually unsustainable because Engine could not have conspired with anyone to injure JT in respect of the 2IA, as JT did not allege that Engine had committed any conspiratorial act prior to the conclusion of the 2IA; and

(c) the Judge had refused to allow Engine's request to file an affidavit to set out facts pertaining to the 3rd Action which occurred after the date of the AR's decision.

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[28] Minute Sheets of RA 209 dated 16 and 18 August 2021.

We will refer to these alleged errors as "the remaining alleged errors".

58 As regards the first of the remaining alleged errors, Engine argues that since the deadline to make payment under the 2IA had not yet expired, there was no accrued loss to JT and hence the 2nd Action was not legally sustainable. It argued before the AR and the Judge that to allow JT to proceed with the 2nd Action would be a collateral attack on the CA Judgment (where the court did not grant damages in respect of the 2IA as the loss had not accrued (see [2] above)).[29] However, JT had argued before the AR and the Judge that although the loss under the third investment agreement had similarly not yet accrued at the time the 1st Action had been filed, the Court of Appeal had allowed the claim to proceed (see *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 in respect of an MI ("MI Judgment") at [62]). Later, after a trial and upon appeal, the Court of Appeal eventually allowed that claim as the loss had accrued by the time of the appeal (CA Judgment at [13(c)], [243] and [246]). The situation might well be different if by the time of the hearing of the substantive claim, the loss had still not accrued. Further, for the 2nd Action, JT was relying on other evidence to show that the risk of loss under the 2IA had already occurred.[30]

59 The AR had considered the MI Judgment, which was a Court of Appeal decision involving an appeal by some defendants in the 1st Action against the granting of a MI against them. He also considered the CA Judgment. In the MI Judgment, the Court of Appeal suggested that a risk that JT might not recover its investment constituted a good arguable case that JT had suffered some

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29 Transcript of AR hearing p 11 at lines 11 to 14; Minute Sheet for RA 209 dated 18 August 2021 at p 8.

30 21/7/21 NA at pp 16 and 19.

pecuniary loss which constitutes actionable damage (at [62]). In the CA Judgment, the Court of Appeal allowed the claim in respect of the third investment agreement (see [2] above). The AR agreed with JT that the 2nd Action was not legally unsustainable. Having dismissed RA 209, the Judge must have agreed with the AR on this point. Having considered both judgments, we are of the view that there was no *prima facie* error of law by the AR or the Judge.

60 As for the second of the remaining alleged errors (see [57(b)] above), this was not an error of law. The AR had noted that JT was relying not only on conduct prior to the conclusion of the 2IA but conduct of Engine subsequent to the conclusion of the 2IA which allegedly induced JT to subsequently complete its payment obligations under the 2IA.[31] Again, in dismissing RA 209, the Judge must have also agreed that the claim is not factually unsustainable. Hence, there was also insufficient basis at present to support even an allegation of *prima facie* error of fact.

61 As for the third of the remaining alleged errors (see [57(c)] above), this overlaps with Engine's application before us to file an affidavit to refer to the 3rd Action and the cause papers filed therein ("the 3rd Action documents") and to invite JT to respond to certain paragraphs of the fifth affidavit of one Muneo Tashiro.

62 In our view, the Judge's decision not to allow Engine to file an affidavit was not an error of law and it was also not a *prima facie* error of fact. There is also no merit in Engine's application before us to file the said affidavit.

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[31] 21/7/21 NA at p 44.

63 The question as to whether JT had been specifically invited to address certain paragraphs of an affidavit is immaterial. It is a matter of fact whether JT had responded or not and a specific invitation to do so will not carry the matter further.

64 As for Engine's intention to refer to the 3rd Action documents, Engine mentioned various reasons:

(a) To show that JT had not included Engine as a party to that action and hence did not genuinely believe that Engine was a legitimate defendant. There was also some argument as to whether Engine's involvement was stated in any of the cause papers.

(b) To show that Engine is being shut out from defending itself against allegations of conspiracy.

(c) To show that the 3rd Action is commenced by way of an originating summons and this gravely prejudices Engine which is again shut out from challenging JT's allegations via a trial.

65 We reject Engine's application for leave to file an affidavit. The non-inclusion of Engine as a party in the 3rd Action is not disputed. Furthermore, the effect of the non-inclusion is equivocal. It could be because Engine was already a party in the 2nd Action. It is also equivocal even if Engine was not specifically mentioned in the 3rd Action documents as a conspirator.

66 We also find Engine's second and third reasons spurious. Engine is a party in the 2nd Action and not the 3rd Action. It is for Engine to defend itself in the 2nd Action and not the 3rd Action even if allegations of conspiracy have been made against it in the 3rd Action as part of the claims against the

defendants in the 3rd Action. If Engine wishes to apply to be joined as a co-defendant in the 3rd Action, that is a separate matter. Thus, whether the 3rd Action is by way of an originating summons or not is irrelevant to Engine. Ironically, Engine's purported wish to challenge JT's allegations via a trial could arguably be said to be contrary to its present course of action in the 2nd Action which is to stop JT's claim against it from being ventilated at a trial.

67 In so far as Engine had said that JT's "Further Affidavit" would also be relevant to show JT's true state of mind with regard to Engine's role in the alleged conspiracy when JT filed proceedings in other jurisdictions, Engine did not elaborate on what it meant. If it was referring to a possible further affidavit from JT in response to paragraphs 11 to 27 of Muneo Tashiro's fifth affidavit, this was speculative. If Engine was referring to something else which it did not adequately elaborate on, then its point is useless.

68 In our view, Engine's attempt to refer to the 3rd Action documents would have muddied the waters if it had been allowed.

69 We also reject Engine's argument that the Judge's decision to refuse to allow it to file a further affidavit showed that the Judge had lost sight of her duty to consider all the circumstances of the case.[32] The duty to consider all the circumstances of a case does not translate into a duty to allow each party to file whatever affidavit it wishes. Indeed, case management responsibilities suggest that a court should be careful not to allow parties to file affidavits just because they allege that it is necessary to do so. Furthermore, there was no *prima facie* error of law or fact on the Judge's part.

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[32] EWS p 6 at para 5.

Conclusion

70 In all the circumstances, there is really no basis for this application. Engine has conflated principles of law and made disingenuous arguments in a desperate attempt for another bite at the cherry. We dismiss its application. After considering the costs estimates of the parties, we order Engine to pay JT the costs of this application fixed at $8,000 (all-in) with the usual consequential orders.

Woo Bih Li
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

Teh Kee Wee Lawrence, Chia Huai Yuan, Elias Benyamin Arun, Pan XingZheng Edric and V Santhosh (Dentons Rodyk & Davidson LLP) for the applicant;
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