Woon Tek Seng and Another v V Jayaraman a/l V A Vellasamy and Another [2008] SGHC 38

Case Number : DC Suit 1245/2006

Decision Date : 18 March 2008

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : Muthu Kumaran (Bernard & Rada Law Corporation) for the plaintiffs; Suja Michelle Sasidharan (Lim & Lim) for the first defendant

Parties : Woon Tek Seng; Rahimah Binti Haji Hashim — V Jayaraman a/l V A Vellasamy; Singa Motivasi (M) Sdn Bhd

Civil Procedure – Discontinuance – Automatic discontinuance – Rationale behind automatic discontinuance rules – Available steps after automatic discontinuance – Right to commence fresh action after automatic discontinuance – Application to strike out recommenced action – Whether plaintiffs precluded from bringing fresh action by reason of doctrine of res judicata, issue estoppel or abuse of process – Whether fresh action per se abuse of process when no prior reinstatement action taken – Whether fresh action abuse of process on basis that same issues litigated previously in discontinued suit – Whether court should exercise inherent powers to strike out plaintiffs' fresh action – Application for interlocutory judgment on fresh action – Order 6, O 18 r 19, O 21 r 2(6) Rules of Court (Cap 322, R 5, 2006 Rev Ed)

18 March 2008

Chan Seng Onn J:

Introduction

1 This is an appeal against the decision of District Judge Toh Han Li ("DJ Toh") which dealt with the principles of court-directed case management and the plaintiffs' right to recommence a suit that had been deemed discontinued by the Rules of Court ("Rules").

2 The plaintiffs maintain that they have an absolute right to commence a fresh action notwithstanding the reinstatement procedure under O 21 r 2(8) (see [12]). The 1st defendant submits that this is an abuse of process, an attempt to bypass the reinstatement procedure and a re-litigation of matters already decided in the action deemed to have been discontinued ("discontinued suit").

3 In the proceedings below, the Deputy Registrar struck out the plaintiffs' action on the basis that it was an abuse of process and dismissed the plaintiffs' application for interlocutory judgment. DJ Toh affirmed the decision of the Deputy Registrar. I allowed the plaintiffs' appeal against (a) the order striking out the plaintiffs' action (RAS72/2007/E); and (b) the dismissal of the plaintiffs' application for interlocutory judgment (RAS71/2007/A).

Brief Facts

4 Woon Tek Seng @ Woon Wee Seng ("1st plaintiff"), Rahimah Binti Haji Hashim ("2nd plaintiff") and V Jayaraman A/L V A Vellasamy ("1st defendant") are the shareholders of the 2nd defendant, Singa Motivasi (M) Sdn Bhd (the "company"). The shares they hold in the company are in the

following proportions: 29% (1st plaintiff), 21% (2nd plaintiff) and 50% (1st defendant).

5 It was agreed that the company would purchase a property and the 1st defendant would contribute 50% of the purchase price which would include payment of mortgage instalments. The company proceeded to purchase the property and obtained financing from a bank. The plaintiffs and the 1st defendant became the joint and several guarantors for the company for the bank's mortgage under a written guarantee dated 26 May 1997. When the company defaulted on the mortgage payments, the plaintiffs settled the outstanding amounts with the bank.

6 The plaintiffs then commenced two suits (MC Suit No 28 of 1998 and DC Suit No 50727 of 1999) to recover contribution from the 1st defendant. The MC Suit was for contribution towards *one* payment by the plaintiffs. The DC Suit was for further contribution after the plaintiffs made *further* payments to the bank on the same guarantee. Interlocutory judgments for the MC Suit and DC Suit were obtained on 20 May 1998 and 22 September 1999 respectively for the 1st defendant's contribution to be assessed as co-surety under the guarantee. On 22 September 1999, the two suits were consolidated. The assessment under the consolidated suit never took place because the automatic discontinuance rules kicked in subsequently.

7 DJ Toh erred in concluding that the last step in the consolidated suit was on 28 March 2001 when the 1st defendant withdrew his appeal against the Deputy Registrar's orders on the plaintiffs' summons for directions. On a close scrutiny of the court's records, I found that the last step was in fact taken on 5 September 2003 when the court heard and granted the application by United Merchant Finance Bhd to cease as a party to the consolidated suit. For more than a year thereafter, no remaining party took any further steps in the consolidated suit. Pursuant to O 21 r 2(6), the consolidated suit was deemed discontinued one year later, namely on 6 September 2004. Order 21 r 2(6) to (6B) reads:

> (6) Subject to paragraph (6A), if no party to an action or a cause or matter has, for more than one year (or such extended period as the Court may allow under paragraph (6B)), taken any step or proceeding in the action, cause or matter that appears from records maintained by the Court, the action, cause or matter is deemed to have been discontinued.
>
> (6A) Paragraph (6) shall not apply where the action, cause or matter has been stayed pursuant to an order of court.
>
> (6B) The Court may, on an application by any party made before the one year referred to in paragraph (6) has elapsed, extend the time to such extent as it may think fit.

8 The present action was commenced on 31 March 2006, some 1½ years after the deemed discontinuance and 2½ years after the last step. The present claims are substantially the same as those in the discontinued suit, and are for contribution from the 1st defendant as co-surety for all the sums paid by the plaintiffs to settle the entire amount under the guarantee.

Automatic discontinuance

9 The rationale behind the automatic discontinuance rules was discussed in *Tan Kim Seng v Ibrahim Victor Adam* [2004] 1 SLR 181. The Court of Appeal said at 184-188 that:

> In this connection, we think it is crucial to bear in mind the overall scheme of things under the present Rules of Court. It was put by Lim Hui Min [in her article "*Automatic Discontinuance under*

Order 21 Rule 2, First Dormant, then Dead" published in (2001) 13 S Ac LJ 150] in these terms:

> In the course of the last decade, there has been a major shift in the judicial approach towards the control of litigation proceedings, not only in Singapore, but in other parts of the Commonwealth. The emphasis is now on expedition, economy, and the avoidance of delay in litigation. Disputes will no longer be allowed to drag on for years. Towards this end, the courts in Singapore have adopted the practice of case management. Each case is monitored, and if necessary, the court will intervene to ensure that it proceeds expeditiously. If every action has an indefinite life span from the time it is commenced, and if the court is to adhere conscientiously to its case management philosophy, the burden will continually be on the court to conduct case management exercises (such as pre-trial conferences) in order to monitor dormant suits and to find out why they have become dormant. This is arguably an unnecessary and inefficient use of judicial resources. It seems that the court has now found a solution – in the form of the automatic discontinuance provision – to the problem of having to adhere to its case management philosophy on the one hand, and having to husband scarce judicial resources in doing so, on the other. Under the automatic discontinuance regime, no action will have an indefinite life span. Therefore the court's burden in conducting case management exercises for any one case will be for a finite time-period.

We would only add that the fact that the court takes the initiative of actively conducting case management does not detract from the parties' obligation to comply with the time-lines set in the Rules of Court. No sufficiently persuasive arguments have been advanced to us to demonstrate why O 21 r 2(6) should no longer apply after interlocutory judgment has been obtained when, quite clearly, further steps are still required to be taken to bring the action to completion. Otherwise, it would mean that a party with the benefit of an interlocutory judgment could let the matter of assessment remain outstanding for an indefinite period, a course which is hardly consonant with the modern approach of requiring civil litigation to proceed expeditiously.

…….

The rationale behind O 21 is the maintenance of an efficient judicial system which requires less policing, with the imposition of drastic consequences for tardy litigants. The approach favoured by Ibrahim would make nonsense of the Rules, which on the one hand encourages the plaintiff to proceed with utmost despatch to interlocutory judgment and yet on the other hand allows the party to procrastinate after that. Until the assessment is completed, the suit is still in the court's docket as an outstanding case. The case is not over yet. It would be totally out of sync with the scheme of things under the current Rules of Court to say that once a plaintiff obtains an interlocutory judgment on liability, he can thereafter take his time.

….

To our mind O21 r 2(6) would apply to any case where steps are still required to be taken to obtain a judgment which is enforceable.

10 It is settled law that the rules on automatic discontinuance remain applicable to the stage of assessment of damages after interlocutory judgment has been obtained until the action is brought to completion, ending with a judgment that is enforceable. Counsel for both parties rightly acknowledge that on the facts of this case, the consolidated action (for which two interlocutory judgments were obtained prior to consolidation) had been deemed discontinued pursuant to O 21 r 2(6), which is also the status shown in the court records.

Available steps after deemed discontinuance

11 In my judgment, a plaintiff whose action has been deemed discontinued, has basically three choices: (a) apply for reinstatement of the discontinued action and face the stringent criteria governing reinstatement; (b) avoid the stringent criteria for reinstatement and start a fresh action; or (c) take no further action and accept that his action has been discontinued under the Rules. Obviously, where the limitation period is exceeded, the plaintiff can no longer start a fresh action and the only real alternative left, if he wishes to proceed further, is to try for reinstatement, which will be an uphill task.

12 A party whose action has been deemed discontinued may apply to the court to have the action, cause or matter reinstated under O 21 r 2(8), which stipulates that:

> Where an action, a cause or a matter has been discontinued under paragraph (5) or (6), the Court may, on application, reinstate the action, cause or matter, and allow it to proceed on such terms as it thinks just. (Note: paragraph (6) is the automatic discontinuance O 21 r 2(6) which is set out at [7].

13 The applicable guidelines governing reinstatement of a discontinued action were set out by Judith Prakash J in *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR 429 ("*Moguntia*"). In summary, they are as follows:

> (a) whether the plaintiff is innocent of any significant failure to conduct the case with expedition prior to the trigger date (*i.e.* the date of the last step in the action).
>
> (b) whether his failure to take any step in the action since the trigger date is excusable.
>
> (c) whether the balance of justice indicates that the action should be reinstated.

14 If the answer to any of the above questions is in the negative, then reinstatement will most likely be refused.

15 The above guidelines have their origins in the case of *Rastin v British Steel plc* [1994] 2 All ER 641 ("*Rastin*") where the Court of Appeal had to consider the proper approach to an application to reinstate an action in an English Country Court after the action had been automatically struck off. Saville LJ in *Bannister v SGB plc* [1997] 4 All ER 129 later reconsidered and simplified the guidelines set out in *Rastin*, which formed the basis of those very helpful guidelines laid down by Prakash J.

16 In *Moguntia* ([13] *supra*) at [21], Prakash J further said that:

> "...reinstatement applications have to be carefully scrutinised and that granting such an application should be the exception rather than the rule. … On the other hand, sub-r (8) recognises that there will be from time to time circumstances in which it is right to reinstate the action that has been automatically struck off. In those rare situations, the court will exercise the power granted by the sub-rule."

17 Clearly then, the court requires good reasons before it will exercise its discretion under O 21 r 2(8) to grant a reinstatement. That is rightly so, as the plaintiff is seeking to be excused for his dilatoriness. Further, in a reinstatement, the plaintiff avoids the possibility of an accrued time bar defence. The plaintiff also avoids incurring a liability to pay for the wasted costs of the defendant in the discontinued action. The benefits of any payments into court by the defendant are also retained

by the plaintiff. Thus, the plaintiff enjoys a significant number of advantages with reinstatement, which would not be available to him if he starts a fresh action.

18 In the light of these advantages, the preferred course of action for a plaintiff may well be to try for reinstatement first, and only after reinstatement is refused will he then commence a fresh action. However, there is a downside to this approach depending on the circumstances of the case. First, there is no certainty that the plaintiff will succeed in getting reinstatement, given the stringent *Rastin* guidelines. Second, if he fails in his application for reinstatement, he will incur additional costs. Third, more time will be wasted. Fourth, when the time bar under the Limitation Act is closely approaching, he will be exposing himself to a greater risk of exceeding the limitation period by starting a fresh action *only after* his attempt at reinstatement fails.

19 Hence, the plaintiff has to carefully evaluate whether it is better for him to proceed straightaway with a fresh action. If he knows that he has no good excuse for his dilatoriness and if he believes that he is not likely to succeed with the reinstatement application in any case having regard to the stringent *Rastin* guidelines, it may be more prudent, expeditious and cost-effective for him to proceed immediately with a fresh action, even though (a) he has to pay the defendant's costs for the deemed discontinued action; and (b) the defendant is entitled under O 21 r 5 to apply for a stay of the fresh action until his costs are paid. (It must be noted that the availability of a stay of the fresh action until the defendant's costs are paid does not of itself preclude the plaintiff from bringing the fresh action. A *stay* of an action unless costs are paid is very different from *striking out* an action.)

20 Having regard to the above, should a court dictate to a plaintiff that he must start first with a reinstatement application, and only if he fails, will he be allowed to commence a fresh action? This appeared to be what DJ Toh indicated to the plaintiffs in the present case: see [26] and [27] of DJ Toh's decision, where he struck out the fresh action, gave the plaintiffs liberty to apply for reinstatement of the previous consolidated action and made clear at the same time that he was not closing the door to a scenario of the plaintiffs filing a fresh action after a failed reinstatement application. I disagree that the plaintiffs, who never applied for any reinstatement under O 21 r 2(8) in the first place, should be made to go through such a convoluted process. Neither is there such a mandatory sequential procedure prescribed in the Rules for actions which have been automatically deemed discontinued.

21 In my judgment, it is for the plaintiff to evaluate carefully the courses of action legally available to him after his action is deemed discontinued, including his own chances of success with each course of action. The decision is for the plaintiff to make. The consequences are his to bear. If the plaintiff is not minded to apply for reinstatement, it is not for the court to compel him to take the reinstatement route by striking out his fresh action, with liberty given to him to start a fresh action upon his failure to obtain reinstatement.

Right to commence a fresh action

22 I turn now to consider the right of a plaintiff to commence a fresh action after an automatic discontinuance (or for that matter, after a failed application for reinstatement).

23 As Prakash J had said that reinstatement applications should be the *exception* rather than the rule, there is much force in the contention by counsel for the plaintiffs that consequently, the *normal course* of action for a plaintiff to take after an automatic discontinuance is to apply for a fresh action (provided the time bar has not set in). This appears to be supported by Para 21/5/17 of the Singapore Civil Procedure 2007 at 385 which states that:

> **Fresh proceedings after automatic discontinuance** --- If an action has been automatically discontinued, a second action can **usually** be commenced in respect of the same cause of action, provided that the limitation period has not expired. See O.21, r.4 (as amended by r.3 of the Rules of Court (Amendment) Rules 2000), and *Gardner v. Southwark London Borough Council (No. 2)* [1996] 1 W.L.R. 561, CA). This is subject to costs being payable by the plaintiff upon automatic discontinuance of the action. … However, the court has a discretion to strike out a subsequent action (*i.e.* brought after the discontinuance of the earlier action) which amounts to an abuse of process. (see *Ansa Teknik (M.) Sdn. Bhd. v. Cygal Sdn. Bhd*. [1989] 2 M.L.J. 423.) (emphasis mine.)

24 Counsel for both parties do not dispute that there is no prohibition in the Rules against a plaintiff recommencing the same or substantially the same action after an automatic discontinuance. It must also be borne in mind that no leave of court is required to issue a fresh writ action under O 6, whether or not there has been an earlier automatic discontinuance.

25 As such, the proper question in my view is not whether the plaintiff has the right to commence the fresh action but whether the fresh action is liable to be struck out under the inherent powers of the court or under O 18 r 19.

26 The next obvious question is whether the principles for reinstatement are the same as those for striking out a recommenced action under O 18 r 19? In my view, they are quite different, though some of the relevant factual considerations may be applicable to both reinstatement and striking out. It is therefore important to recognise that the *Rastin* guidelines as modified by Prakash J for determining reinstatement are not quite the same as the well-known principles for striking out.

27 Very broadly, I am inclined to think that it is more difficult for the plaintiff to satisfy the *Rastin* guidelines for reinstatement than it is for him to show that the defendant has not established any ground for striking out the plaintiff's fresh action. Since the plaintiff has paid the price so to speak and has been penalised for the defendant's costs in the automatically discontinued action, I do not see a need to impose on him those more stringent criteria (applicable for reinstatement) when he simply wants to start afresh with a new action based on the same or substantially the same cause of action. Compared to reinstatement, it may on the whole be easier for the plaintiff to prevent his fresh action from being struck out. This stems in part from the significant difference in the evidential burden: in a reinstatement application, the burden falls on the plaintiff to show that he has satisfied the *Rastin* guidelines, whereas in an application to strike out a recommenced action, the burden falls instead on the defendant to satisfy the requirements for striking out. Hence, while the plaintiff may not succeed in obtaining reinstatement, the defendant on the other hand may also not succeed in striking out the plaintiff's fresh action (brought after an automatic discontinuance).

28 Ms Lim Hui Min ("Miss Lim") in her article *Automatic Discontinuance under Order 21 Rule 2, First Dormant, then Dead* (2001) 13 S Ac LJ 150 discusses the commencement of fresh proceedings after deemed discontinuance at 184-185 as follows:

> If an action has been automatically discontinued, a second action can usually be commenced in respect of the same cause of action, provided that the limitation period has not expired… However, if a plaintiff intends to allow the action to be automatically discontinued at a late stage of the proceedings, with a view to commencing fresh proceedings, this may amount to an abuse of the court process, if the motive behind the plaintiff's actions was to avoid the outcome of the automatically discontinued proceedings. In addition, the defendant may suffer prejudice in terms of the time, costs and effort which he has expended in defending the automatically discontinued proceedings. The court has a discretion to strike out a subsequent action (ie brought after

discontinuance of the earlier action) which amounts to an abuse of process. (See *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd*). It is suggested that, if the court would like to discourage abuse of the court process in the manner described in this paragraph, the court should take a more robust approach (if the circumstances so justify) in holding that the plaintiff's conduct in starting fresh proceedings, after an action has been automatically discontinued, amounts to an abuse of the court process and that the fresh proceedings should therefore be prohibited.

29 The above discussion must be seen in the context of a striking out application made after the fresh action has commenced. Technically, there is no prohibition as such against the commencement of any fresh action (even when the time bar defence exists) by way of issuing and serving a fresh writ, except that the fresh action (just as it is with any other action) may be struck out if the grounds for striking out can be made out by the defendant.

Striking out an action under O 18 r 19

30 Order 18 r 19 provides that:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
>
> **19.** —(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses **no reasonable cause of action** or defence, as the case may be;
>
> (b) it is **scandalous, frivolous or vexatious**;
>
> (c) it may **prejudice, embarrass or delay the fair trial** of the action; or
>
> (d) it is otherwise **an abuse of the process** of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be. (emphasis added)

31 The courts clearly have the power to exercise its discretion to strike out any recommenced action if it finds that any of the grounds (a) to (d) above are made out by the defendant. In deciding whether grounds (b), (c) or (d) are made out, all the relevant facts and circumstances of the case must be considered. Each case must be decided on its own set of facts and circumstances.

Application to strike out the recommenced action

32 I shall now deal with the 1st defendant's application to strike out the fresh action under O18 r 19. The main grounds relied on by the 1st defendant are limbs (a), (b) and (d) of O 18 r 19 that the plaintiffs' fresh action does not disclose a reasonable cause of action, is scandalous, frivolous or vexatious and/or is an abuse of the process of the court.

33 As interlocutory judgments had been successfully obtained before the consolidated action was deemed discontinued, it can hardly be said that the present action, based largely on the same cause of action, is scandalous, frivolous or vexatious. Clearly, a reasonable cause of action has been disclosed. Hence, I shall now deal primarily with the issue of whether there has been an abuse of the process of the court under limb (d) of O18 r 19.

Abuse of process

34 Belinda Ang J. in *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR 644 ("*Kwa Ban Cheong*") said at [25] and [27] that:

> What is required to ascertain whether an action is an abuse of process is a broad, merits-based judgment which takes account of private and public interests and all the facts of the case.
>
> ……
>
> Given the nature of the rule, it would be unwise to try and define fully the circumstances which can be regarded as an abuse of the process or to fix the categories of abuse. Each case must depend upon all the relevant circumstances.

35 The case of *Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd* [1989] 2 MLJ 423 cited to me is one example where even the motive behind the plaintiff's actions was a circumstance taken into account. There the plaintiffs discontinued their action for a debt after the defendant had been given unconditional leave to defend, and commenced winding up proceedings against the defendants in respect of the same debt. Vohrah J ruled that the plaintiffs had abused the court process by employing the winding up procedure to embarrass the defendants and to circumvent the normal course of going to trial on the debt, which on the evidence showed a *bona fide* dispute. Accordingly, Vohrah J struck out the winding up petition.

36 Hence, all relevant facts and circumstances must be considered before the court exercises its discretion to strike out a fresh action commenced after an automatic discontinuance on the ground that it is an abuse of process. The jurisdiction to strike out a statement of claim, whether under the Rules or under the inherent jurisdiction of the court, is only exercised in a plain and obvious case: see *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR 517 at [12] of the decision of the Court of Appeal.

37 It is trite law that the court's power to strike out an action is a draconian one, and should not be exercised too readily unless the court is convinced that the plaintiffs' case is wholly devoid of merit: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374. The Court of Appeal explained at [22] that:

> The term, 'abuse of the process of the Court', in O18 r 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose, as was raised by the respondents. In *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

38 In *Kwa Ban Cheong* ([34] *supra*) at [29] , Belinda Ang J said:

> The power is to be exercised with caution before striking out or dismissing any proceedings on

the ground of abuse of process of the court. This is a drastic step as it will deprive a litigant of the opportunity to have either his claim or defence tried by the court: *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547 at 553. The onus of proving an abuse of process lies firmly on the party alleging it: Lord Millet in *Johnson v Gore* at 118; Sir David Cairns in *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 at 138.

Is a fresh action *per se* an abuse of process when no prior reinstatement action has been made?

39 Is it *per se* an abuse of the process of the court if the plaintiff chooses not to proceed with the reinstatement application but starts immediately with a fresh action? I do not think so. As I have stated before, there is nothing in the Rules which expressly preclude him from starting a fresh action after a deemed discontinuance under O 21 r 2 (6) **without first applying for reinstatement.** Second, the availability of a fresh action on the same or substantially the same cause of action or in short, a "*recommencement*" after a deemed discontinuance is in my view a part of the legal process. The effect of the deemed discontinuance is that the action is merely deemed to have ceased, not dismissed. Hence, there is no *res judicata* and a fresh suit may be commenced on the same facts.

40 As such, I cannot see how the *bona fide* use of an available process of recommencement for the *first time* after the deemed discontinuance is an abuse of process. Of course, if the plaintiff repeatedly allows the matter to be discontinued and repeatedly starts a fresh action each time without any good reason, I will be inclined to find that an abuse of the court process has taken place and strike out the fresh action on an O18 r 19 application by the defendant on the basis that the repeated litigation on the same subject matter was not brought *bona fide* for the legitimate purpose of accessing the courts to secure for himself an enforceable judgment on the basis of a valid claim, but for some ulterior or collateral purpose which is to unjustly harass, vex or oppress the defendant and to put him through unwarranted anxiety and expense. However, the present case before me is nowhere near the hypothetical factual scenario I painted.

41 Can the fresh action be struck out for abuse of process simply on the basis that the same issues were litigated previously in the discontinued suit? I do not think so. O 21 r 4 provides that the fact that the plaintiff is deemed to have discontinued an action shall not be a defence to a subsequent action for the same, or substantially the same, cause of action. This clearly indicates to me that the commencement of a fresh action with the same or substantially the same claims as the one that was automatically discontinued is *per se* not an abuse of process since the Rules have expressly ruled that out as an available defence.

42 The court can of course in a proper case, find an abuse of process where the plaintiff tries to re-litigate an issue which has been decided *against* him in an earlier action. Public policy dictates that there should be finality in litigation. However, this is not a case of the plaintiff, being faced with a decision which for all practical purposes has been decided in a manner unfavourable to him, attempting to have a second bite at the cherry to see if he can "reverse" the decision made *against* him by filing a fresh suit based on the same issues and subject matter. If that were the case, then I would be minded to strike it out as it is an abuse of process to mount a collateral attack on the earlier decision, which has been finally decided *against* him. On the contrary, here is a case where the plaintiffs have already obtained interlocutory judgments. The fresh action, which the plaintiffs had to commence because of the automatic discontinuance, cannot by any stretch of the imagination be said to be an attack on any earlier decision *against* them, but is in reality, an action to "affirm" the earlier interlocutory judgments obtained, and thereafter to proceed with the assessment of the 1st defendant's contribution. The plaintiffs cannot be said to have deliberately allowed the proceedings to lapse into automatic discontinuance because they were trying to avoid some unfavourable outcome in

the discontinued suit. I think the plaintiffs would rather not have had the automatic discontinuance triggered as they could then have immediately proceeded with the assessment of contribution, without being put through all the trouble and expense of filing a fresh suit. The plaintiffs have paid the price for their dilatoriness by having to compensate the defendant for the wasted costs incurred in defending the discontinued suit. All that can really be said is that the plaintiffs should have been more vigilant and should have proceeded more diligently to have the contribution assessed and should not have allowed the matter to go to sleep for more than a year. But that in my view, cannot amount to an abuse of process such that their recommenced action, which clearly on the facts had merits, should be struck out. That would indeed be draconian as that would shut the plaintiffs from access to the courts for what appears to me to be legitimate claims for contribution against the 1st defendant under the guarantee.

Inherent jurisdiction of the court

43 Order 92 r 4 states:

> **Inherent powers of Court**
>
> For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

44 I have also examined whether or not the 1st defendant has suffered any injustice by the plaintiffs taking out a fresh action after a deemed automatic discontinuance having regard to all the relevant facts and circumstances of this case. The burden again is on the 1st defendant to show what injustice he has suffered and he has failed to discharge it. Since there has also been no abuse of the process of the court (see [34] to [42]), there is no reason for me to exercise my inherent powers to strike out the plaintiffs' fresh action.

Res judicata and issue estoppel

45 The 1st defendant contends that the plaintiffs are precluded from bringing this action by reason of the doctrine of *res judicata*, issue estoppel or abuse of process because the present suit is substantially on the same issues as the discontinued suit. With interlocutory judgments entered against the 1st defendant, the issue of liability had been determined. As such, the 1st defendant argues that the plaintiffs are now estopped and precluded form re-litigating the issue of liability. Essentially, the 1st defendant is saying that on the facts of this case, the plaintiffs' fresh action should be struck out as an abuse of process because *res judicata* or issue estoppel operates. I disagree. There is no issue estoppel as the plaintiffs are not re-litigating an issue that has been decided *against* them. See [56]. On the contrary, the liability issue has been determined in the plaintiffs' favour. Second, as the action ended in a discontinuance, not all the rights in the action have been finally disposed of and *res judicata* is not applicable to bar a fresh action on the same, or substantially the same facts. If the 1st defendant is correct that *res judicata* applies, then every such fresh action must be struck out and essentially, no action can ever be started by a plaintiff in all cases of automatic discontinuance, including those triggered *after* interlocutory judgment has been obtained. In my view, the plaintiff in such a case will be severely prejudiced by his mere inaction for more than a year, which precipitates an automatic discontinuance. Automatic discontinuance rules are not meant to operate in a way that creates injustice. It is simply too draconian to deny a plaintiff the chance to restart an action after automatic discontinuance, in particular where the merits of the

plaintiff's case are amply borne out by the interlocutory judgments earlier obtained in the discontinued action.

46 Counsel for the plaintiffs cited the following cases to show that the plaintiffs have a right to commence a fresh action unless the discontinuance is done on terms which prohibit the commencement of a fresh action.

47 In *Tong Guan Food Products Pte Ltd and Others v Teo Cheow Ngoh and Another* [2004] SGHC 261 Woo Bih Li J observed in dealing with the defendant's contention that the plaintiff's second suit was an abuse of process:

> As regards a point taken by Mr Andy Lem, counsel for EH, that the plaintiffs' claims are an abuse of process of court because Tong Guan had commenced and discontinued Suit No 609 of 2000 ("Suit 609") against Mdm Teo for substantially the same reliefs as in the present action, this point is a non-starter. It is the right of a plaintiff to commence a fresh action unless the discontinuance is done on terms which prohibit the commencement of a fresh action. Therefore, while the fact of and circumstances leading to the discontinuance may be used to attack the plaintiff's credibility, it is not an abuse of process to file a fresh action unless the same is prohibited. There was no suggestion that Suit 609 was discontinued on terms that prohibited a fresh action.

48 *Hendrawan Setiadi v OCBC Securities Ltd and Others* [2001] 4 SLR 503 was a case where the plaintiff applied under O 21 r 3 for leave to discontinue the action. Order 21 r 3 states as follows:

> **Discontinuance of action, etc., with leave (O. 21, r. 3)**
>
> 3. —(1) Except as provided by Rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against all or any of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.
>
> (2) An application for the grant of leave under this Rule may be made by summons.

49 Woo Bih Li JC denied the application, ordered the plaintiff's claim against the 1st defendants to be struck out, and costs to be paid to the 1st defendants. He found that notwithstanding that the order did not expressly preclude the plaintiff from commencing a fresh action, the facts and circumstances showed that the order given was intended to preclude any fresh action. This case may be distinguished from automatic discontinuance cases where a fresh action is not precluded under the Rules.

50 These two cases cited by counsel for the plaintiffs are helpful to show that where the court in granting leave to a plaintiff to discontinue an action has not imposed any term prohibiting a fresh action, then the plaintiff has a "right" to commence a fresh action. On the flip side, where the court has specifically ordered or directed that there shall be no commencement of any fresh action after leave is granted for discontinuance, but the plaintiff in defiance of that court order, commences a fresh action nevertheless, then the fresh action is indeed an abuse of the process of the court and will be struck out. The court obviously will not countenance any disobedience of its orders.

51 However in cases of automatic discontinuance under the Rules, **which do not expressly**

prohibit any fresh action, the plaintiff should also have a similar "right" to commence a fresh action based on the same facts and the same causes of action by way of analogous reasoning. If so, then it will be quite an absurdity that exercising that "right" can *per se* amount to an abuse of process such that the fresh action should be struck out.

No reasons offered by plaintiffs for their dilatoriness

52 DJ Toh at [20] of his decision disagreed with the submission of plaintiffs' counsel that in commencing a fresh action, the plaintiffs do not need to explain the reasons for their dilatoriness which led to the discontinuance. In other words, they have an absolute right to recommence fresh proceedings. DJ Toh said:

> Under the paradigm of court-directed case management, the Court needs to examine the facts and circumstances under which the previous suit was discontinued before deciding on whether the Plaintiff can be allowed to proceed with his recommenced action.
>
> On the facts of the present case, the action was deemed discontinued at a very late stage of the proceedings after interlocutory judgment had been obtained following a series of contested hearings and appeals. Despite the 1st Defendant withdrawing of the appeal on 28 March 2001 against the Deputy Registrar's order, nothing was done by the Plaintiffs to move things towards the assessment. After 5 years of inaction by the Plaintiffs, a fresh action is recommenced by the Plaintiffs in 2006 on the same reliefs and seeking interlocutory judgment again.
>
> To my mind, these facts I have cited call for an explanation from the Plaintiffs to the Court as to why the Court should allow the Plaintiff to re-litigate matters after 4 years of deemed discontinuance at such a late stage of proceedings. Interlocutory judgment had been earlier obtained and the Plaintiffs are applying for it all over it again. No effort was made by the Plaintiff in the previous action before the expiry of the one year period to apply for an extension of time under Order 21 r 2 (6B).
>
> The Plaintiff explanation before the Deputy Registrar that it was "more expeditious" to commence an fresh action then to apply for reinstatement was bordering on the ludicrous, especially given the fact that the time frame from commencement of the present action to the Plaintiffs taking out the summons for interlocutory judgment was 8 months. Should an application for reinstatement of the previous action been successful, it would have restored the interlocutory judgement previously obtained in a much shorter time frame.

53 I do not think that the above reasoning is correct for several reasons. First, DJ Toh incorrectly assumed that the period of inaction was 5 years when it was in fact only about 2½ years. This in part influenced his decision. Second, this is an application to strike out the plaintiffs' fresh action, where the burden is not on the plaintiffs but on the 1st defendant to show that there is an abuse of process. This is not an application by the plaintiffs for reinstatement of the discontinued suit, in which case it is the plaintiffs' burden to show that they satisfy the *Rastin* guidelines and they have good reasons for the delay in prosecuting their action. By faulting the plaintiffs' reticence to explain their dilatoriness, it appears that DJ Toh placed the burden on the plaintiffs when it should be on the 1st defendant to establish that there is an abuse of process on the part of the plaintiffs to strike out the fresh action. Obviously, when the plaintiffs do not have any good reasons, they will not attempt to give any explanation. That is probably why the plaintiffs here did not apply for reinstatement where they would be hard put to justify their inaction. They decided in their own best interest to start a fresh action, where the burden is then placed on the 1st defendant to establish a

case of abuse of process. Third, if the plaintiffs are forced to apply for reinstatement (which is not likely to succeed), and then start a fresh action after reinstatement fails, it is going to involve far more delay in my view. Hence, I do not think it is ludicrous under the circumstances for the plaintiffs' counsel to submit that it is more expeditious for them to commence a fresh action. At the appeal, counsel for the plaintiffs stated in their submission that the delays were occasioned not so much by the inaction of the plaintiffs but by the change of counsel, and also by the then counsel's mistaken view of the law that the automatic discontinuance provisions were not applicable to the consolidated action since interlocutory judgments had been obtained. As these were from the bar and not put on affidavit, I disregarded them. In any event, these are poor excuses. I cannot see how a change of counsel within the firm handling the file or even a change of the firm of solicitors handling the matter can account for inaction for 2½ years. The second excuse is worse. Is counsel saying that because he thought the automatic discontinuance provisions do not apply he can then adopt a lackadaisical attitude and take as long as he likes to take the next step in the proceedings? If these reasons were advanced for a reinstatement hearing, I would not have allowed a reinstatement. Fourth, even if there were dilatoriness, lethargy and absence of good excuses on the part of the plaintiffs which resulted in an automatic discontinuance, such conduct must not be equated with wilful or contumacious disobedience such that the subsequent fresh action should be struck out by the court. For this proposition, the case of *Gardner v Southwark L.B.C. (No.2) (CA)* [1996] 1 W.L.R. 561 ("*Gardner*") is particularly pertinent. The Court of Appeal in *Gardner* dealt with three appeals: two cases where the actions were automatically struck out, the subsequent reinstatement applications failed, and fresh actions were filed; and one case where the action was automatically struck out, no reinstatement application was made, and a fresh action was filed. The courts below struck out the plaintiffs' fresh actions in all three cases. The common issue in the three cases before the Court of Appeal was whether a second action, having the same reliefs as the first action and commenced within the limitation period after the plaintiff suffered an automatic striking out of his first action under Ord 17, r.11 of the County Court Rules 1981 in UK, was liable to be struck out in its turn as an abuse of the process of court. The Court of Appeal held that it was not and allowed all three appeals. Waite LJ said at 567:

> No contumely, no contumacious conduct (assuming that there be any difference between the two) and no contempt or defiance of the court's orders is involved in the process of suffering an automatic strike-out of proceedings. There may well be, of course, circumstances showing dilatoriness or absence of excuse which disqualify the plaintiff from obtaining reinstatement of his action on the principles approved in the *Rastin* case [1994] 1 W.L.R. 732, but that is a very long way from saying that such a shortcoming amounts to disobedience or defiance of the kind that is involved when the first action has been struck out for failure to comply with an unless order. In the former case, the mere march of time past the milestones set in the automatic directions programme has deprived the plaintiff of his action. In the latter, the court has made an order specifically addressed to the plaintiff (or other party concerned) demanding performance of a step which, if disobeyed, amounts to a contempt of court and becomes the subject of the punitive sanction of dismissal of the suit. The discretion to strike out for abuse is never excluded, and I support the submission of Mr Aylen to the effect that there is a retained discretion to deal with the kind of exceptional circumstances to which I have already referred. On those grounds I would, for my part, allow this appeal.

54 Sir Thomas Bingham MR agreed with Waite L.J. and added at 570:

> It is therefore asked: is automatic striking out under Ord. 17, r.11(9), in the context of this new regime, to be treated as if it were contumacious disobedience; or should the plaintiff be treated as if, in the absence of any contumacious disobedience, an action had been dismissed for want of prosecution when the plaintiff was still in time to proceed again and had now done so? In the

latter situation it is, I think, clear that the plaintiff could proceed again.

The object of the new procedural regime, as counsel for the defendants have urged, is quite plain. It has been described in earlier cases. It is intended to encourage the expeditious conduct of litigation and strongly to discourage delay. But as it seems to me, a plaintiff who for reasons of negligence, ignorance, dilatoriness, lethargy or mistake fails to apply for a hearing date before the guillotine date and so suffers the consequences of Ord. 17, r. 11(9), cannot be treated as if he were guilty of wilful or contumacious disobedience. The rules do not vary the ordinary rules which the court has habitually observed, and nothing short of a clear provision should, in my judgment, deprive a plaintiff of what is otherwise a potentially important right.

Application for interlocutory judgment on the fresh action

55 The plaintiffs applied for interlocutory judgment on their fresh action (the present action) on three independent grounds, namely:

(a) that the 1st defendant is estopped from disputing his liability to pay the plaintiffs' contribution, to be assessed, as due from the 1st defendant as co-surety under the guarantee, which has been previously determined by the court in two interlocutory judgments in favour of the plaintiffs;

(b) that the 1st defendant has admitted his liability to pay the plaintiffs contribution as due from the 1st defendant as co-surety under the guarantee; and

(c) that there are merits in the plaintiffs' application based primarily on the terms of the guarantee signed by the plaintiffs and the 1st defendant as guarantors for the company's mortgage to the bank.

56 Issue estoppel precludes a party from contending the contrary of any precise point which, having once been distinctively put in issue, has been finally determined against him: see *Xiamen International Bank & Ors v Sing Eng (Pte) Ltd* [1993] 3 SLR 228 at 234. Here the issue of liability has been previously determined against the 1st defendant as a result of the two earlier interlocutory judgments on the same or largely the same claims, saving the issue of the quantum of contribution for the assessment. Hence, the 1st defendant is estopped from raising any issue in his defence to the contrary that he is not liable for contribution. Apart from the defence of abuse of process in commencing the fresh action (which has failed), he cannot now dispute his liability for contribution in the substantive defences he has pleaded in the present action, though he is not estopped from disputing the quantum of his contribution at the assessment. Accordingly, I granted interlocutory judgment for the 1st defendant's contribution to be assessed.

Conclusion

57 In the result, I allowed the two appeals by the plaintiffs and dismissed the 1st defendant's striking out application and entered interlocutory judgment for the plaintiffs' claim in this recommenced action.