Falmac Ltd *v* Cheng Ji Lai Charlie and another matter
[2014] SGCA 42

Case Number	: Originating Summons No 1125 of 2013 and Summons No 1410 of 2014
Decision Date	: 01 August 2014
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Alfred Dodwell and Tay Chie Chiang (Dodwell & Co LLC) for the plaintiff; Tan Teng Muan and K Balachandran (Mallal & Namazie) for the defendant.
Parties	: Falmac Ltd — Cheng Ji Lai Charlie

Civil Procedure – appeals – extension of time

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2013] SGHC 113.]

1 August 2014

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 Falmac Limited ("the Plaintiff") filed Originating Summons No 1125 of 2013 ("OS 1125") on 19 November 2013 for an extension of time to file a Notice of Appeal against the decision of the High Court judge ("the Judge") in *Falmac Limited v Cheng Ji Lai Charlie* [2013] SGHC 113 ("the HC Judgment").

2 Although the law in this area is well-settled, the grounds relied upon by the Plaintiff for the late application – which came close to six months after the HC Judgment had been delivered or close to five months after the deadline for filing the Notice of Appeal had lapsed – were unusual, particularly in the context of the procedural history and background of the dispute. Essentially, the Plaintiff wanted to rely on two favourable foreign judgments issued some five months after the HC Judgment was issued. It claimed that the two foreign judgments supported its action in the High Court and would therefore support its position on appeal.

3 We dismissed, after hearing oral arguments, OS 1125 as well as Summons No 1410 of 2014 ("SUM 1410"), which was a related summons to adjourn the hearing for OS 1125 before this court pending the result of an appeal against the two foreign judgments in the foreign court. We now set out the detailed grounds for our decision.

Background

4 Cheng Ji Lai Charlie ("the Defendant") was a former director and Chief Executive Officer of the Plaintiff. The main action in the High Court was essentially a claim by the Plaintiff against the Defendant for numerous breaches of fiduciary duties by the Defendant. The proceedings initially involved four other defendants but the actions against them were discontinued.

5 One of the alleged breaches was in relation to the Defendant's involvement in the Plaintiff's disposal of two of its subsidiaries in Tianjin, People's Republic of China ("the PRC") to a company

known as Sino Vision (HK) Ltd ("Sino Vision"): Falmac Machinery (Tianjin) Ltd ("FM") and Falmac Textile (Tianjin) Co Ltd ("FT").

6 The trial was heard over three tranches. The first was in July 2011, the second was in September 2012, and the last was a day in November 2012. The HC Judgment dismissing the Plaintiff's claim and awarding the Defendant about $1.33m in his counterclaim was given on 23 May 2013. No appeal was filed within the one-month window period.

7 On 19 November 2013, the Plaintiff filed OS 1125 and its articulated reason for an extension of time to file an appeal nearly six months after the HC Judgment was delivered was that it now had two favourable judgments ("the Tianjin judgments") issued by the Higher People's Court of Tianjin ("the Tianjin court") on 17 October 2013, some five months after the HC Judgment was delivered.

8 A little more background should be given of the proceedings in Tianjin. On 26 June 2012, which was after the end of the first tranche but prior to the start of the second tranche of the High Court trial, the Plaintiff commenced two proceedings in the Tianjin court against Sino Vision. The two proceedings were essentially for the same reliefs, albeit in respect of each subsidiary, *ie*, FM and FT. The reliefs sought by the Plaintiff were for the share transfer agreement which had vested ownership of FM and FT in Sino Vision to be held null and void, restitution to the Plaintiff of the shares transferred to Sino Vision, compensation, and costs. The Defendant was not a party to the two Tianjin proceedings.

9 The Plaintiff claimed that the Tianjin judgments held that the Defendant had acted dishonestly and that the transfer of FM and FT to Sino Vision had been procured by fraud. On that basis, the Plaintiff believed that it had a strong chance of succeeding if it was permitted to file an appeal against the HC Judgment. Its secondary reason as to why its request for an extension of time ought to be allowed was that evidence of the dishonest conduct of the Defendant, which was an integral aspect of the Plaintiff's claim for breach of fiduciary duties, had not been brought to the High Court's attention.

10 As the Tianjin judgments were the subject of an appeal that was scheduled to be heard by the Supreme People's Court of the PRC on 28 April 2014, the Plaintiff also filed SUM 1410 on 18 March 2014, seeking an adjournment of OS 1125 until after the appeals against the Tianjin judgments had been heard by the Supreme People's Court of the PRC.

The issue

11 The only issue before us was whether the Plaintiff's conduct warranted this court's indulgence. The law in that regard, to which we shall turn momentarily, is well-settled. The determination of SUM 1410 largely hinged on our decision on OS 1125.

The applicable legal principles on extension of time

12 Whether or not this court will extend the time for the filing of a Notice of Appeal depends on the application of four factors:

(a) the length of delay;

(b) the reasons for the delay;

(c) the chances of the appeal succeeding if time for appealing were extended; and

(d) the prejudice caused to the would-be defendant if an extension of time was in fact granted.

13 This court in *Lai Swee Lin Linda v AG* [2006] 2 SLR(R) 565 ("*Lai Swee Lin Linda*") explained the four factors (at [45]) as follows:

> The applicable principles governing the jurisdiction of the court to extend the time for filing and/or serving a Notice of Appeal were laid down, most notably perhaps, by the decision of this court in *Pearson Judith Rosemary v Chen Chien Wen Edwin* ("*Pearson*") [1991] 2 SLR(R) 260. The court there held (at [20]) that "the application ... for an extension of time ... should be on grounds sufficient to persuade the court to show sympathy to him". In this regard, four factors have been utilised by the courts to ascertain whether or not the court should be so persuaded. These include the length of delay; the reasons for the delay; the chances of the appeal succeeding if time for appealing were extended; and the prejudice caused to the would-be Defendant if an extension of time was in fact granted: see *Pearson* at [15]; *Hau Khee Wee v Chua Kian Tong* [1985-1986] SLR(R) 1075 at [14]; *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* [1998] 3 SLR(R) 927 at [24]; *Tan Chiang Brother's Marble (S) Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2002] 1 SLR(R) 633 at [27]; *AD v AE* [2004] 2 SLR(R) 505 at [10]; as well as *Ong Cheng Aik v Dayco Products Singapore Pte Ltd* [2005] 2 SLR(R) 561 at [8] and [11]. When applying these factors, the overriding consideration is that the Rules of Court must *prima facie* be obeyed, with reasonable diligence being exercised: see the Privy Council decision of *Thamboo Ratnam v Thamboo Cumarasamy and Cumarasamy Ariamany d/o Kumarasa* [1965] 1 WLR 8 ("*Ratnam v Cumarasamy*") at 12 and the Singapore High Court decision of *Tan Chai Heng v Yeo Seng Choon* [1979–1980] SLR(R) 658 at [5]. This court has also pointed out, in *The Melati* [2004] 4 SLR(R) 7 at [37] that the "paramount consideration" is the need for finality. It should be borne in mind, in this regard, that the would-be appellant has already "had a trial and lost": see *Ratnam v Cumarasamy*, *supra* at 12. Hence, if no appeal is filed and served within the prescribed period (here, of one month), the successful party is justly entitled to assume that the judgment concerned is final: see *Ong Cheng Aik v Dayco Products Singapore Pte Ltd*, *supra* at [8].

14 The principles set out above were endorsed by this court in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 ("*Lee Hsien Loong*") at [18]. We also noted in that case (at [19]) that the emphasis *in the first instance* is invariably on the first two factors:

> The four factors set out above were first enunciated by Chan Sek Keong JC (as he then was) in the seminal High Court decision of *Hau Khee Wee v Chua Kian Tong* [1985-1986] SLR(R) 1075 ("*Hau Khee Wee*"). *In our view, it is significant that of the four factors*, ***the emphasis, in the first instance at least, is invariably on the first two*** , *viz*, ***the length of delay and the reasons for the delay. This is not surprising because the third factor*** *(viz, the chances of the appeal succeeding if time for appealing were extended)*, ***whilst of equal importance relative to the other three factors, is set at a very low threshold in fairness to the Plaintiff – namely, whether the appeal is "hopeless"*** (see the decision of this court in *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 2 SLR(R) 926 ("*Nomura*") at [32]). [emphasis added in italics and bold italics]

15 In so far as the *fourth* factor was concerned, that is, whether the prejudice caused to the would-be defendant if an extension of time was in fact granted, this court observed thus (see *Lee Hsien Loong* at [24]–[27]):

> 24 The fourth factor … would also depend very much on the precise facts before the court.

However, we view it as being of some significance. As Woo Bih Li J put it in the decision of this court in *Wee Soon Kim Anthony v UBS AG* [2005] SGCA 3 ("*Wee Soon Kim Anthony*") at [53]–[54]:

We would say at the outset that the prejudice referred to in the four factors is the prejudice to the would-be respondent if an extension of time were granted and not the prejudice to the would-be appellant if the extension were not granted. This is clear from [*Hau Khee Wee* [1985–1986] SLR(R) 1075] and [*Pearson Judith Rosemary v Chen Chien Wen Edwin* 1991] 2 SLR(R) 260]. After all, the application for an extension of time arises out of the would-be appellant's default and not the default of the would-be respondent.

Furthermore, the prejudice cannot possibly refer to the fact that the would-be appellant would be deprived of his right of appeal if the extension were not granted. Otherwise, it would mean that in every case where an extension of time is sought by a would-be appellant, there would inevitably be prejudice to him.

25 However, as is the case with the second factor, the prejudice alleged must be tangibly proven. As this court observed in *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 3 SLR(R) 355] at [44]:

The 'prejudice' cannot possibly refer to the fact that the appeal would thereby be continued, if the extension is granted. Otherwise, it would mean that in every case where the court considers the question of an extension of time to file notice of appeal, there is prejudice. We endorse the views expressed in this regard by Woo Bih Li JC in *S3 Building Services Pte Ltd v Sky Technology Pte Ltd* [2001] SGHC 87. *The 'prejudice' here must refer to some other factors, eg change of position on the part of the Defendant pursuant to judgment*. [emphasis added]

See also *Wee Soon Kim Anthony* ([24] *supra*) at [55].

26 Nor can the respondent argue that there has been prejudice by virtue of the fact that it would be unable to obtain the benefits of the judgment until the disposal of the appeal. As has been observed by this court in *Ong Cheng Aik v Dayco Products Singapore Pte Ltd* [2005] 2 SLR(R) 561 ("*Ong Cheng Aik*") at [19], "[i]n any event, post-judgment interest should take care of that".

27 Further, in the High Court decision of *S3 Building Services Pte Ltd v Sky Technology Pte Ltd* [2001] SGHC 87 (affirmed by the Court of Appeal in *S3 Building Services Pte Ltd v Sky Technology Pte Ltd* [2001] 3 SLR(R) 213, but without any specific comment on this particular point), Woo Bih Li JC (as he then was) observed at [69] that "the prejudice must be one that cannot be compensated by an appropriate order as to costs".

16 Bearing in mind that the precise facts and circumstances of each case are all-important, the assessment of the four factors is, in the final analysis, guided by the need for *an integrated and holistic* approach (see *Lee Hsien Loong* at [28]).

17 It is precisely because every case is different that the law also takes a calibrated approach in promoting the value of *finality*. Thus, there exists in the law a distinction drawn between an application for an extension of time to file a Notice of Appeal out of time (as here) and an application for an extension of time with respect to other situations (such as the filing of affidavits of evidence-in-chief out of time with regard to a pending action). We need only refer to our following observations in *Lee Hsien Loong* (at [33]–[35]):

33 It is clear, therefore, from the [case law], that the courts will adopt a far stricter approach towards applications for extension of time for the filing and/or serving of a notice of appeal relative to other situations. This is not without good reason. The overriding concern in the context of *appeals* is that there be *finality*. Indeed, the one-month deadline for the filing of a notice of appeal is not an arbitrary one. Underlying the concern with finality is the fundamental rationale of *justice and fairness*. The decision concerned has, *ex hypothesi*, gone against the losing party (*ie*, the would-be appellant), and the onus is therefore on it to file an appeal if it feels that the decision is wrong. Correspondingly, the other party (the would-be respondent), having had the decision handed down in its favour, should not be kept waiting – at least, not indefinitely – on tenterhooks to receive the fruits of its judgment. For better or for worse, the applicant must decide whether or not it wishes to appeal.

…

35 The present system is eminently just and fair. Indeed, if the losing party is unsure whether or not to appeal against the decision, it can always file its notice of appeal first. Such notice can later be withdrawn if it is so desired. Alternatively, the appeal can be allowed to lapse. This being the case, it is clear that if the losing party drags its heels or is otherwise lackadaisical about its right to appeal, then it cannot legitimately ask the court for an extension of time to appeal. This is logical, commonsensical as well as (above all) just and fair. In the oft-cited words of Lord Guest in [*Ratnam v Cumarasamy* [1965] MLJ 228] at 229:

The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. ***If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a [timetable] for the conduct of litigation*** . [emphasis added in bold italics]

[emphasis in original]

Our decision

OS 1125

The length of delay

18 The delay involved in the present proceedings – the time between the last day for filing the Notice of Appeal and the commencement of OS 1125 – was close to *five months*. Whilst five months is a slightly shorter period compared to the delay in *Lee Hsien Loong* which was almost seven months and which was described (at [52]) as "[appearing] to be unprecedented in local case law" and (at [53]) as being "*nothing short of extraordinary*" [emphasis in original], the delay here can hardly be considered ordinary.

19 On its own, this factor militated against the Plaintiff's application, but, needless to say, it was not conclusive.

The reasons for the delay

20 Given the long delay, the Plaintiff needed to furnish very good reasons to persuade us that the indulgence of this court was merited. However, the articulated reason was woefully unconvincing. Its

main thrust was that the contents of the Tianjin judgments were only known when the judgments were released on 17 October 2013. It was only at that point that the merits of the Plaintiff's case strengthened considerably. In consequence, OS 1125 was taken out relatively shortly thereafter, on 19 November 2013.

21 We had no hesitation in giving little credit to the Plaintiff's reason. As we shall explain below, at best, the Plaintiff had only itself to blame for its predicament; at worst, it was a cynical but ultimately unavailing attempt by the Plaintiff to manipulate the court process to its advantage. Either way, these were not situations that warranted our intervention.

22 We start with an observation on the timing of the Tianjin proceedings. These were commenced on 26 June 2012, which was after the end of the first main tranche but before the second main tranche of the proceedings in the High Court here. The claims made in the Tianjin court were based on allegations of *fraud* (which were inherently factual issues) in relation to the transfer of FM and FT to Sino Vision. This specific allegation of fraud was not found in the Plaintiff's pleadings in the High Court, a fact which we found somewhat surprising given the nature of the Plaintiff's claim in the High Court, which was for a breach of fiduciary duties by the Defendant. The Judge evidently considered that fraud was not part of the Plaintiff's case against the Defendant (see the HC Judgment at [14], [94]–[96] and [131]).

23 In these circumstances, one would have expected the Plaintiff to amend its pleadings to introduce the same or corresponding allegation of fraud, and simultaneously to apply for a stay of the High Court proceedings to avoid parallel proceedings which would have introduced the risk of inconsistent judgments on a related issue.

24 The Plaintiff took neither step. Even if the Plaintiff had good reasons for not seeking to amend its pleadings in the High Court to include the allegation of fraud by the Defendant, it could – and in our view, should – have applied to the Judge to stay the High Court proceedings, given what were apparently new developments. Given that the second main tranche had not yet begun, it was possible that the High Court might have permitted a stay pending a final resolution of the Tianjin proceedings.

25 In any case, it was irrelevant whether the High Court would have allowed the stay application because the point was that an application to stay the High Court proceedings could have been, but was not, taken out. The Plaintiff's conduct thus suggested to us that it had made a conscious decision to conduct parallel proceedings. Although the Defendant was not a party to the Tianjin proceedings, we did not that think the Plaintiff could complain that the Tianjin proceedings and Singapore proceedings were not parallel proceedings for that reason. The fact that the Plaintiff sought to use the Tianjin judgments in an abortive appeal in Singapore demonstrates that the issues in both proceedings were intertwined.

26 In our judgment, therefore, the irresistible inference to be drawn from the Plaintiff's inaction was that the Plaintiff intended and desired that the High Court proceedings and the Tianjin proceedings take place simultaneously. The reason for that, as it appeared to us, was effectively a case of the Plaintiff hedging its bets. The Plaintiff wanted as many procedural advantages as possible.

27 If the High Court proceedings were decided in its favour, the Tianjin proceedings (to the extent that it related to the Defendant) would become academic in so far as the Plaintiff was concerned because a judgment of the High Court could be entered against the Defendant. If, however, the High Court proceedings went against it, the Plaintiff could still wait for the Tianjin court to decide on the issue of fraud and, if the Tianjin court ruled in its favour, the Plaintiff could then use the Tianjin judgments as the launch pad for its appeal against the High Court's decision.

28 The risk in the Plaintiff's strategy lay in the relevant timelines which were not fully in its control: if the High Court proceedings were concluded much earlier than the Tianjin proceedings, the Plaintiff's ability to rely on favourable Tianjin judgments would be undermined. As it turned out, this was exactly what happened. The Tianjin judgments were issued some five months after the HC Judgment was issued.

29 But why, then, did the Plaintiff not file a Notice of Appeal pending the decision of the Tianjin court, and then seek a stay of the appeal timelines? We could not be sure. The best and most charitable construction we could place on the Plaintiff's conduct was that it was unaccountably tardy. If that was truly the case, then it had only itself to blame for the consequences of its inaction. Tardiness alone is a poor reason that would rarely justify the granting of extension of time particularly in the light of the long delay. We cautioned in *Lee Hsien Loong* at [35] that if the losing party "drags its heels or is otherwise lackadaisical about its right to appeal, then it cannot legitimately ask the court for an extension of time to appeal".

30 An alternative view, which was less charitable but consistent with the inference that it was all a hedging exercise, was that the Plaintiff did not want to run the risk that the appeal against the HC Judgment would be heard before the Tianjin judgments were released. Had it filed a Notice of Appeal within the one-month deadline, *ie* before 23 June 2013, but was subsequently unable to obtain a stay of the appeal deadlines, the appeal could very well have been heard – and therefore decided – before the end of that year, particularly since the HC Judgment had already been issued. It was not clear on the evidence when the Plaintiff expected to receive the Tianjin judgments, but given that they were issued only on 17 October 2013, there was a real possibility that the Plaintiff would have, at the very least, had to prepare its case for the appeal without the benefit of the Tianjin judgments, and, further, that the appeal might have been heard and decided even before the Tianjin judgments were released.

31 The Plaintiff obviously thought very little of its chances of succeeding without the Tianjin judgments: implicit in its articulated reason for the delay (see above at [20]) was an admission that an appeal mounted without the benefit of the Tianjin judgments would probably have failed. If that was the case, then the Plaintiff's deliberate withholding of the filing of a Notice of Appeal until such time that it could muster sufficient ammunition in the form of favourable judgments from the Tianjin court to sustain a creditable appeal could only be characterised as a calculated risk, one designed to give it maximum benefits with minimum effort. We could not countenance, much less reward, such action on the part of the Plaintiff.

32 The gist of the Plaintiff's litigation strategy can be summed up as follows:

(a) First, the Plaintiff took out related proceedings in Tianjin in the middle of the Singapore proceedings.

(b) Secondly, despite knowing that the Tianjin proceedings were related to the Singapore proceedings, the Plaintiff was happy to allow the Singapore proceedings to continue without so much as informing the High Court that the parallel proceedings in Tianjin might have an impact on the Singapore proceedings.

(c) Thirdly, when the Singapore proceedings finally culminated in the HC Judgment, the Plaintiff elected not to file a Notice of Appeal within the prescribed one-month window.

(d) Fourthly, even after the outcome of the Tianjin proceedings became known to it, the Plaintiff took no immediate steps to seek leave to file a Notice of Appeal, though the Plaintiff

explained that this was because the Tianjin judgments were only enforceable after a 30-day period.

(e) Finally, the Plaintiff took out OS 1125 only in November 2013, a month after receiving the Tianjin judgments, and, even then, waited to March 2014 to take out SUM 1410 to seek an adjournment of OS 1125 until after the Supreme People's Court of the PRC had heard the appeals arising from the Tianjin judgments.

33 In our view, the lack of merits in the Plaintiff's case was self-evident in the above chronology of Plaintiff's litigation strategy.

34 Before us, the Plaintiff kept emphasising that the proceedings in the PRC had an important bearing on the outcome of the matters before this court, and that it was in the Plaintiff's best interests for the first instance proceedings, and then the appeal before the Supreme People's Court of the PRC, to be decided first so that the outcome there could be considered in the Singapore proceedings. That to us was precisely why OS 1125 had to be dismissed. The Plaintiff was essentially saying (whether it realised it or not) that our trial process, the appeal process, timelines for filing appeals as well as all other associated rules were subordinate to the foreign proceedings. We did not think that the Plaintiff's blithe disregard for our processes was at all acceptable.

35 We have said that if a losing party drags its heels in asserting its right to appeal, it cannot legitimately seek an extension of time to appeal (see above at [29]). This principle applies with greater force where the plaintiff, as was the case here, had authored or even engineered a litigation strategy that evinced such scant regard for our court process. To allow the Plaintiff's request for an extension of time to file a Notice of Appeal would have been to encourage such wholly unacceptable conduct in future cases by other litigants.

36 There is one more observation that we wish to make. On 5 November 2013 in a separate hearing concerning winding up proceedings initiated by the Defendant against the Plaintiff, the Plaintiff's counsel – a colleague of Mr Alfred Dodwell ("Mr Dodwell"), the Plaintiff's counsel in OS 1125 and the hearing before us – informed the court that there was no instruction "to apply to appeal against [the HC Judgment] in spite of what Mr Dodwell told the Court on 11 October 2013".

37 However, just two weeks later on 19 November 2013, the Plaintiff filed the present OS 1125. Therefore, when the parties returned for the next hearing in the winding up proceedings on 21 November 2013, the Defendant's counsel voiced his displeasure, calling the Plaintiff's apparent change of position an abuse of process.

38 We thought that the Plaintiff's counsel's statement to the court on 5 November 2013 may be read in a number of ways, and not necessarily as a firm commitment that no appeal would be filed. It appears from the record that Mr Dodwell had in an earlier hearing in the winding up proceedings on 11 October 2013 told the court that it was open to the Plaintiff to ask for an extension of time to file an appeal against the HC Judgment after the Tianjin judgments were released, assuming the outcome there was in the Plaintiff's favour. His colleague's statement on 5 November 2013 could therefore be interpreted as clarifying that *although* Mr Dodwell had highlighted this tentative possibility, the Plaintiff had not yet, as of 5 November 2013, despite having the benefit of the Tianjin judgments by that time and having received legal advice, given any instructions on whether it wanted to appeal against the HC Judgment.

39 Whilst the Plaintiff could and probably should have stated its stance more clearly over the course of the various hearings in the winding up proceedings, we did not consider that the lack of

clarity amounted to an abuse of process as complained of by the Defendant's counsel in the hearing on 21 November 2013. Notwithstanding this, we take this opportunity to state categorically that a plaintiff who takes the position in related proceedings that it would not appeal should not be permitted to resile from its original intent subsequently without demonstrating strong cause.

40 The principle underlying this is that of finality. The public as well as the parties concerned – in particular the winning party – expect a point at which proceedings must end (see, for example, the Singapore High Court decision of *Tan Sia Boo v Ong Chiang Kwong* [2007] 4 SLR(R) 298 at [4] and the excerpt from *Lee Hsien Loong* cited above at [17]). The winning party is entitled to know its position, and to order its affairs in reliance not just on timelines set by the court but also on the opposing party's communications to the court. Hence, even if no prejudice would be caused to the winning party, we thought that a dim view ought to be taken of the reasons given by a losing party for making a 180-degree turn after having taken steps to throw the other party off the legal scent.

41 In conclusion, the Plaintiff's reasons for the delay were manifestly unconvincing. The sequence of events that took place was, in our view, akin to an abuse of the court's process which, under ordinary circumstances, would garner no sympathy from the court. If this was the sole consideration under the framework for determining whether leave to file a Notice of Appeal out of time should be given, we would have had no hesitation in dismissing the Plaintiff's application without more.

42 However, as we have stated above at [16], the reason for delay is but one of four factors which the law assesses in the round as part of an integrated and holistic approach. The Plaintiff's unsatisfactory conduct of its proceedings therefore had to be balanced against the rest of the factors. But we should add here that there may be exceptional cases in which the conduct of the plaintiff is so deplorable that the court simply cannot countenance granting an application for an extension of time to file an appeal. For such exceptional cases, a consideration of the other factors, including the merits of an appeal, might be academic, precisely because a *holistic* approach demands the strictest of responses to the most egregious instances of an abuse of process.

43 Having said that, it was not necessary for us to decide whether the present case falls into that exceptional category for, as we shall explain below, the third factor, that is, whether the appeal was hopeless, was, in any event, not in the Plaintiff's favour.

Whether the appeal was hopeless

(1) Introduction

44 The Plaintiff appeared to take the view that it would be able to succeed in the appeal and was therefore entitled to an extension of time because:

(a) The findings and decision in the Tianjin judgments supported the Plaintiff's case as they showed that the Defendant had acted dishonestly in respect of the transaction involving FM and FT. This shall be referred to as "the Contents Argument".

(b) There was evidence that the signatures on a board resolution dated 9 July 2009 ("the Board Resolution") purporting to transfer the shares in FM and FT to Sino Vision had been forged by the Defendant. The evidence included an affidavit by one of the directors that he had not signed the resolution. This shall be referred to as "the New Evidence Argument".

(c) The consequence of the Tianjin judgments was that the Plaintiff would be restored as the owner of FM and FT. Once that happened, the Plaintiff would have access to the accounts and

other management books of the two subsidiaries, and would be able to uncover further evidence of the Defendant's breaches of his duties to the Plaintiff. This shall be referred to as "the Consequences Argument".

45 On the whole, for the reasons which are set out below, we thought that any appeal would have been hopeless.

(2) The Contents Argument

46 While the tenor of the Plaintiff's case was that the contents of the Tianjin judgments *generally* supported its case of dishonest conduct by the Defendant, the Plaintiff specifically referred to one finding of the Tianjin court, namely, the finding that the Board Resolution was forged by the Defendant.

47 It was common ground that this issue was never pleaded in the action in the High Court. In fact, it was expressly noted by the Judge (at [56] of the HC Judgment) that the Plaintiff was "not challenging this [Board Resolution]. Its case is simply that shareholders' approval must be sought, and no such approval was obtained." Even leaving that aside, if the Plaintiff was seeking to rely on this finding in the Tianjin judgment that the Board Resolution was forged by way of an issue estoppel, then in our view the Plaintiff had no legal basis to do so.

48 The first difficulty for the Plaintiff was an evidential one. This was whether the Tianjin judgments in fact said what the Plaintiff claimed they did (in this regard, see, for example, the approach taken by the Singapore High Court in *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [65]–[71]). While the Plaintiff adduced an affidavit filed by one Wu Chun Xi ("Mr Wu"), a lawyer called to the bar in the PRC, which briefly set out certain conclusions of the Tianjin judgments, the affidavit did not expressly mention that the Tianjin judgments found that the Board Resolution was forged.

49 The other (and more important) reason why the Plaintiff's reliance on the Tianjin judgments was misplaced was that the Defendant was never a party to the Tianjin proceedings. The proceedings in the Tianjin court were between the Plaintiff on the one side, and FM, FT and Sino Vision on the other.

50 A foreign judgment can only be raised and relied upon to found an issue estoppel if certain conditions are fulfilled. One such condition is that the parties in the local proceedings in which the contents of the foreign judgment which is sought to be recognised must be the same parties (or be privy to the parties) in the foreign proceedings (see *Halsbury's Laws of Singapore – Conflict of Laws* vol 6(2) (LexisNexis, 2013 Reissue) at [75.199]). On the face of the Tianjin judgments, the Defendant was neither a party nor privy to the parties in the Tianjin proceedings. In fact, Mr Wu acknowledged that the Defendant was not made a party because the Tianjin proceedings were "actions to recover shares and assets transferred to Sino Vision" and "recover all assets of the Defendants [*ie*, FM and FT] as a result of this illegal transfer of shares".

51 Accordingly, the findings in the Tianjin judgments could not be relied on by the Plaintiff to raise an issue estoppel against the Defendant in the Singapore proceedings.

(3) The New Evidence Argument

52 The Plaintiff submitted that there were three pieces of evidence which would bolster its case but that were not brought to the High Court's attention during the trial. They were as follows:

(a) The signature on the Board Resolution of one Cheng Ji Jiang ("Mr Cheng"), a former director of the Plaintiff, appeared to be pictorially different from his signature on his letter of resignation dated 29 July 2009.

(b) One Fei Xue Jun ("Mr Fei"), a former director of the Plaintiff, swore an affidavit dated 16 August 2010 that he had not signed the Board Resolution and had not participated in any board meetings discussing any resolution to sell the shares in FM and FT.

(c) One David Lu Hai Ge ("Mr Lu"), another former director of the Plaintiff, had already resigned as director on 19 January 2009 and therefore could not have signed the Board Resolution which was dated 9 July 2009.

53 To persuade this court that these three pieces of evidence should be considered by this court now as part of the record, the Plaintiff needed to satisfy us, at the very least under the first limb of the test in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*"), that this fresh evidence could not have been discovered at the time of trial with reasonable diligence. This was where the Plaintiff had, in our view, considerable difficulty.

54 The first difficulty was an issue of pleading. Again, we return to the point that this issue of the allegedly forged Board Resolution could have been but was not raised in the action before the High Court. The allegations of fraud were contained in a document known as the Evidence Explanatory Notes, which was filed at an early stage of the Tianjin proceedings. Thus, while the Plaintiff had pointed to the Board Resolution in its attempt to unwind the disposal of FM and FT before the Tianjin court, it had decided at the same time (for reasons best known to itself) not to raise the alleged fraudulent procurement of the Board Resolution as an issue in the proceedings in the court below.

55 Mr Dodwell confirmed in the course of oral arguments before this court that this issue had not been pressed in the proceedings below. Mr Dodwell also candidly acknowledged that procedurally, in these circumstances, the Plaintiff had no "leg to stand on". We could not agree with many of Mr Dodwell's submissions but this was one point that we were in full agreement with. To be fair to Mr Dodwell, we should make clear that he was not the counsel on record for the Plaintiff in the High Court proceedings.

56 Secondly, the three pieces of evidence referred to above were all in existence or at least appeared to have been discoverable at the time of the commencement of the action, and certainly at the time of the trial in the High Court. There was no evidence from the Plaintiff (or even an allegation in its supporting affidavits) that the Board Resolution, the resignation letter of Mr Cheng, the affidavit by Mr Fei and the fact that Mr Lu had allegedly already resigned by the time the Board Resolution was signed, were all unavailable or unknown to the Plaintiff throughout the course of the High Court proceedings. On the contrary, at least in relation to the Board Resolution, the Plaintiff's position in its affidavit was that the Board Resolution was tendered in the court below.

57 In addition, the fact that the allegation pertaining to the Board Resolution was raised to the Tianjin court at an early stage (even though the exact date is unknown) suggested to us that the Plaintiff was probably in possession of all the relevant evidence, or at least had access to those pieces of evidence, even before the conclusion of the High Court trial. The evidence was therefore not *fresh* evidence which could now pass muster under the *Ladd v Marshall* principles.

58 Although it is frequently said that fraud vitiates all, the law does not say that evidence of fraud which existed at the time of trial but was withheld and only adduced after judgment is released can still be used to unravel that judgment. The law recognises a balance between abuse in the form of

fraudulent conduct and abuse in the form of tactical litigation. Once parties have had their day in court and have decided either not to mount certain arguments or to withhold the presentation of certain evidence that is beneficial for their case, they should not be permitted, because of an adverse judgment, to subsequently introduce those new arguments and evidence to undermine that judgment, especially in an application to appeal five months after the time for appealing had expired.

(4) The Consequences Argument

59 The submission here was that once the Plaintiff acquired control over FM and FT's operations including physical possession of the factories in consequence of the Tianjin judgments, it would have access to an abundant source of information which was likely to demonstrate that the Defendant had breached his duties to the Plaintiff. That might very well be the case, but at this point in time that was all pure speculation.

60 Further, the pending appeal before the Supreme People's Court of the PRC was scheduled to be heard on 28 April 2014, three weeks after the hearing of OS 1125 before us, and the evidence from Mr Wu was that there were no limits as to how long the Supreme People's Court could take to render a decision. Even assuming that the appeal would be dismissed, it would take time before the transfer of ownership of FM and FT was effected. Even more time would be required to unearth the Defendant's alleged wrongdoings. It was therefore entirely too speculative, on the basis of the evidence before us, to conclude that there was even any evidence in the present possession of FM and FT that would support the Plaintiff's case, let alone that such evidence could be procured within any reasonable time.

61 In conclusion, as was the case with the second factor, we were not convinced that the third factor was in the Plaintiff's favour. Consistent with our decision in *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 3 SLR(R) 355 at [43], it should also be apparent that we came to this conclusion without having to undertake a full-scale examination of the merits of the underlying dispute.

62 We come now to the fourth and final factor, that is, whether prejudice would be caused to the Defendant.

Whether prejudice would be caused to the Defendant if an extension of time was granted

63 The Plaintiff submitted that the Defendant would not suffer any material prejudice as he had not yet received payment of the judgment sum. Any other prejudice, it was submitted, could be compensated for by way of an appropriate costs order. The Defendant submitted that he had already incurred substantial costs in his attempts to enforce the HC Judgment, and further delay in the winding up of the Plaintiff might result in the loss of documents and information which could have gone towards proving the assets of the Plaintiff.

64 We agreed with the Plaintiff's submission that there was no material prejudice to the Defendant that could not be compensated by an appropriate costs order. The Defendant's submissions also conceded as much. This was not a case where the judgment sum had been paid and expended by the Defendant. The Defendant was not any worse off now than at the time of the release of the HC Judgment, save for sums incurred to enforce the judgment debt. Those could be recovered as costs in the respective applications.

An integrated and holistic approach

65 Although the last factor was in the Plaintiff's favour, looking at all the factors in relation to the relevant facts and circumstances and taking an integrated and holistic approach (see above at [16]), it was plain beyond question that OS 1125 had no merit and ought therefore to be dismissed.

66 A constant feature in the Plaintiff's submissions and affidavits was that the Defendant had to be brought to justice. There are many aspects to justice and one of them is finality in proceedings (see above at [17]). However, it was clear to us that our decision here was by no means the end of the legal road for the Plaintiff. Should the appeal before the Supreme People's Court of the PRC be dismissed, the Plaintiff would have a very strong remedy against the Defendant. It would have a judgment from the Supreme People's Court of the PRC affirming the Tianjin judgments, and upon which it could take the necessary steps available to pursue the Defendant, particularly in the PRC. This was a point made by the Plaintiff's PRC counsel, Mr Wu, whose affidavit suggested that there was already an ongoing action against the Defendant in the PRC.

67 Mr Dodwell mentioned that there were pending winding up proceedings taken out against the Plaintiff in Singapore (which were alluded to above at [37]) and that, if the Plaintiff was wound up, it would be too late to utilise any funds that might be recovered from the Defendant in the proceedings in the PRC to pay the creditors in the winding up proceedings. That was a legitimate concern but, as we pointed out during the course of the oral arguments, there was nothing preventing the Plaintiff from applying for a stay of the winding up proceedings here pending the outcome of the appeal before the Supreme People's Court of the PRC.

68 It transpired that after we gave our decision on 8 April 2014, the High Court heard the winding up application on 15 May 2014 and thereupon ordered the Plaintiff to be wound up (though the order was extracted only extracted on 3 June 2014). However, as the liquidator may "bring … any action or other legal proceeding in the name and on behalf of the company" (see s 272(2)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed)), the Plaintiff may yet recover control of FT and FM and continue to prosecute its action in the PRC against the Defendant. What fruits of litigation may be reaped by the Plaintiff from any litigation in the PRC depends on how the proceedings there in relation to both the appeal to be decided by the Supreme People's Court of the PRC and the action against the Defendant unfold but these were obviously issues beyond the remit of this court.

SUM 1410

69 Given our decision with regard to OS 1125, it followed that SUM 1410 ought to be dismissed as well.

Conclusion

70 For the reasons set out above, we dismissed both OS 1125 as well as SUM 1410, with costs fixed at $10,000 (including disbursements) to the Defendant. The usual consequential orders followed.