Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and Another Appeal
[2000] SGCA 1

Case Number	: CA 111/1999, 112/1999
Decision Date	: 12 January 2000
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s)	: Michael Khoo SC and Josephine Low (instructed) and Jimmy Yap (Donaldson & Burkinshaw) for the appellant; Harpal Singh and Teh Ee-Von (Harpal Wong & M Seow) for the respondent
Parties	: Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) — Liu Cho Chit and Another Appeal

Civil Procedure – Pleadings – Amending statement of claim – whether amendment should be allowed

Res Judicata – Extended doctrine of res judicata – True basis for operation of extended doctrine – Whether proceedings precluded by doctrine of – Whether failure to make claim in earlier suit against non-party an abuse of process

Trusts – Constructive trusts – Remedies – Claim for restitution on constructive trust – Whether claim frivolous, vexatious or abuse of process of court

(delivering the grounds of judgment of the court): ***Introduction***

There were two appeals before us. The first, CA 111/99, was brought against the decision of the High Court dismissing the appellant`s appeal against the decision of the assistant registrar in which the assistant registrar struck out the appellant`s statement of claim and dismissed the action. The second, CA 112/99, was brought against the High Court`s decision dismissing the appellant`s appeal against the decision of the same assistant registrar in which he disallowed the application by the appellant for leave to amend her statement of claim. We allowed both appeals and now give our reasons.

The facts

The appellant is the widow of one Tan Geok Tee, deceased, and sues in her capacity as the executrix of his estate. These proceedings were commenced in the wake of the decision of the Court of Appeal in two appeals, namely, CA 93 and 94/97, reported in **Fook Gee Finance Co Ltd v Liu Cho Chit and another action** [1998] 2 SLR 121 . The two appeals arose from the decision of the High Court in two suits, which were tried together. The first was Suit 4141/83, in which a Hong Kong company, Fook Gee Finance Co Ltd (`Fook Gee`) claimed against one Liu Cho Chit (`Liu`) (who is the respondent in the present appeals) the sum of US$642,451.04 as a loan. The claim was dismissed with costs by the High Court, and against this decision Fook Gee appealed in CA 93/97. The second was Suit 4149/84, in which the plaintiff was Liu`s wife, Lim Siam Soi (`Lim`), and she sued four parties, namely, Lee Tat Development Pte Ltd (`Lee Tat`), Tan Geok Tee (`Tan`) (who had since died and was represented by his wife, Ching Mun Fong (`Ching`), the appellant in the present appeals), Lee Kai Investments Pte Ltd (`Lee Kai`) and Collin Tan (`Collin`), Tan`s daughter. Lim claimed, inter alia, as against all the defendants a declaration that Lee Tat held certain property known as Lot 1606 of Mukim 28 having an area of approximately five acres on trust for her and Collin in equal shares, or alternatively as against Lee Tat and Tan the sums of S$631,579.10 and S$1,800,000 representing the balance of the

purchase price of her share in the property. The High Court allowed the alternative claim and gave judgment in favour of Lim in the sum of S$2,431,579.10, and against that decision, Lee Tat, Ching representing the estate of Tan, and Lee Kai appealed in CA 94/97.

The relevant facts which led to the two appeals were fully set out in the judgment of this court and were briefly these. In 1972, a company called Peng Ann Realty Pte Ltd (`Peng Ann`) purchased a large parcel of land situate at Kampong Chai Chee comprising lots 21-26, 4-4, 407, 120, 121, 122, 123 and 221 of Mukim 28, having an area of 186.7 acres. The company was specifically incorporated to purchase the land. Liu was at that time a shareholder and the managing director of the company. The purchase price was $1,090,000 and the agreement for sale and purchase was made on 18 July 1972 with completion scheduled to take place on 27 October 1972. Two days after the sale and purchase agreement was made, that is, on 20 July 1972, two of the lots, namely, lots 221 and 4-4, with a total area of about 5.8 acres, were gazetted by the Government for acquisition; some neighbouring and other lands were also included in the gazette notification. As a result, Liu and his co-directors were apprehensive that there might be a further acquisition by the Government of the other lots which Peng Ann had bought. They therefore decided to sell the remaining lots of the land.

In December 1972, Liu was introduced to Tan and following negotiations between them, a sale and purchase agreement was made on 23 January 1973 between Peng Ann and Lee Kai, then known as Collin Investment Pte Ltd, whereby Peng Ann agreed to sell to Lee Kai three of the lots, namely, lots 21-26, 407 and 123 (`the three lots`) having a total area of about 178 acres, at the price of $2,050,000 (`the main agreement`). Lee Kai was one of Tan`s family companies. Liu and Tan also orally agreed to develop jointly a portion of lot 21-26 containing an area of approximately 4.6 acres, zoned permanently residential (`the joint venture site`). The terms of their joint venture were subsequently reduced in writing and made in the names of Liu`s wife, Lim, and Tan`s daughter, Collin. These terms were embodied in four written agreements (collectively called `the joint venture agreements`), and we need to mention only three of them. The first was the sub-sale agreement whereby a part of lot 21-26, namely, the joint venture site, was sold by Lee Kai to Lim and Collin at the price of $50,000. The sub-sale agreement by special condition 1 provided that the purchasers on behalf of the vendor would apply for subdivision of lot 21-26 so as to delineate the site separately from the remainder of the lot, and that the costs and expenses in respect thereof would be borne by the purchasers. The sub-sale agreement was signed by Tan on behalf of Lee Kai, and by Tan and Liu on behalf of Collin and Lim respectively. The second was a pre-incorporation agreement, under which Lim and Collin were to procure the incorporation of a company, Collden Realty Pte Ltd (`Collden`), with an authorised capital of $2m. Similarly, the pre-incorporation agreement was signed by Liu on behalf of his wife and Tan on behalf of his daughter. The third agreement was expressed to be made between Lim and Collin of the one part and Collden of the other, under which Lim and Collin were to convey the joint venture site to Collden in return for certain shares credited as fully paid to be allotted to Lim and Collin respectively. This agreement was signed only by Liu and Tan on behalf of Lim and Collin respectively; it was not signed by anyone representing Collden. All the four agreements were backdated to 23 January 1973, being the same date on which the main agreement was executed. It was not in dispute that neither Collin nor Lim was aware of the joint venture or the agreements signed on their behalf, and were only nominees for their father and husband respectively. The sale under the main agreement was completed on 14 March 1973 and all the three lots were conveyed on the written direction of Tan (presumably on behalf of Lee Kai) to Lee Tat, then known as Collin Development Pte Ltd, another company of Tan.

On 23 July 1976, the three lots conveyed to Lee Tat, except a portion of 4.2 acres, were acquired by the Government, and compensation in the sum of $2,500,000 was awarded. The unacquired land comprised: (a) a portion of 3.7 acres of the joint venture site; and (b) another portion of about 21,808 sq ft of land, also part of Lot 21-26, which was immediately adjoining the joint venture site

and zoned rural. The entire area of the unacquired land was subsequently resurveyed and was described as resurvey Lot 1606 (`Lot 1606`). As it transpired, the joint venture did not materialise. Neither Liu nor Tan, and of course nor their respective nominees, took any step to implement the terms of the sub-sale agreement or any of the other joint venture agreements. Neither Lim nor Collin, and nor Liu and Tan on their behalf respectively, did anything to cause or procure the joint venture site to be conveyed to Lim and Collin pursuant to the sub-sale agreement; nor did they procure the incorporation of Collden as required by the pre-incorporation agreement. Thus, the original joint venture agreements were never performed; in fact the joint venture was abandoned by Liu and Tan.

It was only in 1980 that Liu`s and Tan`s interests in developing Lot 1606 revived. However, negotiations between them eventually failed, as they could not agree on the development plans. All this while, Liu claimed that he (or his wife) had a share or interest in Lot 1606. Liu claimed that in 1981 as a result of the differences of opinion between him and Tan he offered to sell his wife`s share in the land to Tan, and in April 1981 Tan invited him to Hong Kong, where after some negotiations Tan agreed to buy his wife`s share at the price of `$3.8m net of tax`. Tan further agreed to pay a sum of $2m by 24 April 1981 and the balance two months later. On 23 April 1981, in Hong Kong, Tan handed to Liu two cashier`s orders amounting to the sum of US$642,451.04 (equivalent to S$1,368,420.70 at the then exchange rate of approximately S$2.13 to US$1). Liu claimed that Tan agreed to buy Lim`s share in Lot 1606 for $3.8m and the sum of US$642,451.04 (or S$1,368,420.70) was a part payment of the purchase price. Liu further claimed that thereafter he called Tan asking for payment of the balance of the purchase price but Tan informed him that his (Tan`s) wife was not happy with the agreed price, as she felt that it was too high. Tan then asked Liu to sign a letter dated 28 April 1981 prepared by his general manager in Singapore, authorising the payment by Lee Tat to Liu of the sum of US$293,555.99 by way of a cashier`s order. According to Liu, Tan would make this payment when his wife had cooled down, but this sum was never paid to Liu.

On 25 April 1983, Fook Gee instituted an action in Suit 4141/83 against Liu claiming the sum of US$642,451.04 alleged to have been lent to Liu. Liu admitted receiving this sum from Tan, but averred that it was a part payment of the purchase price of Lim`s share in Lot 1606 which Tan had agreed to purchase from her. In the alternative, if the sum was a loan it was void and unenforceable by virtue of the Money Lenders Ordinance of Hong Kong. Although the main defence to the claim was a sale, Liu did not take, or cause Lim to take, at that time, any action to recover the balance of the purchase price. It was only about one year thereafter that Lim took action by instituting Suit 4149/84 against Lee Tat, Tan, Lee Kai and Collin claiming, inter alia, the balance of the purchase price.

Both suits were tried together as the evidence and events which transpired were inextricably linked. The trial judge found that Lim had acquired an interest in Lot 1606 and that through Liu she had entered into an agreement to sell it to Lee Tat in 1981. She also found that the sum of US$642,451.04 (or S$1,368,420.70) paid to Liu in 1981 was a part payment of the purchase price and not a loan. She therefore ordered that Lee Tat pay the balance of the purchase price to Lim and gave judgment to Lim in the sum of S$2,431,579.10 representing the balance of the purchase price. Against this decision, Lee Tat, Ching representing the estate of Tan, and Lee Kai appealed to this court in CA 94/97. As for the claim by Fook Gee for the sum of US$642,451.04, the trial judge found that the sum came from a company called Komala Deccoff & Co SA (`Komala Deccoff`), an import and export company owned by Tan and another person, and there was no evidence that this sum was a loan made by Fook Gee to Liu. She therefore dismissed Fook Gee`s claim in Suit 4141/83, and against this decision, Fook Gee appealed to this court in CA 93/97.

Both the appeals were heard together, and the judgment of the Court of Appeal was delivered on 6 February 1998. The trial judge`s decision in Suit 4149/84 was reversed by the Court of Appeal which held that, on the evidence, Lim had not established that she had acquired an interest in Lot 1606. Her

claim therefore failed. As for Fook Gee`s appeal, the Court of Appeal, like the trial judge, could find no evidence to suggest that the two amounts paid to Liu in April 1981 were in fact a loan from Fook Gee. The appeal was accordingly dismissed.

Proceedings below

On 4 June 1998, the appellant as the executrix of Tan`s estate instituted proceedings in Suit 862/98 against Liu seeking to recover the sum of S$1,368,420.71, being the equivalent of US$642,541.04 at the time of payment. After the close of pleadings, Liu applied to strike out the statement of claim under O 18 r 19 of the Rules of Court or under the inherent jurisdiction of the court on the ground that it is frivolous, vexatious or otherwise an abuse of the process of the court or alternatively on the ground that the claim is statute barred. Upon being served with the application, the appellant applied to amend the statement of claim. Both the applications were heard together before the assistant registrar, who dismissed the appellant`s application to amend the statement of claim and allowed Liu`s application to strike out the statement of claim, and in consequence he dismissed the action. He held that the appellant`s claim was time barred by s 6 of the Limitation Act (Cap 163, 1996 Ed) (`the Limitation Act`), and that the facts relied on did not give rise to a constructive trust or any other proprietary remedy in favour of the appellant. Against the decisions of the assistant registrar, the appellant appealed to a judge in chambers. As there were two applications which were dealt by the assistant registrar, two appeals were filed.

Before the learned judge the appellant proposed a further amendment, namely, the addition of [para] 13A, which is to the effect that arising from the judgment of the Court of Appeal (delivered on 6 February 1998), the appellant became aware that Lim had no interest in Lot 1606 for which the payment of the sum of US$642,451.04 was made to Liu and that such payment was made for no consideration or was made under a mistake that Lim had an interest in Lot 1606, and that the retention of that sum by Liu gave rise to a constructive trust on the part of Liu. The learned judge agreed with the decision of the assistant registrar in striking out the statement of claim. He further held that the appellant was precluded from bringing the present proceedings by reason of the doctrine of res judicata in the wider sense as enunciated in the decision of the Privy Council in **Yat Tung Investment Co Ltd v Dao Heng Bank & Anor** [1975] AC 581. In his view, Tan was a party in Suit 4149/84 and had chosen not to raise in that suit any of the causes of action now raised in these proceedings, and the appellant, his executrix, could not be permitted to raise them now; for her to do so would be an abuse of the court`s process. The learned judge dismissed both appeals.

The appeal

The jurisdiction to strike out a statement of claim, whether under the Rules of Court or under the court`s inherent jurisdiction, is only exercised in a plain and obvious case. In general, the court`s approach to an application to strike out the statement of claim is to consider if the deficiency or defect therein, on the basis of which the application was made, could be cured by an amendment, and would prefer to allow an amendment rather than to take the drastic course of striking it out. In **Tan Soo Leng David v Wee, Satku & Kumar Pte Ltd & Anor** [1994] 3 SLR 481 , Karthigesu JA, delivering the judgment of this court, said at p 487:

> *It will be noted that O 18 r 19 gives the judge a discretionary jurisdiction and permits an amendment of the statement of claim as an alternative. As this court said in **Ko Teck Siang v Low Fong Mei** [1992] 1 SLR 454 , the discretion for striking out under O 18 r 19 should be exercised sparingly. See also **Manuel Misa v Raikes Currie, G Grenfell Gly** [1876] 1 App Cas 554* at *p 559, where*

the House of Lords allowed a new argument to be taken since it did not require any new material to be introduced into the case. The failure to plead the want of best endeavours on the part of the first respondents is not necessarily fatal to the appellant at this stage of the proceedings since that deficiency can be made good by an amendment to the statement of claim before the trial.

Amendments of the statement of claim

We turn first to the amendments of the statement of claim sought by the appellant. The proposed amendments consist of the insertion of, inter alia, the following paragraphs:

11 In Suit 4141, the plaintiffs in that action Fook Gee Finance Co Ltd had commenced an action against the [respondent] herein, claiming for the return of the sum of US$642,451.04 being money lent by the plaintiffs therein to the [respondent], with interest thereon. The [respondent] while not disputing that he had received the said sum of US$642,451.04 from the late Mr Tan, however maintained in his defence to the claim, that he was acting on behalf of his wife, Madam Lim, when he entered into an agreement with the late Mr Tan for a consideration of S$3.8m net of tax, with the purchase price to be paid by instalments.

12 It was further alleged by the [respondent] that consequent to the said agreement, the late Mr Tan had handed to him and he had received on his wife`s behalf, two Bangkok Bank drafts totalling the sum of US$642,451.04 in part payment of the purchase price on 23 April 1981. During the course of the trial, it became apparent for the first time that this said sum was never paid over to Madam Lim but had been retained by the [respondent].

13 By its judgment dated 6 February 1998, the Court of Appeal in determining the appeals arising from the actions in CA 93 and 94/97 found, inter alia:

(a) in respect of CA 94/97 (Suit 4149), that `Madam Lim has not been established that she has, or has acquired, an interest Lot 1606` [the property], set aside the judgment of the court below which had been given in her favour in Suit 4149 and dismissed her claim; and

(b) in respect of CA 93/97 (Suit 4141), that `we can find no evidence to suggest that the two amounts paid to Liu [the respondent herein] in April 1981 were in fact a loan from Fook Gee. On the contrary, there was clear evidence to show that the two amounts came from a company of Tan [the late Mr Tan], Komala Decoff SA and not from Fook Gee`.

13A As from the judgment of the Court of Appeal dated 6 February 1998 the defendant became aware that Madam Lim`s attempt to establish the existence of an interest in the property for which the payment of US$642,451.04 had been made and accepted as part payment had failed. The payment had been made for no consideration or, alternatively, it was made under a mistake that Madam Lim had an interest in the property. The retention thereafter of that money, notwithstanding knowledge of that failure or mistake, gave rise to a

constructive trust. The failure and refusal thereafter to refund what, as the [respondent] well knew had been paid for nothing or under a mistake, constituted a continuing breach of that constructive trust.

There was no serious objection to these amendments and we could see no reasons why they should not be allowed. In particular, they did not introduce any cause of action, in respect of which the relevant period of limitation current at the date of the issue of the writ has expired. There was really no issue on the amendments proposed. The point in issue was whether, on the assumption that the amendments were allowed, the statement of claim (as amended) should be struck out on the ground that the claim was vexatious or frivolous or time-barred or otherwise an abuse of the process of the court.

It is clear to us that the amendments were directed at overcoming the consequences of the claim being time-barred under s 6(1)(a) of the Limitation Act. On the basis of the amendments being allowed, the thrust of the argument made on behalf of the appellant was that s 29(1)(c) of the Limitation Act, and not s 6(1)(a), applies to the claim. Under s 29(1)(c), where an action is for relief from the consequence of a mistake, the period of limitation does not begin to run until the mistake was discovered or could with reasonable diligence have been discovered. It was submitted that one of the appellant`s causes of action is for money paid under a mistake and falls within the ambit of this provision. The mistake arose in this way. Tan made the payment of US$642,451.04 to Liu in April 1981 under the mistaken assumption that respondent`s wife, Lim, had an interest in Lot 1606. That mistake was one relating to the ownership of property and was a mistake of law: see ***Bingham v Bingham*** 1 Ves Sen 126; 27 ER 934, and it was not `discovered` until the Court of Appeal held in CA 94/97 that Lim did not have an interest in Lot 1606, contrary to previous assumption on the part of Tan. It also followed from this that the consideration for which the sum of US$642,451.04 was paid to Liu only failed when that fact was established. The cause of action to recover the sum paid as money had and received or as money paid under a mistake of law therefore accrued only in February 1998, when the Court of Appeal delivered its judgment, and the claim is thus not time-barred.

Counsel for the appellant relied on the recent decision of the House of Lords in **Kleinwort Benson Ltd v Lincoln City Council** [1998] 4 All ER 513[1998] 3 WLR 1095, which abrogated the long-established rule that in general a party cannot recover money paid under a mistake of law. That case concerned an action by a bank to recover money paid to local authorities under certain swap agreements, which following the decision of the House of Lords in **Hazell v Hammersmith and Fulham London Borough Council** [1992] 2 AC 1 were held to be ultra vires and void. In ***Kleinwort Benson*** , it was held that the rule, under which money paid under a mistake of law is not recoverable in restitution should no longer be part of the law, and consequently money paid under a mistake, whether of fact or law, is recoverable. It was further held that money paid under a mistake of law is recoverable, even where the money has been paid under a settled understanding of the law, which is subsequently departed from by judicial decision or where the payment has been received by recipient under an honest belief of an entitlement to retain the money. Such discovery occurs only when the existing law is changed by a later decision of the court.

Reverting to the instant case, we are not concerned, at this interlocutory stage, to inquire whether in truth there was a mistake and whether such mistake was one of fact or law. The burden is on the payer to prove that he was mistaken and that his mistake had caused him to make the payment. We think that the several questions, such as whether Tan paid to Liu the sum of US$642,451.04 under a mistake, whether such mistake was one of fact or law, whether s 29(1)(c) of the Limitation Act applies, and finally whether the mistake was discovered only when the judgment of the Court of

Appeal was delivered or could with reasonable diligence have been discovered earlier, and when it could have been so discovered, are clearly issues which can only be decided at the trial upon a full investigation of all the relevant facts and circumstances. For our purpose, we proceeded on the basis as pleaded in the amended statement of claim that the sum in question was paid to Liu under a mistake, that the mistake was one of law, that it was not discovered until the date the Court of Appeal handed down its decision in CA 94/97 and could not, with reasonable diligence, have been discovered earlier, and that the period of limitation began to run only from that date. On this basis, the appellant`s action for the recovery of the moneys is not time-barred. In our opinion, this is not a plain and obvious case of an action being barred by Limitation Act, and the claim should not have been struck out at this stage. The entire issue: whether the action is time-barred would have to be determined at the trial.

Constructive trust or other proprietary remedy

Before us it was argued on behalf of the appellant that she has a good arguable case that a constructive trust as a remedy is available to her as Tan`s executrix to recover the money from Liu. The money was paid to Liu under a mistake, and although the mere receipt of the money in ignorance of the mistake did not give rise to a trust in favour of Tan at that time, the retention of the money by Liu after the mistake was discovered (ie after the Court of Appeal had delivered its decision) gave rise to a constructive trust in favour of the appellant. Under s 22(1)(b) of the Limitation Act, no period of limitation applies to an action by a beneficiary under a trust to recover from the trustee trust property or the proceeds thereof and converted to his use.

The authority primarily relied upon by the appellant in this regard is **Chase Manhattan Bank NA v Israel-British Bank (London) Ltd** [1981] Ch 105. There, the plaintiffs in July 1974 by mistake paid the defendants some o2m twice. Very soon after the payment, the defendants became aware of the mistake but did not take any step to refund the sum. In the following month, the defendants went into liquidation. In an action brought to recover the money, the plaintiffs sought to trace and recover in equity the sum they had paid under a mistake. Goulding J held that there was no conflict between New York law and English law and that both under New York law and English law the defendants were constructive trustees of the money which had been paid to them by mistake. In English law it was necessary to find that there was a fiduciary relationship between the payer and the recipient. Following **Sinclair v Brougham** [1914] AC 398, the learned judge found that there was such a relationship. He said at p 119:

> *A person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right. I am fortified in my opinion by the speech of Viscount Haldane LC in* ***Sinclair v Brougham*** *[1914] AC 398, 419, 420, who, unlike Lord Dunedin, was not suspected of heresy in* ***Re Diplock****. Lord Haldane (who spoke for Lord Atkinson as well as himself) includes money paid under mistake of fact among the cases where money could be followed at common law, and he proceeds, at p 421, to the auxiliary tracing remedy, available (as he said) wherever money was held to belong in equity to the plaintiff, without making any relevant exception.*

Although in **Westdeutsche Landesbank Girozentrale v Islington Borough Council** [1996] AC 669, the House of Lords departed from its decision in ***Sinclair v Brougham*** , and Lord Browne-Wilkinson in the course of his speech said that he did not accept the reasoning of Goulding J in ***Chase Manhattan*** , the House did not disapprove the conclusion arrived at by Goulding J. Lord Browne-

Wilkinson said at p 715:

> *[**Chase Manhattan**] may well have been rightly decided. The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys ... The judge treated this fact as irrelevant ... but in my judgment it may well provide a proper foundation for the decision. **Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust: Snell`s Equity** p 193; Pettit, **Equity and Law of Trusts** (7th Ed, 1993) p 168; **Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc** [1990] 1 QB 391, 473-474. [Emphasis added.]*

It was submitted on behalf of the appellant that the import of this part of Lord Browne-Wilkinson` speech was that in a situation where the money is paid under a mistake, a constructive trust may well arise at the point when the recipient learns of the mistake, because his conscience is affected by that knowledge. Applying that passage to the facts of the present case, it was submitted that as on and from 6 February 1998, when the Court of Appeal delivered its judgment in CA 94/97, Liu`s conscience was affected by his knowledge of the mistake under which Tan paid him the moneys, and the moneys so paid were thus impressed with a trust in favour of Tan. Liu had been unjustly enriched and was under an obligation to restore the monies as a constructive trustee. The appellant further relied on the following part of the speech of Lord Browne-Wilkinson at p 716:

> *Although the resulting trust is an unsuitable basis for developing proprietary remedies, the remedial constructive trust, if introduced into English law, may provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue.*

Again, at this interlocutory stage, we would refrain from expressing any view whether in Singapore the court would, in appropriate circumstances, impose a constructive trust as a remedy. Quite apart from that, the success or otherwise of the appellant`s arguments on this issue must depend, to a large extent, on the circumstances in which the sum of US$642,451.04 was paid by Tan to Liu and whether such payment was made under a mistake and when the mistake was discovered or ought with reasonable diligence to have been discovered and the extent to which Liu`s conscience was affected by his knowledge of the mistake. These are questions which would have to be addressed and considered in the light of evidence adduced at the trial. At this stage, however, it cannot be said that the appellant`s claim for restitution on the ground of constructive trust is frivolous or vexatious or otherwise an abuse of the process of the court.

Res judicata

We now turn to the last issue: whether the appellant was precluded by the doctrine of res judicata in the wider sense from pursuing this action against Liu. The learned judge in holding that res judicata in the wider sense applied relied on **Yat Tung Investment v Dao Heng Bank** [1975] AC 581, a decision

of the Privy Council on appeal from the Court of Appeal of Hong Kong. In that case, plaintiff was the mortgagor of a certain property and defaulted in payment of the sum due to the bank. The bank in exercise of its rights as the mortgagee sold the property. The plaintiff brought an action against the bank claiming that the property was conveyed to him as a trustee of the bank and accordingly the mortgage was a nullity. The bank counterclaimed for the loss suffered in the sale. The court dismissed the claim of the plaintiff and allowed the counterclaim. One month after the judgment, the plaintiff brought an action against the bank and the purchaser of the property claiming that the sale by the bank to the purchaser was fraudulent and in breach of duty. The bank and the purchaser took out an application to strike out the statement of claim on the ground that it was vexatious and frivolous and/or otherwise an abuse of the process of the court. The judge at first instance struck out the claim as vexatious, frivolous and an abuse of the process of the court. The order was affirmed by the Court of Appeal. On appeal to the Privy Council, the appeal was dismissed. Lord Kilbrandon delivering the judgment of the Board said at pp 589-591:

> *The second question depends on the application of a doctrine of estoppel, namely, res judicata. Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no 969, any formal repudiation of the pleas raised by the appellant in no 534. Nor was Choi Kee [the second respondent], a party to no 534, a party to no 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res judicata is the judgment of Wigram V-C in **Henderson v Henderson** [1843] 3 Hare 100, 115, where the judge says:*
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> *`... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.`*
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> *The shutting out of a `subject of litigation` - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless `special circumstances` are reserved in case justice should be found to require the non-application of the rule ...*

It should be borne in mind that abuse of the court`s process is the true basis for the operation of the extended doctrine of res judicata. In **Greenhalgh v Mallard** [1947] 2 All ER 255, 257, Somervell LJ said:

> *... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised*

that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This passage of the judgment was quoted with approval by the Privy Council in ***Yat Tung*** (at p 540). It was expressly endorsed by the Privy Council in **Brisbane City Council v A-G for Queensland** [1979] AC 419, which was an appeal from the decision of the Full Court of the Supreme Court of Queensland. In that case, the land in question was held by the City Council subject to certain terms and conditions. By a contract in writing, the Council agreed to sell it to a developer for use as shopping centres. The Attorney General of Queensland at the relation of one S brought an action against the Council and the developer seeking a declaration that the sale was ultra vires and void. That action failed and was dismissed. Subsequently, the Attorney General at the relation of S and another person B brought another action against the Council and the developer seeking a declaration that the land was held by the Council subject to a valid and enforceable trust for use as show ground, park and recreation purposes. One of the issues raised was whether the plaintiff was precluded from bringing the second action by the operation of res judicata in the wider sense. It was held by the Privy Council that abuse of process is the true basis for the doctrine of res judicata in the wider sense and that the bringing of the second action was not an abuse of process. Lord Wilberforce delivering the judgment of the Board said at p 425:

*The second defence is one of `res judicata`. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in **Henderson v Henderson** [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in **Hoystead v Commissioner of Taxation** [1926] AC 155. A recent application of it is to be found in the decision of the Board in **Yat Tung Investment Co Ltd v Dao Heng Bank Ltd** [1975] AC 581. It was, in the judgment of the Board, there described in these words:*

`... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.` (p 590)

*This reference to `abuse of process` had previously been made in **Greenhalgh v Mallard** [1947] 2 All ER 255 per Somervell LJ and their Lordships endorse it. This is the true basis of the doctrine and it ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation.*

On this issue, it is helpful to refer to two very recent decisions. First, there is the case of **C (A Minor) v Hackney London Borough Council** [1996] 1 WLR 789. There the plaintiff, a Down`s syndrome girl, lived in a council house of which her mother was the tenant. The plaintiff suffered from recurrent bouts of chest and upper respiratory infections which were caused or aggravated by the disrepair and dampness of the house. An action by the plaintiff`s mother against the council was disposed of by a consent order which specified the works necessary to put the house into repair and provided for the payment of damages. Subsequently, the plaintiff brought proceedings against the council by her stepfather as next friend claiming damages for negligence and breach of statutory duty. She obtained judgment in default of defence for damages to be assessed, but on the council`s

application the judge at first instance set aside the judgment and struck out the action as an abuse of process on the ground of res judicata. On appeal by the plaintiff, it was held, allowing the appeal, that although it was plainly in the public interest in the circumstances to have a single action in which the claims of all affected members of the household were included rather than a multiplicity of actions, the dependent child`s claim was not barred merely because her mother`s claim had been satisfied and the child`s claim could more conveniently have been litigated at the same time. The principle that an unlitigated monetary claim was barred if it could have been advanced and established in earlier proceedings could not be extended to bar claims by those who had not themselves been parties to the earlier proceedings. Simon Brown LJ, with whom Saville and Butler-Sloss LJJ agreed, in the course of his judgment, said at p 794:

> *Turning, then, to* ***Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*** *[1975] AC 581, it is plain from close consideration of the facts of that case that in reality it represents no significant departure whatever from the long established principle that only the parties and their successors are vulnerable to the doctrine of res judicata. Sir James Wigram V-C`s judgment in* ***Henderson v Henderson*** *3 Hare 100, 115, applied in* ***Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*** *[1975] AC 581, 590 and there stated by Lord Kilbrandon to be the locus classicus of the res judicata doctrine in its wider sense, expressly referred to `the same parties`, and stated that the plea applies `to every point which properly belonged to the subject of litigation, and which* ***the parties, exercising reasonable diligence, might have brought forward at the time****`. [My emphasis.]* ***Yat Tung Investment Co Ltd v Dao Heng Bank Ltd****, properly understood, held that the plaintiffs who were barred from bringing their later action were indeed able to be regarded as parties during the earlier, somewhat convoluted, course of the litigation; their new claim was in reality, if sound, a defence available in a previous action in which they had clearly been interested although not formally a party.*
>
> *The general rule is conveniently found stated in the short headnote in* ***Spencer and Spencer v Williams*** *(1871) LR 2 P & D 230:*
>
> *`If parties litigate a question in a court of competent jurisdiction, and a final decision be given thereon, such parties or those claiming through them cannot afterwards reopen the same question in another court. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such party.`*
>
> *See too in this regard* ***Black v Yates*** *[1992] QB 526.*
>
> *I therefore reject entirely the submission that* ***Yat Tung Investment Co Ltd v Dao Heng Bank Ltd*** *[1975] AC 581 justifies extending the* ***Talbot v Berkshire County Council*** *[1994] QB 290 principle - that an unlitigated monetary claim is barred if it could have been advanced and established in earlier proceedings (itself to my mind an extended application of the res judicata doctrine) - to those not themselves party to the earlier proceedings.*

The second case is **Bradford & Bingley Building Society v Seddon, Hancock & Ors** [1999] 1 WLR 1482. The facts were that Seddon took out a mortgage loan with a building society to fund an investment on the advice of Hancock, an accountant. The investment failed and Seddon claimed damages for negligence and/or an indemnity against Hancock, who admitted liability. But Seddon was unable to enforce the judgment against Hancock, because the latter had no money. The building

society, which was then owed more than o180,000, commenced proceedings against Seddon who thereupon brought third party proceedings against Hancock and his partners, Walsh and Rhodes. The third party claim was wider than the original claim against Hancock and included claims against all three of them for an indemnity, damages for failure to indemnify Seddon and/or negligence and/or misrepresentation. An application to strike out the third party claim as an abuse of process because of an inconsistency with the earlier claim against Hancock was allowed at first instance. However, the decision was reversed by the Court of Appeal. The main judgment of the court was delivered by Auld LJ with whom Ward and Nourse LJJ concurred. After referring to the well known dictum of Sir James Wigram V-C in ***Henderson*** , Auld LJ said at p 1490:

> *In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts` subsequent application of the above dictum. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in `special cases` or `special circumstances:` ... The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter.*

He held that the ***Henderson*** rule is capable of being applied to cases where the parties to the proceedings are not the same as parties in the earlier proceedings. He said at p 1491:

> *In my view, it is now well established that the **Henderson** rule, as a species of the modern doctrine of abuse of process, is capable of application where the parties to the proceedings in which the issue is raised are different from those in earlier proceedings. Indeed, it is inherent in Sir James Wigram VC`s reasoning that, as a general rule, all persons who are to be sued should be sued at the same time and in the same proceedings where such a course is reasonably practicable, and whenever it is so and is not taken then, in an appropriate case the rule may be invoked so as to render the second action an abuse ...*
>
> *Equally, the rule may in an appropriate case apply to a plaintiff who could and should have pursued his claim in an earlier action against the same defendant ...*

On this point, his view differed from that of Simon Brown LJ in ***Hackney London Borough Council*** (supra).

Auld LJ also held at p 1492:

> *In my judgment mere `re`-litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process. Rules of such rigidity would be to deny its very concept and purpose.*

In his view, some `additional element` is required, such as a collateral attack on a previous decision,

some dishonesty or successive actions amounting to unjust harassment. In a case of `re`-litigation falling short of res judicata (in the narrow sense), the onus should be on the person alleging abuse to establish what it is that makes the further litigation an abuse. The references in the ***Henderson*** rule and in various modern authorities to the need for a `special` case or circumstances to justify litigating a matter that should have been litigated on an earlier occasion are not an obstacle to his interpretation of the law relating to abuse of process as distinct from res judicata. To construe them as such would undermine the basis of the court`s jurisdiction as it has developed, namely, to look for some element additional to mere `re`-litigation, to avoid restrictive rules and to be cautious before barring people from access to the courts. The learned Lord Justice then concluded thus at p 1498:

> *I can see no circumstance here to justify treating as an abuse of process Mr Seddon`s decision to sue and secure judgment against Mr Hancock on his admission of having given him an indemnity. He may well have taken the view, given that admission, that it would be pointless and wasteful to encumber that litigation with other parties and other claims. No doubt, the necessity only emerged later when his judgment against Mr Hancock proved unenforceable and he found himself on the receiving end of Bradford & Bingley`s claim, requiring him to look to every possible means to protect himself.*

In the case at hand, Tan was a party in Suit 4149/84 initiated by Lim, and the appellant, his executrix, is now bound by the determination of this court in that action. However, Liu was not a party in that action, and purely with the parties as they were in that action as instituted by Lim, Tan could not have counterclaimed against Liu for the return of the moneys. It is true that Tan could have done so by joining Liu as a third party in that action; and that he did not do. But, in our opinion, his failure to do so did not make the present action an abuse of the process of the court. On this point, we find the case of **Gleeson v J Wippell & Co** [1977] 1 WLR 510 instructive.

In that case, the plaintiff was the owner of the copyright in a special type of collar-attached shirt for use by the clergy. In 1970, she commenced proceedings against D Ltd for infringement of the copyright in her drawings, the essence of her claim being that D Ltd had copied a shirt supplied to them by W Ltd, who had indirectly infringed the plaintiff`s copyright by copying a shirt manufactured for the plaintiff, which was itself a copy of the plaintiff`s drawings. W Ltd was not a party to the proceedings. The plaintiff failed in that action, the court holding that there was no infringement of the plaintiff`s copyright, and that decision was upheld by the Court of Appeal. In 1975, the plaintiff issued a writ against W Ltd, alleging infringement of copyright in relation to the same shirt and claiming relief by way of declaration, injunction, damages and delivery up of infringing copies. On the application by W Ltd under O 18 r 19 and the inherent jurisdiction of the court to strike out the statement of claim on the ground that that since it had been held in the earlier action that W Ltd`s shirt did not infringe the plaintiff`s copyright, it was frivolous and vexatious and an abuse of the process of the court for the plaintiff to seek to litigate all over again what had already been decided against her. In rejecting this argument, Megarry V-C held, inter alia, that the failure of the plaintiff to join the defendants W Ltd as a third party in the first action was not an abuse of process under the ***Yat Tung*** principle and she was therefore entitled to bring a second action against W Ltd. He said at pp 517-518:

> *I turn to the other way in which Mr Skone James [counsel for the defendants] put the matter. As this finally emerged, the contention centred on a combination of the* ***Yat Tung*** *case [1975] AC 581 and RSC O 15 r 6(2)(b)(ii) ... Mr Skone James contended that in the Denne proceedings [the first set of proceedings against D Ltd] it was so plain that Wippell was at the heart and core of the case that the plaintiff ought to have joined Wippell, and that as she failed to do so, she ought not now to be permitted to sue Wippell. On the* ***Yat***

> ***Tung*** *case, the question was one not of failure to add a party, but of failure to advance a contention. There was a sufficient identity of parties in the two sets of proceedings, but the Judicial Committee of the Privy Council held that the statement of claim in the second action should be struck out as being an abuse of the process of the court because it was founded on a contention which ought to have been advanced in the first action, but which had not been. Mr Skone James ... urged that there was no great difference between adding contentions and adding parties.*
>
> *It seems to me that the difference is very considerable ... [I]f Mr Skone James is right, the failure to join a possible defendant in the chain may mean that, whatever additional evidence or acquisition of riches subsequently emerges, that possible defendant cannot be sued in subsequent proceedings ...*
>
> *... I can well see the justice of refusing to permit a plaintiff who has failed to take an obvious point against the defendant to have a second bite at the cherry in order to take that point. What I cannot see is the justice of refusing to permit a plaintiff to sue a person at all because the plaintiff failed to join him as a defendant in other proceedings against another person. Such a failure may provide material for cross-examination in the second proceedings, and it may also sound in costs, especially if the second proceedings have the same result as the first; but the drastic step of striking out the proceedings is quite another matter.*

There is yet another reason for holding that the present action is not an abuse of the court`s process. One of the appellant`s claims is that the sum in question was paid to Liu under a mistake of law and the mistake was discovered only upon the Court of Appeal delivering its judgment. Now, this claim could not have been raised in Suit 4149/84, as at that time the mistake was not discovered and could not, with reasonable diligence, have been discovered - so the appellant claims. Upon discovery of the mistake, the appellant as the executrix of Tan is entitled to bring this action to recover the sum alleged to have been paid under a mistake.

In all the circumstances, for the reasons we have given, we are of the opinion that it is not an abuse of process of the court for the appellant to bring the present proceedings seeking to recover the sum paid to Liu. Whether or not she eventually succeeds is a different matter, and that will have to be determined at the trial.

Outcome:

Appeals allowed.

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