IN THE COURT OF APPEAL OF MALAYSIA

Coram: Idrus Harun, JCA; Suraya Othman, JCA; Yeoh Wee Siam, JCA

Lim Chiew v Lee Chao Yong and Another, and Another Appeal

Citation: [2018] MYCA 263 **Suit Number:** Appeal Nos. W-02(IM)(NCC)-2038-11/2016 & W-02(IM)(NCC)-2054-11/2016

Date of Judgment: 30 July 2018

Corporate law – Winding up – Proof of debt – Whether the liquidator has rightfully exercised his discretion to admit the proof of debt – Whether the liquidator's decision accepting the proof of debt unreasonable or absurd

Litigation & court procedure – Locus standi/ Laches – Res judicata/ estoppel – Abuse of process

JUDGMENT

INTRODUCTION

[1] There are 2 appeals before us which are as follows:

(a) Court of Appeal Civil Appeal No: W-02(IM)(NCC)-2038-11/2016 ("Appeal 2038" by the Appellant Lim Chiew); and

(b) Court of Appeal Civil Appeal No: W-02(IM)(NCC)-2054-11/2016 ("Appeal 2054" by the Appellant Siteman Construction Sdn Bhd).

[2] These 2 appeals are against the decision of the learned High Court Judge ("Judge") delivered on 11.10.2016 allowing Lee Chao Yong's application under section 279 of the repealed **Companies Act 1965 ("RCA")**, vide Notice of Motion dated 11.7.2016 ("Motion 97"), to reverse and/or modify the decision of the Liquidator of the Appellant ("Siteman") in admitting Lim Chiew's proof of debt ("POD") dated 21.6.2010 for the total sum of RM6,893,838.23.

[3] The learned Judge's decision/ order in allowing Motion 97 to reverse and/or modify the Liquidator's decision is as follows:

(a) In respect of the POD in the sum of RM6,893,838.23, the Court orders the sum of RM6,334,674.51 to be subjected to determination by the Court;

(b) the Liquidator be directed to apply to the Court for such determination;

(c) all payments of dividend and distribution of the assets of the Appellant Siteman be stayed pending the final determination by Court; and

(d) costs in the cause of the determination referred to above.

[4] On 7.3.2017, by consent of parties, the 2 appeals were orderred to be heard together. We heard the 2 appeals on 25.1.2018 and found merits in both the appeals. We allowed both the appeals against Lee Chao Yong and set aside the decision and order of the learned Judge.

[5] For ease of reference, parties will be referred to as follows:

(a) Appellant in Appeal 2038, Lim Chiew (Petitioner in High Court)- Lim Chiew;

(b) Appellant in Appeal 2054, Siteman Construction Sdn Bhd (Respondent in High Court)- Siteman; and

(c) 1st Respondent in Appeal 2038, and 2nd Respondent in Appeal 2054 (Applicant in High Court)- Lee Chao Yong.

BACKGROUND FACTS

[6] Siteman is a company duly incorporated in Malaysia. Pursuant to a Winding-Up Petition filed by the petitioner Lim Chiew, Siteman was wound up by Order of Court dated 11.6.2010 and Mr. Subramaniam a/l A.V. Sankar was appointed by the Court as the liquidator of Siteman ("Liquidator").

[7] Lim Chiew, the petitioner in the winding-up petition, is a creditor of Siteman and prior to the winding-up of Siteman, Lim Chiew filed 2 suits in the High Court of Kuala Lumpur, namely Kuala Lumpur High Court Civil Suit No. D3-22-1319-2008 ("Suit 1319") and Kuala Lumpur Civil Suit No. D6-22-123-2008 ("Suit 123") against Siteman.

[8] Lee Chao Yong, the applicant, was a director of Siteman until he abruptly resigned on 2.10.2009, 5 days prior to a judgment being entered against Siteman on 7.10.2009. Subsequently, on 6.4.2010, Lee Chao Yong transferred all his shares in Siteman to his driver, Khairul Anuar bin Mamat. As such, Lee Chao Yong is neither a director, shareholder nor contributory of Siteman. Motion 97 under section 279 of the **RCA** is predicated on the ground that Lee Chao Yong is a creditor of Siteman.

[9] On 21.6.2010, Lim Chiew informed the Court in Suit 123 that Siteman has been wound up and withdrew his claim against Siteman with a view of filing POD with the Liquidator. However, Lim Chiew proceeded with his claim against the other Defendants in their personal capacity.

[10] On the same date, 21.6.2010, Lim Chiew filed 2 PODS for the total amount of RM6,893,838.23.

The 2 PODS were filed pursuant to Suits 1319 and 123 respectively. Under Suit 1319, Lim Chiew has obtained judgment on 7.10.2009 for the sum of RM735,000.00 against Siteman and garnishee proceedings had been commenced against Siteman's bank account for the sum of RM264,036.28. Under Suit 123, the POD filed was in relation to an alleged amount of RM6,334,674.51 (as per statement of claim) owing by Siteman to Lim Chiew.

[11] On 2.3.2012, the Liquidator filed a suit on behalf of Siteman against Lee Chao Yong in the High Court of Kuala Lumpur Civil Suit No. 22NCC-291-03/2012 ("Suit 291") to recover the sum of RM2,450,000.00 from Lee Chao Yong, on the ground that these payments were made without authority, deemed fraudulent and or constituted an undue preference of Lee Chao Yong or voluntary settlement in favour of Lee Chao Yong and, accordingly is absolutely void or void against Siteman and/or its Liquidator pursuant to section 293(1), (2) and/or (3) of the **RCA** read together with section 53(1) and/or section 52 of the **Bankruptcy Act, 1967**.

[12] On 15.7.2013, the Liquidator succeeded in Suit 291 and judgment was entered against Lee Chao Yong for the sum of RM2,450,000.00. Lee Chao Yong's appeal to the Court of Appeal was dismissed and his application for leave to appeal to the Federal Court was dismissed on 24.11.2016.

[13] Khairul Anuar bin Mamat, whom Lee Chao Yong transferred his shares to, then filed a motion to remove the Liquidator (Subramaniam). The High Court did not find any basis to remove the Liquidator but allowed Khairul's application on 18.6.2013 in part, by appointing a co-liquidator, Mr Chang Chee Ching. On 8.4.2014, the Court of Appeal set aside the order of the High Court and removed the co-liquidator. Khairul's motion for leave to appeal to the Federal Court was dismissed on 2.11.2016.

[14] On 26.11.2014, Lee Chao Yong filed a motion for leave to bring committal proceedings against the Liquidator (Subramaniam) and leave was granted by the Court. On 16.1.2015, the Liquidator filed an application to set aside the ex-parte order dated 26.11.2014 and the same was allowed by the High Court on 3.7.2015. Dissatisfied with the decision of the High Court in setting aside the ex-parte order dated 26.11.2014, an appeal was lodged by Lee Chao Yong and the same was dismissed by the Court of Appeal on 29.11.2015.

[15] On 13.6.2016, Lee Chao Yong filed a notice of motion for a stay of the winding-up order dated 11.6.2010 ("Motion 93") under section 243 of the **RCA** and the inherent jurisdiction of the Court. The motion was dismissed by the same learned Judge on 11.8.2016. Subsequently Lee Chao Yong appealed to the Court of Appeal and later withdrew the appeal.

[16] On 11.7.2016, about a month after filing Motion 93, Lee Chao Yong filed Motion 97 under section 279 of the **RCA** for the Court to make the following orders:

(a) Mr. Subramaniam a/l A.V Sankar's approval of the Proof of Debt (POD) filed by Lim Chiew be reversed and modified;

(b) the costs of this motion to be borne and paid by the Liquidator to the Applicant forthwith; and

(c) any further orders and/or other reliefs as the Court deems fit and proper in the circumstances of this case.

[17] On 11.10.2016, the High Court allowed Motion 97 and hence these 2 appeals by Lim Chiew and Siteman.

FINDINGS OF THE HIGH COURT

[18] The findings of the learned Judge in her grounds of Judgment ("GOJ") can be summarised as follows:

(a) **On laches/ delay in filing Motion 97**, Lee Chao Yong is not guilty of laches since the earliest date he was clothed with the requisite *locus standi* was when he was adjudged a creditor on 15.12.2013 by another Judge (Has Zanah's J judgment in Suit 291-para 29.1 of GOJ).

(b) **On *res judicata/ estoppel***, the doctrine of *res judicata/ estoppel* is not applicable in this case. The contention by Lim Chiew and the Liquidator that Lee Chao Yong in Motion 97 is *estopped* from raising the issue that the liquidator has failed to verify the Petitioner Lim Chiew's POD and has merely blindly accepted the same cannot be raised again since the same issue was raised in Motion 93 in the stay application does not tantamount to asking the Court to relitigate on the same subject matter. This is so since the test in the stay application of the winding-up proceedings under section 243 of the **RCA** (Motion 93) and the test in Motion 97 to reverse or modify the decision of the Liquidator under section 279 are different and since the tests applied are different, the issue of *res judicata* does not apply. Further, the evidence of the conduct and the considerations of the Liquidator on admitting the POD which is central in Motion 97 was not put before the Court in Motion 93 and no submission on section 279 was made before the Court (para 22.1 till 22.3 of GOJ).

(c) **On abuse of process**, the Court's decision on Motion 93 in disallowing the stay of the winding-up proceedings and the subsequent Motion 97 filed about a month later by Lee Chao Yong does not amount to a collateral challenge on the decision of the stay application on the ground that the Liquidator has failed to verify the POD. This is so even when Lee Chao Yong has withdrawn his appeal in respect of Motion 93. The dismissal of Motion 93 by the same Judge, the withdrawal of the appeal by Lee Chao Yong on Motion 93 on 23.2.2017, and the subsequent filing of Motion 97 about a month after filing Motion 93 does not tantamount to an abuse of process by Lee Chao Yong.

(d) **On whether Lim Chiew's claim is genuine and whether the Liquidator has rightfully admitted Lim Chiew's POD**, the Judge found that the genuineness of Lim Chiew's claim under Suit 123 for the amount of RM6,334,674.51 as being due to him cannot be sustained since this claim is premised on para 21 of his statement of claim for damages and/or unliquidated amount that has yet to be proven (para 33.1 of GOJ). Further,the Judge found that the Liquidator has not given particulars of his investigations and that the acceptance by the liquidator of Michael Yong's (ex-director of Siteman) confirmation of the document on the breakdown of the construction costs

as proof of Lim Chiew's claim is questionable and at best self serving since the author of the said document is unknown and the document has not been verified nor certified by an engineer, architect or quantity surveyor (para 33.3, 33.4 and 33.5 of GOJ).

(e) **On whether Lee Chao Yong has satisfied the threshold test under section 279 of the RCA,** the Judge found that the Liquidator's conduct falls under the following categories:

(i) The Liquidator did not address himself to the correct questions;

(ii) the Liquidator has made errors of law;

(iii) the Liquidator has taken into consideration entirely irrelevant considerations which warranted the Court to interfere with the exercise of the Liquidator's decision.

SUBMISSION OF PARTIES

[19] In essence, the Appellants' (Lim Chiew and Siteman's) main argument is that Motion 97 is caught by laches in that there has been an inordinate and unreasonable delay of 6 years from the time Lim Chiew filed his POD which is on 21.6.2010 and Lee Chao Yong's Motion 97 which was filed on 11.7.2016.

[20] Further, if Lee Chao Yong's argument that the earliest date he could have brought the action was when he was clothed with the requisite *locus standi*, that is after he was purportedly adjudged a creditor on 15.12.2013, then there is still a delay of 2 years 7 months from the date he was adjudged a creditor and the date he filed Motion 97. There was no explanation given at all by Lee Chao Yong in respect of the inordinate delay in his affidavit in support of Motion 97.

[21] The Appellants contend that Motion 97 ought to be dismissed for *res judicata* and *issue estoppel* in that the same issues and grounds raised in Motion 97 had been raised by Lee Chao Yong in an application previously filed by him about a month earlier on 13.6.2016 to stay the winding-up proceeding under section 243 of the **RCA** (Motion 93). Motion 97 under section 279 is an abuse of process since Motion 93 which raised similar issues as in Motion 97 has been dismissed by the same learned Judge and Lim Chao Yong has withdrawn his appeal in respect of Motion 93.

[22] The Appellants submit that the learned Judge erred in law and in fact in failing to judicially appreciate that the burden of proof in Motion 97 under section 279 falls on Lee Chao Yong, as applicant, to prove his case and since Lee Chao Yong had failed to satisfy the burden, Motion 97 should have been dismissed. Further, the learned Judge had failed to draw the proper inference from the totality of the evidence and had failed to take into account relevant consideration and took into account instead irrelevant considerations in deciding Motion 97.

[23] The Respondent Lee Chao Yong in reply contends that he has the requisite *locus standi* as a creditor and/or a contributory to file Motion 97 and that there was no delay in making the application.

[24] The Respondent contends that Motion 97 is not caught by *res judicata* or abuse of process since

Motion 93 which was filed earlier, and Motion 97 which was filed about a month later, has different considerations and, though involving the same parties, did not involve the same issues. **In Motion 93 the Respondent contends that he relied on the grounds** that:

(a) There is a "clash of liquidators" in that the ultimate liquidator for the Company has not been decided on and is pending determination at the Federal Court;

(b) the inactivity of the current Liquidator of the Company; and

(c) the fear of dissipation of the Judgment Sum currently held under the joint stakeholders account.

No evidence was led on the issue of the POD and no submissions were made on the same.

[25] Further, the Respondent could not have included a prayer in Motion 93 seeking the relief as prayed in Motion 97 i.e. for a review of the POD. To do so would have been an abuse of process as Motion 93 was for a stay application.

[26] The Respondent argued that the main issue is whether the Liquidator has exercised his discretion rightly in accepting Lim Chiew's POD. Lim Chiew's POD is not true and genuine and is questionable and should not have been accepted by the Liquidator but should instead be required to be proven in Court. Lim Chiew's POD is supported by the Statement of Claim in Suit 123 and the winding-up order. These two (2) documents do not amount to sufficient proof of his claim. Lim Chiew withdrew the suit against Siteman in Suit 123 and therefore, the debt was never proven and no judgment was obtained.

[27] Further, the Respondent submitted that from the Statement of Claim, it is apparent that his claim is for damages and/or an unliquidated amount that has yet to be proven. Lim Chiew also claims in the alternative, the sum of RM6,333,674.51 as the nett profits due to him, but this is obviously unsustainable. The Liquidator did not carry out adequate investigations in respect of the POD. No particulars of the alleged "investigations into the POD" have been provided by the Liquidator, and as such there are no documents that support this claim by Lim Chiew.

DECISION

***Locus Standi*/ Laches**

[28] We will deal with the issue of *locus standi* and laches first. The learned Judge agreed that inordinate or unreasonable delay is a relevant factor but found that Lee Chao Yong was not guilty of laches. The learned Judge examined the factual matrix and found as follows at para 29:

"29. Having regard to the principles governing the equitable defence of laches and turning now to the factual matrix of this instant case, with respect **I could not agree with the submission of the Liquidator for the Respondent and the Petitioner that the Applicant (i) "is guilty of laches of approximately 3 years and 9 months after the Applicant, as defendant in Suit 291, found out**

> **about the admission of the POD from the witness statements of the Petitioner and the Liquidator both dated 8/10/2012"; and (ii) the Applicant has failed to explain the reason for the inordinate delay. I find there is no evidence of laches...**"

[29] According to the learned Judge, Lee Chao Yong was only adjudged a creditor of Siteman on 15.12.2013 by another Judge (Has Zanah's J judgment), and that was the earliest date Lee Chao Yong was clothed with the requisite *locus standi* to file Motion 97.

[30] Assuming that the delay is not 3 years 9 months, calculated from the date Lee Chao Yong should have known about the admission of the POD from the witness statements of the Liquidator and Lim Chiew as Petitioner (Lee Chao Yong was the defendant in this suit and the Liquidator, the Plaintiff), but by 15.12.2013, when he was clothed with *locus standi* as a creditor, he could have filed Motion 97 then, but instead, he only filed it on 11.7.2016. Clearly there is a delay of about 2 years 7 months and there is no explanation proffered by Lee Chao Yong with regard to the inordinate delay in his affidavit in support of Motion 97. The learned Judge too, did not address this issue extensively, except to say that "neither the Liquidator nor Lim Chiew has shown prejudice to them or asserted that they relied on the Applicant's (Lee Chao Yong) lack of action and have altered their position as such" (para 29.1 GOJ).

[31] It is trite, that inordinate delay without explanation, is in itself fatal to the application under section 279 of the **RCA.** This was held by Ramly Ali J, (now FCJ), in **Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor** [2007] 7 CLJ 516, where the Court in dismissing an application under section 279 of the **RCA,** at para 94, 95 and 96, pages 549 to 550 held:

> "[94] There was clear delay in the filing of encl. 37. **Enclosure 37 was only filed on 27 December 2005 where evidence suggests that the applicant knew of the sale of the said land at least as early as 20 August 2004.**
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> [95] **No reasons have been proffered by the 1st Respondent to explain a delay of almost one and a half years. Such a delay would be in itself, be grounds to refuse encl. 37**. In the Leon case (supra). Plowman J held "another ground for refusing the relief for which the plaintiff is asking in this motion is the matter of delay. It is clear from the evidence that the plaintiff knew before Christmas, 1965... the writ was not issued until Mar. I, that is to say, after a delay of over two months..."
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> [96] As was the state of affairs in the Leon case (supra), the liquidator here was dependent on the approval of HSBC in the sale of the said land. The fact that the said land was leasehold land exacerbated the issue, calling for the said land to be sold as soon as possible. The decision was made and the SPA was signed on 3 June 2003 with the consent of HSBC. It is therefore unreasonable for the applicant to have now awakened from his slumber **over two and a half years** later to begin to question and interfere with that decision with hindsight."
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> **[Emphasis added]**

[32] Further, in the case of **Choong Howei v Cheah Choo Eng & Ors And Another Appeal** [2015] 9 CLJ 689, the Court of Appeal at para 44 held as follows:

> "[44] A local authority on the principle on laches can be found in Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219; [1989] 2 MLJ 202 where Edgar Joseph Jr J of the High Court of Penang held:
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> > Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches **the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted:** 14 Halsbury's Laws of England (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open'."

[Emphasis added]

[33] Thus the learned Judge erred, when she made a finding that there was no delay by Lee Chao Yong when he filed Motion 97, as the facts clearly showed that there was at least a delay of 2 years 7 months when Motion 97 was filed, which delay was not explained by Lee Chao Yong.

***Res judicata/ estoppel*/ abuse of process**

[34] On the issue of *res judicata/ issue estoppel*, we will deal with them together with the issue of abuse of process as the grounds in support of these issues are the same.

[35] About a month before the filing of Motion 97, Lee Chao Yong filed Motion 93 which was an application for a permanent stay of the winding-up order under section 243 of the **RCA**. Motion 97, is for a review of the Liquidator's decision in accepting Lim Chiew's POD under section 279 of the **RCA**. The Appellants contend that Motion 97 ought to be dismissed for *res judicata* and *issue estoppel* in that the same issues and grounds raised in Motion 97 had been raised by Lee Chao Yong on 13.6.2016 in Motion 93 to stay the winding-up proceeding under section 243 of the **RCA**. As such, Motion 97 under section 279 is an abuse of process since Motion 93, which raised similar issues as in Motion 97, has been dismissed by the same learned Judge, and Lim Chao Yong has withdrawn his appeal in respect of Motion 93.

[36] The Respondent contends that Motion 97 is not caught by *res judicata* or abuse of process since Motion 93 which was filed earlier, and Motion 97 which was filed about a month later, has different considerations and, although involving the same parties, did not involve the same issues. In Motion

93, the Respondent contends that he relied on the grounds that:

(a) There is a "clash of liquidators" in that the ultimate liquidator for the Company has not been decided on and is pending determination at the Federal Court;

(b) the inactivity of the current Liquidator of the Company; and

(c) the fear of dissipation of the Judgment Sum currently held under the joint stakeholders account.

No evidence was led on the issue of the POD and no submissions were made on the same.

[37] On perusal of Motion 93 on the stay of the winding-up order under section 243, we found that the Respondent's counsel has left out another ground which was pleaded by him in Motion 93, that is ground 3, which is as follows:

"3 that the current Liquidator has not verified the Petitioner's (Lim Chiew) claim and has merely blindly accepted the same."

[38] This ground was based on:

(a) The witness statements of Lim Chiew and the Liquidator in Suit 291, and the statement of claim in Suit 123, where it was alleged that the Liquidator has failed to verify Lim Chiew's POD and has blindly accepted the same.

(b) Lee Chao Yong's Affidavit in Support, at para 20, which is as follows:

"...the biasness of the current liquidator can be seen from the fact that he has admitted Lim Chiew's claim of RM6,334,674.51 when the claim is for unliquidated damages that have not been proven or assessed. In all probability if the Judgment Sum is paid to the liquidator, he will satisfy Lim Chiew's claims. Lim Chiew is purportedly the sole creditor of the Respondent hence any recovery at this stage would be paid to him alone. **Without proper verification of Lim Chiew's claim, this would result in unjust enrichment of Lim Chiew**."

[39] On perusal of Motion 97 under section 279 to reverse or modify the POD admitted by the Liquidator, we found that similar grounds were forwarded to support the application. The grounds are as follows:

"6 In addition to that, the amount stated in the POD was never proven or substantiated.

7 The Liquidator should not have admitted the said POD. Therefore, the Liquidator has failed and/or neglect his duty towards the court, in that he had admitted the POD without prior and thorough examination."

[40] The learned Judge at para 22.2 of her GOJ accepts and recognises the similarity in both applications, but erroneously held, that "the evidence of the conduct and the considerations of the

Liquidator on admitting the POD which is central in enclosure 97, was not put before the Court in enclosure 93, and that no submission on section 279 was made before the Court". We find that the finding by the learned Judge goes against the record which clearly shows that Lee Chao Yong had, by way of affidavit evidence in Motion 93, directly challenged the Liquidator's conduct in admitting the POD without proper verification.

[41] Further, Motion 93 was fully argued and dismissed by the same learned Judge on 11.8.2016, and Lee Chao Yong's appeal to the Court of Appeal was withdrawn. The same matters had been raised, determined and decided in Motion 93 which was dismissed by the same learned Judge. Similar arguments were relied upon in Motion 97. As such the issue as to whether the POD is valid or admitted correctly becomes *res judicata* and the same issue cannot be re-ventilated and heard again in Motion 97. We thus agree with the Appellants that it is trite that a party cannot bring a fresh action for matters and issues that have been ventilated previously before the Court. This is clearly an abuse of the process of the court.

[42] There is a plethora of cases on the doctrine of *res judicata* and abuse of process. In the case of **Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd** [1995] 3 MLJ 189, the Supreme Court at page 197 held:

> "What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. **When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur.** The public policy of the law is that, it is in the public interest that there should be finality in litigation-interest rei publicae ut sit finis litium. It is only just that no one ought to be vexed twice for the same cause of action-nemo debet bis vexari pro eadem causa. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy."
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> **[Emphasis added]**

[43] In the case of **Chemfert Sdn Bhd & Anor v Lim Hua** [2010] 5 MLJ 228, the Court of Appeal at para 23 (q) held:

> "Res judicata for this purpose is therefore not confined to the issues which the court is actually asked to decide, but **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:** per Somervell LJ in Greenhalgh v Mallard [1947] 2 All ER 255 at p 257 and quoted with approval in the Privy Council in Yat Tung Investment Co Ltd v Dao Heng Bank Ltd and another [1975] AC 581; [1975] 2 WLR 690 (see also SCF Finance Co Ltd v Masri and another (No 3) [1987] QB 1028; [1987] 1 All ER 194 (CA); Bell v Holmes [1956] 3 All ER 449; [1956] 1 WLR 1359 and Hoystead and others v Commissioner of Taxation [1926] AC 155)."

[Emphasis added]

[44] In the case of **Tractors Malaysia Bhd v Charles Au Yong** [1982] 1 MLJ 320, Suffian L.P. (as His Lordship then was), applied the principles on abuse of process in **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529 and held (at page 321) as follows:

> "In our judgment the Malacca action is tantamount to a collateral attack upon the final decision of a court of competent jurisdiction. Since writing this judgment we have come across a decision of the House of Lords on this very point in Hunter v Chief Constable of the West Midlands Police where a civil case was started obviously to try and overrule a decision of a criminal court. There Lord Diplock said at page 914:
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> > "My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety forms. It is not surprising that no reported case is to be found in which the facts present a precise parallel with those of the present case."
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> He then cited with approval the following passages as expressing the principle to be followed by the courts:
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> > "...**the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court.**" (per A.L Smith L.J. in Stepbenson v. Garnett [1898] 1 Q.B. 677, 680-681).
> >
> > "...**I think it would be a scandal to the administration of justice if, the same question having been disposed of by one of the litigant were to be permitted by changing the form of the proceedings to set up the same case again.**" (per Lord Halsbury L.C. in Reichel v. Magrath (1889) 14 App. Cas. 665, 668)."

[Emphasis added]

[45] Similarly, in **Tay Choo Foo v Harrisons Holdings (M) Bhd** [2001] 4 CLJ 52, Ramly Ali JC, (now FCJ), at paragraph 58i, held as follows:

> "On abuse of process of court, ***Lord Diplock in Hunter v Chief Constable of the West Midlands Police & Ors*** [1982] AC 529; [1981] 3 All ER 727, at p. 536 had this to say:
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> > My Lords, this is a case of an abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant must surely be unique. It would, in my view, be most unwise if this House were to use this occasion

> to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disallow the word discretion) to exercise this salutary power.

The above principle was applied by Mohamed Azmi SCJ in Mohamed Habibullah's case (supra) where he further said:

> Applying the above principle, **it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter.**
>
> Applying the above principle, I am also of the view and find that the plaintiff (in our present case) should not be allowed to claim for the dividends in this court where the shares upon which the dividends were derived are being contested in another court filed earlier; and also where the undertaking has also been given (by the plaintiff in this case) in the D3's suit. **There should not be two different courts adjudicating upon the same subject matter.**"
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> **[Emphasis added]**

[46] Based on the above authorities, the doctrine of *res judicata* and abuse of process is applicable in this case since identical question as to the validity of the POD which was accepted by the Liquidator raised in Motion 97 had already been raised, argued and determined in Motion 93. Lee Chao Yong, in the circumstances, should not be permitted by changing the form of the proceedings to a section 279 application, to set up the same case again as he had done in the stay of the winding-up order in Motion 93. Further, Lee Chao Yong had appealed against the decision of the learned Judge in dismissing the stay in Motion 93, and subsequently withdrawn his appeal. The decision in Motion 93 thus became final and binding on him. To now mount a collateral challenge on the final decision through Motion 97 would amount to a re-opening and re-litigating of the same issue twice, and should not be tolerated and allowed, as it is clearly an abuse of process.

On whether the Liquidator has rightfully admitted Lim Chiew's POD

[47] The learned Judge found that the genuineness of Lim Chiew's claim under Suit 123 for the amount of RM6,334,674.51 as being due to him, cannot be sustained, since this claim is premised on para 21 of his statement of claim for damages and/or unliquidated amount that have yet to be proven (para 33.1 of GOJ). Further, the Judge found that the Liquidator has not given particulars of his investigations and that the acceptance by the Liquidator of Michael Yong's (ex-director of Siteman) confirmation of the document on the breakdown of the construction costs as proof of Lim Chiew's claim, is questionable, and at best self serving, since the author of the said document is unknown and the document has not been verified nor certified by an engineer, architect or quantity surveyor (para 33.3, 33.4 and 33.5 of GOJ).

[48] On perusal of the affidavit in reply of the Liquidator dated 29.7.2016 (Common Core Bundle pages 125 to 126), we found that the Liquidator has carried out investigations in relation to the POD of Lim Chiew (the petitioner) and the particulars of his investigations are as follows:

"8 Upon receipt of the POD, I carried out some investigation for the purpose of examining the POD. Based on my investigation, I discovered that:

8.1 On 7.10.2009, the Petitioner obtained a judgment in the sum of RM735,000.00 ('**Judgment Sum**') in Suit D3-22-1319-2008 ('**Suit 1319**') against the Respondent with interest at 8% p.a. from 17.7.2008 until full settlement. The judgment is exhibited as Appendix "B" in the POD.

8.2 The Petitioner has commenced Garnishee proceeding against the Respondent's bank account for a sum of RM264,036.28. Thus, the Petitioner's POD only includes RM559,163.72 out of the Judgment Sum in Suit 1319.

8.3 With respect to the amount of RM6,334,674,51 claimed in the POD, there was a Joint Venture Arrangement ('**JVA**') entered between the Respondent and the Petitioner for a construction of a Kuala Lipis Factory whereby the Petitioner will provide a sum of RM7,500,000 as capital and the Respondent and the Petitioner have agreed to divide the net profit made from the construction on a 50:50 basis.

8.4 From around 2003 to 2004, the Petitioner has made various payments by cheques to the Respondent amounting to RM7,500,000 pursuant to the JVA.

There is now produced and shown to me copies of cheques showing payments by the Pentitioner to the Respondent and marked collectively as **Exhibit 'S-4'**."

[49] Therefore, the learned Judge's finding that the genuineness of Lim Chiew's claim cannot be sustained since the Liquidator only relied on the statement of claim in Suit 123 as proof of his alleged debt, is thus erroneous since she has ignored documentary evidence produced by the Liquidator. Investigation was done by the Liquidator and particulars of his investigation were well documented. As can be seen in his affidavit at para 8.4 referred to in paragraph 48 above, he took into consideration that the petitioner Lim Chiew has made various payments by cheques to the respondent Siteman amounting to RM7,5000.000.00 and these payments by cheques are exhibited in exhibit 'S4'.

[50] As for the sum of RM6,334,674.51 which constitutes the amount claimed by Lim Chiew in Suit 123 (related to para 8.3 in the Liquidator's affidavit referred to in paragraph 48 above), it is supported by a breakdown of the construction costs. The breakdown of the construction costs detailed the profits made from the construction and all payments made by Siteman as costs of the construction under the JVA. In this regard Michael Yong, a former director of Siteman, has confirmed the amount stated in the breakdown of the construction costs and the amount due to Lim Chiew, i.e. RM6,334,674.51.

[51] The learned Judge found that the Liquidator should not have accepted Michael Yong's confirmation of the breakdown of costs because Michael Yong "is in no position to confirm such matters as he has denied Lim Chiew's claim as is evident from his Defence in Suit 123". In this regard, we agree with the Appellant counsel's submission that the learned Judge had failed to appreciate that in Suit 123, Lim Chiew sued Siteman and its former directors, including Michael

Yong, in their personal capacity over monies owing to him under the JVA. Since the JVA was entered into between Siteman and Lim Chiew, it is not surprising that Michael Yong denied Lim Chiew's claim that he was personally liable. As Michael Yong explained in his letter dated 30.8.2016 to the Liquidator, he should not be held personally liable and it was Siteman that should be held solely responsible. Therefore, we agree with learned counsel for the Appellant that there is no basis for the learned Judge to have had any "reservation on the weight to be given to Michael Yong's letter dated 30.8.2016" (para 33.4 GOJ). In the circumstances, we are of the view that Lim Chiew's POD is true and genuine, and that the Liquidator has exercised his discretion rightly in admitting or accepting Lim Chiew's POD.

Failure by the Applicant to prove under section 279 of the RCA 1965 Whether the Liquidator's decision in accepting the POD is so unreasonable and absurd that no reasonable person would have acted that way

[52] The learned Judge found that she had to interfere with the exercise of the Liquidator's decision based on the following grounds:

(a) The Liquidator did not address himself to the correct questions;

(b) the Liquidator has made errors of law;

(c) the Liquidator has taken into consideration entirely irrelevant considerations.

[53] It must be noted that in the case of **Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor** [2013] 2 MLJ 629, the Federal Court in affirming the decision in **Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor** [2007] 2 MLJ 12 held as follows:

> "[24] Based on the above principles of law, we are of the view that **the court should be slow to interfere with any act or decision of the liquidators in discharging their roles in company liquidation and will do so only if it is so unreasonable and absurb that no reasonable person would have acted in that way.** The court will not interfere with the decision simply because its opinion might differ from that of the liquidator (see the case of *Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor* [2007] 2 MLJ 12)."
>
> **[Emphasis added]**

[54] Based on **Wong Sin Fan**'s case (supra), the Court will not interfere unless the conduct of the Liquidator was so unreasonable and absurd that no reasonable person would so act. The Court too, will not interfere with the Liquidator's decision simply because its opinion might differ from that of the Liquidator. In our instant case, we are of the view that the Liquidator's conduct did not fall on any of the specified grounds from (a), (b) and (c) as cited by the learned Judge in paragraph 52 above. We do not think that it could be said that the conduct of the Liquidator was so unreasonable and absurd that no reasonable person would so act.

CONCLUSION

[55] For the foregoing reasons, we are unanimous in our view that appellate intervention is warranted premised on the following grounds:

(a) There was delay of at least 2 years 7 months in filing Motion 97 with no explanation proferred by the Applicant Lee Chao Yong for the delay;

(b) the doctrine of *res judicata/ estoppel* and abuse of process is applicable since a similar or identical question as to the validity of the POD which was accepted by the Liquidator had previously been raised and argued in Motion 93 for a stay of a winding-up order. Motion 93 was dismissed by the same Judge. Lee Chao Yong appealed against this decision and later withdrew the appeal, thus the judgment becomes final and could not be relitigated;

(c) the Liquidator had rightfully exercised his discretion to admit Lim Chiew's POD based on his investigation which he had particularised in his affidavit and supported it with documents in the form of copies of cheques showing payments by Lim Chiew to Siteman;

(d) the Liquidator's decision in accepting the POD is not so unreasonable and absurd that a reasonable person would not have acted in that way.

[56] In the circumstances, the appeal is allowed and the order and decision of the High Court is set aside. Costs of RM10,000.00 each against Lee Chao Yong is awarded to both the Appellants subject to the payment of allocator fee. The deposits are refunded to the Appellants.

Date: 30th July 2018

Signed

SURAYA OTHMAN
Judge
Court of Appeal Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Bankruptcy Act 1967, Sections 52, 53(1)

Companies Act 1965, Sections 243, 279, 293(1), 293(2), 293(3)

JUDGMENTS REFERRED TO:

Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516

Andrew Christopher Chuah Choong Eng Chuan v Ooi Woon Chee & Anor [2007] 2 MLJ 12

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189

Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228

Choong Howei v Cheah Choo Eng & Ors and Another Appeal [2015] 9 CLJ 689

Hunter v Chief Constable of the West Midlands Police [1982] AC 529

Tay Choo Foo v Harrisons Holdings (M) Bhd [2001] 4 CLJ 52

Tractors Malaysia Bhd v Charles Au Yong [1982] 1 MLJ 320

Wong Sin Fan & Ors v Ng Peak Yam @ Ng Pyak Yeow & Anor [2013] 2 MLJ 629