IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-008215
[2013] NZHC 573

BETWEEN	TIAN MIN (MAGGIE) MA Plaintiff
AND	TONY MENG HIANG TAY & ORS Defendant

CIV 2012-404-003751
[2013] NZHC 573

BETWEEN	TONY MENG HIANG TAY & ORS Plaintiff
AND	TIAN MIN (MAGGIE) MA Defendant

Hearing: 27 February 2013

Appearances: P Dale for Ms Ma
A Swan for Mr Tay & Ors

Judgment: 25 March 2013

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Monday, 25 March 2013 at 3:15 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:

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A M Swan, Barrister, PO Box 5444, Wellesley Street, Auckland

Introduction

[1] Tian Min (Maggie) Ma and Tony Meng Hiang Tay are former business partners who have had a falling out.

[2] In CIV 2011-404-008215, Associate Judge Gendall gave summary judgment in favour of Ms Ma against Mr Tay, his wife, and two associated companies in the sum of $403,034.44 plus interest on the basis, inter alia, of an acknowledgement made by Mr Tay in a document dated 13 October 2011 that responsibility for a mortgage over a property owned by Ms Ma in Karapiro would be transferred to him.[1] Related claims in the same proceeding of fraud on the part of Mr Tay in relation to the execution of the mortgage, together with a claim for general damages, have been set down for three day hearing commencing 27 May 2013.

[3] Mr Tay now makes application for an order directing that Ms Ma provide interim security for costs in the sum of $25,000 in respect of the hearing in May.

[4] In CIV 2012-404-003751, proceedings filed six weeks after Associate Judge Gendall's judgment in CIV 2011-404-008215, Mr Tay claims the sum of $442,810.72 from Ms Ma on the basis that she is indebted to him for that amount in relation to the disproportionate injection of capital into two companies which were formed as part of an oral joint venture agreement between them.

[5] Ms Ma now makes application for an order striking out Mr Tay's claim or, alternatively, for summary judgment.

CIV 2011-404-008215 – Application by Mr Tay for security for costs

[6] The facts surrounding this proceeding are set out in Associate Judge Gendall's judgment of 16 May 2012 at [8] – [65]. In the judgment, Associate Judge Gendall ordered Mr Tay to pay Ms Ma the sum of $403,034.44, which equated to a judgment which had been obtained by the Westpac Bank against Ms Ma on 15 September 2011, following default by her in her obligations to Westpac. Mr Tay

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1 *Ma v Tay* [2012] NZHC 990.

took steps to have the judgment of Associate Judge Gendall recalled. He was unsuccessful. He then appealed against the judgment but later abandoned it. In October 2012, Mr Tay paid Westpac approximately $450,000 in satisfaction of Ms Ma's liability to Westpac. That sum is being held in trust pending the outcome of the proceedings filed by Mr Tay in CIV 2012-404-003751.

Submissions by Mr Tay

[7] Mr Tay submits that Ms Ma has had her liability to Westpac removed and therefore has received the fruits of her judgment. Ms Ma has also received all costs in respect of the summary judgment, the application for recall of the judgment and the various enforcement actions taken by her. Those costs were either agreed or fixed by the Court.

[8] Mr Tay points to an affidavit sworn by Ms Ma on 31 July 2012, in which Ms Ma says that she would not be able to meet the Westpac judgment if she had to, that she did not work and has had to borrow money to pay the legal fees in the proceedings. Ms Ma's parents and other family members have also had to provide financial support, which she says is going to be difficult for her to ever repay.

[9] Accordingly, Mr Tay submits that there is evidence that Ms Ma will be unable to pay costs if she is unsuccessful in the three day hearing set down for 27 May 2013. There is no evidence that her financial position has in any way improved since July 2012 nor has she disclosed her financial position in any detail other than stating that she is relying on others for financial support.

[10] Finally, counsel for Mr Tay submits that there is little financial benefit in taking this matter to trial given its associated costs. In the present case, he submits that it appears the only gain for Ms Ma, if she was successful, would be a small award of general damages and possibly indemnity costs. It is for that reason that Mr Tay seeks protection against wasted litigation, which he says has little prospect of success. Mr Tay points to scale costs for a trial of three days, which amounts to $32,835 and notes that his costs for the trial are estimated to be $50,000. He therefore submits that an appropriate sum to order as security for costs is $25,000.

Submissions by Ms Ma

[11] Ms Ma notes that judgment has been entered against her by Westpac notwithstanding that Mr Tay had agreed to take responsibility for the Westpac mortgage. She submits that general damages should be recoverable because her reputation has obviously been damaged and she will testify that she has suffered stress and humiliation as a result of the judgment. Ms Ma submits that, even without a finding of fraud, her claim for general damages is therefore highly likely to succeed.

[12] Ms Ma acknowledges that there is no contest about her financial circumstances. She has been placed under considerable financial pressure by the conduct of Mr Tay, not just in failing to take responsibility for the Westpac mortgage, but in putting her to needless expense in relation to this and other proceedings, including a quite unwarranted claim of harassment. She would therefore not be able to pursue her claim if an order of security for costs were made. Ms Ma submits that this is a case in which the Court's discretion should be exercised against the making of any order because judgment has already been entered in her favour and general damages are likely to be awarded. She submits that all of the circumstances strongly point to Mr Tay endeavouring to keep her away from having her day in Court.

Discussion

[13] It is my view that the predominant factor in exercising my discretion whether or not to order security for costs, is the fact that summary judgment for a substantial sum has already been granted to Ms Ma. I also accept that it is likely, in terms of the authorities, that Ms Ma will secure an award of general damages. I recognise that Associate Judge Gendall did comment that there was little substantial evidence before him of actual harm and distress but it seems to me that the major factor in his decision not to award general damages in the summary judgment proceeding was that Mr Tay did not have a real opportunity to counter Ms Ma's evidence. Nor did his counsel make detailed submissions on the issue.

[14] As to the allegations of fraud, although no finding was made by Associate Judge Gendall, I note that at [77] of his judgment, he did feel the need to comment on certain specific aspects of the purchase of the property which, in his mind, raised significant questions. These included the fact that the $90,000 deposit provided for in the agreement for sale and purchase was not paid and that the vendor of the property, a company associated with Mr Tay, effectively paid Ms Ma's costs. He also noted that there was no acknowledgement of debt, second mortgage or other document which related to the unpaid deposit and that no demand by the vendor had ever been made for the unpaid $90,000. Associate Judge Gendall noted that a similar underpayment appears to have occurred on a number of other sales of property by the vendor at Karapiro and commented that it goes without saying that this fact, which is entirely unexplained, must be viewed as extremely surprising.

[15] Associate Judge Gendall also set out a transcript of a recorded conversation in which Mr and Mrs Tay acknowledge that Ms Ma's name was used in order to secure funding for the development which would otherwise not be available. The Judge also noted that in the original Westpac loan application, Ms Ma is said to have an annual income of $190,000. This was incorrect. Her income was $60,000 per year plus a small amount of $160 per week from Middlemore Hospital for her part-time job there. That is what she told the agent filling out the loan application form.

[16] Because Ms Ma has already been granted summary judgment for a substantial sum, because she is likely to be awarded general damages and there are, to quote Associate Judge Gendall, "a range of matters raising certain disturbing questions which at some point require a proper response", I decline Mr Tay's application for security for costs.

CIV-2012-404-003751 – Application by Ms Ma to strike out Mr Tay's claim or, alternatively, for summary judgment

Statement of claim

[17] In this proceeding Mr Tay alleges that he and Ms Ma orally agreed on a joint venture to form two companies, one to operate a wellness centre in Auckland and the

other to prepare for the future operation of a wellness centre at Karapiro. Mr Tay alleges that 60 per cent of each company would be held by himself and/or his Trust while the remaining 40 per cent would be held by Ms Ma and/or her Trust. Crucially for the purpose of this proceeding, Mr Tay also alleges that there was an oral agreement that any capital injections required for the two companies would be made on the basis that the parties would contribute according to their respective shareholdings.

[18] The first company formed to operate a wellness centre in Auckland, Jireh Health Limited, ceased trading in November 2011 and was placed into liquidation in May 2012. The Official Assignee is the liquidator. The second company, which was formed to prepare for the future operation of a wellness centre at Karapiro, Karapiro Management Limited, also ceased trading when Jireh Resorts Limited, which owned the Karapiro resort where the wellness centre was to be based, was placed into receivership.

[19] Mr Tay further alleges that in the document dated 13 October 2011, which was the basis for summary judgment in favour of Ms Ma in CIV2011-404-008215, Ms Ma acknowledged that she was indebted to Mr Tay to the extent of 40 per cent of the capital injections Mr Tay had made and/or been credited with to Jireh Health Limited and Karapiro Management Limited. Mr Tay alleges that it was further agreed that because neither of the companies were continuing to trade, a final audit would be carried out to determine the extent of Ms Ma's indebtedness to Mr Tay.

[20] The original statement of claim dated 26 June 2012, alleged that in accordance with the 13 October 2011 agreement, audits of Jireh Health Limited and Karapiro Management Limited were completed in around May 2012. The audits determined that since the incorporation of Jireh Health Limited, Mr Tay had made a net capital of injection of $332,970 into the company, whilst Ms Ma had made a net capital injection of only $4,229. In respect of Karapiro Management Limited, Mr Tay alleged that he had injected capital of $780,400.35 through a third party, the Tony Tay Group Limited, and that Ms Ma has made no capital injections. Mr Tay therefore alleged that Ms Ma was indebted to him in the sum of $442,810.72.

[21] In an amended statement of claim dated 19 December 2012, Mr Tay acknowledges that a final audit of the Jireh Health Limited and Karapiro Management Limited accounts has not been completed. He now alleges that the audits have not been completed because Ms Ma, through her accountant Alan Tong, has taken possession of and/or retained certain documents, records, bank statements, sundry invoices and receipts and various working files for the companies, which are required for the audit. Mr Tay still alleges that Ms Ma is indebted to him in the sum of $442,810.72, but now states that this is "pending completion of a final audit". In addition, a further cause of action is added which alleges that, in breach of the joint venture agreement and/or the 13 October 2011 agreement, Ms Ma has failed or refused to make financial records in the possession of her accountant available for an audit and/or to pay Mr Tay the sum of $442,810.72. Orders are now sought for the taking of accounts and for the delivery of all financial records in the possession of Ms Ma or her accountant.

Ms Ma's application

[22] The grounds of Ms Ma's application to strike out Mr Tay's claim or, alternatively, for summary judgment are:

(a) That Mr Tay's claim is an abuse of process because:

(i) The issues between Mr Tay and Ms Ma were the subject of separate proceedings, which were resolved by way of a judgment of Associate Judge Gendall dated 16 May 2012.

(ii) In that proceeding, Mr Tay alleged that the 13 October 2011 agreement upon which he now seeks to rely, was procured by undue influence and/or duress and was therefore unenforceable.

(iii) Any issues as to the validity or enforceability of the 13 October 2011 agreement ought properly to have been determined in that proceeding.

(iv) There were further proceedings between Mr Tay and Jireh Health Limited (CIV 2011-404-007708) in which Mr Tay gave affidavit evidence and in which the alleged obligations arising out of the 13 October 2011 agreement were relevant and should have been raised.

(b) That the joint venture pleaded in the statement of claim (which is denied) does not give rise to any liability on the part of Ms Ma to make any capital contribution to either Jireh Health Limited or Karapiro Management Limited.

(c) That the 13 October 2011 agreement does not give rise to any obligation on the part of Ms Ma to make any further capital contribution to the companies. As at that date, Ms Ma was not a share holder in Jireh Health Limited.

(d) That Mr Tay has admitted that any capital injections made by him to Karapiro Management Limited (which are denied) were made prior to 2009 and that Karapiro Management Limited has not traded since.

(e) That Tony Tay Group Limited, which is alleged to have made capital injections into the companies (which is denied), is not a party to the 13 October 2011 agreement.

[23] Following the filing of the amended statement of claim, a further ground was added in Ms Ma's application. Ms Ma now argues that Mr Tay's claim should also be struck out on the basis that it is premature in that, even if Ms Ma was obliged to make capital injections into the companies in proportion to her shareholding (which is denied), no figure is yet able to be calculated because of the lack of any audit of the companies' financial affairs.

[24] Ms Ma's application is supported by an affidavit sworn by her and an affidavit from Mr Tong. In response, Mr Tay has filed a notice of opposition and

affidavits by himself as well as Ross Hern Yen Chin, Damian Siow, Kok Soon Lee and Colin Gregory Carr. Affidavits in reply have been filed by Ms Ma and Mr Tong.

Application to strike out

[25] As noted above, Ms Ma advances her application to strike out the proceeding on two grounds. The first is an allegation that this proceeding is an abuse of process because Mr Tay seeks to enforce the very agreement that was the subject of the claims of undue influence and/or duress in the proceeding before Associate Judge Gendall. Ms Ma also submits that Mr Tay's claim should have been advanced in those proceedings. The second ground upon which Ms Ma seeks an order striking out this proceeding is that it is premature because of the lack of an audit of the companies.

[26] As is evident already, the document dated 13 October 2011 is central to both proceedings. It reads in its entirety:

> **Heads of Agreement Between Maggie Ma and Tony Tay**
>
> **A. Westpac Loan**
>
> A loan of $360,000 was borrowed by Tony Tay in Maggie Ma's name from Westpac Bank in 2007, mortgaged using Unit 7 of Karapiro Resort, 1002 SH1, Waipa. This was used by Tony Tay, as his injection, to inject into Jireh Health Limited and Karapiro Management Limited to keep the companies afloat.
>
> Maggie Ma and Tony Tay hereby agrees to settle the account as follows:
>
> 1) The mortgage for the above loan owed to Westpac Bank, all related expenses and responsibilities is to be taken by Tony Tay.
>
> 2) Tony Tay will meet up with a representative of Westpac by 14 October 2011 together with Maggie Ma or representative to transfer responsibility for the above loan from Maggie Ma to Tony Tay. This date is subject to an appointment made with Westpac.
>
> **B. Jireh Health Limited and Karapiro Management Limited Accounts**
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> 1) Upon the final audit of the Jireh Health Limited accounts, each shareholder is responsible for their shares in the company.
>
> 2) Upon the final audit of the Karapiro Management Limited accounts, each shareholder is responsible for their shares in the company.

Agreed By:

It is then signed and dated by both Ms Ma and Mr Tay. Their signatures were witnessed by Mr Lee and Mr Chin.

[27] In the proceeding before Associate Judge Gendall, Mr Tay claimed that Ms Ma extracted his signature to the agreement by undue influence and/or duress. He confirmed on oath, by way of an affidavit sworn on 15 March 2012, that he did not sign the agreement of his own free will. He also said on oath, by way of an affidavit sworn on 8 November 2011 in other proceedings, that the document "did not in any way record the truth of the various matters which were in issue between the parties". He said that he and his wife had endured many hours of threats and intimidation and that it did cross his mind throughout this period that violence may have occurred if they had not removed themselves when they did. Mr Tay claimed that he only signed the document "to escape from the terrifying situation we were in".

[28] Associate Judge Gendall did not find Mr Tay's claim credible. At [104], he found that there could be no suggestion that undue influence was exerted on Mr Tay to sign the agreement because Ms Ma could not be described as the stronger party. If anything, it was the contrary. As to the allegation of duress, at [109], Associate Judge Gendall found that the only possible conclusion that could be reached is that what was said, at most, would have exerted some degree of pressure on Mr Tay to sign the agreement but that it could not be seen in any way as illegitimate or to constitute duress. The judge dismissed the defence advanced by Mr Tay that the agreement was entered into by him as a result of undue influence and/or duress.

[29] In this proceeding Mr Tay recants his earlier statement on oath that the document "did not in any way record the truth of the various matters which were in issue between the parties". Mr Tay now says on oath in an affidavit sworn on 30 January 2013 that:

> Although I consider that I was forced to sign the agreement, I say that only in respect of Part A which related to the Westpac loan because it did not reflect the true position. I did not borrow $360,000 from Westpac Bank in 2007 in Maggie Ma's name. However, the Court has since found that the

> agreement is valid. I certainly accepted Part B of the agreement because that recorded and was an acknowledgement of what Ms Ma and I had agreed from the outset of the joint venture. I note also that there is some reference in Part A that the money was used as my injections into the companies to keep them afloat. That confirms that the issue of injections was discussed at the meeting.

[30] On the issue of audits of Jireh Health Limited and Karapiro Management Limited, Jireh Health Limited is in liquidation and the company records are in the possession of the Official Assignee as liquidator. Ms Ma therefore has no control of them. The company records of Karapiro Management Limited are with Mr Tong, but he has no recollection of ever receiving a request to release the records from Mr Tay or anyone acting on his behalf.

[31] Mr Tong has sworn an affidavit dated 27 September 2012, in support of Ms Ma's application in which he states that he was retained to undertake a review of the financial records and financial statements of both companies from incorporation to 31 March 2011. He refers to the fact that major transactions undertaken by the companies were not supported by directors' resolution or proper documentation and a number of transactions required further investigation and documentary support. He was, therefore, not able to complete the review.

[32] Mr Carr has sworn an affidavit dated 19 December 2012 in which he states he was asked by Mr Tay to provide independent advice as to the correctness of the accounts of both companies. He did not see the need to obtain the records held by Mr Tong but confirms that the accounts for both companies are true and fair and that the amounts set out in clause 12 of the amended statement of claim, correctly reflect the capital contributions that Mr Tay or entities associated with him and Ms Ma have made to the companies. He acknowledges however that he has not carried out a full audit and to do so he would need the records held by Mr Tong.

[33] In a reply affidavit sworn on 19 February 2013, Mr Tong refers to the purported injection of $365,000 into Jireh Health Limited through Tony Tay Group Limited. He notes that the only record of this loan or injection is a journal entry made in the company's general ledger. No journal voucher with supporting documentation, or loan agreement or directors' resolution or special resolution of

shareholders was provided to Mr Tong to support the transaction. He confirms from his review of the company's bank records that $365,000 has not been deposited in the company's bank account by Mr Tay personally.

[34] Ms Ma confirms that the records of Jireh Health Limited are with the liquidator but as far as she is concerned Mr Tay is welcome to uplift the records of Karapiro Management Limited and to undertake an audit if he so wishes, provided he meets the cost of so doing.

Ms Ma's submissions

[35] Ms Ma submits that it is an abuse of the Court's process for Mr Tay in one proceeding to swear an oath that the 13 October 2011 agreement "did not in any way record the truth of the various matters which were in issue between the parties" and in another proceeding to swear on oath that he was forced to sign the agreement only in respect of Part A as "I certainly accepted Part B of the agreement because that recorded and was an acknowledgement of what Ms Ma and I had agreed from the outset of the joint venture".

[36] Ms Ma also submits that if Mr Tay did have a valid counterclaim and/or set-off to her application for summary judgment, then he should have raised the issue in the proceeding before Associate Judge Gendall. At the earlier proceeding he should have submitted that Ms Ma's purchase of the property at Karapiro must be seen in the context of an oral joint venture agreement between them, in respect of which Ms Ma owed him approximately $400,000, which cancelled out any debt he may owe her in the event that the Court found that he took responsibility for the Westpac mortgage on the property.

[37] If Mr Tay had raised the issue in the proceeding before Associate Judge Gendall, then Ms Ma submits that he would have been less troubled by the allegations of undue influence and/or duress since he would have known that only part of the agreement was challenged and would have addressed the issue of whether Mr Tay was in fact indebted to Ms Ma at all. This is said to have been an obvious

benefit to Mr Tay, which should have been raised in the summary judgment proceeding.

[38] As to prematurity, Ms Ma submits that even if everything alleged by Mr Tay is true, unless there is a final audit, there can be no liability. Clause B of the 13 October 2011 agreement states "Upon the final audit ...". Ms Ma also submits that she has not impeded the completion of the audits of Jireh Health Limited and Karapiro Management Limited and Mr Tay's claim accordingly fails on this narrow ground. Finally, because of the unsatisfactory nature of the companies' records, Ms Ma submits that there is no certainty at all that she will be liable to Mr Tay even if his claims to an oral joint venture agreement are upheld.

Mr Tay's submissions

[39] Mr Tay submits that the 13 October 2011 agreement does not give rise to any liability. It only imposes an auditing requirement on the parties, which is to Ms Ma's advantage and the reason why Mr Tay has requested the taking of accounts. If it is correct that he cannot rely on the 13 October 2011 agreement because he had earlier alleged that it was obtained under duress and was therefore unenforceable, then Mr Tay submits that his claim can proceed without an audit and on the basis of the evidence submitted by him.

[40] As to the alleged requirement that Mr Tay should have raised the issue of the disproportionate capital contributions as a counterclaim or a set-off, in the proceeding before Associate Judge Gendall, Mr Tay submits that the previous proceeding was materially different. The issues at the previous hearing had very little relevance to the present claim other than perhaps to credibility issues. The claim in the present proceeding is that there was a joint venture agreement in 2007, the terms of which have been breached. Mr Tay submits that the only relevance of the document dated 13 October 2011, is that it acknowledges the terms of the joint venture and provides that an audit will be undertaken to determine what amounts are owing.

[41] If the claim is premature because an audit has not been completed, Mr Tay submits that both parties should be required to take positive steps to perform the agreement and Ms Ma should not be allowed to use it as a defence by doing nothing and sitting on her hands.

Discussion

[42] The principle of law relied upon by Ms Ma has been described as deriving from the concept of *res judicata* or from the power of a court to prevent an abuse of its process. *Res judicata* was relied upon by the Vice Chancellor Sir James Wigram in *Henderson v Henderson*[2] in which there had been a determination on issues in relation to a partnership in the Supreme Court of Newfoundland and then further proceedings touching on the same issues in England. The Vice Chancellor explained the principle of law as follows:[3]

> In trying this question I believe I state the rule of the [115] Court correctly when I say that, 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.

[43] This statement of principle was applied by the Privy Council in *Yat Tung Co Ltd v Dao Heng Bank Ltd.*[4] In that case, there was a judgment dismissing the plaintiff's claim against a bank that: the sale of a property to it by way of mortgagee sale was a sham, that the property had been conveyed to it as trustee for the bank and that the mortgage was accordingly a nullity. The decision upheld the bank's counterclaim for the loss suffered on the resale to a third party. One month later, the plaintiff brought an action against the bank (and the third party) claiming that the

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2 *Henderson v Henderson* (1843) 3 Hare 100.
3 At 114–115.
4 *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581.

resale was void or voidable as fraudulent in that the bank and the third party were "acting in concert with a common design calculated to obtain ... the property at a low price and to extinguish the plaintiff's interest therein." The Privy Council held that there was no reason why a defence impugning the *bona fides* of the sale to the third party could not have been pleaded as a counterclaim to the bank's counterclaim in the earlier proceeding. Accordingly, the doctrine of *res judicata* in its wider sense applied and it would be an abuse of the process of the court to raise in subsequent proceeding, matters which could and should have been litigated in the earlier proceedings.

[44] In *Port of Melbourne Authority v Anshun Pty Ltd* the High Court of Australia took a somewhat narrower approach than the Privy Council in *Yat Tung*. The majority judgment stated that:[5]

> In this situation we would prefer to say that there will be no estoppel unless it appears the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it.

[45] The House of Lords also reviewed *Yat Tung* in their decision in *Johnson v Gore Wood & Co (a firm)*. Lord Bingham stated that:[6]

> The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse of process if the Court is satisfied...that the claim or defence *should* have been raised in the earlier proceedings if it was to be raised at all.....It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.

[46] In an earlier decision of *Greenhalgh v Mallard*, Sommervell LJ defined the test for abuse of process as where:[7]

> 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 process of the court to allow a new proceeding to be started in respect of them.

[47] The principle distilled from these cases is that a party cannot bring a later claim when the claim "properly belonged" to the earlier litigation. The following

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5 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602.
6 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31.
7 *Greenhalgh v Mallard* [1947] 1 All ER 255 at 257.

facts illustrate that the present claim by Mr Tay properly belonged in the earlier litigation.

[48] To adopt the approach taken by the Privy Council in *Yat Tung Co Ltd v Dao Heng Bank Ltd*, the first question to consider is whether there was any procedure by which, in CIV 2011-404-008215, Mr Tay could have pleaded as a reply to Ms Ma's application for summary judgment what was to be the basis of his own claim in CIV 2012-404-003751. In her statement of claim in CIV 2011-404-008215, Ms Ma alleged that she had not offered to purchase, and did not wish to purchase the property at Karapiro, that she did not have the financial means to pay either the deposit or the purchase price and that the sole purpose of entering into the agreement was to obtain mortgage finance from Westpac which would be appropriated by interests associated with Mr Tay and his wife.

[49] In an affidavit sworn on 15 March 2012, Mr Tay stated:

> 5. After meeting Ms Ma and her father, Ms Ma advised me of their skills. Ms Ma and her father were both doctors. After numerous discussions it was decided to assist Ms Ma and her father settling in New Zealand, by involving them in a Wellness Centre at Karapiro. This was around January 2007. Based on this idea Ms Ma and I formed two companies, Karapiro Management Limited ("KML") and Jireh Health Limited. My family trust held 60% of the shares in each entity whilst Ms Ma's family trust held 40%.
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> 6. The intention was, because the construction at Karapiro had not been completed, that Ms Ma together with her father set up a Wellness Centre at 540 Great South Road, Greenlane. That is where the Tony Tay Group ran its business. It owned the building there. The idea was that Ms Ma would set up the Wellness Centre in Great South Road and run the business on her own. In doing this it was intended that Ms Ma would establish a client base. By the time construction at Karapiro was complete the business could also be operated from there using the same client base.
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> 7. In accordance with our intentions in 2007 Ms Ma was appointed managing director of the Wellness Centre and commenced operating out of Great South Road, with her father. Ms Ma in her capacity as managing director was totally responsible for all aspects of the day to day running of the business. I was not expected to have anything to do with this new business partly because I we knew nothing about that type of business and also at the time there were about 30 other companies in the group which consumed my time.

> 8. In the first year of operation which was in 2007, the Wellness Centre survived financially, but after that the Tony Tay Group had to keep injecting money to keep the business going.
>
> 9. The business was not run efficiently because Ms Ma and her father could not work independently because Ms Ma's father could not speak English. Their hours were inconsistent, most of the time Ms Ma would come in in the afternoon. We observed this on a daily basis because we operated our business in the same building. Ms Ma and her father were also away for extended periods of time which again impacted on the business.
>
> 10. During the years through until 2009, the Tony Tay Group injected significant sums of money into the businesses in order to enable them to survive. More than $1,000,000 was probably injected for this purpose. Ms Ma and her father put in next to nothing. I note Ms Ma mentions that she acquired various items in China for the business. I can confirm that Ms Ma was reimbursed for these items.

[50] While he mentions the parties' respective shareholding in the companies, Mr Tay does not refer to an oral agreement that any capital injections required for the two companies would be made on the basis that the parties would contribute according to their respective shareholdings. In fact, in paragraph 10 of his affidavit, Mr Tay refers to over $1 million injected into the business by the Tony Tay Group Limited while asserting that Ms Ma and her father put in next to nothing for which Ms Ma was, in any event, reimbursed. The fact that she has been reimbursed may be seen as inconsistent with an obligation on her part to make a capital contribution in proportion to her shareholding.

[51] High Court Rule 5.53 allows a defendant who intends to raise a counterclaim against a plaintiff to file a statement of counterclaim. McGechan[8] states that in cases within r 5.53 no restriction exists upon the character of the counterclaim which may be brought. It is an independent proceeding linked only for procedural convenience. The statement of counterclaim may comprise any matters which could have been included in a proceeding separately issued.

[52] McGechan[9] notes that counterclaim and set-off are conceptually different. Counterclaim is a separate claim in its own right by a defendant against a plaintiff. Set-off by contrast, is not a claim; it is a defence. It follows that set-off has no

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8 McGechan on Procedure (looseleaf ed) HR5.53.03.

9 McGechan on Procedure (looseleaf ed) HRPt5 Subpt 11.01(3).

independent existence in its own right. It stands or falls with the plaintiff's proceedings.

[53] In CIV 2011-404-008215, Ms Ma claimed the sum of $403,034.44 against Mr Tay together with on-going interest payable to Westpac in terms of the judgment entered against her. In CIV 2012-404-003751, proceedings issued six weeks after summary judgment in CIV 2011-404-008215, Mr Tay claims the sum of $442,810.72 against Ms Ma. Could Mr Tay have raised his claim as a counter claim or set-off to Ms Ma's claim?

[54] The alleged indebtedness of Ms Ma to Mr Tay is said to arise out of an oral agreement between the parties in 2007. It did not arise subsequent to the filing of proceedings in CIV 2011-404-008215. In my view, compelling reasons have not been advanced to show that Mr Tay was unable to have either counterclaimed against Ms Ma or set-off Ms Ma's alleged indebtedness as a defence to her claim in CIV 2011-404 -008215. In fact, no reasons are advanced as why Mr Tay was unable to raise his claim in CIV 2011-404-008215 except to say that the previous proceeding was materially different.

[55] However, there is no doubt in my mind that Ms Ma's purchase of the property at Karapiro had to be viewed in light of the development of the Karapiro resort as a wellness centre. Mr Tay acknowledges as much by stating in his affidavit sworn on 15 March 2012 that "It is totally normal for people involved in projects similar to the Karapiro project, to purchase [units]". Mr Tay also considered it relevant to discuss the shareholding in both companies and refer to the parties' respective injections of money into the businesses although he noted that Ms Ma had been reimbursed for her "next to nothing" contributions. I therefore do not agree with counsel for Mr Tay that the previous proceeding was materially different and Mr Tay's claim could not have been dealt with in the previous proceeding. Counsel did acknowledge that issues at the previous hearing could have been relevant to credibility issues in the present proceeding.

[56] Having determined that Mr Tay was able to file a counterclaim or plead a set-off by way of defence against Ms Ma's claim in CIV 2011-404-008215, the second

question to be considered, according to the Privy Council in *Yat Tung Co Ltd v Dao Heng Bank Ltd,* is what consequences flow from his failure to have done so.

[57] The Privy Council noted:[10]

> 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.

[58] In my view no special circumstances exist. Reasonable diligence would have caused the issue of capital contributions to the businesses to be earlier raised. The rule articulated as long ago as 1843 in *Henderson v Henderson* – that it is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings - should be applied. I am indeed fortified in my view by the contradictory evidence given by Mr Tay in the two sets of proceedings. In the first, he relied on a statement made in an affidavit, which he had sworn in other proceedings, that the 13 October 2011 agreement "did not in any way record the truth of the various matters that were in issue between the parties". In the second, he now says he "certainly accepted Part B of the [13 October 2011] agreement because that recorded and was an acknowledgement of what Ms Ma and I had agreed from the outset of the joint venture." The alleged oral joint venture agreement was an issue which was clearly part of the proceeding before Associate Judge Gendall and so could have been, and should have been, raised. Therefore, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of it.

[59] Mr Tay himself acknowledges the interdependence of the issues when he states in his affidavit sworn on 30 January 2013:

> I accept that most urgent matter in the [12/13 October 2011] meeting was the Westpac mortgage issue however I was certainly not going to sign anything that did not include reference to balancing up the contributions to the company.

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[10] At 590E.

[60] Mr Tay also notes that there is some reference in Part A of the 13 October 2011 agreement (which he still says he was forced to sign), that the Westpac money was used as his injection into the companies to keep them afloat. That confirms, so he says, that the issue of injections was discussed at the meeting. In his affidavit Mr Tay also refers to earlier versions of the agreement drafted that evening, which were not signed, one of which reads in part "The loan Maggie borrowed from Westpac was used to inject into Jireh Health Limited and Karapiro Management Limited as Maggie's share of her injection into the companies." This clearly connects the issues and yet the issue of capital contributions was not raised in the earlier proceeding.

[61] Having determined that Mr Tay's claim should be struck out as an abuse of process, it is not strictly necessary for me to go on to consider the issue of prematurity, nor to determine Ms Ma's application for summary judgment. I will, however, briefly express my views on both matters in case they later become of relevance.

[62] On the issue of prematurity, I accept that courts should adopt a degree of flexibility. In *Commodore Pty Ltd v Perpetual Trustees Estate & Agency Co of New Zealand Ltd*,[11] Perpetual's claim against guarantors could not have succeeded when the proceedings were filed because the principal money for which it sued were not payable. But prior to the hearing the power of sale had been lawfully exercised and Perpetual amended its statement of claim, without objection, to set off the proceeds of sale against the principal and interest owing. Cooke J stated:[12]

> The modern practice of the Court should be sufficiently adaptable to accommodate the present type of claim without requiring the ritual of another action.

[63] Cooke J also cited Lord Templeman in the Privy Council decision of *Austin v Hart:*[13]

> Their Lordships are satisfied that, if a premature action is irregular and the irregularity is of a kind, which, as in the instant case, was cured without

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11 *Commodore Pty Ltd v Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1984] 1 NZLR 324 (CA).

12 At 335.

13 *Austin v Hart* [1983] 2 All ER 341 at 344-5.

> amendment by the mere lapse of time and which causes no prejudice to the defendant, there is no reason for the court to insist that the irregularity nullifies and invalidates the whole proceedings. The modern approach is to treat an irregularity as a nullifying factor only if it causes substantial injustice.

[64] In the present case, it is my view that substantial injustice would not be caused to Ms Ma if the proceeding remains on foot while an audit of Jireh Health Limited and Karapiro Management Limited is undertaken. The companies have not traded for some time. The records of both companies are available and it seems to me that an audit would not necessarily be a lengthy process. In that regard, however, I do not agree with Mr Tay's submission that Ms Ma should not be allowed to use the lack of an audit as a defence by doing nothing and sitting on her hands. The claim is one for Mr Tay to establish. He has the burden of proof. I accept Ms Ma's assurance that she will not impede an audit of the companies but it is for Mr Tay to undertake the audit if he wants to prove his claim. I would also not be minded to order a taking of accounts as I am not satisfied that there is a liability to account,[14] which is a prerequisite for such an order.

Application for summary judgment

[65] A defendant's application for summary judgment differs from that of a plaintiff. A defendant's application for summary judgment is similar to a striking out application in that the defendant has to show that the plaintiff cannot succeed.[15] I would therefore only consider granting Ms Ma's application if she had a complete defence to Mr Tay's claim.

[66] It is, however, clear to me that there is a factual dispute as to the existence of the oral joint venture agreement and its terms which by itself makes the application for summary judgment inappropriate. In his affidavit dated 30 January 2013, Mr Tay sets out in some detail the background leading up to the joint venture agreement. His version of events is supported by Mr Siow, the former in-house accountant for the Tony Tay Group Ltd. In his affidavit dated 17 December 2012, Mr Siow refers to

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[14] *Worldtel NZ Ltd v Cho* HC Auckland CIV-2009-404-001818, 30 July 2009, Associate Judge Doogue at [21].

[15] McGechan on Procedure (looseleaf ed) HR12.2.07(1).

a meeting with Ms Ma on a specified day in which he confirmed with her the terms of the joint venture agreement. He also prepared all the documentation relating to the incorporation of the companies which Ms Ma signed in his presence.

[67] In her reply affidavit dated 20 February 2013, Ms Ma flatly denies there was any joint venture agreement between her and Mr Tay. Ms Ma states that the only reason she received a shareholding was because she and her father were contributing their professional skills to the establishment and development of the wellness centres. She also denies that she ever met with Mr Siow. I would be quite unable to resolve this conflict in the context of a summary judgment application and so would dismiss the application.

Conclusion

[68] The application by Mr Tay for security for costs in CIV 2011-404-008215 is dismissed.

[69] Mr Tay's claim in CIV 2012-404-003751 is struck out on the basis that it raises an issue that could have been and should have been raised in Ms Ma's claim CIV 2011-404-008215. Mr Tay's contradictory evidence is a manifestation of the difficulties which arise if the wider doctrine of *res judicata* is not applied in the present case. I agree with the Vice Chancellor's comment in *Henderson v Henderson* that "it is plain that litigation would be interminable if such a rule did not prevail".[16] This is the fourth set of proceedings which have arisen out of the parties' falling out. If it had been necessary, I would have declined both Ms Ma's application to have Mr Tay's claim struck out on the ground of prematurity and her application for summary judgment.

[70] If the parties are unable to agree on costs, I will receive memoranda which are to be filed within 21 days of the date of this judgment.

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Woolford J

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[16] At 115–116.