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Blowing hot and cold in litigation: Abuse of process, election or approbation and reprobation? BWG v BWF [2020] SGCA 36

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Blowing hot and cold in litigation: Abuse of process, election or approbation and reprobation? BWG v BWF [2020] SGCA 36

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Abstract

This note analyses the Singapore Court of Appeal's decision in BWG v BWF which allowed the adoption of inconsistent positions across related court proceedings against different parties. The decision raises crucial questions on the limits to be imposed on a party's freedom to pursue opposing rights in litigation, and how the doctrines of abuse of process, election by waiver, and approbation and reprobation should be applied. It is argued that the court's application of the abuse of process doctrine obscured the central exercise of assessing all the relevant interests and circumstances. The differing rationales underlying the common law doctrine of election and the equitable doctrine of approbation were also inadequately articulated, resulting in ambivalence concerning why they were deemed inapplicable. Finally, there was a missed opportunity to clarify how the doctrines overlap and yet differ.

1. Introduction

Strategic litigation commonly involves pursuing concurrent remedies and advancing proceedings against different parties. The courts have recognised that 'there is nothing inherently abusive of process about making inconsistent or merely new allegations possibly resulting in different outcomes in different actions'.[1] Nevertheless, the courts have also used the abuse of process doctrine to impose limits on litigation conduct that has compromised public interests such as finality of litigation and is thus deemed to be a misuse of the court's process. The proper limits to strategic litigation are difficult to discern amidst the emergence of other overlapping doctrines including election by waiver, and approbation and reprobation. The former common law doctrine could apply when a party chooses between inconsistent rights or remedies in its litigation conduct and communicates the decision to another party.[2] The related equitable doctrine of approbation and reprobation pre vents a party from asserting a right in litigation that is inconsistent with benefits reaped through earlier court action.[3]

This note examines these three overlapping doctrines in the context of the Singapore Court of Appeal's decision in BWG v BWF,[4] which allowed the adoption of inconsistent positions across related court proceedings against different parties. It argues that the court could have drawn from the earlier jurisprudence of abuse of process in relation to res judicata, to more holistically assess

[1] Bradford & Bringley BS v Seddon [1999] 1 WLR 1482 (England and Wales Court of Appeal (EWCA)) 1498.
[2] United Australia Ltd v Barclays Bank Ltd [1941] AC 1 (United Kingdom House of Lords (UKHL)).
[3] Express Newspapers Plc v News (UK) Ltd [1990] 1 WLR 1320 (England and Wales High Court (EWHC)).
[4] [2020] (Singapore Court of Appeal (SGCA)).

the salient public and private interests when determining whether the court's process was being abused. In addition, the differing rationales underlying the doctrines of election and approbation were inadequately articulated, resulting in ambivalence concerning why they were deemed inapplicable. Finally, it argues that there was a missed opportunity for Singapore's highest court to clarify how the three doctrines overlap and yet differ.

2. The brief facts

There was a series of three back-to-back contracts for the sale of crude oil cargo. Company one (C1) sold the cargo to the appellant (C2), which was followed by the sale of the same cargo by C2 to the respondent (C3), and finally, the sale by C3 to C1. C3 was to receive payment from C1 one day before it was obliged to pay C2 on 11 July 2018. Although C3 was an intermediary in this string of contracts, it was unaware at the conclusion of the contracts that C1 was both the buyer and seller of the cargo. The present appeal involved only C2 and C3.

Prior to its payment due date, C1 informed C3 of its inability to pay. C3 learned during the negotiations that C2 had initially bought the cargo from C1. A settlement agreement was concluded on 12 July for C1 to pay C3 over three instalments and for C1's Chief Executive Officer (Sit) to personally guarantee these sums.

During the above settlement discussions, C3 stressed to C2 that it would only make payment after receiving the agreed sums from C1. However, C2 sent reminders to C3 to make payment by the contractual date of 11 July. On 13 August, C2 served a statutory demand on C3. In response, C3 applied on 3 September to set aside the statutory demand and for an injunction to restrain C2's winding-up proceedings. That application was the subject of BWG v BWF. C3 argued that the winding-up proceedings commenced by C2 should be stayed because of a contractual clause to refer any disputes to arbitration. It further advanced four defences to demonstrate that there was a bona fide prima facie dispute to be arbitrated.

Separately, C3 served a statutory demand on C1 on 30 August because of the latter's failure to pay the instalments under the settlement agreement. C1 successfully obtained a moratorium on C3's intended winding-up proceedings. In addition, C3 obtained a bankruptcy order against Sit in the Hong Kong courts on 11 April 2019 based on his failure to fulfil his personal guarantee under the settlement agreement.

3. The court's decision

3.1. The High Court's decision

The High Court granted the injunction to stay the proceedings. The judge ruled that the existence of a bona fide prima facie dispute based on C3's defences was sufficient for an injunction to be granted. A stay would be declined only when an applicant's conduct constituted an abuse of process.[5] In this regard, C2 submitted that C3's separate actions against C1 and Sit under the settlement agreement were inconsistent with its rights asserted in the application to restrain C2's winding-up proceedings, and thus constituted abuse of process, waiver by election, and approbation and reprobation. The judge found no inconsistency in C3's assertion of its rights because its winding-

[5] BWF v BWG [2019] SGHC 81 [23]–[41] (Singapore High Court (SGHC)). [2020] 3 SLR 894.

up application against C1 was premised on the settlement agreement, which was separate from the initial contract. There was thus no approbation and reprobation. There was also no waiver as C3 only learned about the C2-C1 contract in around August, and its steps taken to enforce its right against C1 did not constitute an unequivocal representation of waiver of rights. Finally, the judge held that the circumstances did not meet the high threshold required to satisfy abuse of process.[6]

3.2. The Court of Appeal's decision

The appeal was heard together with AnAn Group Pte Ltd v VTB Bank (VTB)[7] because both cases raised the issue of the applicable standard of review to restrain winding-up proceedings based on debts subject to arbitration. The present appeal focused on whether C3's enforcement of its settlement agreement with C1 and Sit was inconsistent with its position raised against C2, and thus constituted an abuse of process resulting in the rejection of C3's application to stay the winding-up proceedings. C3 again argued in the alternative that the alleged inconsistent positions further constituted waiver by election and satisfied the doctrine of approbation and reprobation.

The Court of Appeal released its grounds of decision for VTB shortly before its judgment of the current appeal. In VTB, the court held that the prima facie standard of review should apply in deciding whether to stay or dismiss winding-up proceeding based on a valid agreement to arbitrate, provided that the debtor was not raising the dispute in abuse of the court's process.[8] In the present appeal, the court reiterated that the abuse of process doctrine was an appropriate control mechanism against possible abuses of the prima facie standard of review. One instance of abuse of process was a debtor adopting an inconsistent position regarding a defence it raised to dispute the debt in relation to winding-up proceedings. The court would, in the absence of clear and convincing reasons for this inconsistency, deny the debtor relief based on its abusive conduct.[9]

Turning then to examine C3's defences raised against C2, the court found that it seemed to have adopted an inconsistent position only in relation to the defence of illegality. C3's serving of a statutory demand against Sit on 12 September and the commencement of winding-up proceedings against C1 on 1 November did not initially manifest inconsistencies with the respondent's awareness of potential illegality. However, C3 later averred in its affidavit on 26 November that it believed that the transaction might have been entered with the intention to deceive the bank. Hence, its subsequent conduct in filing an affirmation in the bankruptcy proceedings against Sit and obtaining the bankruptcy order appeared inconsistent with its belief that the transaction was illegal.[10]

Despite the apparent inconsistency, the court decided that C3 should not be precluded from relying on the defence because of a greater risk of injustice in barring it from doing so. There were several exceptional circumstances that the court considered. First, C3 was a victim of the alleged deception and only stood to gain a modest commission from the transaction. Second, it was placed between a rock and hard place when served with a statutory demand by C2 despite not being paid by C1 under the settlement agreement. In the circumstances, it had no choice but to advance all reasonable defences to resist C2's claim while also seeking to recover from C1. Lastly, if the illegality defence were disallowed, C2 would be free to enforce a claim potentially based on an illegal contract.[11]

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[6] Ibid [48], [50]–[52].
[7] [2020] SGCA 33 (SGCA).
[8] Ibid [56].
[9] BWG (n 4) [52]-[58].
[10] Ibid [73]-[92].
[11] Ibid [93]-[99].

The court also rejected the alternative arguments based on waiver by election as well as approbation and reprobation. Having found that C3's defences raised at least a prima facie dispute, the court dismissed the appeal. It also dismissed the entire winding-up application.[12]

4. Abuse of process arising from taking inconsistent positions in litigation

Despite its flexible nature, the abuse of process jurisdiction has been subject to a high threshold. Several decisions have reiterated the exhortation in Johnson v Gore Wood & Co (No 1)[13] to make a 'broad, merits-based judgment taking into account the public and private interests involved, and all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court'. Concerning public interests, previous decisions have discussed matters relating to efficiency in conducting litigation, and the interest in having finality of litigation.[14] Other cases have focused on the likelihood that the administration of justice is brought into disrepute and whether a collateral attack was being launched on the court's earlier decision.[15] With regard to private interests, the courts have given extensive consideration to the impact of the litigation conduct on the other parties, including being vexed twice for the same matter.[16] In determining whether there was manifest unfairness to the other party, the courts have taken into account the procedural conduct of all the parties.[17]

Notably, the balancing exercise has gained greater significance as the initial Henderson abuse of jurisdiction[18] extended its reach to other circumstances apart from re-litigation. When deciding whether to apply the doctrine to different parties across legal proceedings, the courts have assessed the relevant interests very carefully to ensure that abuse of process is not unduly extended. For instance, the plaintiff in Johnson v Gore was different from the claimant in the earlier action, which was a company controlled by the plaintiff. The House of Lords decided that there was no abusive conduct because all the parties earlier accepted that it was open to the plaintiff to subsequently issue proceedings to enforce his personal claim.[19] Similarly, the court exercised great caution in Bradford & Bingley Building Society v Seddon[20] when deciding whether a party adopting inconsistent positions across related proceedings had abused the court's process. The inconsistency here was between an earlier judgment entered by the defendant against an accountant for negligence, and the defendant subsequently commencing third party proceedings against the accountant and his

[12] Ibid [102]-[131].
[13] [2002] 2 AC 1 (UKHL) 31.
[14] Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd [2013] UKSC 46 (United Kingdom Supreme Court (UKSC)); Johnson (n 13); Arnold v National Westminster Bank plc [1991] 2 AC 93 (UKHL).
[15] Hunter v Chief Constable of the West Midlands Police [1982] AC 529 (UKHL); Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 321 (EWCA); Taylor Walton (a firm) v Laing [2007] EWCA Civ 1146 (EWCA); Kotonou v National Westminster Bank Plc [2015] EWCA Civ 1106 (EWCA).
[16] Johnson (n 13).
[17] Kotonou (n 15); Virgin Atlantic (n 14) (considering that the Court of Appeal's decision holding that the claimant's patent was valid and infringed by the defendant, was followed by the unusual circumstance of the defendant's patent being amended by the European Board of Patents and having retrospective effect. The Supreme Court deemed this to be new point which could not have been raised in the earlier English proceedings).
[18] See Henderson v Henderson (1843) 3 Hare 100; 67 ER 313.
[19] Johnson (n 13). See also Aldi Stores Ltd v WSP Group Plc [2007] EWCA Civ 1260 (EWCA) (noting that abuse of process could apply when the plaintiff was suing parties who were not defendants in an earlier suit, but finding the plaintiff had earlier informed the defendants of a potential suit, and that the plaintiff's litigation conduct was reasonable in the circumstances).
[20] Bradford (n 1).

two former partners in an action commenced by another party against him. The Court of Appeal reversed the decision below to strike out the third-party claim as an abuse of process. Applying the Henderson rule, Auld LJ stated that some additional element apart from mere re-litigation or inconsistency—such as a collateral attack on a previous decision—was required in order to find an abuse of process.[21] More recently, the High Court in Twinsectra Ltd v Lloyds Bank Plc[22] applied Bradford's principles, holding that there were other additional elements present leading to abuse of process, such as the pursuit of mutually exclusive claims. In short, it is not sufficient to merely assert that a matter could have been raised in earlier proceedings or that inconsistent positions were adopted.[23] The doctrine imposes a high threshold by requiring careful scrutiny and balancing of all the relevant interests and circumstances.

The above background forms a crucial backdrop to the analysis of the present decision. Unlike the conventional usage of abuse of process, the Court of Appeal was utilising the abuse of process doctrine as a control mechanism against the relatively low standard of review to obtain a stay of winding-up proceedings. There appear to be two primary aims underlying the court's novel choice: upholding a high threshold before conduct amounts to 'abuse of process', and having a flexible mechanism for review of potential abuses of process. These goals are evident from the court's related discussion in its earlier grounds of decision in VTB. It acknowledged in that case that the lower standard of a prima facie dispute could 'lend itself to abuse if a stay was automatically granted [based on an agreement to arbitration]'.[24] Deciding that abuse of process provided a suitable check, the court then stressed that the threshold for abusive conduct was very high. At the same time, it highlighted that the doctrine cohered well with the law of civil procedure and could be used in a variety of scenarios.[25] In the current BWG appeal, the court elaborated on the flexible nature of this doctrine, stating that the categories for abuse of process were not closed. This jurisdiction was ultimately exercised at the court's discretion depending on all the interests and circumstances of the case.[26]

As discussed above, a broad assessment of the relevant interests and circumstances is critical to maintain a sufficiently high threshold for the abuse of process doctrine. The court in BWG initially appeared to endorse this discretionary approach of balancing public considerations and interests of justice.[27] However, it diluted this approach by stating that the court, 'in the absence of a clear and convincing reason for the debtor's inconsistency' or 'exceptional circumstances', would find an abuse of process.[28] There seems to be an implicit assumption that inconsistency will be deemed abusive unless the debtor can show otherwise. This approach departs significantly from the broad assessment in Johnson and potentially distracts the courts from engaging in a holistic examination of the relevant public and private interests. A future court could expend undue attention on ascertaining whether there were inconsistent positions and neglect the overarching question whether the different positions taken amounted to a misuse of the court's process in all the circumstances. This approach is also more reminiscent of the strict analysis in res judicata rather than the flexible approach for abuse of process, veering close to what Lord Bingham termed as a 'dogmatic … approach' of finding that conduct is necessarily abusive when a matter should have

[21] ibid 1492–1493.
[22] [2018] EWHC 672 (Ch) (EWHC)
[23] Bradford (n 1); Johnson (n 13).
[24] VTB (n 7) [93].
[25] Ibid [99].
[26] BWG (n 4) [53]–[54].
[27] Ibid [54], [58].
[28] Ibid [56], [58].

been raised earlier.[29] More significantly, it may obscure salient public and private interests and fail to ensure a high threshold for abuse of process.

Furthermore, the court narrowly focused on two conflicting policy considerations: a policy preventing a party from relying on inconsistent positions, and the principle that the court cannot and will not lend its aid to enforce an illegal contract.[30] This binary analysis could have benefitted from a more comprehensive consideration of other salient interests relating to the efficient administration of justice, chief of which is the risk of different courts arriving at inconsistent decisions on the same matter and bringing disrepute to the overall administration of justice. In addition, there was insufficient consideration of the procedural impact of C3's litigation conduct on the other parties. Notably, the court expressed disapproval of C3's proceedings against C1 and Sit, but reasoned that C3 was not seeking to obtain a windfall out of these proceedings because of its repeated commitments to pay C2 after being paid by C1. Nevertheless, it is patent that C3's conduct would have a detrimental impact on the other parties. Sit was clearly liable under the bankruptcy order to pay C3, despite the risk of C3 not paying C2 after success fully advancing its defences in arbitral proceedings. Although C3 had repeatedly confirmed that it would pay C2 after recovering from C1, it would be anomalous for it to do so despite obtaining an arbitral award releasing it from these obligations. C2, in turn, would be uncertain as to whether C3 would seriously pursue its defences in the arbitral proceedings, or fulfil its earlier assurance of paying C2 after recovering monies from the other parties. Furthermore, the court found that C3 had formed a preliminary view on 8 November of the potential illegality and formulated its written sub missions on 26 November. By the time it filed an affirmation on 4 February the next year in the bankruptcy proceedings against Sit, C3 would have been aware of its inconsistent positions across both sets of proceedings. It is therefore arguable that C3's continuation of the bankruptcy proceedings in these circumstances was manifestly unfair to the other parties. Unfortunately, the court focused more on C3's earlier difficulties in conducting concurrent litigation and failed to also consider the procedural impact of C3's obtaining of the bankruptcy order on the other parties.

It is also questionable whether the court should have accorded significant weight to the public policy of not assisting C2 to enforce a potentially illegal transaction. It reasoned that if the illegality defence had been C3's only defence, C2 would then be free to enforce a potentially illegal contract through continuing its winding-up proceedings. This was clearly not the case in the current circumstances as C3 had raised three other defences besides illegality that satisfied the prima facie standard of review for an injunction. This meant that arbitral proceedings would take place. Indeed, the court had earlier acknowledged that C3 might still be able to obtain an injunction as long as some of its multiple defences were not deemed to be an abuse of the court's process.[31] Hence, it is curious that the court's attribution of significant weight to this factor is premised on the hypothetical scenario of C3 raising only the illegality defence.

In summary, the court's underlying aims of achieving flexibility and a high threshold through using abuse of process as a control mechanism were not fulfilled. Its articulation of the relevant principles seemed to obscure the central exercise of balancing of interests, and to give undue weight to determining whether inconsistent positions were adopted. In addition, the court's inadequate articulation of the salient interests gave the impression that it did not make a broad assessment of all the relevant interests and circumstances.

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[29] *Johnson* (n 13) 31.
[30] *BWG* (n 4) [98].
[31] Ibid [57].

5. Achieving coherence in the overlapping doctrines of abuse of process, election, and approbation

The court also considered the parties' alternative arguments based on the related doctrines of waiver by election, and approbation and reprobation. Although these overlapping doctrines are frequently raised together, they have rather distinct emphases. Election by waiver, a common law doctrine, applies when a party, knowing that he can choose between inconsistent courses of actions affecting another party's rights, decides on one option and communicates the choice to the other party. The most well-known application of election is the choice between accepting a repudiatory breach of contract and affirming the contract, but its application has been extended to choosing between different rights or remedies in the conduct of litigation: United Australia Ltd v Barclays Bank Ltd[32] and Tang Mang Sit (decd) v Capacious Investments Ltd.[33] Both decisions highlighted that the election of remedies need only be made by the time judgment is given, and not before.[34] The recent Twinsectra decision applied these principles to circumstances where the claimant companies earlier obtained judgment against a director for breaching his fiduciary duties in causing them to enter a loan with a bank secured by charges, and later challenged the validity of the charges against the bank. The court held that the claimant had made an election between inconsistent remedies and rights when it obtained a final court order against the director. Significantly, it stressed that once an election was made, it could not be retracted. It could not be undone by a subsequent undertaking by the claimants not to enforce the earlier judgment against the director.[35]

In contrast to the common law doctrine of election, the doctrine of approbation and reprobation has equitable origins. The House of Lords in Lissenden v CAV Bosch Ltd noted that the equitable doctrine originated in Scottish law, premised on the principle that a person who accepts a benefit under an instrument, such as a will, must also accept the burden of it.[36] This doctrine was extended to litigation conduct in Express Newspapers Plc v News (UK) Ltd[37] and Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd.[38] Robert Walker LJ in the latter case stated that a party could not 'blow hot and cold' by pursuing inconsistent cases. Noting that this principle overlapped with election by waiver, he emphasised that it was a more flexible doctrine.[39] n the same vein, the authors of Spencer Bower: Reliance-Based Estoppel observed that the doctrine does not involve the party making a choice, but simply prevents the assertion of a right inconsistent with the benefits taken before through a court process.[40]

The Singapore court in the present appeal broadly adopted the English common law principles on election by requiring three elements: the concurrent existence of two inconsistent sets of legal rights; knowledge of the facts giving rise to these rights; and the making of an unequivocal representation concerning the right or remedy being waived. Referring to Twinsectra, it then observed that election by waiver could apply in relation to different proceedings against different parties. It stressed that the doctrine was typically engaged when a party had secured a benefit from an earlier inconsistent position. Curiously, the court then stopped short of applying these principles

[32] United Australia (n 2).
[33] [1996] AC 514 (United Kingdom Privy Council (UKPC)).
[34] United Australia (n 2) 18–19; Tang Man Sit (n 33) 521–522.
[35] Twinsectra (n 22).
[36] [1940] AC 412 (HL), 418.
[37] Express Newspapers (n 3).
[38] [2000] Ch 12 (EWCA).
[39] Ibid 31.
[40] Piers Feltham, Tom Leech, Peter Crampin, and Joshua Winfield, Spencer Bower: Reliance-Based Estoppel (5th edn, Bloomsbury 2017) [13.5].

to the facts, probably because it had made its decision based on abuse of process and approbation and reprobation.[41]

Significantly, the present circumstances closely mirror the situation in Twinsectra. It was open to the claimants in Twinsectra to pursue two inconsistent remedies against two parties: a judgment against the director premised on liability to the bank under the charges, or an order against the bank that the charges were invalid. They made a representation of their election by obtaining a court order against the director on the basis of liability to the bank. This choice was made with the benefit of all information and legal advice. The claimants were thus precluded from seeking the inconsistent remedy of avoiding liability under the charge. Their earlier election could not be revoked by providing an undertaking not to enforce their earlier order against the director.

Similarly, C3 in the Singapore case knew of the availability of two inconsistent courses of action by 2019: invalidating the contract with C2 based on illegality in future arbitral proceedings after staying C2's winding-up proceedings; or enforcing its settlement agreement with C1 that was potentially tainted by the earlier illegal contract. The court found that C3 had since November 2018 been aware of the potential illegality of the contract entered with C2. Arguably, C3's obtaining of the bankruptcy order in February 2019 enforcing its settlement agreement with Sit, which was premised on a potentially illegal contract, was an unequivocal representation to C2 that it had elected not to pursue its defence of illegality. As such, it was not open to C3 to maintain its inconsistent position in the present proceedings that its illegality defence warranted a stay of C2's winding-up proceedings.

The court seemed persuaded that C3 would not gain a windfall because it had confirmed its intention to pay C2 after being paid by C1. Be that as it may, C3's promise to C2 to pay it despite receiving a future arbitral award invalidating the contract cannot possibly revoke an earlier election. As observed in Twinsectra, an election by waiver was final and could not be belatedly altered.[42] Furthermore, the authors of Spencer Bower: Reliance-Based Estoppel commented in the same vein that election by waiver, being a common law doctrine, depended on choice and did not give the courts the equitable dis cretion to grant relief.[43]

Unlike its analysis of election, the court did explain why there was no approbation or reprobation. Again, it endorsed the English principles, including Express Newspaper's extension of the equitable doctrine to situations where parties assert inconsistent positions in different court proceedings. However, its application of these principles was not persuasive. It first acknowledged that the decisions such as Twinsectra suggested that the doctrine operated when a party 'has received an actual benefit as a result of an earlier inconsistent position'.[44] The court then conceded that C3 received an apparent benefit through the bankruptcy order. Surprisingly, it reasoned that any benefit obtained was intended to be paid to C2 to discharge C3's liability, but not to enrich itself. Hence, the court deemed it inappropriate to apply the doctrine given the risk of greater injustice and C3's declared intention not to retain the benefit.[45]

Admittedly, the equitable nature of this doctrine gave the court the discretion to apply it flexibly. Nonetheless, C3's declared intention to pay C2 under the contract seemed highly incongruous with its conduct of arguing that the contract was invalid. Furthermore, the obtaining of a benefit from a court judgment is strikingly similar to the claimants' obtaining an earlier order against their director

[41] BWG (n 4) [121]–[127].
[42] Twinsectra (n 22) [72].
[43] Piers Feltham and others (n 40) [13.2].
[44] BWG (n 4) [118].
[45] BWG (n 4) [100]-[120].

in Twinsectra. Since the circumstances did not persuasively indicate a risk of injustice, it stands to reason that the doctrine of approbation and reprobation should have been satisfied here.

The overriding consideration in the court's analysis was the injustice of allowing C2 to successfully wind-up C3 based on a potentially illegal contract. Granted that illegality impinges on crucial public policy considerations, there were residual questions that the court alluded to but did not resolve. Crucially, what if C3 recovered monies against Sit under the bankruptcy order and also successfully persuaded the arbitral tribunal that the contract with C2 was illegal? C3 would no longer be obliged to pay C2. It would be reaping a clear benefit from the bankruptcy order that was not passed to C2. Furthermore, this benefit would have arisen from enforcing a settlement agreement against Sit tainted by illegality. By disallowing C2 to enforce a potentially illegal contract against C3, the court would be effectively permit ting C3 to benefit from the same illegality. In sum, the court could have more clearly addressed the consequences of allowing the inconsistent positions and balanced them against any injustice occasioned by disallowing C3's illegality defence.

More importantly, there was a missed opportunity to clarify how the overlapping doctrines of abuse of process, election by waiver, and approbation operated differently in the context of alleged inconsistency. Notably, election stands out as a less flexible doctrine, focusing narrowly on whether there was a choice made between inconsistent rights or remedies, and an unequivocal representation to the other party of the election.[46] By comparison, both doctrines of abuse of process and approbation are more discretionary. The former entails an assessment of whether the party is misusing the court's process by adopting inconsistent positions, in light of the relevant public and private interests involved. Because of its close association with res judicata, abuse of process frequently involves the consideration of interests relating to the administration of justice, such as whether a collateral attack is being made on the court's decisions.[47] Finally, approbation, unlike abuse of process, appears to concentrate less on whether there is an affront to the court's process than on the injustice caused by the adoption of contrary stances in different litigation proceedings concerning the same matter. The unfairness here stems from obtaining a benefit from a court process and being unwilling to accept the burden.[48] The differing nuances in these doc trines should be clearly delineated, so as to guide the courts in the future applications of these overlapping doctrines.

6. Conclusion

This appeal provided an opportune moment for the apex court in Singapore to clarify how the doctrines of abuse of process, election by waiver, and approbation and reprobation overlap and yet differ. Although the specific context was a debtor adopting a position in winding-up proceedings that are allegedly inconsistent with related proceedings, the court's analysis has implications on future proceedings in which inconsistent stances have been adopted across different litigation proceedings against the same or different parties. It has been argued in this note that the distinct origins and elements of the three doctrines could have been delineated more clearly. The court's analysis of the relevant interests under abuse of process could have been more holistic by considering the potential impact on other parties, as well as the impact of inconsistent judgments on the overall administration of justice. Additionally, the court set out the principles concerning election, but

[46] United Australia (n 2) 30; Twinsectra (n 22) [72].
[47] See section 4 above.
[48] Express Newspapers (n 3).

regrettably did not apply them. It also appeared to accept that the elements in approbation and reprobation were satisfied, but reasoned that they should not apply because of the risk of greater injustice. Nevertheless, the court neglected the ramifications arising from C3's eventual choice to obtain a bankruptcy order against C1's CEO. It is at this crucial juncture where the court should have assessed whether an election was rep resented to C2, whether a benefit was reaped which precluded C3 from disclaiming the burden of its contract with C2, and whether there was a misuse of the court's process by advancing a position contrary to the premise of the bankruptcy order.

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