Lassiter Ann Masters v To Keng Lam (alias Toh Jeanette)
[2003] SGHC 176

Case Number : Suit 870/1997, Summons for Directions No 600265/2003, 6000278/2003

Decision Date : 20 August 2003

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Michael Hwang SC, Ernest Wee (Michael Hwang) and Siva Murugaiyan (Sant Singh Partnership) for plaintiff; Quentin Loh SC and Anthony Wee (Rajah and Tann) for defendant

Parties : Lassiter Ann Masters — To Keng Lam (alias Toh Jeanette)

Civil Procedure – Appeals – Registrar's Appeals from assessment of damages – Whether appeal operates as rehearing – Whether judge has discretion to allow admission of further evidence on appeal – Whether Ladd v Marshall principles apply to Registrar's Appeals relating to assessment of damages

The background

1 Ann Masters Lassiter (the plaintiff) is the widow of an American, Henry Adolphus Lassiter (the deceased), who was knocked down at about 6.30am on 9 May 1994, by a car driven by Jeanette Toh (the defendant), resulting in his untimely death at the age of 48.

2 The plaintiff commenced these proceedings in May 1997 on her own behalf and on behalf of the deceased's dependants (three daughters), pursuant to s 12 of the Civil Law Act (Cap 43). By consent, interlocutory judgment was entered against the defendant on 19 May 1998 with 45% and 55% liability apportioned in favour of the defendant and the deceased respectively.

3 The plaintiff made the following heads of claim for damages pursuant to her notice of assessment filed on 11 December 2001:

(a) loss of inheritance;

(b) loss of dependency; and

(c) cost of administering the estate of the deceased, including the cost of resisting the imposition of tax by the Internal Revenue Service ("IRS") of the United States of America ("the US").

4 Assessment of damages for the plaintiff took place before the learned Assistant Registrar Kwek Mean Luck ("Asst Registrar Kwek") in two tranches, the first between 27 February and 5 March and the second from 20 to 28 June 2002. On 29 June 2002, Asst Registrar Kwek delivered his written judgment wherein he awarded the plaintiff the following amounts:

(a) Non-recurring pre-trial expenses:

(i) bereavement USD10,000.00

(ii) transport of body USD10,918.00

(iii) funeral expenses USD12,014.00

(b) Non-recurring pre-trial loss of support:

(i) Cindy Lassiter's wedding USD27,803.93

(ii) Christy Lassiter's education USD77,457.75

(iii) Cheryl Lassiter's education USD175,572.30

(iv) Automobiles for

1. Christy Lassiter USD22,000.00

2. Cheryl Lassiter USD25,000.00

Subtotal USD327,833.98

(c) Pre-trial loss of support:

(i) multplicand USD130,000.00

(ii) muliplier 8 years

Subtotal USD1,040,000.00

(d) Post-trial non-recurring loss of support:

(i) Christy Lassiter's wedding USD30,000.00

(ii) Cheryl Lassiter's wedding USD30,000.00

Subtotal USD60,000.00

Asst Registrar Kwek dismissed the plaintiff's claims for loss of inheritance and costs of administering the estate of the deceased.

5 The defendant filed Registrar's Appeal No 600066 of 2003 ("the defendant's appeal") against Asst Registrar Kwek's multiplicand of USD130,000 and against his award of 50% costs (to be taxed) to the plaintiff while the plaintiff filed Registrar's Appeal No 600067 of 2003 ("the plaintiff's appeal") against Asst Registrar Kwek's entire awards, his dismissals of her claims for loss of inheritance, cost of estate duty administration, certificate for two counsel as well as his costs order. Both the defendant's and the plaintiff's appeals were scheduled to be heard together.

6 However, just before the hearing of both appeals, the plaintiff filed two Summonses for Further Directions numbered 600265 of 2003 and 6000278 of 2003 ("the applications") respectively, praying for leave to adduce further evidence by:

(a) the second and third supplemental Affidavits of Evidence-in-Chief of James M Baker ("Baker");

(b) the fourth supplemental Affidavit of Evidence-in-Chief of Bruce A Seaman ("Seaman");

at the hearing of the appeals (hereinafter, the above affidavits will be referred to as the second, third and fourth AEICs of the respective deponents).

7 The applications were scheduled to be dealt with at the hearing of the defendant's and plaintiff's appeals. However, in view of the impact my decision on the applications would have on the appeals (and also partly due to time-constraints), I decided to postpone hearing of the appeals proper to a later date, until after I had decided on the applications.

The arguments

The plaintiff's submissions

8 Mr Hwang, counsel for the plaintiff, pointed out that Registrar's Appeals are dealt with by way

of actual rehearing and the judge treats the matter afresh as though it came before him for the first time. He cited *Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd* [1990] SLR 1234, *Augustine v Goh Siam Yong* [1992] 1 SLR 767 and *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233, following the English position in *Evans v Bartlam* [1937] AC 473. As such, the court has an unfettered discretion to admit further affidavits for the plaintiff's and the defendant's appeals. Indeed, in the absence of special reasons, the judge is free to admit fresh evidence and he frequently does so. This principle extends to appeals from the Registrar's assessment of damages (*Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82). The principles in *Ladd v Marshall* [1954] 1 WLR 1489 would therefore not apply.

9 Mr Hwang explained he had attempted to put in the additional AEICs for the second tranche of the assessment hearing but the plaintiff's request was disallowed by Asst Registrar Kwek. He then gave the background leading to the filing of the applications:

(a) Before the first hearing in February 2002, there was a consent order for discovery (made on 15 February 1999) that the plaintiff would give discovery by 1 March 1999, failing which she was barred from adducing documentary evidence at the assessment hearing. The plaintiff failed to comply and accordingly the bar applied.

(b) After the assessment dates had been fixed, the defendant's solicitors applied for specific discovery in December 2001.

(c) The plaintiff's case on loss of inheritance (rejected by Asst Registrar Kwek) was based on analysis of the growth of the net wealth of the deceased, through a comparison of the deceased's Consolidated Financial Statements ("CFS") over certain years of his lifetime. The deceased's accountant, Herman Kooymans had exhibited to his affidavit (filed in March 2000) the relevant CFS. Seaman, the plaintiff's expert witness (an Associate Professor of Economics at Georgia State University) had used the CFS statements as the basis of his first AEIC (sworn on 19 March 2001 and exchanged with the defendant in June 2001) and from there, developed his assessment of the likely growth of the deceased's net wealth, based on alternative growth rates of 10.75% and 8.6%.

(d) The defendant had responded to the affidavits filed on the plaintiff's behalf by filing two AEICs of William Hecht ("Hecht") on 24 August 2001 and 2 March 2002 (Hecht is a certified public accountant and lawyer whose opinion was sought by the defendant on the disposable income of the deceased between the years 1991–1994, with regards to the deceased's reported income (for tax purposes) from two companies, Lassiter Properties Inc ("LPI") and Micro Design International ("MDI")).

(e) Although Hecht had seen Seaman's percentages (of 10.75% and 8.6%) in the latter's first AEIC, Hecht did not comment on them in either his first or second affidavits; he had merely criticised the tax aspect of Seaman's views.

(f) Just before the hearing of the first tranche, Seaman revised his affidavit to update his calculations for loss of dependency and to add a third possible growth rate of 4.3%. At the hearing itself, Seaman elaborated orally on his revised affidavit by reference to graphs taken from the data already contained in the plaintiff's and his first AEIC. As counsel for the defendant indicated he was not ready to cross-examine Seaman in view of what he described as new evidence, counsel obtained leave from court to file affidavits in reply by 14 May 2002, which deadline was subsequently extended to 7 June 2002, as the defendant's (other) counsel Anthony Wee ("Wee") could only visit Atlanta at the beginning of May 2002 to obtain documentation from the plaintiff's American solicitors.

(g) On 7 June 2002, the defendant's solicitors served on the plaintiff's solicitor S Murugayian ("SM") affidavits (with reports) of Hecht and one Carl Bellows ("Bellows") (Bellows is an American lawyer and expert witness for the defendant, who gave his opinion on Seaman's testimony that IRS had valued the deceased's estate as worth USD100m at the time of demise but allowed a "key man" discount to reduce the estate's value to USD39.1m). Both experts' reports contained voluminous documents and service was effected just before SM left for England. Although he arranged for the documents to be couriered to his destination, SM did not receive them until 12 June 2002.

(h) Mr Hwang himself left Singapore on 7 June 2002 and for the States on 14 June 2002; he did not see the affidavits of Hecht and Bellows until 14 June. In any case, there was nothing he could do until after the plaintiff or her American lawyer ("JP") had given their instructions. JP received the aforesaid documents on 11 June 2002 whilst the plaintiff herself received copies a day later.

(i) Baker (an estate agent/broker) who had known the deceased since 1981 was not able to meet up with JP to discuss the defendant's affidavits and give instructions to prepare an affidavit in reply before he and JP left Atlanta for Singapore on 17 June 2002 for the assessment hearing.

(j) It was after the arrival of Baker and JP in Singapore that the plaintiff's solicitors decided a reply affidavit was required to answer Hecht's report and his allegations that:

(i) the transaction concerning the deceased's family home at Emerald Drive was intended to place the property out of reach of the deceased's creditors;

(ii) the values attributed to the deceased's properties in his July 1990 CFS Chapter 11 bankruptcy filings were highly suspect;

(iii) the values of the Orkin transaction in Georgia and the Adirondacks transaction in New York were inflated.

Baker would be the most appropriate person to affirm the reply affidavit as he is an expert in real estate, especially in Georgia, and was personally aware of the transactions, being the deceased's partner.

(k) However, when the second tranche hearing began on 20 June 2002, Baker's reply affidavit was not ready as the exhibits had yet to arrive from the US. The exhibits related to 37 property transactions between 1994 and 2001 relating to the deceased's bankruptcy; they only arrived in Singapore on 21 June 2002.

(l) Mr Hwang/SM notified the court on 20 June 2002 that Baker would be replying to Hecht's AEIC, to which counsel for the defendant objected and Asst Registrar Kwek also expressed his unhappiness at the lateness. Mr Hwang attempted to introduce Baker's second AEIC on 25 June 2002 (fourth day of the hearing) but his application was denied by Asst Registrar Kwek.

(m) When Mr Hwang cross-examined Hecht, he was hampered by not being able to put to Hecht certain facts contained in Baker's second AEIC. Further, Asst Registrar Kwek disallowed (on the objections of counsel for the defendant) the introduction of a bundle containing the 37 property transactions referred to in Baker's second AEIC.

(n) When Hecht finished his testimony on 27 June, Mr Hwang applied for Baker to be called as a rebuttal witness but the application was denied.

Mr Hwang pointed out that Baker's second AEIC was made available to the defendant's legal team as early as 25 June 2002, so there was no question of their being unaware of its contents. He had also raised its contents in his cross-examination of Hecht.

10 Mr Hwang then explained the reasons for wanting to admit the third AEIC of Baker. The affidavit:

(a) gave a comprehensive analysis of all sales of whole tracts of properties in Georgia listed in the deceased's July 1990 CFS, from that month until end 2001. In Baker's second AEIC, there was only a comparison of sales prices with the Disclosure Statement (filed by the deceased in the Chapter 11 re-organisation proceedings) and not with the CFS. Further, Baker's second AEIC dealt with 37 properties whereas his third AEIC dealt with another 74 properties so as to make the comparison complete;

(b) tendered supporting documentation for the analysis in (a) above in the form of contemporaneous closing statements and conveyances;

(c) verified transactions (37 to 74) already described and documented in the bundle prepared by the plaintiff's team for cross-examination of Hecht, by authenticating the contemporaneous closing statements and conveyances evidencing their sale prices;

(d) exhibited a photograph of the Orkin property (disallowed by Asst Registrar Kwek) which showed the location and surrounding environment of the Orkin property, in particular its vicinity to the Atlanta International Raceway, which would have an impact on its value;

(e) attested to the fair market rental value of Emerald Drive (the Lassiter home) which was relevant to the issue of fair maintenance for the plaintiff and her exercise of the option to repurchase, a factor which is material to her dependency claim.

11 As for Seaman's fourth AEIC, it was to address certain comments which Asst Registrar Kwek had made on Seaman's earlier testimony, namely, the basis for Seaman's calculations, the fact that there was no mention of *probability distribution* in his affidavits nor in his testimony, that there was no documentation to support Seaman's calculations. Seaman's fourth AEIC supplied the calculations missing from his earlier affidavits. Mr Hwang pointed out that Asst Registrar Kwek had denied Seaman an opportunity to give oral evidence at the second tranche hearing to answer criticisms made by Hecht of Seaman's testimony even though those criticisms arose *after* Seaman had testified, and despite the provisions of O 38 r 2(3) of the Rules of Court (Cap 322, R 5).

12 Mr Hwang submitted that in the light of the chronology of the events leading up to the second tranche of the assessment hearing in June 2002, the applications should be allowed. The defendant's repeated objections of prejudice cannot hold since the evidence in the affidavits to be admitted was with them since June last year. The plaintiff was prepared to give the defendant a reasonable time to respond to the new affidavits and to recall the deponents for further cross-examination, if required. Dates for the plaintiff's and defendant's appeals need only be taken/given after the defendant's legal team had had time to consider their response to the new affidavit evidence. There was no prejudice to the defendant if the affidavits were admitted whereas the plaintiff would suffer irreparable prejudice if the applications were denied.

13 The new evidence was important in order to assist the court in its assessment of damages of a complex and very important case which would be heading for the Court of Appeal, regardless of which party succeeds in the Registrar's Appeals.

The defendant's submissions

14 Not surprisingly, counsel for the defendant, Mr Loh, opposed the applications, contending that the criteria laid down in *Ladd v Marshall* applied and the plaintiff had failed to satisfy the requirements therein for admission of new evidence.

15 Contrary to the complaint of her counsel, it was not the defendant's last-minute challenge of her evidence but the plaintiff's own conduct, in attempting to admit documents at the eleventh hour, that was the reason for Asst Registrar Kwek's refusal to admit the supplemental AEICs of Baker and Seaman.

16 Mr Loh submitted that the applications were yet another attempt, in a consistent pattern by the plaintiff, to introduce new evidence just before a hearing, when her half-truths and suppression of crucial facts are discovered. He pointed out that her attempts to introduce new evidence at every stage have consistently been with the aim of trying to plug gaps that have appeared in her case.

17 Mr Loh pointed out that the plaintiff had put forward a novel claim not raised previously either in Singapore or in England; she had claimed loss of inheritance in sums ranging from USD29m to USD75m (based on 45%). She had sought to show that the deceased was a hardworking, thrifty and successful businessman who had decided at the beginning of the 1990s, to enjoy the fruits of his labours and to lavish his family with a higher level of living with each passing year. The rosy picture she painted was shattered when the defendant's counsel discovered (which fact she initially hid) that the deceased (and his main company LPI) had filed for Chapter 11 bankruptcy on 4 November 1991, from which the deceased had not yet emerged as at the date of his demise. The deceased had also been indicted for racketeering (on 11 October 1993) under Georgia's laws, over alleged timber and timber-related fraud offences, which related directly to his main business of buying and selling timber land. The company LPI was actually worth a negative USD5.497m at the time of his demise. Indeed, the deceased's estate was still paying off debts due to its creditors (including his American legal counsel), some of which will only be fully repaid in 2009.

18 Breaches in the plaintiff's case occurred incrementally with each new discovery, which she fought tooth and nail to obscure and hide. The plaintiff kept changing her story and introduced new evidence to plug the holes that emerged in her case. Documents which showed that LPI had a negative value had to be forced out of the plaintiff by the defendant, in discovery applications which she resisted strenuously.

19 Mr Loh accused the plaintiff of being deceitful, of adopting "trial by ambush" and "sandbagging" tactics, by introducing new evidence at the very last minute, giving the defendant little/no time to verify the same. He cited seven occasions where she had adopted this approach:

For the first tranche of the hearing (28 February to 5 March 2002):

28 February 2002:

(i) admission of James Baker's first supplementary AEIC;

(ii) admission of Herman Kooymans' supplementary AEIC;

(iii) admission of Bruce Seaman's second AEIC;

1 March 2002:

adducing oral testimony from Bruce Seaman under the guise of explaining his AEIC.

The above applications were allowed but the court granted leave to the defendant to check on the issues she had raised and provide an opportunity to answer them.

For the second tranche hearing (20 – 28 June 2002):

25 June 2002:

(i) admission of James Baker's second AEIC;

(ii) admission of further oral testimony of Seaman;

27 June 2002:

admission of James Baker's second supplementary AEIC on the ground it was rebuttal evidence.

20 The court disallowed the plaintiff's attempts to introduce fresh evidence. The following extracts from the notes of evidence (of 25 June) of the exchange between Asst Registrar Kwek and counsel explains why:

Hwang: Your Honour, I am making this application for leave to recall Mr Baker to give evidence in terms of this second supplemental affidavit. I ask your Honour to bear in mind that we have not closed our case yet, so what we are doing is simply recalling a witness, which was foreshadowed earlier by Mr Siva Murugaiyan.

… This is important evidence. It is certainly relevant to the court, if it is interested in justice, in considering it. Otherwise, I will be hampered in my cross-examination of Mr Hecht.

His Honour: This is not the first time that this has occurred, Mr Hwang. Right before we were supposed to begin with the examination of Dr Seaman a fresh affidavit or second affidavit of Dr Seaman was filed, right on the hour.

That is precisely my point. I do not deny that the plaintiffs have a right to bring the relevant facts. What I find disconcerting is the timing of the plaintiff's action.

All these facts were freely available to the plaintiffs. All these facts are only in the awareness of the plaintiff. Without denying that they have a right to bring these facts to the court, why have they chosen to bring these facts to the court at the last minute on each occasion?

21 The defendant gave the following reasons why the court should not allow the applications:

(a) It is too late in the day, given that the assessment which took place over two tranches (three-and-a-half months apart) has been completed; witnesses have been called, cross-examined and re-examined; final submissions have been made and judgment has been delivered.

(b) The plaintiff has had more than ample time and opportunity to present her evidence and has not given any good, sufficient or even convincing reasons why she should now be allowed to do so on appeal.

(c) Admitting new evidence on appeal would cause extreme and irreparable prejudice to the defendant which cannot be compensated by costs.

(d) The plaintiff had failed miserably in her discovery obligations and to present her case with honesty and candour. She has attempted to mislead the court with half-truths and mischievous suppression of relevant evidence, consistently surprising the defendant with biased and incomplete discovery and last-minute evidence.

(e) Her attempt to introduce the fourth AEIC of Seaman ten months after judgment has been delivered is an abuse of the process of court. Seaman had been unable to answer or convince Asst Registrar Kwek on a basic point (probability distribution theory) put to him by counsel for the defendant and the court. He was now attempting belatedly, to put in evidence to criticise or rebut the findings of the assistant registrar.

22 The court should also disallow the applications based on the law:

(a) The plaintiff has not satisfied the conditions in *Ladd v Marshall* for the introduction of new evidence.

(b) Alternatively, the court should not (based on *Krakauer v Katz* [1954] 1 WLR 278) exercise its discretion in the plaintiff's favour due to the delay in the applications. None of the purported reasons given by the plaintiff answer why she or her legal team could not have disclosed the additional evidence earlier. It is the duty of a litigant to put forth his entire case and not give it in bits and pieces (*Lough Neagh Exploration Limited v Morrice* Chancery Division GIRJ 2654). This was particularly so in claims of this nature where the evidence was uniquely in the domain of the plaintiff; it behoves her to come to court and present her evidence in a forthcoming manner with candour and honesty. No court would lend its aid to a party who was guilty of *suppressio veri suggestio falsi* in presenting its case.

23 Mr Loh surmised that the reason for the applications was due to the plaintiff's case having been incrementally demolished through discovery. Her case having been damaged, the plaintiff was now seeking to repair the damage after the fact. Counsel set out the defendant's version of the chronology of events as follows:

(a) After the deceased's Chapter 11 bankruptcy was discovered and the original affidavits filed by her witnesses no longer rang true, the plaintiff introduced Baker's first supplementary AEIC to "white-wash" the fact of the bankruptcy. In relation to the bankruptcy, the plaintiff contested the defendant's application (filed on 14 December 2001) for discovery. Although the court ordered her on 4 January 2002 to produce the documents, she only gave partial discovery on 15 January 2002. The court then granted (on 1 February 2002) leave for the defendant's solicitor (Wee) to visit Atlanta, Georgia to inspect documents *after* 18 February 2002. There, Wee discovered, *inter alia*, a valuation report (of Taylor Consulting) showing that LPI was worth a negative USD5.497m, which document was not disclosed by the plaintiff until 7 May 2002, and even then only after the defendant had given notice that an application to court would be made if she refused.

(b) When the defendant discovered that the value of the deceased's estate had been inflated, the plaintiff attempted to introduce new evidence by way of Baker's second AEIC, to explain away the discovery, and attempted yet again to do so by his third AEIC, the subject of the applications.

(c) Seaman had originally recommended that the court compensate the plaintiff a minimum sum of USD46.66m (based on 45% liability) but, after the deceased's bankruptcy was discovered, Seaman had no alternative but to moderate his figure to USD29.74m (in his first supplementary AEIC which he attempted to introduce at the second tranche of the hearing). Although Asst Registrar Kwek allowed the admission of Seaman's (and Baker's) first supplementary AEICs, Seaman touched on new points in his oral testimony, causing the court to allow the defendant a chance to check and, if necessary, to file affidavits in reply to the new points raised before the next hearing.

(d) In order to plug the holes in her case (after Wee's visit to Atlanta), the plaintiff applied to Asst Registrar Kwek to adduce further oral evidence from Seaman on 25 June and admit Baker's second AEIC served on the defendant a day later. Both applications were refused.

(e) On 27 June 2002, counsel applied to introduce Baker's second AEIC by way of rebuttal evidence. Questioned by Asst Registrar Kwek, Mr Hwang conceded that although technically different in grounds, his application was the same in substance as that made on the previous day. After hearing protracted arguments, Asst Registrar Kwek disallowed the application.

24 On the complaint that the plaintiff had been caught by surprise by Hecht's report, Mr Loh pointed out that it was the plaintiff who introduced (through Seaman) the concept of "key man" discount and alleged that the deceased's estate was worth USD100m as at 31 December 1993. Yet the value of his estate had dropped to USD39m by the date of his demise, a difference of more than

USD60m. There could only be two possible explanations for the sharp drop in value:

(a) a "key man" discount was indeed given by the IRS; or

(b) the deceased's net worth in the CFS and Disclosure Statements in the bankruptcy court was inflated.

Consequently, the plaintiff and her legal advisers must have known that the above discrepancy in figures would lead to a train of inquiry on the possibilities. Had the plaintiff complied with her discovery obligations under Singapore law and the defendant's witnesses were erroneous in their views, there would have been no difficulty for them to have been proved wrong had they been shown the correct documents. It therefore did not lie in the plaintiff's mouth to allege she had been taken by surprise.

The decision

25 I start by referring to a preliminary objection raised by Mr Loh when hearing first commenced. He pointed out that in the light of Asst Registrar Kwek's refusal to allow the admission of the affidavits now the subject of the applications, the proper course was for the plaintiff to appeal against his orders by way of Registrar's Appeals instead of making fresh applications; I agree. The explanation put forward for the plaintiff – that it was a deliberate decision not to appeal because her counsel did not want the matter remitted back to the Registrar is unsatisfactory. Leaving that aside, I now turn to the merits of the applications.

26 I would also add that the fact that our (and UK) courts treat Registrar's Appeals as rehearings does not give judges a *carte blanche* as Mr Hwang seemed to suggest, to admit fresh evidence as opposed to admitting additional affidavits for the appeal, which is routinely done. In my view, there is a vast difference between the two. I agree with the defendant's submission that rehearing by way of Registrar's Appeals only means that a judge in chambers is entitled to look at the case *de novo* based *on whatever evidence that was presented to the Registrar below*; it does not extend to the admission of new testimony.

27 It bears remembering that, if the assessment of damages had been conducted before a judge (as was originally intended according to Mr Hwang) instead of by the Registrar and the plaintiff had appealed therefrom to the Court of Appeal instead of to a judge in chambers, there is no question that the principles in *Ladd v Marshall* would apply, in which case the applications would most likely have been refused.

28 It would be useful at this juncture to recapitulate the principles enunciated by the UK Court of Appeal in *Ladd v Marshall* as to when leave to adduce further evidence on appeal will be granted. They are:

(a) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) if the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) if the evidence is such as is presumably to be believed.

29 Mr Hwang had cited my decision (as well as the Court of Appeal's) in *Chang Ah Lek v Lim Ah Koon* as authority for his submission that even an appeal on assessment of damages to a judge in chambers is dealt with by way of a rehearing. That may be so, but neither in that nor in any of the other cases he cited has the court been known to admit fresh evidence by way of AEICs or *viva voce* testimony on interlocutory applications.

30 As O 38 r 2(3) of the Rules of Court was also relied on by Mr Hwang, I now turn my attention to that rule. It states:

> Unless the Court otherwise orders, no deponent to an affidavit may at the trial or hearing of any cause or matter give evidence in chief, the substance of which is not contained in his affidavit except in relation to matters which have arisen after the filing of the affidavit.

Order 38 r 2(4) would also be relevant in this regard. It reads:

> Notwithstanding paragraph (1), (2) or (3), the Court may, if it thinks just, order that evidence of a party or any witness or any part of such evidence be given orally at the trial or hearing of any cause or matter.

31 The scope of the court's discretion to admit further evidence by the above rules is spelt out in the commentary in the Singapore White Book (*Singapore Civil Procedure 2003*) at p 643, para 38/2/3:

> Even where affidavits are filed and notwithstanding O 38 r 2(3), the trial judge's discretion to allow a witness to give evidence orally under O 38 r 2(4) remains unfettered provided that the oral evidence is to be merely an amplification of the affidavit evidence and will not take the other party by surprise: *Lee Kuan Yew & Anor v Vinocur & Ors and another action* [1995] 3 SLR 477.

32 Consequently, I am of the view that neither the fact that Registrar's Appeals operate by way of rehearings nor O 38 r 2(3) of the Rules of Court gives a judge in chambers the discretion to automatically admit further testimony (oral or written) where damages have already been assessed and judgment thereto delivered. No amount of costs would compensate the irreparable prejudice caused thereby to the opposing party. To allow such applications would be to set a dangerous precedent and open the floodgates to abuse of the rule that Registrar's Appeals are dealt with by way of rehearings.

33 I would at this juncture refer to the 1998 (unreported) decision in *Lough Neagh Exploration Limited v Morrice* cited by the defendant. In that case, the court was confronted with the same issue in an appeal which came before him, arising from the dismissal of the plaintiff's action by a Master (the equivalent of our Registrar) pursuant to the defendant's application, on the ground that there was pending in the High Court in the Irish Republic, an action raising the same causes of action and/or the same subject matter of a dispute between the parties ("the Irish proceedings"). Just before the scheduled hearing of the appeal, the plaintiff's solicitors lodged in the Chancery Office a substantial number of files of documents relating largely to the Irish proceedings. The documents as furnished were not prepared in accordance with the Chancery Practice Direction No 4 1997. The plaintiff also sought leave to introduce further affidavit evidence in support of the appeal. This was what Girvan J had to say when he disallowed the plaintiff's application:

> On an appeal from the Master to the Judge in a case such as the present the matter comes by way of a rehearing and in the normal course of events is determined on the evidence put before the Master. Frequently, the parties will seek to put before the court fresh evidence and not infrequently such further evidence is admitted either by agreement of the parties or by leave of the court in the exercise of its discretion. The position is thus stated in the *Supreme Court Practice 1999 Volume 1* paragraph 58/1/3:
>
> > It is common practice for the Judge in Chambers, subject, of course, to the question of costs, to admit further or additional evidence by affidavit to that which was before the Master or District Judge; but if a party has taken his stand on the evidence as it stood before the Master or District Judge, the Judge in Chambers may in his discretion, by analogy with the practice in the Court of Appeal, refuse to allow him to adduce further evidence

(see *Krakauer v Katz* [1954] 1 WLR 278).

34 In *Krakauer v Katz*, the defendant asked the Court of Appeal to admit in evidence certain further affidavits on his appeal against the decision of the judge not to strike out the plaintiff's claim for want of prosecution (which had been initially granted by the Master). Although their Lordships allowed the defendant's appeal, they rejected the defendant's application on the ground that an appellant in an interlocutory matter had no right to adduce further evidence by affidavit. Denning LJ had this to say (at 279):

> In exercising our discretion in this case, there is an overwhelming obstacle in the way of the defendant. At the hearing below the judge in chambers asked his counsel whether he wanted to answer the affidavit of the plaintiff and whether he wanted an adjournment so to do, and counsel said that he did not. Counsel thus took his stand on the evidence as it then stood before the judge; and it would be contrary to the right exercise of our discretion if we were to allow counsel for the defendant to go back on that position and to introduce further evidence in this court.

35 Mr Hwang may well argue that the plaintiff did not take her stand on the evidence she had presented at the assessment hearing, as she tried (unsuccessfully) to put in more evidence *via* Seaman's additional AEICs. That is not the point – what is noteworthy is the pattern of how the plaintiff has conducted her case for the assessment.

36 Assuming I am wrong and judges do have the discretion for Registrar's Appeals (relating to assessment of damages) to allow the admission of fresh evidence (and which would necessitate the recalling of witnesses who testified at the assessment), I would not have exercised my discretion in the plaintiff's favour in any event. I would still have refused the applications for reasons which I shall now set out.

37 From the chronology of events set out by the parties, it seems to me that the plaintiff's conduct has been less than commendable. In this regard, Mr Loh's criticism of the plaintiff, that she conducted her trial "by ambush" is not unfounded. I find it most telling that the plaintiff (according to her own chronology of events) failed to comply with the consent order for discovery made on 15 February 1999. Clearly, she did not wish to reveal and indeed deliberately hid, the deceased's Chapter 11 bankruptcy until she was forced to deal with it when confronted by the defendant's counsel upon their discovery. Neither did she give satisfactory answer when cross-examined (on 20th June) on her omission. Equally, the plaintiff chose not to disclose the Taylor Consulting report which she had submitted to IRS, showing that LPI had a negative value of USD5.497m.

38 It would be useful at this juncture to consider how Seaman dealt with the deceased's bankruptcy initially. In his first AEIC filed on 1 March 2002, Seaman at p 16 of his report exhibited therewith had stated (euphemistically according to the defendant):

> While it is true that Henry A Lassiter had been dealing with some financial complications through the bankruptcy courts, he had emerged from these problems and was proceeding to further accumulate wealth as he had done so successfully in the past. For example, for the five year period from 1985 through 1990, Henry A Lassiter's net wealth grew from $25.023 million to $149.615 million. The implicit compound annual growth rate over that period was nearly 43%.

There was no mention by Seaman that he had looked at the bankruptcy proceedings in the preparation of his above report. Yet, on 1 March 2002, he confirmed to Mr Hwang that despite his omission, he had reviewed thoroughly in preparation for his first report, the reorganisation plan and the Disclosure Statement regarding the bankruptcy proceedings. At that hearing, Seaman introduced for the first time, a new method of calculating the deceased's projected wealth, namely the incremental method. Further, Seaman propounded (again for the first time) the "*key man*" concept.

39 Next, I refer to para 17 of Asst Registrar Kwek's Grounds of Decision where (in dismissing the plaintiff's loss of inheritance claim) he said:

> The key factual question is, whether Henry Lassiter would have, on the balance of probabilities, accumulated the level of wealth put forth by the plaintiff's expert Dr David Seaman. Dr Seaman provided several sets of different figures, the range of which put Henry Lassiter's accumulation of wealth as at 2016 as somewhere between US$34.205m to US$167.439m, calculated to present value to the date of trial using a discount rate of 6%; see exhibit P2. I had difficulty uncovering the basis of his calculations. For example, at p 16–17 of his 2nd affidavit filed on 25 February, he observes that the compound annual growth rate of Henry Lassiter between 1985 and 1990 was 43% and that if the future accumulation were to occur at only 20% or 25% of this peak rate, the corresponding compound annual growth rate till 2016 would be 8.6% (*ie* 0.2 x 43%) or 10.75% (*ie* 0.25 x 43%). These are two key growth rates which are used in the computations set out in exhibit P2. The 8.6% growth rate is where the third growth rate of 4.3% used in P2 is derived, being half of 8.6%. During cross-examination, Dr Seaman said that 4.3% is derived from a probability distribution (see transcript of 27 June 2002 at p 103 lines 3–4). There is however, no mention of this probability distribution in his affidavits, nor was it set out during his testimony. Instead, there is only a mention at p 19 of his 2nd affidavit that 4.3% is one half the intermediate growth rate of 8.6%.

40 The plaintiff intends by having Seaman's fourth AEIC admitted, to plug that particular hole in her case. Seaman has in paras 5 to 6 of his fourth AEIC sought to explain *probability distribution* and further suggests that it was nothing new but what he had already testified to, when cross-examined by Mr Loh, on 26 June 2002. I have checked the transcript of that day's proceedings and note that Seaman mentioned "*probability distribution*" only in the following context:

> Q: So I am putting to you that it is entirely reasonable for anybody projecting Mr Lassiter's ability to earn money or accumulate wealth onwards must include this factor of bankruptcy?
>
> A: And I will represent to you Mr Loh, that I perfectly agree with that. Let me tell you how one can very easily get a 10.75% growth rate. This is what my underlying analysis can also be represented as: this is a *probability distribution* in this world. There are no certainties. I adjust for risk, in fact, not so much through the discount rate. I do not want to double count risk. It is through the numerator. It is through the calculation of the actual stream of wealth. If you have a 10% chance of a 34% growth rate and a 20% chance of a 28% growth rate and a 40% chance of a 10.75% growth rate and a 20% chance of an 8.6% growth rate and a 10% chance of a minus 42.7% growth rate, you would get an expected growth rate of 10.75%. This is what I am simply telling you can be an underlying foundation, *which I have testified to, by the way, in other trials, regarding how one adjusts for risk accurately* This is probability distribution. [emphasis added]

41 I have several observations to make on the above testimony. Firstly, the information on *probability distribution* was "volunteered" by Seaman. Secondly, he could have elaborated on his theory further, either in cross-examination or when re-examined; he did neither. Thirdly, Seaman was not a witness of fact but the plaintiff's expert who came with impressive credentials who, by his own admission as appears from the above *underlined* words, had testified in other trials on the same theory. If he failed to persuade Asst Registrar Kwek to accept his theory or failed to explain it clearly enough, I do not see why he should be given a second chance to do so now.

42 What I find even more damning against Seaman is that he had a second bite at the cherry a day later (27 June) when he again raised the issue of *probability distribution* in the course of re-

examination by Mr Hwang when answering questions on Hecht's challenge of his report.

> Q: So I think this is where he is challenging your 6%?
>
> A: Actually, I think he is making a somewhat different point there than just the discount rate. It is a related point … The reason why you have 4.3% is because it is a *probability distribution*. He would have probably optimistically expected that he could have gotten 10.8, 15. I am saying he would have actually got 4.3. So he would have continued to actively manage for two very important reasons in this case: …
>
> [emphasis added]

All that he now says in his fourth AEIC could and should have been raised then together with the workings set out in his fourth AEIC; Seaman could have furnished his calculations overnight to Mr Hwang for re-examination purposes. He failed to do so and failed to give a credible explanation for his omission.

43 The above observations would equally apply to the second and third AEICs of Baker which the plaintiff now seeks to admit. In this regard, I refer to the exchange between Mr Hwang and Asst Registrar Kwek, set out in para 20 above. I fully adopt the observations of the latter, namely that all the facts which the plaintiff sought to admit by the new AEICs of Seaman and Baker were freely available to the plaintiff, known to her only and could have been presented much earlier.

44 The plaintiff's complaint of having been taken by surprise cannot be viewed with any sympathy as it arose through the manner she conducted her own case. Whilst I cannot comment on the system of trial in the US, the Singapore system does not condone or allow "trial by ambush", adopting the words used by Mr Loh. If the plaintiff, who has been given ample opportunity to do so, fails to present her case and evidence fully at trial or assessment, she should not be given second or third chances to do so to the detriment of the defendant, particularly where it would involve the recalling of foreign witnesses. There is more than a grain of truth in the defendant counsel's contention that every time his team finds a weakness in her case, the plaintiff attempts to plug the gap by adducing more evidence; this is not how litigation is conducted under Singapore's system of law.

Conclusion

45 I accept the defendant's arguments that the principles in *Ladd v Marshall* apply even to Registrar's Appeals, that the plaintiff has not satisfied those principles and the applications are made too late in the day. Accordingly, I dismiss the applications with costs to the defendant. As the plaintiff will most likely appeal against my decision, I hereby certify pursuant to s 34(1)(c) of the Supreme Court of Judicature Act (Cap 322), that I do not require further arguments.

Applications dismissed.