Olivine Capital Pte Ltd and another *v* Chia Chin Yan and another matter [2014] SGCA 19

Case Number	: Civil Appeal No 86 of 2013 and Summons No 6101 of 2013
Decision Date	: 09 April 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Quentin Loh J
Counsel Name(s)	: James Leslie Ponniah and Vincent Yeoh (Malkin & Maxwell LLP) for the appellants; Daniel Chia and Loh Jien Li (Stamford Law Corporation) for the respondent.
Parties	: Olivine Capital Pte Ltd and another — Chia Chin Yan

Civil Procedure – Summary Judgment

Contract – Interpretation

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2013] SGHC 168.]

9 April 2014

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal against the decision of the High Court judge ("the Judge") in *Olivine Capital Pte Ltd and another v Lee Chiew Leong and another* [2013] SGHC 168 ("the GD") dismissing Registrar's Appeal No 125 of 2013 ("RA 125/2013"). That was an appeal against the decision of the assistant registrar ("the AR") in Summons No 608 of 2013 ("SUM 608/2013"), an application made pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court"). The Judge agreed with the AR that the parties had compromised all the claims between them. We allowed the appeal against the ruling of the Judge and now give the detailed grounds for our decision.

The facts

2 The first appellant, Olivine Capital Pte Ltd ("the First Appellant"), was the leaseholder of a plot of land at 180–188 Rangoon Road. The second appellant, Ong Puay Guan @ Steven Ong ("the Second Appellant"), is the chief executive officer ("CEO") and a director of the First Appellant. The First Appellant sought to redevelop the land and initially hired Chia Chin Yan ("the Respondent") as the professional engineer and one Lee Chiew Leong ("Lee") as the architect in May 2006.

3 Work began on the redevelopment project ("the Project") in late 2007. In September 2007, an underground sewer pipe was damaged during piling work. The First Appellant and the Second Appellant (collectively, "the Appellants") alleged that the damage was caused by the negligence of the Respondent and Lee. The Appellants alleged that the Respondent had negligently failed to ascertain whether there was an underground sewer during the preparation of the piling plan, had given the go-ahead to proceed with the piling and had also failed to supervise the piling operation. The Respondent denied the foregoing, and alleged that the Appellants were negligent in commencing the piling work without his knowledge and consent. The alleged negligence of Lee is not germane to

this appeal as it was not the subject of the O 14 r 12 proceedings.

4 The Public Utilities Board ("the PUB"), on 24 December 2007, gave notice to the parties to repair the damaged sewer. On 31 December 2007, the Appellants told the PUB that they would not do the repair work, and agreed to bear the cost of the PUB doing the repair work instead. On 16 January 2008, the PUB informed the Appellants that the estimated cost would be $600,000. The following day, the Appellants informed the Respondent, Lee, and the piling contractor that they were holding them liable for the repair costs.

5 The Respondent oversaw the repair work on the damaged sewer from December 2007 to February 2008. On 28 April 2008, the PUB invoiced the First Appellant an amount of $512,939.18. The First Appellant has yet to make the requisite payment.

6 After a dispute with the initial builder for the Project in June 2009, the First Appellant appointed a second builder, HPC Builders Pte Ltd ("HPC"). Contemporaneously with this, the Respondent took on the additional roles of architect and project coordinator, on top of his initial role as professional engineer. According to the Appellants, the Respondent was to be paid by HPC under this new arrangement.

7 On 16 July 2009, the Respondent was charged with an offence under s 14(1) of the Sewerage and Drainage Act (Cap 294, 2001 Rev Ed) ("the Act"). No other parties were charged at that time.

8 On 15 October 2009, the Respondent resigned and gave the Second Appellant a letter ("the Compromise Letter") on the Respondent's company letterhead. The material parts of the Compromise Letter are as follows: [note: 1]

> With regards to the captioned project, we agree to amicably terminate my role as Qualified Person (Architectural and Structural) and project coordinator with effect from 15 October 2009 with no claim from either party.

The letter was signed by the Respondent. The Second Appellant signed the letter in his capacity as CEO of the First Appellant below the phrase "I agree and acknowledge receipt of this letter". [note: 2]

9 On 9 March 2012, almost three years after the Respondent was initially charged, the PUB charged the Second Appellant and Lee with offences under ss 14 and 20 of the Act. The Respondent was also charged with an additional offence under s 20 of the same.

10 On 11 September 2012, the Appellants filed Suit No 762 of 2012 ("Suit 762/2012") against the Respondent and Lee, essentially alleging that they were negligent and claiming, *inter alia*, an indemnity for compensation payable to the PUB. The Respondent denied these allegations in his defence, and also counterclaimed for an order that the Appellants indemnify him against all losses arising from the charges brought against him under the Act. On 1 February 2013, the Respondent filed SUM 608/2013 seeking a determination under O 14 r 12 of the Rules of Court as to whether the Compromise Letter was effective to release him from any liability to the Appellants apropos the damaged sewer. The AR held that the Compromise Letter did have this effect. The Judge in turn dismissed the Appellants' appeal against the AR's decision (*viz*, RA 125/2013).

Summary of the arguments below

11 The Respondent argued that the Compromise Letter compromised all claims between the Appellants and him with regard to his roles as architect, professional engineer and project coordinator.

Any claim that the Appellants might have had against him for negligently causing damage to the sewer had therefore been compromised.

12 The Appellants argued that the ambit and effect of the Compromise Letter was not a matter suitable for summary determination under O 14 r 12 of the Rules of Court because the factual matrix surrounding the letter was in dispute. The Appellants also argued that the Compromise Letter did not release the Respondent from liability apropos the damaged sewer. Instead, the Compromise Letter only compromised claims relating to the period when the Respondent concurrently held all three roles as architect, professional engineer and project coordinator (*ie*, the period between June and October 2009).

13 It should also be noted that the Appellants did not raise the issue of mistake in the proceedings below, although they have now sought to raise this particular issue via an amendment of their pleadings.

The decision below

14 The Judge accepted that the factual context surrounding the signing of the Compromise Letter was relevant and in dispute. She noted that ordinarily, summary determination under O 14 r 12 was inappropriate if there were factual disputes affecting the point of construction. She pointed out that this proposition was, however, subject to two caveats: (a) there must be a genuine dispute of fact; and (b) the contract must be capable of bearing the meaning which the resisting party asserted.

15 In the Judge's view, the Appellants had taken the opening words of the Compromise Letter out of context to qualify the phrase "no claim from either party". [note: 3] It was plain on its face that the phrase was not limited in time. The Judge found the Appellants' version of the facts incredible for three reasons: first, this was not a case of the Respondent waiving $6,000 in unpaid fees in exchange for the First Appellant releasing him from a half-a-million-dollar liability; second, there was no objective evidence of a claim by the Appellants against the Respondent, even though the PUB had already invoiced the First Appellant for the cost of repairing the damaged sewer by then; and third, it was incredible, having regard to the circumstances, that the Second Appellant would sign the Compromise Letter without qualification to the phrase "with no claim". [note: 4]

16 The Judge thus held that the Compromise Letter had effectively compromised the Appellants' claims against the Respondent.

The parties' respective cases on appeal and the Appellants' proposed amendment of their pleaded defence

17 The Appellants submit that a determination under O 14 r 12 should not be made because the factual context surrounding the signing of the Compromise Letter is in dispute. They take the position that their evidence is not so incredible that it should be rejected, and the Compromise Letter should not be construed to release the Respondent from liability for the damage to the sewer. In any event, the Appellants contend, the Compromise Letter is void or voidable on the ground of mistake.

18 The Respondent, on the other hand, submits that the case is suitable for determination under O 14 r 12 because there are no genuine disputes of fact relating to the objective evidence. The Respondent contends that the Appellants' evidence is incredible. The Compromise Letter was drafted clearly and unambiguously, and compromised all claims, including any claims pertaining to liability for the damaged sewer. The Compromise Letter, the Respondent submits, is also not void or voidable on the ground of mistake.

19 The Appellants' submissions on mistake are new, and were neither pleaded in their defence to the Respondent's counterclaim nor raised at the two hearings below. This raises a few preliminary issues, one of which centres on Summons No 6101 of 2013 ("SUM 6101/2013"), which is the Appellants' application for leave to amend their pleaded defence. These issues shall be explored first.

The preliminary issues

20 The following preliminary issues are raised by the Appellants' new submissions on mistake:

(a) Can a defendant introduce new arguments in an appeal from an O 14 determination?

(b) Is a defendant bound by the four corners of his pleadings during an O 14 determination?

(c) If a defendant is so bound, should the Appellants nonetheless be allowed to amend their pleaded defence to the Respondent's counterclaim?

Can a defendant introduce new arguments in an appeal from an O 14 determination?

21 The starting point underlying the issue of whether a defendant can introduce new arguments in an appeal from an O 14 determination is the principle of finality in litigation. As Prof Jeffrey Pinsler SC has observed (in *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) ("*Singapore Court Practice 2009*") at para 57/13/10):

> Consistent with the principle of finality of litigation is the requirement that the parties should raise *at trial* all matters which have a bearing on the outcome of the case. The Court of Appeal will generally refrain from entertaining a new point on appeal, particularly if the circumstances are such that the court is not in as advantageous a position as the court below (with regard to the evidence as well as other matters which may have arisen if the point had been brought up in the court below), to adjudicate upon the issue. … [emphasis added]

22 As an O 14 determination is conducted on the basis of affidavit evidence, this court is in as advantageous a position as the court below to adjudicate on the Appellants' new submissions on mistake. The general principle of finality in litigation does not apply; the Appellants were therefore allowed to argue their new point on mistake in the proceedings before this court (see also the decision of this court in *Rainforest Trading Ltd and another v State Bank of India Singapore* [2012] 2 SLR 713 at [27]–[28]).

Is a defendant bound by the four corners of his pleadings during an O 14 determination?

The two lines of cases

23 Turning to the issue of whether a defendant is bound by the four corners of his pleadings during an O 14 determination, there are in fact two lines of cases taking diametrically opposed views on this particular issue.

(1) The first line of cases – a defendant is not bound

24 The seminal decision in the first line of cases is that of the Malaysian High Court in *Lin Securities (Pte) v Noone & Co Sdn Bhd (Klang Jaya Bahru Development Bhd, Third Party)* [1989] 1 MLJ 321 ("*Lin Securities*"), in which V C George J held that a defendant was *not* bound by his pleadings in the context of O 14 proceedings. The learned judge observed thus (at 322):

> … No doubt a defendant is ***bound*** *by the four corners of his pleading* ***at the trial*** ***of the action*** ***but*** ***he is*** ***not*** ***so bound at*** ***the O 14 proceedings*** *. … He is entitled to show at the hearing of the O 14 application that* ***over and above*** *what has been pleaded in the statement of defence* ***he has other defences*** . The issue at an O 14 application is whether the defendant has a defence and not whether the statement of defence provides him with a defence. [emphasis added in italics, bold italics and underlined bold italics]

25 The above proposition (relied upon by the Appellants in the present proceedings) was in fact endorsed by this court in *Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace)* [2010] 1 SLR 1129 ("*Poh Soon Kiat*"), where the appellant, against whom summary judgment had been entered, applied to this court for leave to amend his defence as a prelude to his appeal. In this particular regard, the court observed as follows (at [15]):

> In this connection, the Appellant applied to this court via SUM 1312/2009 for leave to amend his defence to plead that the 2001 California Judgment was not a foreign money judgment ... We declined to hear this application and treated it as withdrawn. In our view, it was an unnecessary application as, in summary judgment proceedings, "[a] defendant may raise defences in his affidavit even if they are not referred to in the pleaded defence" (see *Singapore Civil Procedure 2007* (G P Selvam chief ed) (Sweet & Maxwell Asia, 2007) at para 14/2/12) and is "bound by the four corners of his pleadings [only] at the trial of the action but ... not ... [in] the O. 14 [*ie*, summary judgment] proceedings" ...

26 Although the court in *Poh Soon Kiat* did not cite *Lin Securities directly*, it *did* in fact cite that case *in substance*. To elaborate, the court referred (as we have seen) to a passage from *Singapore Civil Procedure 2007* (G P Selvam ed-in-chief) (Sweet & Maxwell Asia, 2007) ("*Singapore Civil Procedure 2007*") at para 14/2/12. It is important, in this regard, to note that the actual text of that particular passage reads as follows:

> A defendant may raise defences in his affidavit even if they are not referred to in the pleaded defence (***Lin Securities (Pte.) Ltd. v. Noone & Co. Sdn. Bhd.*** **[1989] 1 M.L.J. 321**). A defendant is bound by the four corners of his pleadings at the trial of the action but is not so bound at the O.14 proceedings. [emphasis added]

(2) The second line of cases – a defendant is bound

27 The second line of cases – in which the courts concerned held that a defendant *ought to be bound* by his pleadings during an O 14 determination and could not therefore rely upon a fresh defence that was not pleaded unless the defence was amended or unless, in exceptional cases, the court concerned found that there were good reasons to permit such reliance (and which is relied upon by the Respondent in the present proceedings) – comprises a series of Singapore High Court decisions. Detailed reasons were proffered in these decisions, and we shall therefore set out the relevant analyses *in extenso*.

28 The first decision is that of Woo Bih Li J in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786 ("*Lim Leong Huat*"), where the learned judge observed thus (at [22]–[25]):

> 22 I had *some reservation* about the correctness of the decision in *Lin Securities* for *various reasons*. *It is one thing for a rule to say that a defendant may show cause against an application for summary judgment by affidavit or otherwise. In such a rule, a defendant need not file an affidavit to show cause if, for example, he is able to rely on the statement of claim*

and/or the affidavit for the plaintiff to establish that summary judgment should not be granted. The rule does not necessarily mean that a defendant may say something in his affidavit which is not pleaded in his defence. Let me elaborate. ***Supposing a defendant were to be allowed to rely on an allegation in his affidavit which is not in his defence and, solely because of that allegation, he is able to avoid summary judgment. What happens if, when he subsequently applies to amend his defence to include this allegation he is not allowed to amend? This would mean that summary judgment should have been entered in the first place. Such an incongruous situation would be avoided if he were not to be allowed to rely on the allegation unless the defence is first amended to include that allegation.*** I was also of the view that the pleadings govern the issues between the parties throughout the action and the pleadings apply to all interlocutory proceedings. On the other hand, the decision in *Lin Securities* seemed to suggest that for the purpose of applications for summary judgment, the pleadings did not govern.

23 It should also be remembered that previously, applications for summary judgment were often made before a defence was filed. Accordingly, there was usually no question of an affidavit for a defendant raising an allegation which was not in the defence. Such a problem would arise only when a defence had already been filed. I will say more about this later.

24 Secondly, it is one thing to say that a defendant may rely on an affidavit allegation not pleaded in his defence but it is quite a different thing to say he may rely on an affidavit allegation which is contradictory to that which has already been pleaded in his defence. In such a situation, it seemed to me all the more so that the defence must first be amended before he can rely on the affidavit allegation. As mentioned above, it is by no means certain that the application to amend the defence would be allowed. Certainly in the case before me, Lim and Tan [the defendants in the application] would have to explain why, if the new allegation were true, it was not mentioned at the earliest opportunity when the initial defences were filed. It would then be questionable whether an application to amend the defence would be allowed.

2 5 *Thirdly, our Rules of Court were amended recently in 2006 so that currently, a plaintiff may apply for summary judgment only after the defence has been served. This is unlike the previous situation where, as I have mentioned, a plaintiff might and often did apply for summary judgment even before the defence was filed. The purpose of the amendment was so that a plaintiff would know the specific defence before applying for summary judgment.* ***I was of the view that to allow a defendant to raise a substantive allegation in his affidavit which was not pleaded in his defence would undermine the purpose of the amendment*** *.*

[emphasis added in italics and bold italics]

29 Woo J reaffirmed his views in the subsequent decision of *HSBC Institutional Trust Services (Singapore) Ltd v Elchemi Assets Pte Ltd and another* [2010] SGHC 67 ("*HSBC Institutional Trust Services*"), as follows (at [21]):

In [the second defendant's] affidavit to resist [the plaintiff's] application for summary judgment, he raised fresh allegations not found in the defence. I was of the view that he was not entitled to do so unless the defendants had first applied for and obtained leave to amend his defence (see my decision in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR(R) 786). The defendants did not seek leave to do so and accordingly, were not entitled to rely on the fresh allegations.

30 Woo J, in fact, delivered his decision in *Lim Leong Huat* on 25 January 2008. Significantly, in our

view, on 30 January 2008 (some five days later), Judith Prakash J in *United States Trading Co Pte Ltd v Ting Boon Aun and another* [2008] 2 SLR(R) 981 ("*United States Trading*") expressed a similar view on the issue presently being considered. Given both the timing as well as the content of this particular judgment, it was clear that Prakash J arrived at this similar view *in a parallel and independent manner*. The learned judge observed thus (at [23]–[25]):

> 23 [Counsel for the second defendant] stated that the assistant registrar had not accepted these arguments [resisting the plaintiff's summary judgment application] because they were not based on matters pleaded in the defence. He argued that the omission to plead such arguments as defences was irrelevant because at a summary judgment hearing, the defendant was entitled to raise matters which had not been pleaded. In support he cited the 1989 case of *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("the *Lin Securities* case"). That was a Malaysian case which held that whilst the defendant was bound by the four corners of his pleadings at the trial of the action, he would not be so bound at the O 14 proceedings. The Malaysian O 14 r 4(1) Rules of the High Court 1980 (PU(A) 50/1980) provided that a defendant may show cause against an application for summary judgment by affidavit or otherwise and it was held that he was therefore entitled to show at the hearing of an O 14 application that over and above what had been pleaded in the statement of claim, he had other defences.
>
> 24 The present O 14 regime as encapsulated in the Rules of Court is predicated, unlike the regime that applied in Malaysia and Singapore in 1989 when the *Lin Securities* case was decided, on both the statement of claim and the defence having been filed before the application for summary judgment is taken out. As the commentary in *Singapore Civil Procedure 2007* (G P Selvam ed) (Sweet & Maxwell, 2007) ("the *White Book*") notes at para 14/1/7, the previous procedure was unsatisfactory:
>
> > ... as the plaintiff who applies for summary judgment may not be in a position to pinpoint the specific defences that the defendant may raise. This has often resulted in the plaintiff's affidavit in reply to the defendant's show cause affidavit raising new issues, which the defendant then requires leave of court to respond to. This disrupts the timetable for the filing of affidavits set out in O.14, r.2. With the amendments, the service of a defence by the defendant and not just the entry of appearance is now a prerequisite to an application under O.14.
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> The *White Book* at para 14/2/12 also restates the principle established by the *Lin Securities* case that the defendant is not bound by the four corners of his defence at the summary judgment stage but follows that with a reference to the case of *Pembinaan V-Jaya Sdn Bhd v Binawisma Development Sdn Bhd* [1987] 2 CLJ 446 which it cites for the principle that where the defence amounts to nothing more than a bare denial of the claim, the court may be particularly cautious about defences suddenly raised by the affidavit.
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> 25 ***In my view, now that the Rules of Court have been amended to require the defence to be filed before the summary judgment application can be made, the principle in the*** **Lin Securities** ***case must be looked at again. I consider that it behoves a defendant to set out all his defences in his defence so that the plaintiff can make a proper assessment of the chances of an application for summary judgment being successful. It is not correct for the defendant to plead one thing which, objectively, does not seem to afford him a good defence and then when the application is made by the plaintiff to bring up various other points and take the plaintiff by surprise. To allow a defendant to do this as a matter of course would be to allow an abuse of process. This does not mean that in all circumstances a defendant should not be able to raise a new defence in his affidavit***

responding to the O 14 application but he should be able to give good reasons for not having raised such defence in his pleading and, if he is not able to do so, the defences should be either disregarded or treated with a great deal of suspicion.

[emphasis added in bold italics]

31 Kan Ting Chiu J had – more recently – the opportunity to consider *all* the decisions hitherto referred to in *Rankine Bernadette Adeline v Chenet Finance Ltd* [2011] 3 SLR 756 ("*Rankine Bernadette Adeline*"). Indeed, he cited (as we have) the relevant passages in these decisions *in extenso.* In particular, the learned judge was impressed by the detailed reasoning rendered in both *Lim Leong Huat* as well as *United States Trading*. He observed (at [14]) that Woo J had (in *Lim Leong Huat*) "addressed the issue *with admirable thoroughness*" [emphasis added]. Kan J also noted (at [17]) that Prakash J (in *United States Trading*) "took care to explain" her reasons for arriving at the same conclusion as Woo J in *Lim Leong Huat* and *HSBC Institutional Trust Services*, and further observed (at [18]):

> From these … decisions, the position appears to be that a fresh defence that is not pleaded cannot be relied on unless the defence is amended, or in exceptional cases where the court finds that there are good reasons to allow that to be done.

32 Kan J then proceeded to cite (at [19]) Prof Pinsler's seminal work *Singapore Court Practice 2009*, as follows:

> These cases have been noted and discussed in *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) at para 14/3/2A:
>
> **Pleading defences for the purpose of challenging O 14 application.**
>
> > A respondent to an application for summary judgment must ensure that he pleads all the defences he intends to rely on in his pleading. If he fails to do this, he may not be able to raise a defence at the hearing of the application even if it is stated in his affidavit or other source. This principle, which was propounded by Judith Prakash J in *United States Trading Co Pte v Ting Boon Aun* [2008] SGHC 15 ('*United States Trading*'), reverses the previous practice which did not bind the defendant to the four corners of his pleading (see, for example, *Lin Securities (Pte) Ltd v Noone* [1989] 1 MLJ 321, which is cited in [*United States Trading*], at [24]–[25]; and *Superbowl Jurong Pte Ltd v Sami's Curry Restaurant Pte Ltd* [2007] SGDC 157). The binding effect of the defence pleading was also propounded in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] SGHC 12 (decided within a week of *United States Trading*). Woo J considered that the rule permitting the defendant to challenge an application for summary judgment … 'by affidavit or otherwise' (see O 14, r 2(3)) (RC) did not mean that he was entitled to omit defences from his pleading (ibid, at [20]–[28]).

33 Kan J then concluded his analysis by noting (at [20]) that "[t]he latest decision on the question" was that of this court in *Poh Soon Kiat*. He noted, *inter alia*, that the decision in the case just mentioned had been delivered on 28 April 2009. The decision in *Poh Soon Kiat* was actually delivered on 8 December 2009 – this is significant inasmuch as the decisions in *Lim Leong Huat* and *United States Trading* had *already* been delivered by the time this court released its judgment in *Poh Soon Kiat*. *Lim Leong Huat* and *United States Trading* did not, however, appear to have been brought to this court's attention. Neither were Prof Pinsler's views (in *Singapore Court Practice 2009* (quoted by Kan J in *Rankine Bernadette Adeline*; see above at [32])) cited to this court, although it is entirely

conceivable that *Singapore Court Practice 2009* could not have been cited because it was published almost contemporaneously with the release of the judgment in *Poh Soon Kiat*.

34 Kan J, in *Rankine Bernadette Adeline*, noted (at [22]) that the court in *Poh Soon Kiat* had in fact cited the passage from *Singapore Civil Procedure 2007* (quoted above at [26]), and that *Singapore Civil Procedure 2007* "did not have the advantage of considering the reasoning in the decisions of Woo J and Prakash J and their views on the statement of law laid down in *Lin Securities*". As counsel for the plaintiff in *Rankine Bernadette Adeline* was prepared to deal with the unpleaded defence, Kan J did not exclude that defence from his consideration and therefore did *not* have to arrive at a *definitive* conclusion on this particular issue. He nevertheless did observe thus (at [23]):

> There is a possibility that the Court of Appeal would have dealt with the issue differently if its attention was drawn to *Lim Leong Huat*, *United States Trading* and the *Singapore Court Practice 2009*. We have to wait till the question goes before the Court again to have an answer. In the meantime, it can only be said that there is room for greater clarity and certainty on this issue.

The textbook commentaries

35 Before proceeding to express our view as to which line of cases ought to be preferred, it would be apposite to note what the leading textbook commentaries on Singapore civil procedure have to say with respect to this particular issue.

36 The first is *Singapore Court Practice 2009*, the relevant extract from which has already been quoted above (at [32]). Not surprisingly, as the decision in *Poh Soon Kiat* was presumably delivered *after* this particular work had gone to press (see also above at [33]), Prof Pinsler did not comment on the effect of that particular decision.

37 We have also already noted the views expressed in *Singapore Civil Procedure 2007* (which have been quoted above at [26]). Not surprisingly, these views were expressed *prior to* all the decisions considered above (with, of course, the exception of *Lin Securities*). Significantly, and in contrast, in the latest edition of this particular work, *Singapore Civil Procedure 2013* (G P Selvam ed-in-chief) (Sweet & Maxwell Asia, 2013), the following views (which did take into account *all* the relevant decisions) were expressed (at vol 1, para 14/2/12):

> A defendant should set out all his defences in his pleadings so that a plaintiff can properly assess the chances of a summary judgment application. If he fails to do so, new defences raised in his affidavit will be disregarded or treated with a great deal of suspicion unless there were good reasons for not raising the defence in his pleading. (See *United States Trading Co. Pte. Ltd. v. Ting Boon Aun* [2008] 2 S.L.R.(R.) 981; *Lim Leong Huat v. Chip Hup Hup Kee Construction Pte. Ltd*. [2008] 2 S.L.R.(R.) 786; and *HSBC Institutional Trust Services (Singapore) Ltd. v. Elchemi Assets Pte. Ltd.* [2010] S.G.H.C. 67.) In light of amendments to the Rules of Court requiring defence to be filed before the summary judgment application can be made, the former principle that a defendant was not bound by the four corners of his pleadings in O.14 proceedings (see, for example, *Lin Securities (Pte.) Ltd. v. Noone & Co. Sdn. Bhd.* [1989] 1 M.L.J. 321) was doubted in *United States Trading* and *Lim Leong Huat*. However, in *Poh Soon Kiat v. Desert Palace Inc. (trading as Caesars Palace)* [2010] 1 S.L.R. 1129, at [15], the Court of Appeal appears to have affirmed the former principle. Citing the previous edition of this book, it held that a defendant is bound by the four corners of his pleadings only at the trial of the action but not in O.14 summary judgment proceedings. The cases of *United States Trading* and *Lim Leong Huat* were however not considered by the Court of Appeal.

> Where the defence amounts to nothing more than a bare denial of the claim, the court may be particularly cautious about defences suddenly raised by the affidavit (see *Pembinaan V-Jaya Sdn. Bhd. v. Binawisma Development Sdn. Bhd.* [1987] 2 C.L.J. 446).

38 It is clear, in the circumstances, that this court ought to consider the observations made in *Poh Soon Kiat* (quoted above at [25]) in light of the various (and detailed) observations made by Woo J and Prakash J as set out above.

Our decision

39 The first port of call ought to be the precise facts, context as well as decision in *Poh Soon Kiat*. This particular case involved an attempt to recover a foreign gambling debt owed by the appellant. The respondent, an operator of a Las Vegas casino, sought to enforce a Californian judgment granted in 2001 against the appellant which set aside a fraudulent transfer of property, ordered the property to be sold and further ordered the proceeds thereof to be applied to satisfy judgment debts arising from an earlier judgment given by the same Californian court in 1999. At first instance, the Singapore High Court ruled in favour of the respondent and held that the 2001 Californian judgment was enforceable in Singapore. The central issue arising for this court's consideration was whether the 2001 Californian judgment was a judgment for a definite sum of money (in short, "a money judgment"). This court allowed the appeal on the basis that the 2001 Californian judgment was not a money judgment and was therefore unenforceable under Singapore law (see *Poh Soon Kiat* at [33]–[34]).

40 The observations that were made in *Poh Soon Kiat* on the issue that is presently being considered were *obiter dicta*. Counsel in *Poh Soon Kiat* did not fully argue the point, and did not appear to bring this court's attention to *Lim Leong Huat* and *United States Trading*. Additionally, *Poh Soon Kiat* concerned the issue of whether the sought-to-be-enforced foreign judgment was a money judgment. A foreign judgment may only be enforced via a common law action for debt if and only if the judgment is for an ascertained sum of money (see, for example, the English decision of *James Sadler v James Robins* (1808) 1 Camp 253 at 257; 170 ER 948 at 949). This was a key threshold issue which struck at the heart of the court's power to enforce the 2001 Californian judgment; *stricto sensu*, it would not have been necessary for the appellant in *Poh Soon Kiat* to apply for leave to amend his defence to plead that the 2001 Californian judgment was not a money judgment. This court would have considered the issue *sua sponte* and would have requested for submissions on the same even if the parties had not raised it in their pleadings.

41 It is therefore open to this court to reconsider this particular issue based on logic, principle, common sense as well as (relevant) policy. In this regard, we find the reasoning of Woo J in *Lim Leong Huat* (at [22], and quoted above at [28]) persuasive – even when viewed prior to the amendments effected to the Rules of Court in 2006. As Woo J pointed out in the decision just cited, if a defendant is not bound by his pleadings in O 14 proceedings, it could lead to an absurd situation. A defendant could succeed in resisting O 14 proceedings on the basis of an unpleaded defence. If an amendment to the defence to include that unpleaded defence is subsequently disallowed, the defendant will not be able to rely on the unpleaded defence at trial, with the potential result that he would have no arguable defence. This paradoxically means that summary judgment should have been entered in the plaintiff's favour in the first place. This would undermine the *raison d'être* of O 14, which is precisely the expeditious resolution of cases which do not require a full-blown trial.

42 Further, as both Woo J (in *Lim Leong Huat* at [25]) and Prakash J (in *United States Trading* at [25]) have very cogently and persuasively pointed out, the arguments in favour of departing from *Lin Securities* (and holding, instead, that a defendant is bound by his pleadings in O 14 proceedings and

cannot therefore rely upon a fresh defence not hitherto pleaded unless his defence is amended or unless the court holds that there are good reasons to permit such reliance) are *even stronger in light of the amendments to the Rules of Court in 2006*. In particular, the 2006 amendments to the Rules of Court – whereby an application under O 14 could only be made after the defence was filed – were meant to obviate the difficulties inherent in the previous procedure. Under the old regime, a plaintiff filing his O 14 application before the defence was filed could not pre-emptively rebut all of the defendant's possible defences, and had to wait for the defendant's affidavit in order to see what grounds the resisting defendant was relying on. Practically speaking, the plaintiff would always have to file and serve on the defendant a supplementary affidavit in order to reply to the resisting defendant's affidavit. This would drag out the O 14 process, especially as leave was required for the parties to file further affidavits in response to the plaintiff's reply affidavit. Under the new regime, an O 14 application is only allowed after the defence is filed. This means that at least one round of affidavits is dispensed with, as the plaintiff knows exactly what the defendant's pleaded case is and is able to tailor his O 14 application to the defendant's pleadings. If a defendant could rely on unpleaded defences in O 14 proceedings, the plaintiff would be unfairly taken by surprise and the efficiency of the new regime would be completely undermined.

43 In summary, we agree with both Woo J and Prakash J (in particular, with their reasoning with respect to the position after the above-mentioned amendments to the Rules of Court), and therefore hold that a fresh defence that has not been pleaded cannot be relied on by the defendant in O 14 proceedings *unless* the defence is amended *or* unless the case is an exceptional one where the court concerned is of the view that there are good reasons to permit reliance on such a fresh defence (for instance, if the fresh defence strikes at the heart of the court's powers, as was the case in *Poh Soon Kiat*). We therefore proceed – in the context of the present proceedings – to consider whether or not the Appellants ought to be allowed to amend their pleaded defence to the Respondent's counterclaim.

Should the Appellants be allowed to amend their pleaded defence?

44 The starting point is, of course, O 20 r 5(1) of the Rules of Court, which stipulates that a court may allow amendments to pleadings at any stage of the proceedings on such terms as to costs or otherwise as it may direct. The guiding principle is that amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined (see, for example, the decision of this court in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [113]).

45 Lord Griffiths' comments in the House of Lords decision of *Ketteman and others v Hansel Properties Ltd and others* [1987] 1 AC 189 are particularly pertinent (at 220): to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight based on an entirely different defence.

46 The present case concerns O 14 proceedings, which, *ex hypothesi*, take place before (or in place of) a trial. If the Appellants are allowed to amend their defence to the Respondent's counterclaim, the Respondent can hardly be said to suffer from prejudice that cannot be compensated by costs, especially as a full-blown trial with oral cross-examination has not taken place. On the contrary, if the Appellants are not allowed to amend their defence to the Respondent's counterclaim and consequently fail to resist the Respondent's O 14 r 12 application, that could be tantamount to a denial of justice.

47 The Appellants' application in SUM 6101/2013 for leave to amend their pleaded defence to the Respondent's counterclaim to include pleadings based on mistake was therefore allowed.

The substantive issues

The substantive issues

48 The Respondent's O 14 r 12 application proper raises two issues:

(a) Does the Compromise Letter release the Respondent from liability arising from the damaged sewer?

(b) Is the Compromise Letter void or voidable on the ground of mistake?

Principles governing an O 14 r 12 application

49 The ambit of O 14 r 12 was considered by Chao Hick Tin J (as he then was) in the Singapore High Court decision of *Payna Chettiar v Maimoon bte Ismail and others* [1997] 1 SLR(R) 738, in which the following principles were laid down (at [35]):

> The English Court of Appeal had the opportunity to review the scope of O 14A [the English equivalent of O 14 r 12] in the unreported 1994 case *Korso Finance Establishment Anstalt v John Wedge*. The principles which it laid down are set out in para 14A/1–2/4 of the *Supreme Court Practice* and they are as follows:
>
> 1 An issue is a disputed point of fact or law relied on by way of claim or defence.
>
> 2 A question of construction is well capable of constituting an issue.
>
> 3 If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a Court ought to proceed to so determine such issue.
>
> 4 Respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If there were material circumstances of which the Court should take account in construing the document they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the Court should not refrain from dealing with the application.

50 Choo Han Teck JC (as he then was), in the Singapore High Court decision of *Barang Barang Pte Ltd v Boey Ng San and others* [2002] 1 SLR(R) 949, observed (at [5]), as follows:

> … The construction of law or document must be such that it can be achieved without a full trial and such a determination will fully determine the entire cause or matter. … [emphasis in original omitted]

51 A further caveat is that the invocation of O 14 r 12 is not appropriate where factual disputes would affect the point of construction (see, for example, the Singapore High Court decisions of *Re CEP Instruments Pte Ltd (in liquidation)* [2004] SGHC 206 at [39] and *ANB v ANF* [2011] 2 SLR 1 at [32]).

52 On the facts of the present case, the construction of the Compromise Letter, if resolved in favour of the Respondent, will fully determine the issue of whether the Respondent is contractually released from liability arising from the damaged sewer. The language used in the Compromise Letter is, however, latently ambiguous and, in the circumstances, the court should not determine the issue of

interpretation under O 14 r 12 on the sole basis of competing affidavit evidence. This point will be elaborated on below (at [54]–[60]).

53 The issue of whether the Compromise Letter is void or voidable on the ground of mistake is likewise not suitable for an O 14 r 12 determination. *Ex hypothesi*, a plea of mistake necessarily entails the resisting party alleging that the contract is void or voidable because of facts not readily apparent from the face of the contract (these facts being actual knowledge of the resisting party's mistake in the case of unilateral mistake, and a common (and fundamental) misapprehension between the parties in the case of common mistake). This point will also be elaborated upon below (at [61]–[72]).

Does the Compromise Letter release the Respondent from liability arising from the damaged sewer?

54 With regard to whether the Compromise Letter releases the Respondent from liability arising from the damaged sewer, the starting point is the seminal decision of this court in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029. V K Rajah JA, delivering the judgment of the court, drew a sharp line between the use of extrinsic evidence to interpret a contract on the one hand, and to contradict or vary it on the other (at [122]; see also the decision of this court in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [45]):

> … the courts must remain ever vigilant to ensure that, in interpreting a contract, extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it. …

55 To reiterate, the plain language of the Compromise Letter (see above at [8]) states that there shall be "no claim from either party". [note: 5] On the face of it, "no claim from either party" [note: 6] applies to all claims and is not restricted to claims arising from a particular time period or claims pertaining to a certain subject matter. Such qualifications would seemingly constitute contradictions or variations of the plain language of the contract.

56 The Compromise Letter, however, explicitly refers to the Respondent's role as "Qualified Person (Architectural and Structural) and project coordinator". [note: 7] The Respondent was initially hired directly by the First Appellant as the professional engineer from May 2006 onwards, and only took on the additional roles of architect and project coordinator when hired by the new builder, HPC, from June 2009 onwards. From May 2006 to June 2009, the Respondent's title was Qualified Person (Structural). Taken as a whole, the Compromise Letter is latently ambiguous: does the phrase "no claim from either party" [note: 8] only apply to the Respondent's acts and omissions *qua* professional engineer, architect *and* project coordinator all at once, or does it also extend to the Respondent's acts and omissions *qua* professional engineer alone? The former interpretation would mean that the Respondent is not released from liability for the damaged sewer because that liability arose when he was only the professional engineer. In contrast, the latter interpretation would mean that the Respondent is released from liability for the damaged sewer.

57 The ambiguity lies in whether "Qualified Person (Architectural and Structural) and project coordinator" [note: 9] is to be interpreted conjunctively or disjunctively. On a conjunctive interpretation, the Respondent must have held all three roles concurrently at the material time before he can avail himself of the "no claim from either party" [note: 10] clause. On a disjunctive interpretation, it is sufficient for the Respondent to avail himself of that clause even if he held only the role of Qualified Person (Structural) at the material time.

58 As both interpretations are plausible, there would be no variation or contradiction involved in choosing between one and the other. As such, extrinsic evidence is admissible in the interpretation of the Compromise Letter.

59 The Appellants take the position that a conjunctive interpretation should be adopted, placing especial reliance on the assertion that the Respondent knew that they were holding him responsible for the damage to the sewer. [note: 11] This is also somewhat corroborated by the Respondent's own evidence, who in his affidavit stated that: [note: 12]

> The Plaintiffs agreed to my request to resign from the Project on the following basis that: (i) I would not make a claim on my fees; and (ii) I would assist Mr. Wu Ruixin as the newly appointed qualified person for architectural and structural services, if so required.

Conspicuously, the Respondent did not refer to the damage inflicted on the sewer as a basis for resignation.

60 In the circumstances, we held that an O 14 r 12 determination was inappropriate in so far as this particular issue was concerned.

Is the Compromise Letter void or voidable on the ground of mistake?

Overview

61 The doctrine of mistake in contract law is a complex one. Fortunately, it is unnecessary for the purposes of the present grounds of decision to delve into its various facets – still less into the substantive merits of the specific issues which the Appellants have sought to raise in the context of the present case. However, it would be of some assistance to set out – in the briefest possible manner – the applicable legal principles in so far as they illustrate why the relevant issues cannot be resolved on the basis of affidavit evidence alone, but can only, instead, be resolved at a trial.

Common mistake

(1) General

62 As has been observed (see "Mistake" in ch 10 of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) ("*Mistake*") at para 10.026):

> *A common mistake occurs when, although both offer and acceptance are otherwise properly effected, both the contracting parties are, however, mistaken as to the basis upon which they contracted.* In other words, although both parties thought they were contracting with respect to certain specific contractual subject matter, it turns out that, in point of fact, the actual contractual subject matter is *radically different. Whilst the general concept is easily stated, the criteria and (more importantly) application of those criteria may … be quite a difficult task indeed.* [emphasis added]

63 There are in fact two broad categories of common mistake – common mistake at common law and common mistake in equity, respectively. As we shall very briefly touch on below, the latter category no longer exists under English law, *but is still an existing category under Singapore law*.

(2) Common mistake at common law

64 In so far as the category of common mistake at *common law* is concerned, reference may be made to two leading English decisions (which also appear to represent the law in the *Singapore* context (see generally *Mistake* at paras 10.092–10.108)) – the English High Court decision of *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 ("*Associated Japanese Bank*") and the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 ("*Great Peace Shipping*").

65 In so far as *Associated Japanese Bank* is concerned, Steyn J (as he then was) set out five important propositions (at 268–269) – a summary of which is as follows (see *Mistake* at para 10.052):

(a) **Proposition 1:** "The first imperative must be that the law ought to uphold rather than destroy apparent contracts." [see *Associated Japanese Bank* at 268]

(b) **Proposition 2:** "Secondly, the common law rules as to a mistake regarding the quality of the subject matter, *like the common law rules regarding commercial frustration*, are designed to cope with the impact of *unexpected and wholly exceptional circumstances* on apparent contracts." [emphasis added] [see *Associated Japanese Bank* at 268]

(c) **Proposition 3:** "Thirdly, such a mistake in order to attract legal consequences must *substantially* be shared by *both* parties and must relate to facts as they existed *at the time the contract was made*." [emphasis added] [see *Associated Japanese Bank* at 268]

(d) **Proposition 4:** "Fourthly, and this is the point established by *Bell v Lever Bros Ltd* [[1932] AC 161] …, the mistake must render the subject matter of the contract *essentially and radically different from the subject matter which the parties believed to exist*." [emphasis added] [see *Associated Japanese Bank* at 268]

(e) **Proposition 5:** "Fifthly, there is a requirement which was *not specifically discussed* in *Bell v Lever Bros Ltd* … In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him *without any reasonable grounds* for such belief … That is not because principles such as estoppel or negligence require it, but simply because *policy and good sense* dictate that the positive rules regarding common mistake should be so qualified. Curiously enough this qualification is similar to the civilian concept where the doctrine of *error in substantia* is tempered by the principles governing *culpa in contrahendo. More importantly*, a recognition of this qualification is *consistent with* the general approach in *equity* where fault on the part of the party adversely affected will generally preclude the granting of equitable relief." [emphasis added] [see *Associated Japanese Bank* at 268–269]

[emphasis in original]

66 In so far as *Great Peace Shipping* is concerned, Lord Phillips of Worth Matravers MR set out the following five elements which must be satisfied before the court concerned will find that there is a common mistake which is sufficient to avoid the contract in question at common law (at [76]):

> … [T]he following elements must be present if common mistake is to void a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must

subsist if performance of the contractual adventure is to be possible.

67 Although there is much overlap between the propositions set out in *Associated Japanese Bank* (see above at [65]) and those set out in *Great Peace Shipping* (see above at [66]), they are not identical. An attempt has been made to reconcile the propositions elsewhere (see generally *Mistake* at paras 10.067–10.090), with a proposed summary as follows (see *Mistake* at para 10.090):

> **(v) Summary**
>
> In summary, therefore, the application of the doctrine of common mistake at common law may be approached by applying the following steps: firstly, the two preconditions; and secondly, two requirements (bearing in mind throughout the two general principles which constitute the background against which the aforementioned preconditions and requirements are applied). These may be summarised as such:
>
> (a) The ***general principles*** , which are to be considered as part of the background, are as follows:
>
> (i) The First General Principle is that the law has as its paramount policy concern the sanctity of contracts. It will seek to uphold them, rather than destroy them.
>
> (ii) Thus, according to the Second General Principle, the doctrine of mistake caters (in a more specific vein) only to unexpected and wholly exceptional circumstances.
>
> (b) Before one considers how the doctrine of common mistake at common law is to be applied, the following ***preconditions*** must be met:
>
> (i) The First Precondition is that there must have been no allocation of risk to either party of the consequences occasioned by the mistake.
>
> (ii) The Second Precondition is that the mistake concerned must also not be attributable to the fault of either party.
>
> (c) The ***requirements*** of the test to determine if common mistake operates to void the contract at common law are as follows:
>
> (i) The First Requirement is that the mistake must be shared by both parties and relate to facts or law before the contract was concluded.
>
> (ii) The Second Requirement is that the mistake must render the subject matter of the contract fundamentally different from the subject matter which the parties contracted on as constituting the basis of their contract.
>
> [emphasis in original]

68 It will suffice for the purposes of the present appeal to note that whether or not there has been, on the facts of this case, a common mistake at common law turns on the *factual* question of whether the parties held a common mistaken view of the ambit of the Compromise Letter. This is an issue that cannot be resolved on the basis of affidavit evidence alone and can only be resolved at a trial. That it is also a viable issue for trial is clear from the existing facts to date (see above at [2]–[9] and, in particular, the fact that the Second Appellant was charged by the PUB only in March 2012, some two and a half years after the Compromise Letter was first signed). The substantive

merits and outcome can only be determined after *all* the relevant evidence has been adduced at the trial itself.

(3) Common mistake in equity

69 As alluded to at [63] above, there is no longer a doctrine of common mistake in *equity* under *English* law (which was traditionally traced to the statement of principle by Denning LJ (as he then was) in the English Court of Appeal decision of *Solle v Butcher* [1950] 1 KB 671 ("*Solle*") at 692–693 (see also generally *Mistake* at paras 10.109–10.116)). This was clearly stated in *Great Peace Shipping* (see also *Mistake* at para 10.117). However, it has been argued (albeit in an extrajudicial sphere) that there are good reasons why *Solle* ought still to be followed and the doctrine of common mistake in equity upheld, notwithstanding the clear pronouncement to the contrary in *Great Peace Shipping* (see generally *Mistake* at paras 10.119–10.122). Indeed, it is now established in the local case law that there *continues to be* a doctrine of common mistake in *equity*, the leading decision being that of this court in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502 ("*Digilandmall*") (see also generally *Mistake*, especially at paras 10.130–10.133).

70 Again, what is germane in so far as the present appeal is concerned are the considerations set out above (at [64]–[68]), which, given the close similarity in the tests for common mistake at common law and common mistake in equity (see also *Mistake* at paras 10.134–10.140), would apply *equally* to the application of the doctrine of common mistake in *equity* in the context of the present appeal. Put simply, whether or not there has been a mistake of this nature is an issue that cannot be resolved on the basis of affidavit evidence alone and can only be resolved at a trial.

Unilateral Mistake – at common law and in equity

71 The Appellants now also seek to rely – in the alternative – on the doctrine of *unilateral* mistake. The focus in this particular regard is on the situation where one party is mistaken but the other party is (or ought to be) aware of the first party's mistake. This is, of course, a simple statement of the general law, which is rather more nuanced in its specifics (see generally *Mistake*, especially at paras 10.141–10.175). What *is* important to emphasise at this juncture is that there *is* a doctrine of unilateral mistake in the *Singapore* context at both common law *and* in equity (see *Mistake* at paras 10.145–10.146), and the general principles of this doctrine are (for the most part at least) fairly well-established (see generally *Mistake* at paras 10.162–10.175). In particular, the following statement of principle by Chao Hick Tin JA, delivering the judgment of this court in *Digilandmall* (at [75]–[80]) (in respect of the doctrine of unilateral mistake in equity), may be usefully noted:

> 75 We appreciate that there are difficulties in delineating precisely the considerations which should apply for equity to intervene. One suggested way to differentiate the application of the common law rule and equity would be to hold that the former is limited to mistakes with regard to the subject matter of the contract (like that in *Bell v Lever Bros* [[1932] AC 161]), while the latter can have regard to a wider and perhaps open-ended category of "fundamental" mistake: see *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016 *per* Hoffmann LJ at 1042.
>
> 76 In view of the difficulties, one may be tempted to take a clear simplistic approach, namely, where there is actual knowledge, the contract would be void at common law. But where there is no actual knowledge, the contract ought to be performed. There would then be no room for equity to operate. But we believe that simplicity may not always lead to a just result, especially where innocent third parties are involved.

77 We do not think this court should approach the issue in a rigid and dogmatic fashion. Equity is dynamic. A great attribute, thus an advantage, of equity, is its flexibility to achieve the ends of justice. Constructive notice is a concept of equity and whether constructive notice should lead the court to intervene must necessarily depend on the presence of other factors which could invoke the conscience of the court, such as "sharp practice" or "unconscionable conduct". Negligence *per se*, on the other hand, should not be sufficient to invoke equity. Parties to a contract do not owe a duty of care to each other.

78 However, "unconscionability" cannot be imputed based on what a reasonable person would have known. It must be based on matters the non-mistaken party knows: see *Can-Dive Services v Pacific Coast Energy Corp* (2000) 74 BCLR (3d) 30 ("*Can-Dive*") *per* Southin JA at [142]. One cannot act unconscionably if one does not know of facts which could render an act so. Thus, we do not think we can accept the views of Shaw J, the lower court judge in *Can-Dive*, that constructive knowledge alone would suffice to invoke equity's conscience. However, as we have indicated earlier, Canadian jurisprudence has moved in that direction.

79 The point is raised by the appellants as to the relevance of the negligence of the mistaken party. Clearly, more often than not, whenever a mistake has occurred, there would have been carelessness, though the degree may vary from case to case. This will be a factor which the court should take into account to determine where equity lies. All we would add is that carelessness on the part of the mistaken party does not, *ipso facto*, disentitle that party to relief.

80 To the extent that the court below thought that there is no equitable jurisdiction in the courts to deal with the situation where one party is mistaken as to an important or fundamental term, we would respectfully disagree. Where the case falls within the common law doctrine of unilateral mistake, there is, in effect, no contract. There will be no room for equity to intervene. But where it does not and the court finds that there is constructive knowledge on the part of the non-mistaken party, the court would, in the exercise of its equitable jurisdiction, be entitled to intervene and grant relief when it is unconscionable for the non-mistaken party to insist that the contract be performed. Accordingly, we accept the *amicus curiae*'s submission that constructive knowledge alone should not suffice to invoke equity. There must be an additional element of impropriety. The conduct of deliberately not bringing the suspicion of a possible mistake to the attention of the mistaken party could constitute such impropriety.

72 What is of the first importance in so far as the *present appeal* is concerned is that whether or not the Appellants can successfully invoke the doctrine of unilateral mistake at common law and/or in equity depends very much on the relevant evidence adduced at the trial itself, and *not* on affidavit evidence alone. In particular, the resolution in this particular regard (assuming that the mistake as to the ambit of the Compromise Letter is a sufficiently fundamental mistake) turns on the factual questions of: (a) whether the Appellants were mistaken as to the ambit of the Compromise Letter; and (b) whether the Respondent had actual or constructive knowledge of the Appellants' mistake and (if the Respondent had constructive knowledge) whether the Respondent acted unconscionably. In particular, the question of actual knowledge is one of pure fact that can only be sufficiently ascertained after full evidence has been given at the trial itself. The remaining issues of constructive knowledge and unconscionable conduct are mixed issues of law and fact which are also unsuitable for summary determination.

Conclusion

73 For the reasons set out above, the appeal was allowed. The decision of the court below was

set aside and Suit 762/2012 was remitted for trial.

74 We also allowed the application in SUM 6101/2013, with costs fixed at $5,000 (including reasonable disbursements) awarded to the Respondent. Leave was also granted to the Respondent to amend his pleadings pursuant to the amendments to the Appellants' pleadings.

75 Costs in the cause were awarded for SUM 608/2013 (the initial O 14 r 12 application before the AR). The costs awarded to the Appellants for RA 125/2013 (the appeal from the AR's decision before the Judge) were fixed at $10,000, plus reasonable disbursements. The costs awarded to the Appellants for this appeal (*ie*, Civil Appeal No 86 of 2013) were fixed at $10,000, plus reasonable disbursements. We also made the usual consequential orders.

[note: 1] Appellants' Core Bundle ("ACB") vol 2, p 70.

[note: 2] *Ibid*.

[note: 3] *Ibid*.

[note: 4] *Ibid*.

[note: 5] *Ibid*.

[note: 6] *Ibid*.

[note: 7] *Ibid*.

[note: 8] *Ibid*.

[note: 9] *Ibid*.

[note: 10] *Ibid*.

[note: 11] Affidavit of Ong Puay Guan @ Steven Ong dated 25 February 2013 at para 7 (ACB vol 2, p 162).

[note: 12] Affidavit of Chia Chin Yan dated 1 February 2013 at para 43 (ACB vol 2, p 66).