# Lim Quee Choo (suing as co-administratrix of the estate of Koh Jit Meng) and Another v David Rasif and Another
# [2008] SGHC 36

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| **Case Number** | : Suit 2/2007, SUM 5455/2007 |
| **Decision Date** | : 10 March 2008 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Goh Yi Han AR |
| **Counsel Name(s)** | : Sarjit Singh Gill SC and Pradeep Pillai (Shook Lin & Bok LLP) for the second defendant/second defendant; Johnny Cheo (Cheo Yeoh & Associates LLC) for the plaintiffs/plaintiffs |
| **Parties** | : Lim Quee Choo (suing as co-administratrix of the estate of Koh Jit Meng); Wong Peng Luan — David Rasif; David Tan Hock Boon |

*Civil Procedure*

10 March 2008

AR Goh Yihan:

**Introduction**

1 The present application concerns two broad prayers, which I will outline shortly but not before providing a brief summary of the parties involved. David Tan Hock Boon ("the second defendant") is the second defendant in Suit No 2 of 2007 ("the present action") and the applicant in the present application. Suit No 2 of 2007 is a negligence suit brought against him and David Rasif ("the first defendant") by two co-administratrices of the estate of Koh Jit Meng ("the deceased"), namely, Lim Quee Choo ("the first plaintiff") and Wong Peng Luan ("the second plaintiff"). The plaintiffs are the respondents in the present application.

2 In the present application, the first prayer is for an order to set aside the order of court dated 30 January 2007 wherein it was ordered that the service of the amended writ of summons ("the amended writ") in this action be effected on the second efendant by, *inter alia*, publication of a Notice in English in one issue of *The Straits Times* ("the order for substituted service"), and that all proceedings in this action taken thereafter to be similarly set aside. The second alternative prayer is for the interlocutory judgment (with damages to be assessed) entered in default of appearance on 26 February 2007 against the second defendant to be set aside, and that the final judgment against the second defendant with damages assessed at $3,695,622.32 on 14 September 2007 to be similarly set aside. If the interlocutory judgment and the final judgment are set aside, the second prayer goes on further and seeks leave for the second defendant to enter an appearance to the action and to file and serve his defence to the action herein.

3 As the orders are prayed for in the alternative, such that the granting of one will render consideration of the other unnecessary, I will deal initially with the first prayer to set aside the order for substituted service. Notwithstanding my conclusion in relation to the first prayer, I will, for completeness, also deal with the second prayer to set aside the interlocutory judgment entered in default of appearance and the final judgment against the second defendant. I turn now to the second defendant's first prayer in the present application for an order to set aside the order for substituted service.

**Prayer for order to set aside order for substituted service**

***The facts***

*Commencement of present action*

4 The genesis of this first prayer can loosely be said to stem from a newspaper article. On 6 January 2007, there appeared in *The Straits Times* an article authored by K C Vijayan entitled "Suits mount against runaway lawyer" ("The Straits Times article"). The "runaway lawyer" referred to in the article is, of course, David Rasif, who is the first defendant in the present action and the named defendant in other actions brought in the aftermath of his runaway. However, the well publicised saga surrounding his misappropriation and subsequent disappearance do not concern this application brought by the second defendant and constitute a somewhat unnecessary, if unavoidable, distraction to the facts at hand. The Straits Times article is only relevant to the extent that it reported that on 3 January 2007, two co-administrators of a dead man's estate filed a High Court negligence suit for a flawed $3.5 million share-transfer agreement involving a company director and a shareholder against the first defendant and the second defendant, the latter of whom was expressly identified as "David Tan" and described as "a lawyer who worked at [the first defendant's] firm". It should additionally be mentioned that while the Straits Times article provided some brief background as to the circumstances leading to the negligence suit, including the name of the deceased, it did not mention anything about the identity of the law firm which was instructed to commence the said suit. The detailed facts surrounding the suit are not relevant for now. Nonetheless, it is clear from the information provided in the Straits Times article that the "High Court negligence suit" actually referred to the present action, *viz*, Suit No 2 of 2007.

5 The second defendant deposed in his affidavit filed on 7 December 2007 for the purposes of the present application ("the second defendant's first affidavit") that he had read the Straits Times article. He thus conceded that he "was aware" of that a negligence action was commenced against him by virtue of this article. However, in the same affidavit, he also stated that he had no idea as to whether the plaintiffs would be proceeding with their action against him. He was also unsure whether he could be held liable for any alleged defaults of the first defendant's law firm, David Rasif & Partners ("DRP"), as DRP was a sole proprietorship and he was merely an employee.

6 As it turned out, the initial writ of summons in the present action was issued against the defendants on 3 January 2007. The Straits Times article was therefore accurate in so far as it reported that there was a High Court negligence suit filed against the defendants on 3 January 2007. However, the amended writ was subsequently issued on 23 January 2007.

*Application for substituted service*

7 On the same day when the amended writ was issued, the plaintiffs applied by way of an *ex parte* summons for an order for substituted service. In support of the summons, the solicitor for the plaintiffs filed an affidavit stating, *inter alia*, that: (a) the second defendant was a former partner of DRP and that he had left the practice; (b) neither he nor the plaintiffs knew of the second defendant's residential address; (c) the plaintiffs had only communicated with the second defendant at the office of DRP which has since closed; and (d) service by way of advertisement in *The Straits Times* would be effectual in bringing the amended writ to the second defendant's knowledge.

8 The summons first came before the assistant registrar on 23 January 2007. The assistant registrar refused to grant the order for substituted service and directed, with respect to the second defendant, that the plaintiffs' solicitor filed a supplementary affidavit exhibiting People Profile

Information ("PPI") searches and describing attempts to serve at alternative addresses, if any.

9 Later in the afternoon of the same day, the plaintiffs' solicitor attended before the assistant registrar and submitted, with respect to the second defendant, that the he had tried PPI searches but that there were too many "David Tans" such that he could not be sure which referred to the second defendant. This was reflected clearly in the assistant registrar's minutes of the proceedings.

He additionally submitted that he had tried to get the second defendant's residential address from the Law Society of Singapore ("the Law Society") but that the latter declined to provide the required address on grounds of confidentiality.

10 The assistant registrar then directed the plaintiffs to file a supplementary affidavit setting out the matters submitted by him. This supplementary affidavit was filed on 29 January 2007 and deposed to, *inter alia*, the following: (a) the plaintiffs only knew the second defendant's name and identity card number but not his residential address; (b) the plaintiffs were unable to conduct a property search to ascertain the second defendant's residential address based purely on his name and identity card number; (c) the Law Society had refused to release the second defendant's residential address; and (d) the Law Society had forwarded to the second defendant correspondence from the plaintiffs' solicitor concerning the present action but that the second defendant had not responded. As a further follow-up to the state of the said correspondence, the plaintiffs have in their affidavit filed on 4 January 2008 for the purposes of the present application ("the plaintiffs' first affidavit") deposed that they eventually discovered in December 2007 that the Law Society had sent the correspondence to the second defendant's former address, from which he had moved out prior to the commencement of the present action.

11 After the supplementary affidavit was filed, the order for substituted service was granted by the assistant registrar on 30 January 2007.

*Judgments entered against the second defendant in default of appearance*

12 Pursuant to the order for substituted service, an advertisement was put on *The Straits Times* on 7 February 2007. The second defendant never saw this advertisement and thus did not enter an appearance. On 12 February 2007, the plaintiffs informed the brokers for the second defendant's professional indemnity insurers' ("Lockton") that they had commenced the present action. However, it appears that this information never reached the second defendant as Lockton later replied on 15 February 2007 that they were only the brokers and did not deal with claimants or their solicitors directly. In the result, interlocutory judgment in default of appearance was entered against the second defendant on 26 February 2007 and final judgment with damages assessed at $3,695,622.32 was obtained on 14 September 2007.

*The second defendant's discovery of the present action*

13 Less than a month after final judgment was obtained, the first plaintiff called the second defendant on his mobile phone on 5 October 2007 and informed him that the plaintiffs had obtained default judgment against him. The plaintiffs had not contacted the second defendant by his mobile phone prior to this because, as they have stated in their first affidavit, they did not realise that they had the mobile phone number of the second defendant written on a note until late 2007. A meeting was arranged on 8 October 2007 between the parties, during which the second defendant was informed that the amended writ was served on him by way of substituted service. The plaintiffs have also in their first affidavit deposed that the second defendant had at this meeting informed them that in January 2007, Lockton contacted him about the Straits Times article and informed him that the

plaintiffs had commenced the present action against him and the first defendant. On 9 October 2007, the second defendant met with the plaintiffs' solicitor and requested for copies of the relevant court documents. These were forwarded to the second defendant on 12 October 2007.

14 After receiving copies of the court documents, the second defendant informed his professional indemnity insurers, who in turn instructed the second defendant's present solicitors to act for him. The second defendant subsequently determined that he needed to review some files left at DRP's offices when he left in March 2006. From his enquiries, the second defendant found out that after the Law Society had intervened in the practice of DRP following the disappearance of the first defendant, the files of DRP were retained by the Law Society. On 26 October 2006, the second defendant's solicitors wrote to the Law Society requesting to inspect all the relevant files. However, when the second defendant's solicitors attended at the Law Society, they were told that the plaintiffs, being the previous clients of DRP, had collected three boxes of relevant files from the Law Society on 14 June 2006.

15 On 26 October 2007, the second defendant's solicitors wrote to the plaintiffs' solicitor requesting to inspect the relevant files. This was eventually fixed to take place on 7 November 2007. The second defendant's solicitors then realised during the course of inspection that they needed copies of the documents for further review and collation. Copies of the documents were eventually received by the second defendant's solicitors on 19 November 2007. On 28 December 2007, the plaintiffs' solicitor informed the second defendant's solicitors that more files relating to the period before March 2004 had been located. These files were inspected on 11 January 2008 and copies of the relevant documents obtained on 14 January 2008.

16 The above thus sets out the background to the present application which was commenced on 7 December 2007, specifically in relation to the first prayer for an order to set aside the order for substituted service.

***Whether the order for substituted service should be set aside***

17 For an order for substituted service can be made under O 62 r 5(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"), the applicant must satisfy the court that (a) the applicant is in fact unable to effect personal service of the writ; and (b) the writ is likely to reach the defendant or come to his knowledge if the method of substituted which is asked for is adopted: see *Porter v Freudenberg* [1915] 1 KB 857 at 888. An order made under O 62 r 5(1) of the Rules may be set aside under O 32 r 6 on the basis that it is an *ex parte* order and hence is essentially a provisional order made on the basis of evidence and submissions emanating from one side only and therefore when the court reviews the provisional order in the light of the evidence and arguments adduced by the other party, the court is not inhibited from discharging or varying the original order: see *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721. This embodies the fundamental rule of practice that a party affected by an *ex parte* order may apply to the court to discharge it, inasmuch as he has not had an opportunity of being heard: see *HMS Archer* [1919] P 1.

18 Applied to an order for substituted service made under O 62 r 5(1), the court is thereby able to discharge or vary the order made previously upon hearing the opposite side and is convinced that one or all of the requirements for an order to be granted was not met. It should be emphasised that the court's jurisdiction to set aside the order for substituted service is not appellate in nature and instead flows from a very fundamental desire to consider all relevant facts and arguments which can be made before it for its benefit in coming to a just result.

*Two preliminary points*

19 Before considering whether the requirements under O 62 r 5(1) were met, specifically whether sufficient efforts were utilised to locate the second defendant by the plaintiffs, I have to first consider two preliminary points raised by the plaintiffs which they say will prove fatal to the second defendant's present application.

(1) The issue of knowledge

(A) THE ARGUMENT

20 First, it was argued that the second defendant was fully aware of the present action either before or shortly after the order for substituted service had been made. Therefore, it was submitted that since the intention which underlies all procedure with regard to procedural service is that the defendant will probably get to hear of the proceedings, and this purpose had been fulfilled in the present action, the question of whether the order for substituted service is in order is not relevant. The authority cited for this proposition is the High Court decision of *BNP Paribas v Polynesia Timber Services Pte Ltd* [2002] 4 SLR 933 ("*BNP Paribas*").

(B) ANALYSIS

21 With respect, I am unable to accept this contention. The first point really is that knowledge of the proceedings *after* the order for substituted service is not relevant. In every application to set aside an order for substituted service, it is axiomatic that the applicant would already have known of the proceedings commenced against him. Otherwise, how would he be able to make such an application in the first place? If, as the plaintiffs contended, the proposition of law that flows from *BNP Paribas* is that so long as the plaintiff comes to know that proceedings have already been commenced against him, then any order for substituted service, however irregularly obtained, must not be set aside because the purpose of service is already fulfilled, then I think that this is too wide a proposition which, in any event, was not intended by the High Court in *BNP Paribas*. Indeed, if the plaintiffs are correct, then *all* applications to set aside orders for substituted service must fail for the simple reason that in every such application, the applicant must have known after the event that there was an action commenced against him. This clearly cannot be the law.

22 Having ascertained that the second defendant's knowledge after the order for substituted service to be irrelevant, I come now to his knowledge *before* the order was made. While not articulated in such a manner, the plaintiffs' argument with respect to the second defendant's knowledge *before* the order for substituted service was made must be premised on the following propositions: the purpose of personal service is to enable the defendant to obtain *actual* knowledge that an action had been commenced against him; the purpose of substituted service, on the other hand, is to impute only *constructive* knowledge of this fact when the circumstances did not make it possible to impute actual knowledge; thus, if the second defendant *actually* knew of the present action being commenced against him before the order for substituted service, then the order, in so far as it sought to impart a *lesser* degree of knowledge *vis-à-vis* the degree of knowledge already possessed by the second defendant, would not advance *any further* the purpose of service, which had been achieved when the order was made.

23 While I agree that the very purpose of service is to bring to the actual knowledge of the defendant that an action has been commenced against him by the plaintiff, I do not think that the Straits Times article achieved this purpose. The very essence of personal or substituted service is that it is a *direct* communication from the plaintiff to the defendant that a writ had been issued against the latter. This ensures its accuracy and reliability. In the present case, although the Straits

Times article contained some particulars with regard to the present action, it was not a direct form of communication between the plaintiffs and the second defendant. It would have been open to the second defendant not to pay any heed to the article since the contents of the article did not emanate from the plaintiffs and he could very rightly regard its contents to be potentially inaccurate (although I do not intend to say that *The Straits Times* is not a reputable publication; it clearly is). Thus, although the second defendant has conceded that he "was aware" of the negligence action being commenced against him by way of the Straits Times article, I do not think that this knowledge amounted to *reliable* actual knowledge that the plaintiffs had in fact commenced the present action against the second defendant. Indeed, the plaintiffs were unable to point to any authority for the proposition that newspaper articles in general (as opposed to advertisements pursuant to an order for substituted service) could properly impart knowledge of the commencement of proceedings on a defendant.

24 This can be contrasted with the facts of *BNP Paribas*, which was relied upon by the plaintiffs. In that case, the plaintiff, BNPP, had commenced an action against, *inter alia*, the guarantor ("D2") of a loan it had granted to a company ("PTS") when the company defaulted on the loan. D2, who resided in Malaysia, had written to BNPP's solicitors to confirm his residential address and also asked BNPP to fix an appointment to effect service on him at his residence. BNPP then successfully applied for service to be effected for service outside jurisdiction to be effected on D2. However, BNPP was later informed that the Kuala Lumpur High Court's process server had failed to effect service on D2 on three occasions. Following this, D2 orally informed BNPP over the telephone that the writ could be served on him at his residence or at his office in Malaysia. BNPP then advertised the notice of the writ in two Malaysian newspapers, pursuant to an order granting substituted service. D2 informed BNPP that he would not enter appearance as the writ was not validly served on him. BNPP then obtained judgment in default of appearance. D2 applied to set aside the substituted service and default judgment obtained thereafter.

25 In reversing the order that the substituted service be set aside, the High Court found that D2 was fully aware that BNPP had issued a writ against him even before substituted service was granted or executed. Consequently, the High Court found that there was no question of D2 having suffered prejudice as a result of not knowing of the advertisements. The High Court then cited with approval the passage from *Karen Ahmad v Standard Chartered Bank 2(3) Mallal's Digest* (4th Ed, 2001 Reissue) [5328] ("*Karen Ahmad*") which opined that the intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings. If this purpose is achieved, the question as to whether the application for substituted service was in order or otherwise is no longer relevant.

26 In my respectful view, the reasoning behind the High Court's decision and endorsement of *Karen Ahmad* may perhaps be further explained by my explanation of the plaintiffs' contention with respect to the second defendant's knowledge before the order for substituted service was made (see [22] above). If this is correct, then it would not escape keen eyes that in *BNP Paribas*, the actual knowledge acquired prior to the order for substituted service in that case came directly from BNPP, the plaintiffs. There was communication between the parties such that D2 actually wanted to fix an appointment with BNPP to effect personal service on him. This was, to my mind, a far more reliable form of actual knowledge than knowledge acquired through a third party which, in this case, was the Straits Times article. Accordingly, I do not think that the knowledge acquired by the second defendant prior to the order for substituted service was such as to render the very purpose of the order fulfilled such that its regularity ought not to be in question.

27 Before I depart from this preliminary issue, I note also that the plaintiffs pointed to the second defendant being informed by Lockton in January 2007 about the action. Again, for the reasons above,

I do not think that such information can be equated with a direct communication from the plaintiffs to the second defendant about the commencement of the present action.

(2) The alleged waiver of irregularity

(A) THE ARGUMENT

28 The second preliminary point raised by the plaintiffs was that the second defendant had waived any irregularity of the order for substituted service by including the second prayer for leave to enter an appearance file his defence in the present application. The authority cited for this proposition is the Malaysia decision of *Development & Commercial Bank Bhd v Aspatra Corp Sdn Bhd* [1995] 3 MLJ 472 ("*Development & Commercial Bank Bhd*").

(B) ANALYSIS

29 In my view, this argument has little merit. The case of *Development & Commercial Bank Bhd* may be easily distinguished since the prayers in that case for the setting aside of the substituted service and to file an appearance were not in the alternative; on the other hand, in the present case, the prayers are clearly in the alternative. It is only if the court were unwilling to set aside the order for substituted service that the prayer to set aside the judgments in default of appearance (with the further prayer for leave to enter an appearance) is considered. If the plaintiffs are correct, then it would preclude the courts from considering both prayers in the same application, even if prayed for in the alternative. This clearly is not the case as the courts have always considered both prayers in the same application, albeit in the alternative: see, for example, *Low Choon Kung v Tham Chan Kum* [2004] SGDC 139 ("*Low Choon Kung*").

*Whether it was impracticable to serve the amended writ on the second defendant*

30 I come now to the primary question of whether the plaintiffs had discharged the burden of satisfying the court that it was impracticable to serve the amended writ on the second defendant. It is worthwhile first to outline the parties' arguments on this issue.

(1) The parties' arguments

(A) THE SECOND DEFENDANT'S ARGUMENTS

31 The second defendant's arguments centred on the second defendant's mobile phone number and the PPI searches. It was submitted that it would have been extremely easy to contact the second defendant on his mobile phone, as had actually been done in late 2007 when the first plaintiff called the second defendant *after* final judgment was obtained.

32 As for the PPI searches, it was submitted that it would have been simple to conduct a PPI search (if done *properly*) to ascertain the present address of the second defendant, at which he has been living since June 2005. In fact, the second defendant had instructed his solicitors to perform a PPI search using his name and identity card number to verify the plaintiffs' solicitor's claim that there were "many David Tans", as was submitted to the assistant registrar at the application for the order for substituted service. The second defendant's solicitors performed four types of PPI searches. It is only necessary to refer to two of these searches. The first of these searches was to search by a given identity card number. By keying in the second defendant's identity card number, the PPI search showed that the second defendant was listed in the system. The second of these searches involved typing in the second defendant's full name in a particular order, *ie*, "Tan Hock Boon David" (as

opposed to "David Tan Hock Boon"). This search showed that the second defendant was listed in the system. By proceeding with the searches based on the identity card number and full name, *ie*, Tan Hock Boon David", the final result would show the second defendant's present address, with the date this address was put into the system shown to be 7 June 2005, prior to the commencement of the present action. Accordingly, the second defendant submitted that the plaintiffs' solicitor, who had submitted before the assistant registrar that he had performed a PPI search but obtained so many "David Tans" that he could not tell who was the correct person, must have done the PPI search *without* using the second defendant's identity card number and full name, both of which were within his knowledge.

33 For these reasons, it was therefore incorrect for the plaintiffs' solicitor to have submitted to the assistant registrar that there was no way of ascertaining the second defendant's address for the purpose of effecting personal service.

(B) THE PLAINTIFF'S ARGUMENTS

34 On the other hand, the plaintiffs submitted that there are no grounds for setting aside the order for substituted service. First, it was submitted that it was indeed not practicable to effect personal service of the amended writ on the second defendant. In this regard, it was said that the plaintiffs did not know the second defendant's residential address as all their dealings with him had been at the offices of DRP. The plaintiffs had thereafter taken sufficient steps to discover the residential address of the applicant by notifying (a) the Law Society (see [9] above) and (b) Lockton (see [12] above). In reply to the second defendant's assertion that the plaintiffs could have discovered his residential address by contacting him on his mobile phone or conducting a PPI search properly, it was first said that the plaintiffs' evidence is that the first plaintiff had only located the note containing the second defendant's mobile phone number in late 2007 (see [13] above).

35 As for the PPI searches, it was stated that the plaintiffs did not know and had no basis to suspect the second defendant to be the director or shareholder of any company and accordingly did not undertake any PPI search. Although the assistant registrar's minutes on the afternoon of 23 January 2007 clearly recorded the plaintiffs' solicitor as saying that there were many "David Tans" when he had performed a PPI search (see [9] above), the plaintiffs explained that the reality was that the assistant registrar had meant to refer to a search through the phone book. The assistant registrar had also (supposedly) explained that a PPI search was a property tax search and because the plaintiffs' solicitor was not sure what a PPI search meant, he took this to be case and submitted before the assistant registrar that it was not possible to conduct a property tax search as he did not have the second defendant's residential address in the first place.

(2) Analysis

36 It is not without precedent that an order for substituted service can be set aside if insufficient effort had been used in attempting to locate the residential address for personal service. Thus in *Low Choon Kung*, the substituted service of a divorce petition by advertisement was deemed irregular as the petitioner's efforts in locating the respondent for the purpose of personal service was deemed to be insufficient.

37 However, a further question begs to be answered: what does "sufficient effort" mean? The short answer must be that these are steps which satisfy the court that it is impracticable for personal service to be effected. Further, *The Supreme Court Practice Directions* offers some practical guidance as to what constitutes these steps. In particular, paragraph 32 provides that two attempts at personal service should be made and that the attempts should be made at the residence of the

party to be served, if known; otherwise or if the claim relates to that party's business or work, the attempts should be made at the party's place of business or work. While these are merely guidelines, they do provide for the criterion which underpins the sufficiency of efforts: reasonableness. In *Wiseman v Wiseman* [1953] 2 WLR 499, it was said that methods of communication which were reasonably obvious and could have been used but which were not would constitute fall short of the standard required. This is a useful yardstick to be used in ascertaining whether the plaintiffs used sufficient efforts in the present application. Here, two matters pointing to potential insufficiency in the plaintiffs' efforts in effecting personal service on the second defendant warrant closer attention: (a) the allegation that the plaintiffs had the second defendant's mobile phone number; and (b) the PPI searches.

(A) THE SECOND DEFENDANT'S MOBILE PHONE NUMBER

38 I deal first with the second defendant's mobile phone number. While I found it slightly incredulous that the plaintiffs did not have the second defendant's mobile phone number until it suddenly appeared just a few weeks after final judgment was obtained (and indeed I should mention that the plaintiffs' solicitor admitted before me that the timing would have seemed "unusual" to a third party), I cannot discount the plaintiffs' evidence on affidavit that they only located the second defendant's number towards the end of 2007. However, in my view, had it been the case that the plaintiffs were in possession of the second defendant's mobile phone number before the order for substituted service was made and they had neglected to take this very simple step to contact the second defendant to ascertain his residential address, I would have had no hesitation in finding that insufficient effort had been utilised by the plaintiffs.

(B) THE PPI SEARCHES

39 In my judgment, the PPI searches provide the key to answering the question of whether sufficient effort was made and hence whether the plaintiffs had discharged their burden of showing that it was impracticable to effect personal service. I accept the second defendant's submission that it would have been extremely easy for the plaintiffs, who were at the very least in possession of the second defendant's full name and identity card number, to conduct a PPI search properly to ascertain the second defendant's residential address.

40 I do not think that there is any merit to the plaintiffs' submission that the assistant registrar had not properly explained what a PPI search is. The minutes of the hearing of the *ex parte* application, which I will have to accept as true, shows that it was in fact the plaintiffs' solicitor who had submitted to the assistant registrar that he had conducted the PPI searches but that there were too many "David Tans". In the absence of extremely compelling evidence to the contrary, I am led to conclude that the plaintiffs' solicitor knew what a PPI search was and had really not done a search properly. Had he done one properly with the second defendant's full name and identity card number, he would have been able to locate the second defendant's residential address.

(C) NOTIFYING THE LAW SOCIETY AND LOCKTON

41 Finally, I do not think that notifying the Law Society and/or Lockton constituted sufficient effort. First, contact was made with Lockton only *after* the order for substituted service was obtained. Thus this could not have any bearing on convincing the court of whether sufficient effort was used to locate the second defendant to effect personal service. As for notifying the Law Society, while I accept that this could in some circumstances constitute sufficient effort, the circumstances of the present case force me to conclude otherwise, especially since the simple step of conducting the PPI

searches properly was not done.

42 In the final analysis, I find that the plaintiffs had not discharged their burden of showing that it was impracticable to effect personal service on the second defendant. The plaintiffs ought to have done the PPI search properly, in view of the fact that their solicitor actually knew what a PPI search is (as is evident from the minutes stating that he had done a search) and with their knowledge of the second defendant's full name and identity card number. However, I do not think that the plaintiffs' solicitor was in the least seeking to conceal anything to the court; I am satisfied that he had made full and frank disclosure to the court in so far as that means that he had not sought to intentionally withhold information in his knowledge.

***Conclusion in relation to prayer to set aside order for substituted service***

43 For the reasons given above, I set aside the order for substituted service. It necessarily follows from this that all other proceedings thereto are similarly set aside. While this is sufficient to dispose of this application, I now deal with the second alternative prayer for an order to set aside the judgments entered in default of the second defendant's appearance in the event that I am wrong with respect to the setting aside of the order for substituted service.

**Prayer for order to set aside judgments entered in default of appearance**

***The facts***

44 As it is relevant to the second prayer to set aside the judgments entered in default of appearance, the background facts giving rise to the present action against the defendants can now be briefly stated. The entire saga started with the deceased's decision to deal with two individuals known as Tan Wah Leng ("Tan") and her husband Thian Kim Hoe ("Thian"). Tan and Thian were the sole shareholders and directors of a company incorporated in Singapore known as Dauphin Offshore Engineering & Trading Pte Ltd ("the Company"). They were the registered owners of all ten million ordinary shares in the Company which constituted the entire shareholding of the Company.

*The Share Transfer Agreement and the Supplemental Agreement*

45 In 2001, the deceased paid $3.5m to Tan and Thian for 3 million shares in the Company. In addition, the deceased also advanced a sum of about $316,000 to Tan and Thian. The understanding was supposedly that the sale proceeds of the shares and the advances from the deceased were to be used by Tan and Thian to pay the Company's creditors and enable the Company to tide over its financial difficulties.

46 Between May and June 2001, the terms for the purchase of the 3 million shares were set out in the Share Transfer Agreement dated 29 May 2001 ("the Share Transfer Agreement") prepared by the defendants. In June 2001, the defendants prepared a Supplemental Agreement which was signed by all the parties. Under the Supplemental Agreement, Tan and Thian agreed to buy back 1.5 million shares of the Company from the deceased no later than 30 June 2002 and repay the monies that had been advanced to them.

*The defendants' breach of obligations*

47 By April 2002, Tan and Thian had breached their obligations under both the Share Transfer Agreement and the Supplemental Agreement. However, the deceased passed away on 6 April 2002 before any legal proceedings were commenced. In August 2002, unknown to the plaintiffs, Tan

transferred all her 25% interest and title in a property at 2 Clementi Crescent to her relatives.

48 On 7 August 2003, letters of administration were granted to the estate of the deceased and the plaintiffs were appointed as the joint administrices. Later, on 12 September 2003, the plaintiffs and Tan and Thian entered into a further agreement ("The Agreement of Settlement") whereby Tan and Thian acknowledged that they owed the deceased's estate the sum of $3.5m and a further sum of $316,656.05 and promised to repay these monies by a schedule of instalments.

*Commencement of legal proceedings*

49 On 23 March 2004, Suit 232 of 2004 ("Suit 232") was commenced after Tan and Thian again defaulted in the instalment payments under the Agreement of Settlement. After filing an application for summary judgment under O 14 of the Rules, the defendants proceeded to enter into negotiations with the lawyers representing Tan and Thian. On 16 May 2004, unknown to the plaintiffs, Tan had transferred 1.5m of her shares in the Company to her relatives, Tan Jin Sin ("TJS") and Lim Lee Chin ("LLC"), who are both directors in the Company.

50 On 9 July 2004, the defendants, on behalf of the plaintiffs, entered into an agreement with the lawyers for Tan and Thian to allow the latter a further period to make payment by a revised schedule of instalment payments. This agreement was embodied in a Tomlin Order.

51 On 20 October 2004, judgment was entered against Tan and Thian in Suit 232 when they defaulted in making the instalment payments due under the Tomlin Order. In October and November 2004, execution proceedings were commenced to, *inter alia*, seize the balance 8.5m shares in the Company registered in the names of Tan and Thian by way of Writ of Seizure Nos 58 and 61 of 2004 ("the execution proceedings").

52 On 15 April 2004, the defendants commenced Suit 249 of 2005 ("Suit 249") against Tan, Thian, Trios Corporation (S) Pte Ltd ("Trios") together with the directors of Trios for conspiracy. On 23 September 2005, bankruptcy orders were made against Tan and Thian. On 26 September 2005, on the defendants' advice, the plaintiffs entered into a Settlement Agreement with all the defendants in Suit 249 in respect of the action.

*Negligence action against the defendants*

53 As it eventually turned out, the plaintiffs failed to recover substantially the monies owing to them by Tan and Thian and they commenced the present action against the defendants, alleging that they had been negligent in their conduct of the aforementioned matters.

54 Before I turn to consider whether the judgments entered in default of the second defendant's appearance, I should first consider the applicable law.

***The law on setting aside judgments entered in default of appearance***

*Preliminary observations and the second defendant's argument*

55 Assuming that the order for substituted service in the present action is valid, it must follow, as conceded by the second defendant, that the interlocutory judgment and final judgment entered in default of appearance must be a regular judgment. In this regard, O 13 r 8 of the Rules provides that the court may, on such terms as it thinks just, set aside or vary any judgment entered in default of appearance to writ. As the learned authors of *Singapore Civil Procedure 2007* (Sweet & Maxwell Asia,

2007) point out at 121, the leading local case for the law on O 13 r 8 is *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 ("*Abdul Gaffer*"), a decision of the Court of Appeal. The Court of Appeal had in *Abdul Gaffer* laid down the relevant principles for the exercise of the court's discretion under O 13 r 8. As the material passages are not long, and are regarded to be of utmost important in local jurisprudence, I hereby set out them out:

> We now turn to consider the principles *upon which the court should exercise its discretion under O 13 r 8*. They are:
>
> (i) it is not sufficient to show merely an arguable defence that would justify leave to defend under O 14; it must both have a real prospect of success and carry some degree of conviction; and
>
> (ii) if proceedings are deliberately ignored, this conduct, although not amounting to an estoppel at law, must be considered 'in justice' before exercising the court's discretion to set aside the default judgment. (see *The Saudi Eagle; Alpine Bulk Transport Co Inc v Saudi Eagle Shippimg Co Inc*).
>
> [emphasis added]

I need only to mention that *Abdul Gaffer* has been followed very recently by the High Court in *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2007] SGHC 185 ("*Canberra Development*"). In fact, the High Court in *Canberra Development* pointed out (at [24]) that the position is not in doubt in the case of a regular judgment and in further elaboration of the test in *Abdul Gaffer*, stated that:

> To persuade a judge to set aside a regular judgment it is insufficient for the defendant to put forward an arguable defence that would justify leave to defend under O 14.

56 I respectfully agree with the High Court in *Canberra Development*, adopting *Abdul Gaffer* as the authority which cannot be departed from, that the position is not in doubt. However, before me, the second defendant advanced an interesting legal argument in relation to O 13 r 8 which indirectly challenged *Abdul Gaffer*, and which I consider necessary of further analysis.

57 Citing *Singapore Civil Procedure 2007*, it was urged upon me that quite apart from the high authority of *Abdul Gaffer* (which purports to lay down the principles which a court *should* apply when exercising its discretion under O 13 r 8), there are actually two classes of cases, the latter of which the test in *Abdul Gaffer* does *not* apply. It was said that where (a) each party's case would carry conviction if it stood alone; (b) the issue of liability will turn entirely on the assessment of the facts at trial; and (c) the court is not able to say which will succeed, it is quite impossible to be dogmatic about the extent to which the court must be satisfied of the validity of the suggested defence, citing *Allen v Taylor* [1992] PIQR 255 at 259. *Allen v Taylor*, as far as I am aware, has never been applied by a Singapore court before. In fact, *Singapore Civil Procedure 2007* does not cite a single Singapore case which supports the proposition of a second class of cases to which *Abdul Gaffer* does *not* apply.

58 Additionally, it was also suggested that if the defendant did not deliberately ignore proceedings in the context of an application under O 13 r 8, the court will not scrutinise the defence as strictly as the test put forth in *Abdul Gaffer*. This is said to mitigate the rather harsh effect of a strict compliance with *Abdul Gaffer*. Indeed, as pointed out by Daniel Chia in "Setting aside a regular default judgment: What is a good defence on the merits – real prospect of success or arguable, triable issue?" (1996) 17 Sing LR 221 ("Setting aside a regular default judgment") (at 241), the present test adopted by the Singapore courts in deciding whether to set aside a judgment entered in default of

appearance "tilts the balance too far in favour of the plaintiff and exorbitantly distorts the object of civil procedure". Accordingly, it was submitted by the second defendant that the full rigour of the *Abdul Gaffer* test did not apply in such cases, notwithstanding the fact that (and this was not argued) there is no local case supporting these propositions.

59 Strict adherents to the doctrine of *stare decisis* will highlight at this juncture that *Abdul Gaffer* propounded a test which a court *should* exercise its discretion under O 13 r 8 (see [55] above); as such, there can be no distinction between two classes of cases since the Court of Appeal made no distinction between any class of cases. While I am fully aware that I am bound by higher authority, I am equally of the view that where such higher authority is not entirely clear, or has been qualified indirectly by another authority of equal standing in recent times, the lower court should not be precluded solely by the matter of precedence from re-examining the case law and determining whether there is scope for further clarification of the law in order to do justice as a matter of fairness and principle.

*The basis for discretion to set aside judgments entered in default of appearance*

60 An appropriate avenue from which to start this examination is the underlying basis for the discretion under O 13 r 8 itself. The principle underlying the discretionary power of the court to set aside a judgment entered in default of appearance has been said to be that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been only been obtained by a failure to follow any of the rules of procedure: *per* Lord Atkin in *Evans v Bartlam* [1937] AC 473 at 480. This has been endorsed by the High Court in *Hsing Mei Construction Pte Ltd v Lim Check Meng* [2000] SGHC 75 and also by the Court of Appeal in the recent case of *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 ("*Su Sh-Hsyu*") (at [42]). Indeed, V K Rajah JA, who delivered the judgment of the court, went on to declare (at [43]) that:

> In an application to set aside this type of default judgment, the question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant's explanation both for the default and for any delay, as well as against prejudice to the other party: *Shocked* ([41] *supra*) at 379 citing *Evans v Bartlam*, *Vann v Awford* (1986) 130 SJ 682 and *The Saudi Eagle* [1986] 2 Lloyd's Rep 221. This position has been adopted locally: see *Hong Leong Finance Ltd v Tay Keow Neo* [1992] 1 SLR 205.

61 Somewhat curiously, this very fundamental rationale underlying the discretion in O 13 r 8 was not cited by the Court of Appeal in the hitertho leading local case of *Abdul Gaffer*. While the Court of Appeal in the more recent case of *Su Sh-Hsyu* constrained itself to passing only "brief comments" on the law relating to the setting aside of default judgments under O 13 r 8, I think that its elevation of the rationale underlying O 13 r 8 as stated in *Evans v Bartlam* lends welcome assistance to the question of whether there exists a second class of cases involving regular judgments under O 13 r 8 wherein the courts will not adopt the strict *Abdul Gaffer* approach in full.

62 It is perhaps trite to state that every law exists for a purpose and where the rule becomes divorced from its purpose of even becomes antithetical to its prior purpose, then it ought to be reviewed. That is why the Court of Appeal's formal statement of the purpose for the discretion under O 13 r 8 is important in the discussion to follow. In order to set the context of the discussion in its proper light, I should first set out the prior position before *Abdul Gaffer*, and the *Abdul Gaffer* test itself. Before doing so, I should acknowledge the considerable assistance I derived from the excellently written article by Daniel Chia, *viz*, "Setting aside a regular default judgment".

*The previous test: arguable or triable issue*

63 It has been said that the old test found expression in the House of Lords decision of *Evans v Bartlam*. In that case, Evans owed Bartlam a sum of money. Bartlam sued Evans, but Evans failed to enter an appearance. Bartlam therefore obtained judgment in default. Thereafter, Evans asked for time to pay, and Bartlam gave him a further seven days. However, before those seven days expired, Evans applied to court to set aside the default judgment. The English Court of Appeal dismissed the application, holding on the first ground that the judge below was precluded from exercising his discretion to set aside the judgment by the fact that with knowledge of the judgment Evans had applied for the matter to stand over for him to see if he could arrange to pay and Bartlam had consented to let it stand over for seven days. Alternatively, it was held that Evans had approbated the default judgment and therefore was obliged to submit to it. The House of Lords disagreed with the English Court of Appeal. In holding first that the English Court of Appeal's reasons for declining to exercise its discretion to set aside the default judgment are erroneous, the House of Lords then went on to state the principles by which the courts have laid down for themselves to guide in the exercise of the discretion. In this respect, Lord Atkin said (at 480):

> The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. *One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a* prima facie *defence*. [emphasis added]

Further down in his speech, the learned law lord further opined thus:

> But in any case in my opinion the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. *Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from*. [emphasis added]

It was in this context that the famous words alluding to the underlying basis for the discretion under O 13 r 8 of the Rules were uttered (see [60] above).

64 Lord Wright seemed to have shared Lord Atkin's view in the same case when he said that the primary consideration is whether the defendant "has merits to which the court should pay heed" (at 489). Lord Russell of Killowen considered the matter in some detail as follows (at 482):

> The contention [advanced by counsel for Bartlam] no doubt contains this element of truth, that from the nature of the case no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (*a*) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action, and (*b*) how it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence. *But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance*. [emphasis added]

Although Lord Russell seemed to allude to a stricter test than one requiring merely an arguable or triable issue when he used the expression "serious defence", I doubt very much that he had intended his words to have such an effect. Indeed, the learned law lord had explained his earlier statement that there must be a useful purpose to be served by setting aside the judgment by stating that there would be such a purpose when there was a *possible* defence to the action. I do not think that the expression "serious defence" was intended to qualify the earlier reference to "possible defence" as

Lord Russell then goes on to state that, in any event, the discretion to set aside a judgment in default of appearance need not be preconditioned on the proof of these matters which must necessarily enter into the judge's consideration. In other words, the exercise of the discretion is not dependent on the satisfaction of certain conditions, although these conditions may feature in the consideration whether to exercise the discretion.

65 The "arguable or triable issue" test was subsequently followed in later decisions. Lord Denning in *Burns v Kondel* [1971] 1 Lloyd's Rep 554 held (at 555) that the defendant does not have to show a good defence on the merits. Instead, he needs only show a defence which discloses an arguable or triable issue. Chao Hick Tin J expressed the same view in *Singapore Gems v The Personal Representatives for Akber Ali, deceased* [1992] 2 SLR 254 ("*Singapore Gems*"), in which he held that the defence need only disclose "an arguable or triable" issue (at 259).

*The present test: a real prospect of success*

66 The test in *Evans v Bartlam* was explained and ultimately (at least locally) superseded by the decision of the English Court of Appeal in *Alpine Bulk Transport v Saudi Eagle Shipping* [1986] 2 Lloyd's Rep 221 ("*The Saudi Eagle*"). In this case, the plaintiff chartered the *Saudi Eagle* from the defendant shipowners, but the liner booking note stated that the vessel was the *Saudi Ambassador*. The booking note was made subject to the Conlinebill terms and provided that the contract was between the "Merchant and the Owner of the vessel" and, further, that the shipowner shall be liable for any damage or loss due to any breach or non-performance of any obligation. The defendant refused to load the cargo and the plaintiff claimed damages. No notice of intention to defend was given by the defendant. The plaintiff signed interlocutory judgment in default and their damages were later assessed. The defendant, having at one stage deliberately decided not to defend the proceedings because it had no assets, recalled that security had been put up by them, and accordingly applied for leave to set aside the judgment and for leave to defend on the ground that the plaintiff had sued the wrong defendant. The defendant appealed against the lower court's decision not to set aside the judgment.

67 Sir Roger Ormrod, delivering the judgment of the English Court of Appeal, helpfully summarised the law (at 223):

> The following "general indications to help the Court in exercising the discretion" … can be extracted from the speeches in *Evans v Bartlam* ... bearing in mind that "in matters of discretion no one case can be authority for another…"
>
> (i) a judgment signed in default is a regular judgment from which, subject to (ii) below, the plaintiff derives rights of property;
>
> (ii) the Rules of Court give to the Judge a discretionary power to set aside the default judgment which is in terms "unconditional" and the Court should not "lay down rigid rules which deprive it of jurisdiction";
>
> (iii) the purpose of this discretionary power is to avoid the injustice which might be caused if judgment followed automatically on default;
>
> (iv) the primary consideration is whether the defendant "has merits to which the Court should pay heed," not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence and if he has shown the "merits" the ... Court will not, *prima facie*, desire to let a judgment pass on, which there has

been no proper adjudication;

(v) again as a matter of common sense, though not making it a condition precedent, the Court will take into account the explanation as to how it came about that the defendant … found himself bound by a judgment regularly obtained to which he could have set up some serious defence.

68 He then considered the nature of the case required of the defendant to set aside a regular default judgment (at 223):

> [What does the expression] "primary consideration" really mean ... [i]n the course of his argument, [counsel] used the phrase "an arguable case" and it, or an equivalent, occurs in some of the reported cases. ... This phrase is commonly used in relation to RSC O 14, to indicate the standard to be met by a defendant who is seeking leave to defend [an application by the plaintiff for summary judgment].

He continued (at 223):

> If ["arguable case"] is used in the same sense in relation to setting aside a default judgment, it does not accord ... with the standard indicated by each of their Lordships in *Evans v Bartlam*. All of them clearly contemplated that a defendant who is asking the Court to exercise its discretion in his favour should show that he has *a defence which has a real prospect of success* … [emphasis added]

Further, it was said that (at 223):

> … [I]t would be surprising if the standard required for obtaining leave to defend (which has only to displace the plaintiff's assertion that there is no defence) were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff. … *[T]herefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed*. The "arguable" defence must carry some degree of conviction. [emphasis added]

69 The English Court of Appeal therefore found that it is not enough for the defendant to show a mere "arguable" defence. While such a defence suffices to justify leave to defend summary judgment under Order 14, it is not enough to set aside a regular default judgment. A default judgment which has been regularly entered can only be set aside if the defendant can show, on his affidavit of merits, that his "arguable" defence has a real prospect of success and carries some degree of conviction. In other words, the court must be able to predict the outcome of the case on the basis of the evidence it has on the application to set aside the default judgment; if it is unable to do so and yet it is unable to say with certainty whether the defendant will fail, it will have to refuse relief. On the facts, the it was found that "the evidence falls short of proof that *Saudi Eagle* was on time charter ... [so that the Court did] not think that the defendants [had] shown that they have a defence which has any reasonable prospect of success".

*The Saudi Eagle accepted and applied in Singapore*

70 This new test was followed in Singapore by MPH Rubin JC in *Hong Leong Finance Ltd v Tay Keow Neo & Anor* [1992] 1 SLR 205 ("*Hong Leong Finance Ltd*"), a case referred to by the Court of Appeal in the recent case of *Su Sh-Hsyu*. In *Hong Leong Finance Ltd*, the defendants were directors of a

defunct company. They executed a guarantee in favour of the plaintiff finance company which had extended credit facilities to them. The assistant registrar dismissed their application to set aside judgment entered against them in default of appearance. The defendants appealed to the High Court, alleging *inter alia* that they had acted under undue influence and were unaware of the nature of the document they had assigned. Their appeal was dismissed because Rubin JC found that their claims were "sham and had very little substance" (at [60]), so that the defendants clearly failed the standard required of them, which was that of "a defence which had [a] reasonable prospect of success" (at [61]). The learned judge stated that (at [61]):

> It is my view that the defendants have not shown that they have a defence *which had any reasonable prospect of success on the grounds stated and the evidence placed before me*. Above all, the conduct of the defendants in ignoring the service of process when they allowed the judgment to be entered in default, further fortifies my view that their conduct was deliberate and that they came in to dispute the issues only when they found they were going to be made bankrupts. The defences raised were by not any means meritorious and the defendants had deliberately allowed the plaintiff's claims to go by default. [emphasis added]

71 Although Rubin JC referred to both *Evans v Bartlam* and *The Saudi Eagle*, he had apparently accepted that *The Saudi Eagle* correctly interpreted *Evans v Bartlam* as requiring a higher standard than the "arguable or triable issue" test. However, as Daniel Chia in "Setting aside a regular default judgment" notes at 227, it was (with respect) unfortunate that no further explanation was furnished as to the court's views on the *possible* differences between the two standards especially since the facts of *Hong Leong Finance Ltd* were such that the defendants would have failed both the "reasonable prospect of success" test and the lower "arguable or triable issue" standard. *The Saudi Eagle* was simply applied without question. This is since Rubin JC had found that the defendants' claims were "sham", a standard which does not pass muster for unconditional leave to defend under O 14. The apparent confusion in the local position was further heightened when, barely a year later, the High Court decided in *Singapore Gems* that the for the purpose of setting aside a default judgment, the defence on the merits which the defendant was required to show need only disclose an "arguable or triable issue".

72 Of course, *Abdul Gaffer* was then decided by the Court of Appeal a few years later and by its adoption of *The Saudi Eagle* (again without any detailed explanation), the position in Singapore was and has been regarded as settled. Indeed, as I have mentioned earlier, the High Court in *Canberra Development* very recently reaffirmed that the position in Singapore as not being in doubt.

*The Saudi Eagle doubted and qualified elsewhere*

73 However, while the position in Singapore is generally regarded as being settled, the same cannot be said about that in England. Indeed, part of the reason for this may be that arguments relating to the correctness of *The Saudi Eagle* (as accepted in *Abdul Gaffer*) have not been as readily advanced for the courts' consideration. This could also be why the purported existence of a second class of cases in *Singapore Civil Procedure 2007* is based entirely on English authorities which may not stand up to scrutiny when considered against the backdrop of *Abdul Gaffer*, which seemingly lays down a mandatory set of guidelines to be applied in conjunction with the discretion under O 13 r 8 (see also [55] above). Coming back to the issue at hand, it is without question that *The Saudi Eagle*, despite its relatively calm acceptance into Singapore law, has faced much tougher currents in other jurisdictions.

(1) England

74 As Prof Jeffrey Pinsler SC notes in his seminal work, *Singapore Court Practice 2006* (LexisNexis, 2006) at 195, it is interesting that Hobhouse J in *The Ruben Martinez Villena* [1987] 2 Lloyd's Rep 621 (a case which has not been considered by the Singapore courts) doubted the purported effect of *The Saudi Eagle*. Hobhouse J reiterated what he thought was the rationale and true meaning of the decision in *Evans v Bartlam* thus (at 623):

> So the ratio of Lord Wright is that it is a matter of discretion which depends on the circumstances of the case, but the test that he held should be satisfied in that case was "he clearly shows an issue which the court should try", and similar language is used by Lord Atkin: "He must show on the evidence that he has a *prima facie* defence" and the spirit of the judgment of Lord Russell is to the same effect. *The logic of the decision is, as I have said, that there is no purpose in setting aside a judgment if there is not going to be something to be gained by having a trial, so that the defendant must show a real prospect that, if the matter goes to trial, there will be some different decision*. One way that that can be expressed is if the defendant can show that he has a "good arguable defence" or, if one prefers it, "an arguable defence", although I think "a good arguable defence" is nearer the right terminology. Similarly, it can be said: "a defence which has a real prospect of success". Those phrases are the phrases which were relied upon before me by the plaintiffs in resisting this application and I think they are legitimate phrases to use. In other cases the simple phrase "arguable defence" has been used, and that may be more appropriate in certain situations because, as is clear, all these cases depend upon their own circumstances; in another situation it has been said, to quote Lord Denning in *Burns v. Kondel*, he need only show a defence which discloses an arguable or triable issue. *Those are very similar criteria and the emphasis may just arise from the difference that is presented by the facts in each case*. [emphasis added]

75 A little further down in his judgment, Hobhouse J, commenting on the effect of *The Saudi Eagle*, continues and concludes that *The Saudi Eagle* was never meant to create a new and more onerous standard than the one in *Evans v Bartlam* (at 625):

> But, in the course of his judgment, Sir Roger Ormrod did refer to various other criteria that might be applied. Most of what he says is consistent with what I have said. He refers to "a good prospect" of success or in other places "an arguable defence", but at one place he does say something that is inconsistent. He says:
>
> > Indeed, it would be surprising if the standard required for obtaining leave to defend, which is only to displace the plaintiff's assertion that there is no defence, were the same as that required to displace a regular judgment of the Court and with it the rights acquired by the plaintiff. In our opinion, therefore, to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed. The arguable defence must carry some degree of conviction.
>
> *If in that passage he is intending to say that the Court must do its best to predict the outcome of the action if the judgment is set aside, and should only set aside a judgment if it is satisfied that the outcome of the action will, on a better than 50-50 chance, be a judgment in favour of the defendants, then I consider that statement goes beyond the law as it has been laid down in the authorities*. As it is an *obiter dictum* it is not binding on me and I am under no obligation to follow it; *but I doubt whether Sir Roger Ormrod was intending to say that*. He was presented with a case in which the suggested defences involved just simple questions of law; they were questions of construction; he considered that they were unarguable and, therefore, there was no reason for setting aside the judgment.

[emphasis added]

76 As Daniel Chia notes in "Setting aside a regular default judgment" at 240, Hobhouse J was probably suggesting that, on the facts of *The Saudi Eagle*, the defendant would have failed to establish any defence on the merits whether the "arguable or triable issue" test or the "real prospect of success" test was applied. Hobhouse J therefore concluded that Sir Roger Ormrod could not have intended to create a new and higher standard to be followed. Indeed, the varying expressions used, be it "real prospect of success" or "arguable defence", are just different ways of expressing the same standard, since difference phrases were appropriate in different circumstances. Dealing with the rather explicit view of Sir Roger Omrod that the standard was not the same as that applied in O 14 applications, Hobhouse J simply said that this was not supported by existing authority.

77 In *Allen v Taylor*, Dillon LJ, delivering the judgment of the English Court of Appeal, stated similarly thus (at 259):

> It is quite impossible to be dogmatic about the extent to which the court must be satisfied of the validity of the suggested defence. *There must be numerous cases where the issue will turn entirely on the assessment of the facts at trial*: each party's case would carry conviction if it stood alone and without conducting a trial the court is not able to say which will succeed. The present is, it seems to me, one of those cases. [emphasis added]

Indeed, Prof Pinsler in *Singapore Court Practice 2006* pertinently observes (at 198) that this conclusion would seem to conflict with the unqualified direction found in *The Saudi Eagle* that "… the court must form a provisional view of the probable outcome if the judgment were to be set aside and the defence developed".

78 Another case which I need to point out and that is *Day v RAC Motoring Services* [1999] 1 WLR 2150, wherein the English Court of Appeal held that a court, in deciding whether to set aside a judgment in default of defence, need not be satisfied that there was a real likelihood that the defendant would succeed, but merely that the defendant had an arguable case which carried some degree of conviction. An important part of the decision appears at 2157, which I quote below:

> ***This may be largely a matter of semantics and it would be better if the differences in language in these cases could be viewed as the emphasis in a particular case to the particular facts of that particular case***. Perhaps the best guidance of all is in Sir Roger Ormrod's judgment that this is not a rule of law but a matter of commonsense. Thus it is usually easy to identify the case which is hopeless and say "There is *no* real prospect of success." I add the emphasis to make the point that one is looking at the matter negatively. ***The approach is distorted if one uses "real prospects of success" as a positive test***. That wrongly encourages a test of judging fact on affidavit and then coming to a provisional view of the probable outcome. I agree, however, that the arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it. ***I would therefore be a little hesitant to elevate the test into, as it is advanced in The Supreme Court Practice, "a real likelihood that a defendant will succeed."*** [emphasis in bold italics; original emphasis in italics]

79 From this survey of the English decisions following *The Saudi Eagle*, none of which have been considered by a Singapore court, it is clear that the *The Saudi Eagle* has either not been accepted as

standing for a more rigorous test, or simply qualified to the extent of non-existence, even if later cases such as *Swain v Hillman* [2001] 1 All ER 91 have continued to use the expression "real prospect of success". It seems to me that Sir Roger Ormrod's supposed elevation of the test in *Evans v Bartlam* to one which requires "a real likelihood of success" has been interpreted to be *merely another way* of expressing the "arguable or triable issue" test. In this sense, there has not been a new test at all following *The Saudi Eagle* but simply another way of stating the old test. The can be contrasted with the views of the Singapore courts, which have hitherto accepted that *The Saudi Eagle*, as accepted in *Abdul Gaffer*, stands for a higher test than the "arguable or triable issue" test.

(2) Malaysia

80 It remains for me to state rather briefly, with the invaluable assistance of Prof Pinsler's *Singapore Court Practice 2006* (at 197), that the courts in Malaysia have been more guarded about accepting *The Saudi Eagle* test. For example, in *PL Construction v Abdullah bin Said* [1989] 1 MLJ 60, it was said that a defence on the merits means a defence which discloses "an arguable and triable issue".

81 Similarly, in *Hasil Bumi Perumahan v United Malayan Banking* [1994] 1 MLJ 312, the Supreme Court of Malaysia was of the view that the approach in *The Saudi Eagle* was not entirely clear, and that the test to set aside a default judgment ought to remain the same to determine whether an application for summary judgment should succeed (at 321):

> … the guidelines in *Evans v Bartlam* should be accepted. In our view, in order to succeed in his application the applicant must show that he has a defence which has some merits and which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is *prima facie*, raising serious issues as a *bona fide* reasonable defence.

82 With the approaches of other jurisdictions in mind, I turn now to examine the law in Singapore.

*Is there scope for the existence of a second class of cases where Abdul Gaffer does not apply with its usual rigour?*

(1) Is the existence of a second class of cases supported by authority?

83 The first question which I need to answer is whether there is a second class of cases to which *Abdul Gaffer* does not apply with its usual rigour. I note first that the very premise of a second class of cases purportedly derives its authority from *Allen v Taylor*, as the learned authors of *Singapore Civil Procedure 2007* rely on at 121. However, it seems to me that Dillon LJ was of the same view as Hobhouse J in *The Ruben Martinez Villena* in that *The Saudi Eagle* never purported to lay down a rigid rule of universal application which was, *at the same time*, of a more onerous standard that the *Evans v Bartlam* test. As I have mentioned, *Allen v Taylor* is the subject of a material passage in *Singapore Civil Procedure 2007* (at 121) which was the subject of the submission of law before me, and as such I think it is worthwhile to reproduce this passage in its entirety and then discuss it in some detail:

> (7) In another class of cases, where: (a) each party's case would carry conviction if it stood alone; (b) the issue of liability will turn entirely on the assessment of the facts at trial; and (c) and the court is not able to say which will succeed, it is quite impossible to be dogmatic about the extent to which the court must be satisfied of the validity of the suggested defence: *Allen v. Taylor* [1992] P.I.Q.R. 255 at 259.

84 In my respectful view, this passage, which purports that *Allen v Taylor* stood for the proposition

that there exists a second class of cases wherein *The Saudi Eagle* applied with less rigour, is not entirely descriptive of the decision in *Allen v Taylor*. In my view, all that Dillon LJ intended to say was something similar with the views of Hobhouse J in *The Ruben Martinez Villena*, *ie*, that that cannot be a universal standard to guide the exercise of discretion for the setting aside of a default judgment *and* that *The Saudi Eagle* was never intended to lay down a test different from the test in *Evans v Bartlam* (see [76] above). I do not think that both learned English judges accepted that *The Saudi Eagle* stood for a higher test than that for O 14 applications. As such, I am unable to see how *Allen v Taylor* can stand for the proposition that there is a *second* class of cases apart from that in *The Saudi Eagle*.

85 In any event, *even* accepting that there is a second class of cases propounded by Dillon LJ, I do not think that the passage in *Singapore Civil Procedure 2007* accurately reproduces the criteria by which to assess which cases fell within this second class. Transposing the passage onto the relevant paragraph in *Allen v Taylor* (reproduced at [77] above), I think that the *sole* criterion applied by Dillon LJ was when "*the issue will turn entirely on the assessment of the facts at trial*". The further exposition that "each party's case would carry conviction if it stood alone and without conducting a trial the court is not able to say which will succeed" are, to my mind, but further reasons explaining why in cases involving issues of fact, a supposedly less rigorous standard ought to apply (as contended for in *Singapore Civil Procedure 2007*). As such, I do not think that there are *three* criteria (denoted by (a), (b) and (c) in the relevant passage) in ascertaining whether a given case fell into the so-called "second class" (if this proposition is correct in the first place). Criteria (b) and (c) are but elaborations of criterion (a), which must stand on its own. Accordingly, I think that if at all there is a second class of cases where *The Saudi Eagle* applies with less rigour, this is where there is a triable issue of fact which, as will be seen, is supportable by recourse to the underlying basis of O 13 r 8.

86 However, this is not to say that there cannot be a second class of cases in Singapore, save that its authority cannot be supported by the passage in *Singapore Civil Procedure 2007*. It is important to note that in Singapore, unlike in England, there is one decision (*Abdul Gaffer*) which has been unquestionably accepted as correct by the lower courts thus far. This means that there is at least acceptance of one class of cases from which deviations may be thought to be authority for a second class of cases.

(2) The High Court's decisions lend support to second class of cases

(A) AWYONG SHI PENG V LIM SIU LAY *[2007] 2 SLR 225 ("*AWYONG SHI PENG*")*

87 Preliminary support for the view that there exists a second class of cases can be derived from a recent High Court decision. In *Awyong Shi Peng*, the respondent-plaintiff had entered judgment against the appellant-defendant in default of defence and the appellant filed an application to set aside the default judgment on the ground that he had applied to strike out the respondent's action and thought that by reason of that, the defence need not be filed in the meantime. The High Court, in dismissing the appeal from the lower court's decision to set aside the default judgment, held, with respect to the exercise of discretion to set aside a default judgment under O 19 r 9, as follows (at [8]):

> The discretionary power of the court to set aside a default judgment that has been entered into regularly, as was the case here, is unconditional. The overriding principle in the exercise of the court's discretionary power is to avoid the injustice which may result if judgment follows automatically on default. In exercising its discretion to set aside the judgment, the court would look at whether the defendant had established a defence with a real prospect of success and

> which carried some degree of conviction (applying *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221 ("*The Saudi Eagle*"); followed in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484 ("*Abdul Gaffer*")). However, where the defendant did not deliberately ignore the proceedings, the merits of the defence may not be scrutinised as strictly as propounded in *The Saudi Eagle* (see *Singapore Civil Procedure 2003* (Sweet & Maxwell Asia, 2003) at para 13/8/3).

Applying this to the facts of that case, the High Court held that it was evident from the affidavit of the appellant that he did not deliberately ignore the proceedings. Accordingly, applying a lesser test than the one in *The Saudi Eagle*, it was held that (at [9]):

> At present, the merits of the case appear to be evenly balanced. *It was not readily apparent from the affidavits filed which of the two parties was generally more truthful and reliable in respect of their claims. It was undeniable from the affidavits that there was substantial dispute of fact between the parties*. While it was evident that there might be fraud involved, it is not clear which party was the perpetrator of the fraud. It seemed to me that the appellant *may have a defence* but that is not a matter for me to decide conclusively on at this juncture. It would be fair, therefore, that the appellant be given the opportunity to present his side of the story to the trial judge. [emphasis added]

88 It will be observed that the High Court did not, as required by *Abdul Gaffer*, come to a view as to whether there was a *real prospect of success*; it merely decided that there *may* be a defence. The court was clearly not able to tell which of the affidavits was more truthful; if so, it would not have been able to come to a provisional view as to which side was more likely to win, as required by *The Saudi Eagle*. This clearly is a departure from *Abdul Gaffer*, albeit with respect to O 19 r 9, not O 13 r 8.

89 I acknowledge that the High Court in *Awyong Shi Peng* was not bound directly by *Abdul Gaffer* as the latter case only purported to lay down the binding law with respect to O 13 r 8. *Awyong Shi Peng* was a decision on the exercise of the discretion under O 19 r 9. Yet, I fail to see why there should be a difference in principle across both Orders of the Rules. Indeed, both Orders concern the setting aside of a default judgment differ only in how the judgment came about: O 13 r 8 being concerned with a judgment arising from default of appearance to writ, and O 19 r 9 being concerned with a judgment arising from default of appearance to defence. This does not alter the fact that, in both cases, the court is concerned with setting aside a judgment *obtained not on the merits but because of some non-adherence to some procedural rule*. Indeed, in *TR Networks Ltd and Others v Elixir Health Holdings Pte Ltd and Others* [2005] SGHC 106 ("*TR Networks Ltd*"), the High Court held (at [32]) that O 19 r 9 "were on the same terms" as O 13 r 8 and seemingly applied *The Saudi Eagle* test to O 19 r 9 in that case. Quite apart from the divergent High Court authorities with respect to O 19 r 9, *TR Networks Ltd* at least shows that, in principle, the same approach should apply for both O 13 r 8 and O 19 r 9. On that premise, therefore, *Awyong Shi Peng* is minimally preliminary support for the view that, despite the leading authority of *Abdul Gaffer*, there may exist a second class of cases in which the full rigour of *Abdul Gaffer* does not apply.

(B) OTHER CASES

90 From an examination of the other High Court cases which have cited and applied *Abdul Gaffer*, I find that there may be some truth to the proposition that there is a second class of cases in which *Abdul Gaffer* does not apply fully, and that this class concerns questions of fact which the court is unable to say for certain whether is true at the interlocutory stage.

91 There are several reported decisions concerning questions of fact. For the cases where the High Court set aside the default judgment, the allegations of fact were found to be utterly and completely insupportable on the evidence before the court. Thus, in *Loh Poh Lai (trading as Edmund Dawn Marine Engineering) v Wei Sheng Marine Services Pte Ltd* [1997] 2 SLR 154, the High Court, while deciding that the test was that as stated in *Abdul Gaffer*, nonetheless was able to decide that there was no real prospect of success as the defendant's allegation of the non-existence of the contract which he was now sued on was found to be unsupportable by the evidence before the court. Similarly, in *Spandeck Engineering (S) Pte Ltd v Yong Qiang Construction* [1999] 4 SLR 447, the High Court found that the defence did not have a real prospect of success and did not carry some degree of conviction as, once again, the defendant's allegations of fact were unsupportable by the evidence. In *Zulkifli Baharudin v Koh Lam Son* [2000] 2 SLR 233, which was a defamation action, the High Court declined to set aside the default judgment as the defence did not challenge the facts as alleged by the plaintiff but that, as a matter of law, the words were clearly defamatory. Finally, in *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR 168, the High Court once again endorsed the *Abdul Gaffer* test and decided not to set aside the default judgment as the defendant failed to show that there was any substance to its suggested defence that the plaintiff's works were incomplete and defective. This I take it to mean that the allegations of fact by the defence were unsupported by the evidence.

92 On the other hand, where there was a genuine dispute on the facts, the High Court has decided to set aside the default judgment even though on a strict reading of *Abdul Gaffer*, it would not be able to come to a provisional view as to the likely outcome of the trial since the allegations of fact before it were open to differing interpretations. Thus in *M-Power Development Pte Ltd v Goodway Agencies (Shipping) Pte Ltd* [2003] SGHC 180 ("*M-Power Development*"), where the issue was whether the plaintiff had sued the right party,namely the party who issued the bill of lading, the High Court upheld the lower court's decision to set aside the default judgment. It appears from the judgment that the defence had asserted that the defendants were merely the agents of the true party who issued the bill of lading whereas the plaintiff alleged that there is no evidence of such agency. As such, there was a question of fact which could not be resolved by the court at the interlocutory stage. Despite this, applying the *Abdul Gaffer* test, the court was able to state that the defence had a real prospect of succeeding since the identity of the party who issued the bill of lading was one best considered at trial (at [15]).

93 Finally, in cases involving questions of law, the courts appear more ready to come to the conclusion that there is a real prospect of success. In *Cosmic Insurance Corp Ltd v Ong Kah Hoe (trading as Ong Industrial Supplies)* [1996] 2 SLR 356, the High Court decided that the appropriate test was a "real prospect of success" and set aside the default judgment as the issue concerned a question of law.

94 From the above examination of the case law, I come to the conclusion that, in so far as questions of fact are concerned, the High Court has in reported decisions declined to set aside the default judgment only where the facts alleged by the defence are clearly unsupportable. On the other hand, where there is some dispute as to the allegations of fact but where it cannot be sure for certain which side is correct, the High Court has set aside the default judgment for the full merits of the case to be considered at trial: see, for example, *M-Power Development*. This, to my mind, means one of two things: first, there is a "real prospect of success" when there is a triable issue as to fact (as in *M-Power Development*) *or* second, there is a second class of cases where *Abdul Gaffer* does not apply with its full rigour, and this is where the case concerns disputes of fact. The former cannot be right as the Court of Appeal has in *Abdul Gaffer* stated that the test in O 13 r 8 is not the same as that for O 14. As such, I am of the view that upon the examination of the case law, coupled with the recent High Court decision of *Awyong Shi Peng*, there does exist a second class of cases in which

*Abdul Gaffer* does not apply with its full rigour, and this will be when the issue of liability will turn almost entirely on the assessment of facts at trial, as stated by the English Court of Appeal in *Allen v Taylor*. I should stress that I have not come to this conclusion based solely on the relevant passage in *Singapore Civil Procedure 2007*, which I respectfully think does not represent Singapore law in so far as it purports to apply *Allen v Taylor* in Singapore without any Singapore precedent cited in support.

(3) Reconciling *Abdul Gaffer* with *Su Sh-Hsyu*

95 I find that with the recent pronouncement by the Court of Appeal of the rationale underlying O 13 r 8 in *Su Sh-Hsyu*, my conclusion above is fortified even further. If *Abdul Gaffer* is applied unquestionably to every case, including those involving disputed allegations of fact, then I can hardly see how the wise words of Lord Atkin (see [60] above) which underlie and underpin the exercise of discretion under O 13 r 8 can be given effect to.

96 Indeed, Prof Pinsler in *Singapore Court Practice 2006* notes at 197 that there are two difficulties with the approach in *The Saudi Eagle* (as applied in *Abdul Gaffer*):

> In the first place, the higher standard requires the court to enter into an evaluation of the evidence to determine the likely outcome of the case. *This task may be compromised by the inconclusiveness of the affidavits, and allegations in the pleadings which have yet to be substantiated by evidence tested on oath*.
>
> …
>
> Secondly, *it may be unjust to deprive a defendant who can raise a genuinely triable issue (as opposed to a sham defence) of his opportunity to challenge a plaintiff's case at trial*.
>
> [emphasis added]

These same concerns also resonated with Lim Jian Yi in *Canberra Development Pte Ltd v Mercurine Pte Ltd* [2007] SGHC 107 (at [50]), although this was not a question he had to resolve in that case.

97 Prof Pinsler's words find especial relevance in so far as affidavits are concerned. If the affidavits are incomplete, or the court hearing the interlocutory application is unable to tell which is the truth, would justice be served by the adherence to *Abdul Gaffer* which demands that the court come to a provisional view as to the likely success of the defence? Would Lord Atkin's anxious warning to the courts not to dispense with hearing the full merits of case unless in extremely clear cases (quite apart from mere failure to adhere to rules of procedure) be given effect to if, in cases involving disputes of fact, the court simply declines to set aside the default judgment on the ground that it is unable to conclude which of two affidavits is more truthful? Ultimately, as Daniel Chia notes in "Setting aside a regular default judgment" at 234, perhaps we would do well to heed the words of the court in the American decision of *Jackson v Washington Monthly Co* (1977) 569 F 2d 119:

> Trial court dismissal of a lawsuit never heard on its merits is a drastic step, normally to be taken only after unfruitful resort of lesser sanctions … sound discretion hardly comprehends a pointless exaction of retribution.

98 Accordingly, bound by authority that *Abdul Gaffer* is still the law, and yet taking into account the recent case of *Su Sh-Hsyu* of the same standing, I conclude that a satisfactory reconciliation of the two cases, as well as decisions of the High Court following *Abdul Gaffer*, can only be effected by

deciding that there exists a class of cases wherein *Abdul Gaffer* cannot apply with its full rigour. This class of cases would be those in which the issue of liability turns almost entirely on the assessment of facts at trial.

(4) Sound reasons to depart from *The Saudi Eagle*

99 In fact, if I were not bound by *Abdul Gaffer*, I would very respectfully have thought that there are good reasons to depart entirely from *The Saudi Eagle*. First, the only reason given in *The Saudi Eagle* for justifying a higher test to set aside default judgments (as contrasted from O 14 applications) is that there exists a regular court judgment in the former case. To my mind, this is a formalistic distinction. True it may be that there is a judgment in question under O 13 r 8, but that is a judgment in name rather than in substance; it is a judgment obtained without consideration of the full merits of the case. The defendant has not been heard *fully*. Likewise in an O 14 application, the plaintiff is seeking that the defendant not be heard *fully*. *The underlying basis in both applications is the same*. In both cases, the court is being asked to decide, as a matter of convenience and efficacy, whether the defendant ought to be heard fully. In some cases, the defendant making an application to set aside a default judgment would not have deliberately sought to evade his procedural responsibilities; he simply did not know of proceedings against him. Would the underlying rationale for the discretion under O 13 r 8 (as propounded in *Evans v Bartlam*) be advanced any further by the application of a higher test? Why should the same test *not* apply in both O 13 r 8 and O 14? Of course if the defendant had deliberated ignored court proceedings, there could be better reason to penalise him by subjecting him to a higher test.

100 I thus find it ironic that if the whole basis to the discretion to set aside a default judgment is to reserve judgment on the merits of the case for a full trial so that justice can be done substantively, this supposed rationale is given effect by the application of test which requires the court, in some sense, to pronounce on the substantive effect of the defence in the absence of full arguments. In any event, as the foregoing discussion shows, *The Saudi Eagle* (as applied in *Abdul Gaffer*) has been the subject of numerous qualification and disagreement in both England and Malaysia. Perhaps the time has also come for the Court of Appeal to re-examine the issue when the opportunity next arises, but it is not my position to say anything more in this aspect. For my limited part, bound as I am by authority, I am constrained to only find that the *Abdul Gaffer* does not apply fully in the class of cases I have elucidated above.

*Conclusion with respect to the law*

101 Ultimately, in my view, one must not be unduly bound up by the colourful expressions used in the case law relating to O 13 r 8. Whether the expression used is "arguable or triable issue", "real prospect of success" or "carried some degree of conviction", one must not lose the proverbial woods for the trees and lose sight of the rationale that underlies and underpins the exercise of the discretion under O 13 r 8, and that is that the courts will be extremely slow to allow judgment to be passed when the merits of the case have not been conclusively argued before it. This in part flows from the time-honoured tradition that every party to an action has a right to be heard and indeed forms one of the very fundamental tenets of natural justice. The importance of the House of Lords decision of *Evans v Bartlam* is not so much its support for the "arguable or triable issue" test but for the law lords' clear exposition of the very premise of O 13 r 8. Now that the Court of Appeal in *Su Sh-Hsyu* has finally reaffirmed the underlying basis for the discretion under O 13 r 8 and elevated it to the same authoritative standard as the *Abdul Gaffer* test, it necessarily falls for the lower courts to reconcile the two. In my view, there is no conflict between the two views *if* one were to take the view that *Abdul Gaffer* does not apply fully in all cases.

102 In summary, my views on the law regulating the exercise of the discretion under O 13 r 8 are such: in order to give effect to *both* the Court of Appeal decisions in *Abdul Gaffer* and *Su Sh-Hsyu*, I accept the second defendant's submission before me that in cases involving liability which turns almost entirely on the assessment of facts at trial, *Abdul Gaffer* does not apply with its full rigour, and the applicable test would be that if the defendant can show an "arguable or triable issue", the court could (not should, since O 13 r 8 ultimately encompasses a discretion) set aside the judgment obtained in default of appearance to writ.

***Application of the law to the present facts***

103 I turn now to apply the law as discussed to the facts at hand.

*Whether there had been undue delay*

104 However, lest it be thought that I have not applied my mind to this issue, let me state at the outset that I do not think that there had been undue delay by the second defendant in applying for the default judgment to be set aside: see, for example, *European Asian Bank v Chia Ngee Thuang & anor* [1995] 3 SLR 171. I am satisfied that the second defendant, who only knew about the judgments entered against him in September 2007, needed some time to review files before he commenced the present application more than a month later. This was not an undue delay. Indeed, I am also convinced that the second defendant had not sought to evade the current court proceedings against him, and as such there is no reason for me to decline not to exercise my discretion under O 13 r 8.

*Whether liability depended on assessment of facts at trial*

105 The general allegation made by the plaintiffs is that the defendants never rendered any opinion, advised them of the risks, or dutifully kept them informed of the developments especially the negotiations that they had conducted with the lawyers of Tan and Thian. It was further alleged that they did not forward to the plaintiffs any drafts of the various agreements that they had prepared pursuant to these negotiations or explained these documents to them. It was further alleged that the defendants only told the plaintiffs to sign the documents on the day itself without explaining any of the contents. In addition, it was alleged that the defendants did not take proper care and were not diligent in prosecuting the litigation even though they were aware that there were other creditors with claims against Tan and Thian. It was thus due to the defendants' conduct that led to Tan and Thian being able to delay the proceedings and thwart recovery of the monies due to them. These were all deposed to by the plaintiffs in their first affidavit.

106 In my judgment, this is clearly a case where the liability of the second defendant depended almost entirely on the assessment of facts which can only be undertaken in a full trial. This is a case in which the plaintiffs have alleged that the second defendant had not advised them properly, while the second defendant has denied those allegations of fact. In fact, before me, it was conceded for the plaintiffs that there were many triable issues of fact in the present action. Accordingly, in view of my conclusion as to the applicable law above, this alone would have been enough for me to set aside the interlocutory judgment entered in default of appearance against the second defendant, and the final judgment as well. However, for completeness, although I should not say too much about the merits of the defence, I will nonetheless briefly go through the various allegations made by the plaintiffs and show why I think there is at least an arguable issue of fact and, further, a defence which has a real prospect of success and carry some degree of conviction (to use the words in *Abdul Gaffer*).

*Examination of allegations of negligence by the plaintiffs*

(1) DRP failed to advise the deceased on his remedies and rights under the Share Transfer Agreement and the Supplemental Agreement

107 The first allegation of negligence as pleaded in the Statement of Claim at [9] is that DRP failed to advise the deceased on his remedies and rights under the Share Transfer Agreement and the Supplemental Agreement, and that no action was taken against Tan and Thian notwithstanding their breach.

108 In my judgment, there is a good defence (even applying the elevated *Abdul Gaffer* test) against this claim. Apart from denying the plaintiffs' allegations of fact in his affidavit, the second defendant has also shown that there *is* evidence showing that the deceased was well aware of the financial conditions of *both* the Company and Tan and Thian and that he wanted to extend the loan despite having knowledge of this. This is evident from the first plaintiff's affidavit filed on 5 May 2004 in support of her application for summary judgment in Suit 232. This affidavit clearly deposed that the deceased and the second plaintiff were introduced to Tan sometime in May 2001, when Tan wanted to sell off her property. It was then that the deceased and the second plaintiff were informed that Tan had to sell her property urgently as Tan was facing a suit in relation to her company (which is the Company referred to above) and Tan needed to raise the sum of $500,000 to pay the Company's creditor. It was further stated by the first plaintiff in this affidavit that on or about 23 May 2001, the deceased and her were informed during a meeting at Tan's solicitor's office that Tan and Thian were facing bankruptcy proceedings and were expected to be made bankrupts shortly. The Share Transfer Agreement was signed on 29 May 2001. These were all knowledge acquired by the deceased pointing to the dire financial conditions of the Company, as well as Tan and Thian.

109 The fact that the deceased had entered into the loans with Tan and Thian in full knowledge of their dire financial condition was further corroborated by draft affidavits prepared by the first plaintiff in consultation with DRP, probably in support of the application for summary judgment in Suit 232. At [6] of this draft affidavit, which appears at the second defendant's second affidavit filed for the present action ("the second defendant's second affidavit") at 71, it was stated that the deceased informed the first plaintiff that he was going to invest in the Company to help Tan and Thian out of their "legal and financial problem". While I am fully aware that these were merely draft affidavits, I am nonetheless convinced that the facts stated therein further substantiated the truth of the facts already deposed to by the first plaintiff herself in her own affidavit filed for her application for summary judgment in Suit 232. Moreover, the second defendant has said that the deceased in December 2001 said to him that while he was aware of Tan and Thian's obligations under the Share Transfer Agreement and the Supplemental Agreement, the deceased declined to enforce them. It is clear also from [3] of the affidavit filed by Tan and Thian to oppose the plaintiffs' application for summary judgment that they did execute the necessary share transfer forms in favour of the deceased. The problem was that, apparently, Tan and Thian did not pay the requisite stamp duties such that the share registration did not take place. The defendants surely could not be expected to effect the registration in such circumstances.

110 Accordingly, with respect to the plaintiffs' first allegation of negligence, I find that the second defendant has raised an arguable defence and even a defence with a real prospect of success and which carried some degree of conviction.

(2) DRP failed to advise the plaintiffs to enforce their rights under the Share Transfer Agreement and/or Supplemental Agreement

111 The second allegation of negligence as pleaded in the Statement of Claim at [11] relates to the failure of DRP to advise the plaintiffs to enforce their rights under the Share Transfer Agreement and/or Supplemental Agreement. It was said in the plaintiffs' first affidavit that after the deceased's passing on 6 April 2002, the defendants did not advise the plaintiffs of their rights under the two agreements. It was further alleged that the defendants said that they could not take any action until the grant of the letters of administration. In fact, even after the grant was obtained in August 2003, it was alleged that the defendants still did not render any advice or commence any proceedings.

112 In my judgment, the second defendant has once again raised an arguable issue of fact. I will go as far as to say he has raised a defence with a real prospect of success. The second defendant has said in his second affidavit that DRP was in constant contact with the plaintiffs during the time of the deceased's death to the time of the grant of the letters of administration. The documentary evidence clearly shows this be true. For example, on 20 February 2003, the second defendant sent a draft letter to the plaintiffs with a draft letter of demand to Tan and Thian for the plaintiffs' perusal. On 21 February 2003, an amended letter of demand was sent to the plaintiffs, once again for their approval. This letter of demand was eventually sent to Tan and Thian on 6 March 2003. On 16 April 2003, the second defendant wrote to the plaintiffs advising them to "sue [Tan and Thian] for the breach of the sale and purchase agreement and the supplemental agreement". On 28 April 2003, the second defendant again wrote to Tan and Thian regarding the letter of demand which was earlier sent to them. This was again done on 9 May 2003, 4 June 2003, 17 June 2003, 11 July 2003, and 14 July 2003, as is evident from the evidence before me. I need only to add that even after the grant of the letters of administration was obtained, the evidence clearly showed that the second defendant kept up with the communication with Tan and Thian. The correspondence before me showed these to have taken place on 26 August 2003, 28 August 2003, 29 August 2003 and 10 September 2003. As such, it seems rather surprising to me that the plaintiffs have made the allegation that the defendants did *nothing* from the deceased's death to the grant of the letters of administration (and thereafter) when the evidence very clear shows otherwise.

113 Accordingly, with respect to the plaintiffs' second allegation of negligence, I find that the second defendant has raised an arguable defence and even a defence with a real prospect of success and which carried some degree of conviction.

(3) DRP failed to advise or properly advise the plaintiffs that there was no need to enter into the Agreement of Settlement or their rights under this Agreement

114 The third allegation of negligence (as pleaded at [13] of the Statement of Claim) is that DRP failed to advise or properly advise the plaintiffs that there was no need to enter into the Agreement of Settlement or alternatively it failed to advise the plaintiffs of their rights under this Agreement. Once again, I find that the second defendant has raised an arguable defence and even a defence with a real prospect of success and which carried some degree of conviction with respect to this allegation. The second defendant has stated that the Agreement of Settlement was to record and update the payment obligations of Tan and Thian. Further, the second defendant said that in order to prevent Tan and Thian from subsequently raising a defence to any claim by the plaintiffs, the Agreement of Settlement was necessary to make them admit to the debt owed to the plaintiffs. In fact, if not for the Agreement of Settlement, the plaintiffs' application for summary judgment in Suit 232 would have been thwarted. I therefore see no reason to deny the second defendant a chance to fully refute the plaintiffs' current allegation in a full trial.

(4) DRP failed to advise the plaintiffs to enforce their rights under the Agreement of Settlement

115 The fourth allegation of negligence, as pleaded at [14] of the Statement of Claim, is that DRP

failed to advise the plaintiffs to enforce their rights under the Agreement of Settlement. In my view, the second defendant has made out an arguable defence and even a defence with a real prospect of success and which carried some degree of conviction with respect to this allegation. Based on the first plaintiff's affidavit deposed on 5 May 2004 in Suit 232, Tan and Thian complied with cl 4(A) of the Agreement of Settlement by paying three instalments of $30,000 each and one instalment of $40,000. Indeed, the second defendant also deposed in his first affidavit that the plaintiffs' instructions were to threaten Tan and Thian with legal action but not to commence legal action immediately upon the breach of the Agreement of Settlement. DRP also did not sit idly by while Tan and Thian defaulted in their payment obligations. On 1 March 2004, when Tan and Thian defaulted in making full payment, DRP wrote to Tan and Thian's solicitors reminding them of their clients' payment obligations. A total of five letters were sent between 1 March 2004 and 19 March 2004. Accordingly, I think that the second defendant should be given a chance at a full trial to contend these allegations in detail.

(5) DRP failed exercise due care, skill or diligence with respect to Suit 232

116 The fifth allegation of negligence as pleaded at [17] of the Statement of Claim relates to DRP's negligence conduct of Suit 232. One of the allegations was that DRP entered into negotiation with Tan and Thian's solicitors and entered into the Tomlin Order without advising the plaintiffs. I do not think the evidence entitles me to conclusively determine this to be the truth. After all, the plaintiffs did initial on the Tomlin Order, a *prima facie* indication that they were at least aware of what was happening. These are all matters of fact which I am ill-placed to ascertain determinatively, and I therefore think that the second defendant has made out an arguable defence or even a defence with a real prospect of success and which carried some degree of conviction with respect to this allegation.

(6) DRP failed to ensure that TJS and LLC fulfil their obligations under the Shares Agreement

117 The sixth allegation of negligence (as pleaded at [31] of the Statement of Claim) relates to the Shares Agreement and alleges that DRP failed to ensure that TJS and LLC fulfil their obligations in the Shares Agreement. Here again the affidavits differ as to what DRP really advised the plaintiffs to do and I think this is an issue best determined by a trial court since an arguable issue of fact has been raised.

(7) DRP failed to ensure proper execution of the Settlement Agreement in Suit 249

118 The seventh and final allegation of negligence (as pleaded at [23] and [26] of the Statement of Claim) relates to the execution of the Settlement Agreement in Suit 249. The plaintiffs allege that they were not aware of the settlement negotiations and were not shown drafts of the agreement. The plaintiffs also allege that DRP did not conduct bankruptcy searches on Tan and Thian before the execution proceedings. Once again, the allegations of fact are different and I am unable to determine conclusively which side is speaking the truth. Therefore, I find that an arguable issue of fact has been raised with respect to this allegation.

***Conclusion with respect to setting aside of judgments entered in default of appearance***

119 Accordingly, on the application of the law as discussed, I find that this being a case in which liability depended almost entirely on the assessment of facts at a full trial, an arguable defence is only necessary. I find that there is an arguable defence with respect to all of the plaintiffs' allegations of negligence. In any event, even if I am wrong on the law and *Abdul Gaffer* applies in full, I nonetheless am convinced by the evidence adduced before me that the second defendant has advanced a

defence which has a real prospect of success and carries with it some degree of conviction. Thus, even if I am wrong on setting aside the order for substituted service, I would have set aside the interlocutory judgment entered in default of appearance against the second defendant and final judgment entered against the second defendant.

**Conclusion**

120 In final analysis, I do not think that the ends of justice would be met if I were to dismiss the second defendant's present application and deny him a chance to present his case in court. Whether the determinative issue is the order for substituted service or the setting aside of the default judgments, I come unhesitatingly to the view that, if one were to take a step back and ask oneself if justice would be served denying the second defendant a chance to argue the case on its full merits before a trial court, knowing what the court now knows with the second defendant's submissions, the answer would be an unequivocal "no". This, in a single sentence, aptly summarises the underlying reason for my decision.

121 For the reasons above, I set aside the order for substituted service and all proceedings thereafter. I will hear the parties as to costs.