Nim Minimaart (a firm) v Management Corporation Strata Title Plan No 1079 and Others [2009] SGHC 251

Case Number : DC Suit 1263/2008, RAS 106/2009

Decision Date : 06 November 2009

Tribunal/Court : High Court

Coram : Steven Chong JC

Counsel Name(s) : Appellant/plaintiff in person; Leo Cheng Suan/Ee-Von Teh (Infinitus Law Corporation) for the respondents/defendants.

Parties : Nim Minimaart (a firm) — Management Corporation Strata Title Plan No 1079; Andrew Lim Boon Kheng; Andrew Yip Mun Tuck; Steven Chua; Roland Chew Kwong Yen; Lim Chwee Kiat Roland; Goh Chai Kuan; Gary Teh Keng Hup; Wilfred s/o Sreekaran

Civil Procedure

6 November 2009 Judgment reserved.

Steven Chong JC:

Introduction

1 This case serves as a timely reminder that due process is one of the cornerstones of our judicial system. It is the duty of a trial judge to allow a litigant to present his case and not to prejudge the merits. That is not to say that in the trial process, a judge is not permitted to indicate provisional views of the evidence presented. The guidelines on the permissible limits of judicial interference are succinctly set out in the seminal decision of the Court of Appeal in *Mohammed Ali bin Johari v PP* [2008] 4 SLR 1058 ["*Johari*"]. However, the present case goes beyond mere judicial interference *per se*. It concerns the appearance of judicial pressure being brought to bear during the trial which led to an abrupt settlement. Remarks which may reasonably be perceived that the judge has already made up his mind before a case is closed should be avoided. If such observations eventually culminate in a compromise settlement, caution should be exercised to ensure that the consent is voluntary and not tainted by judicial pressure. This is particularly compelling if the litigant appears in person as is the case before me. Just to be clear, I am not suggesting that a different standard applies when a litigant appears in person. The point is that it cannot be ignored that a trained solicitor is in a better position to evaluate the import and effect of unfavourable comments or remarks from a judge. In any case, on the facts here, I would have arrived at the same outcome even if the litigant was represented by counsel. This will become apparent when the judge's remarks are examined below.

Background

2 The plaintiff firm is a mini-supermarket store in a condominium development known as Nim Gardens ("the Development") and is represented in this action by Mr Sambasivam s/o Kunju ("Mr Sambasivam"). Mr Sambasivam is a partner of the firm. The first defendant is the management corporation of the Development. The other defendants are the council members of the first defendant. On 15 January 2006, the plaintiff and first defendant entered into a licence agreement to lease the premises for the plaintiff's business for two years.

3 Clause 3 of the licence agreement provides as follows:[note: 1]:

> In consideration of the payment by the Licensee monthly and proportionately for any part of a month for the duration of the Licence, a monthly fee of Dollars Five Hundred Only ($500.00) hereinafter referred to as "the License Fee") payable on the first day of each month, the Management Corporation hereby grants to the Licensee the Licence:
>
> …
>
> (d) to extend the contract for another year (15th January 2008 to 14th January 2009) subject to revision of rental.

The plaintiff claimed that the first defendant refused to extend the licence agreement for a further year as provided for under cl 3(d). Instead, the first defendant extended the licence agreement on a monthly basis at a rent of $1,000 per month. According to the plaintiff, it was unable to maintain as wide a variety of stock of goods as it used to due to the transient nature of the monthly licence. As a result, the plaintiff claimed it suffered a general loss of business. On 21 April 2008, the plaintiff commenced the action against the defendants for breach of the license agreement. The plaintiff claimed for specific performance of cl 3(d) and/or alternatively, damages. The losses and damages were particularised as follows:

(a) during renovation period in October 2007: - loss incurred from payment of salaries - loss of income	 $2,500 $5,000
(b) Loss of income due to monthly tenure commencing 15 January 2008 to-date	$10,000
(c) Loss of income should the Agreement not be renewed	$60,000

4 The defendants claimed that the Notice of Termination was served on the plaintiff by the first defendant's solicitors on 11 April 2008 due to the plaintiff's failure to pay rent promptly, for encroaching onto the common property and for using a section of the minimart as an office. The defendants also counterclaimed for double rent under section 24 of the Civil Law Act (Cap 43, 1999 Rev Ed) since the plaintiff was still occupying and holding over the premises. The defendants, in addition, sought an injunction to remove the plaintiff and its goods from the premises and to reinstate the property.

Events leading to the Consent Order

5 The trial was fixed for hearing from 11 to 13 March 2009 before the District Judge ("the trial judge"). On the first day of the trial, the plaintiff's counsel was discharged as the plaintiff could not afford to pay the fees. The plaintiff was instead represented by Mr. Sambasivam. The only witnesses for the plaintiff were one Neoh Gin Sim (a resident at the Development) and Mr Sambasivam himself. The defendants' witnesses were to be the chairman of the first defendant, Mr Andrew Lim Boon Keng, Mr Tan Sim Peng (the former chairman of the Council) and Mr Koh Teck Soon, the former condominium

manager. The action was settled on the third day of trial. By then, both of the plaintiff's witnesses had given evidence. The defendants had then only called one witness, Mr Andrew Lim who was being cross-examined. The terms of the settlement agreement (Consent Order) were as follows:

> Settled on 3rd day of trial. With no admission of liability by either party. 1st Defendant to refund $1500 to Plaintiff being rent deposit. 1st Defendant to refund $250 being ½ month advance April rent to Plaintiff. Plaintiff granted access to minimart from 23-31 March, 0900 – 1700, Monday to Friday only. Upon Plaintiff vacating premises and leaving it vacant and empty, 1st Defendant shall pay the Plaintiff the aforesaid sum of $1750. Plaintiff to remove signboard. Parties to file NOD by 15.4.2008 once above terms have been abided by. Liberty to apply.

Procedural history leading to the appeal

6 On 21 March 2009, eight days after the parties settled the dispute and recorded the terms in the Consent Order, Mr Sambasivam, on behalf of the plaintiff, wrote to the Registrar of the Subordinate Courts to complain that he was "*pressurised into a settlement*" as a result of various remarks made by the trial judge during the proceedings. The letter was copied to the solicitors for the defendants. On 1 April 2009, Mr Sambasivam received a response from the Subordinate Courts that since the dispute was concluded by way of mutual settlement, the plaintiff would be required to "*apply to set aside the mutual settlement*" before a retrial can be ordered.

7 On 9 April 2009, the plaintiff filed Summons No 6059 of 2009 to set aside the Consent Order and for a retrial before a different trial judge. The application was heard on 29 June 2009 before the Deputy Registrar. The application was dismissed. Thereafter, the plaintiff appealed against the decision of the Deputy Registrar. The appeal was heard before another District Judge ("the DJ") and was dismissed on the ground that the wrong procedure was adopted. He held that the plaintiff should have commenced a fresh action to set aside the Consent Order. The plaintiff's appeal was filed on 24 August 2009. The appeal before me is against the decision of the DJ.

Irregular extraction of the Judgment

8 After the Consent Order was recorded, the defendants wrote to inform the Registrar of the Subordinate Courts that the plaintiff had breached the terms of the settlement and sought leave to extract the Judgment. The draft Judgment was sent to the plaintiff for approval. However, it was not approved because the plaintiff disputed the contents of the draft. In particular, the draft Judgment contained the following additional paragraphs which were not part of the Consent Order:

> IT IS ORDERED THAT
>
> (a) The Defendants be permitted to remove and dispose of all the items and goods from the Nim Minimaart, and to reinstate the premises, at the Plaintiffs' costs.
>
> (b) The Plaintiffs do pay the Defendants legal costs.

9 By this time, the defendants were already aware that the plaintiff had applied to set aside the Consent Order and that the application was pending to be heard. Despite the pending application and the objections from the plaintiff, the defendants wrote to the Subordinate Courts on 6 May 2009 to extract the Judgment as drafted. The plaintiff then applied to set aside the Judgment on the ground that it was irregularly extracted. This is a separate and distinct matter from the application to set

aside the Consent Order. This application was also dismissed by the Deputy Registrar but was allowed on appeal by the DJ on 11 August 2009. He held that the extraction of the Judgment should have been heard and settled by the trial judge and should not have been extracted on an *ex-parte* basis. He also directed the defendants to write in for a date for both parties to appear before the trial judge to settle the Consent Order. In spite of the direction, the defendants have not written in for a date and consequently have not extracted the Consent Order. It remains to be perfected.

Permissible limits of judicial interference

10 The principles on the limits of judicial interference have been neatly summarised by the Court of Appeal in *Johari*. at [175]. The Court observed, *inter alia*, as follows:

It is appropriate, in our view, to summarise the applicable principles that can be drawn from the various authorities and views considered above, as follows (bearing in mind, however, that, in the final analysis, each case must necessarily turn on its precise factual matrix (see also above at [162])):

(a) The system the courts are governed by under the common law is an adversarial (as opposed to an inquisitorial) one and, accordingly, the examination and cross-examination of witnesses are primarily the responsibility of counsel.

(b) It follows that the judge must be careful *not* to descend (and/or be perceived as having descended) into the arena, thereby clouding his or her vision and compromising his or her impartiality as well as impeding the fair conduct of the trial by counsel and unsettling the witness concerned.

(c) However, the judge is not obliged to remain silent, and can ask witnesses or counsel questions if (*inter alia*):

…

The judge, preferably, should not engage in sustained questioning until counsel has completed his questioning of the witness on the issues concerned. Further, any intervention by the judge during the *cross-examination* of a witness should *generally* be *minimal*. In particular, ***any intervention by the judge should not convey an impression that the judge is predisposed towards a particular outcome in the matter concerned*** (and *cf* some examples of interventions which are unacceptable which were referred to in *Valley* (see [138] above)).

(d) What is crucial is not only the quantity but also the qualitative impact of the judge's questions or interventions. The ultimate question for the court is whether or not there has been the possibility of a denial of justice to a particular party (and, correspondingly, the possibility that the other party has been unfairly favoured). In this regard, we gratefully adopt the following observations by Martin JA in *Valley* (reproduced above at [138]):

> Interventions by the judge creating the appearance of an unfair trial may be of more than one type and the appearance of a fair trial may be destroyed by a combination of different types of intervention. The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but ***whether he might*** *reasonably****consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial*** …

(e) Mere discourtesy by the judge is insufficient to constitute excessive judicial interference, although any kind of discourtesy by the judge is to be eschewed.

[emphasis in original in italics: emphasis added in bold italics]

11 It is clear from *Johari* that the judge should not convey the impression that he is predisposed towards a particular outcome *ie*, should not prejudge the merits of the dispute. In the context of the present appeal, the test is whether "*a reasonably minded person*" having read the remarks made by

the trial judge would consider that there was at least an appearance that the Consent Order was brought about by judicial pressure.

Was there an appearance of judicial interference on the part of the trial judge

12 As the plaintiff's application to set aside the Consent Order is premised on the improper conduct of the trial judge, it is perhaps apposite to begin the analysis by determining whether there is any evidence of inappropriate judicial interference.

13 The remarks, which the plaintiff alleged the trial judge made at different junctures during the trial in open court, eventually caused him to agree to the Consent Order are set out in Mr Sambasivam's affidavit filed on 9 April 2009 at [15]:

> During the trial and especially from the second day onwards, the Honourable Judge had made angry remarks and behaved in an intimidating manner such as these:
>
> - **"Right now, my sole impression of your integrity is zero. You will suffer the consequences when I make the judgement"**
> - **"Even if you prove that they were in breach of contract, you have no loss. It's like you win the battle but lose the war. If that happens, I'll award $1 judgement. I'm sure anybody here will be happy to take $1 from his pocket and pay you"**
> - **"you had your chance"**
> - **"Do you want to re-think your strategy now?"**
> - **"Even if you win, you suffered a loss; does it make sense to go on if you are not getting anything?"**
> - **"Nim Minimart has suffered a loss, even if you win this case, you get zero"**
> - **"Do you want to re-think of your position now"**
> - **"I don't care who is right or who is wrong, do you want to continue wasting everybody's time and get nothing?"**
> - **"alright then, it's your grave you are digging"**
> - **"you seriously have to think of your stand at this point"**
>
> [emphasis in original]

14 If these words were indeed said, the trial judge would have been discourteous to Mr Sambasivam to say the least. While mere discourtesy is insufficient to constitute excessive judicial interference, any kind of discourtesy by a judge is to be discouraged: see above at [10].The remarks, however, went beyond mere discourtesy.

15 In his affidavit, Mr Sambasivam also explained what happened in open court as well as in

chambers on the third day of the trial. He claimed that these events led to the Consent Order. According to him, on the morning of the third day of trial, when he was cross-examined by the defendants' counsel on the plaintiff's business income tax statement, the trial judge intercepted to question him and told him that even if breach of contract was proven, the plaintiff would be unable to prove its loss and would only get only a one-dollar judgment. Mr Sambasivam then requested to show supplementary documents to prove the plaintiff's loss. The trial judge then asked if he wished to rethink his strategy. However, Mr Sambasivam chose to continue.

16 After his cross-examination, Mr Sambasivam tried to explain the plaintiff's losses during re-examination. Mr Sambasivam claimed that the trial judge, however, gave him a lecture on profit for about half an hour. The trial judge looked upset when Mr Sambasivam said that he wished to continue with the proceedings. Mr Sambasivam claimed that the trial judge shouted angrily: "*I don't care who is right or who is wrong, do you want to continue wasting everybody's time and get nothing?*" [emphasis added]

17 Mr Sambasivam claimed that he was traumatized and felt that if he continued, he could be in contempt of court. It appeared to him that the trial judge had prejudged the outcome of the case even before the case was over and did not give Mr Sambasivam the chance to prove the plaintiff's claim. The trial judge again asked Mr Sambasivam to seriously rethink his stand.

18 After the lunch break on the third day of the trial, Mr Sambasivam requested to see the trial judge in Chambers to clarify what he had meant when he was told to rethink his stand. The trial judge told him:

> One, if you win the case, you get nothing. Two, looking at this case, you have to pay costs to the defendants even if you win. Three, if you lose the case, which at this point (hand gestures of a scale) is greater, you have to pay the full costs.

Shortly after the session in Chambers, Mr Sambasivam agreed to settle on the terms of the Consent Order.

19 Ms Rozizah binti Abdul Rahman ("Ms Rozizah") who was in court to assist Mr Sambasivam filed an affidavit dated 18 May 2009 to corroborate Mr Sambasivam's evidence that the remarks were in fact made by the trial judge. She was an ex-employee of the plaintiff. Her affidavit sought only to verify the remarks made in open court.

20 Opposing the application, the defendants, through the second defendant, filed two affidavits. At para 8(e) of the second affidavit filed on 11 May 2009, the second defendant claimed:

> The quotations were quoted out of context and calculated to cause mischief and embarrassment and prejudice to the Honourable Trial Judge.

No affidavit was filed by the defendants to provide a different version of the remarks allegedly made by the trial judge.

21 During the hearing before me, I pointedly enquired from counsel for the defendants whether the observations allegedly made by the trial judge set out in Mr Sambasivam's affidavit were indeed made. He clarified that the defendants do not dispute that they were made but maintained that they were quoted out of context.

22 The defendants have not clarified in what context the remarks were actually made. Having said

that, if these remarks were in fact made, I cannot see how they can be justified under any circumstances. In the premises, based on the unchallenged evidence before me, there is sufficient basis for me to find that the remarks were made during the trial. I must make it absolutely clear that I am not making any finding that the trial judge did in fact make those remarks in the precise words or manner as alleged in Mr Sambasivam's affidavit. I do not have any verbatim transcripts or digital recording to assist me in the process. It would not be appropriate for me to verify the remarks with the trial judge. I am therefore left with only the unchallenged affidavits of Mr Sambasivam and Ms Rozizah. I should add that in *In re R (A Minor) (Consent Order: Appeal)* [1995] 1 WLR 184 ("*In re R*") (the facts of which I will discuss later), there were three versions of the comments made by the judge and yet a retrial was ordered on the ground that the consent was tainted by judicial pressure. In the present case, the defendants did not directly challenge Mr Sambasivan's evidence (corroborated by Ms Rozizah) that the remarks were made. They only disputed the context in which they were made without ever explaining what they meant by this.

Would the observations, if in fact made, amount to improper interference to set aside the Consent Order

23 It is to be noted that the plaintiff only agreed to the Consent Order on the third day of the trial. This was after the trial judge had allegedly repeatedly observed that the plaintiff would not recover any damages even if it was successful in proving that the defendants had breached the contract and that an adverse cost order would likely be made against the plaintiff even if the claim on liability was successful.

24 Assuming for the purposes of this appeal the trial judge made those remarks, what inspired him to do so? It seems to me that the genesis of these unfavourable remarks came about because the plaintiff's income tax returns showed a loss for 2006 and 2007. On the strength of these income tax returns, the trial judge believed that the plaintiff would not be able to claim any "loss of profit". It is also clear from the defendants' submissions filed on 14 July 2009 that they were equally of the same view that the plaintiff would not be able to succeed in its claim for "loss of profit".

25 However, on a plain reading of the Statement of Claim, it is obvious that the plaintiff is not claiming for "loss of profits" in the first place. Instead, the claim is for "loss of income". The plaintiff's business is a minimart. It is stocked with provisions some with a limited shelf life. These stocks have already been purchased for the purpose of resale to generate operating income. Obviously, if the minimart is not allowed to operate, there would be no income to defray its fixed expenses, such as salaries and repayment of the stock. The plaintiff also claimed that the monthly licence prevented it from stocking the minimart with their usual variety of provisions. Therefore, it appears that the trial judge may well have misdirected himself on the issue of damages which led him to make the observations when Mr Sambasivam decided to persevere with the action in spite of the losses disclosed in the income tax returns. The judge in *In re R* also appeared to have misdirected himself as to the relevant issue before the court. He thought that the only relevant issue was the father's commitments to the child when the true issue was whether the contact would be too disruptive for the child at that age. Oddly enough, the unfavourable comments by the judge in *In re R* were also engendered by his misunderstanding of the issues.

26 I must also make clear that I am merely observing that there is a difference between a claim for "loss of profits" and a claim for "loss of income". I am not expressing any view that the plaintiff has a good claim for "loss of income".

27 Whatever the reason may have been which led to the remarks, it is clear that Mr Sambasivam believed that the trial judge had already made up his mind and that an adverse cost order would likely

be made against the plaintiff come what may. In *Johari*, the Court of Appeal emphasised that any intervention by the judge should not convey an impression that the judge is predisposed towards a particular outcome: see above at [10]. It is no coincidence that in *In re R*, it was the threat of an order of costs against the mother and grandparents which resulted in the consent order.

28 Accordingly, I find that there is at least a reasonable appearance that the consent by the plaintiff may have been tainted by judicial pressure. Every litigant must be accorded their right to present their case fully. Great care must be taken not to impose any undue pressure on a party to settle a case particularly in the present case when it should have been clear to the trial judge that the plaintiff was extremely reluctant to do so. I do not suppose that the trial judge, in making those observations, intended for his remarks to be taken in that way but I think that there is sufficient basis for me to find that the plaintiff eventually succumbed and agreed to the Consent Order because he felt, based on the remarks by the trial judge, that it would end up paying the costs of the defendants even if it succeeded to prove the breach.

Must fresh proceedings be commenced to set aside the Consent Order

29 Counsel for the defendants submitted that the proper procedure to set aside the Consent Order is by way of fresh proceedings. *Wiltopps (Asia) Ltd v Drew & Napier* [2000] 3 SLR 244 was cited in support of this argument. Essentially, the consent order is treated as a "contract" between the parties to the proceedings and once settled, it puts an end to the proceedings which thereby become spent and exhausted. The settlement or compromise would constitute a new and separate agreement between the parties which can only be set aside by fresh proceedings. This is line with the decision of the Court of Appeal in *Indian Overseas Bank v Motorcycle Industries (1973) Pte Ltd* [1993] 1 SLR 89. It should be highlighted that in those cases, there was no issue that the consent was in any way tainted or procured as a result of judicial pressure. Alternatively, the defendants submitted that the notice of appeal should have been filed against the decision of the trial judge when the Consent Order was recorded on 13 March 2009. Since the plaintiff did not adopt either of these routes, the defendants submit this appeal is doomed to fail.

30 My initial reaction was to accept the defendants' submission that instituting a fresh action was the correct procedure. After all, this was the orthodox view to set aside consent orders. However, the plaintiff helpfully directed my attention to a recent English Court of Appeal decision, *In re R*. The Court in that case held that if it was alleged that the judge's improper conduct resulted in a settlement to which true consent had not been given, then it would not be appropriate to commence fresh proceedings to set aside the consent order. The facts bear an uncanny resemblance to the present case. The case concerned an application by the father for a contact order in respect of a child born out of wedlock. The respondents to the application were the mother and grandparents. The parties were never married. They lived together for a short time but eventually the father left when the child was just under two years old. The mother later fell ill and the custodianship was granted to the grandparents. The father saw the child on a few occasions and had one contact with her on the phone. Initially, the mother offered contact to the father provided he appeared as a friend and not as the father. The father rejected the offer and applied for a contact order.

31 During the hearing, the judge remarked that it was in the interests of the child that contact should be introduced gradually over a period of time. The judge emphasised that the trial was a waste of public money and that there should instead be a trial period of supervised contact as one of the two suggestions by the court welfare officer. The mother was, however, displeased with these observations made by the judge. She was concerned about the likely disruption that a resumption of contact would cause to the child who was then just beginning to adjust after her unsettled upbringing. When she informed the court that she wanted the trial to continue, the judge indicated

that he is likely to find for the father and accordingly warned the respondents that they may be liable to pay cost which was very unusual in the context of contact applications.

32 The respondents felt that the judge was not prepared to listen to their case and had already made up his mind. The respondents were concerned that they were in serious risks of a cost order made against them. Under these circumstances, they consented to an interim contact order. The respondents appealed against the decision to set aside the consent order and for a retrial principally on the ground that judicial pressure from the judge had resulted in a settlement in which no true consent had been given. The appeal was filed 42 days out of time.

33 The usual requirement to institute fresh proceedings to set aside consent orders is premised on a contract having been concluded between the parties on the terms set out therein. This was the same objection which was raised and rejected in *In re R*.

34 Typically, the grounds to set side such consent orders would relate to conduct of the parties to the proceedings. However, if the alleged vitiating factor is the conduct of the judge, I can see the logic that in such a situation, it would not be appropriate to commence fresh proceedings since the ground, strictly speaking, does not arise from the conduct of the other party.

35 As rightly observed in *In re R* at 189–190:

> Where the criticism is directed against the judge's conduct, it is for this court to entertain the appeal rather than for an application or fresh proceedings to be started in the court of trial to determine in what circumstances the consent was given. If, as is alleged here, the judge has brought improper pressure to bear upon a party to reach a settlement by appearing to have made up his mind finally without hearing the evidence, or by some threat or unjustifiable warning as to consequences in costs, it is appropriate for this court to consider that misconduct of the trial.

36 Counsel for the defendants sought to distinguish *In re R* on the basis that the case concerned issues relating to the welfare of a child and therefore should be treated as an exception to the rule which otherwise requires the commencement of fresh proceedings. I do not agree that the principle in *In re R* should be so restricted. The *raison d'etre* in *In re R* was not premised on the nature of the proceedings but rather that the judicial pressure had caused the consent to be involuntary.

37 I therefore determine that the plaintiff need not commence fresh proceedings to set aside the Consent Order.

Jurisdiction to order a retrial

38 The defendants' alternative submission is that the appeal should have been filed within 14 days of the Consent Order as recorded before the trial judge. I accept that this is a route which was available to the plaintiff as was done in *In re R*. However, instead of filing the appeal, the plaintiff applied by way of summons in chambers. This was in part due to the reply letter from the Subordinate Court that the plaintiff should "apply to set aside the mutual settlement". I should mention that by the time the reply was received, the 14 days had already expired.

39 I am mindful that the appeal before me is against the decision of the DJ and not against the Consent Order recorded before the trial judge. I could direct the plaintiff to apply for an extension of time to file the appeal against the Consent Order as I am of the view that the unusual extenuating circumstances in this case would have justified the grant of such an extension of time. However, this

would serve no useful purpose. It would only increase cost unnecessarily and cause further delays. The subject matter of the Consent Order is, in any event, now before me.

40 Section 22(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") provides the High Court with the same powers and jurisdiction on the hearing of appeals from the District Court as that of the Court of Appeal when it hears appeals from the High Court. Section 39(1) of the SCJA provides:

> **New trial**
>
> **39.** —(1) Except as is provided in this Act, the Court of Appeal shall have power to order that a new trial be had of any cause or matter tried by the High Court in the exercise of its original or appellate jurisdiction.

41 Additionally, O 55D R 12(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) provides as follows:

> 12. —(1) On the hearing of any appeal, the High Court may, if it thinks fit, make any such order as could be made in pursuance of an application for a new trial or to set aside any finding or judgment of the Court below.

42 Counsel for the defendants accepts that I have the power to order a retrial. His submission, which I accept, is that the power of this Court to order a new trial under O 55D should only be exercised in exceptional circumstances. By reason of my findings above, the circumstances here are indeed compelling to warrant a retrial. For the reasons set out above, a retrial should be ordered in the interest of justice. I should add that my decision is based entirely on the facts and submissions before me. The trial judge's version of events has not been sought.

Conclusion

43 The appeal is therefore allowed. The Consent Order is hereby set aside and a new trial is ordered before a different District Judge. The parties are to bear their own costs for this appeal and the costs below.

[note: 1] Statement of Claim at p 1