Ching Chew Weng Paul, deceased, and others *v* Ching Pui Sim and others [2011] SGHC 69

Case Number	: Suit No 594 of 2008 (Summons Nos 4104, 4280 & 4569 of 2010)
Decision Date	: 28 March 2011
Tribunal/Court	: High Court
Coram	: Steven Chong J
Counsel Name(s)	: Hri Kumar SC, Wendell Wong, Emmanuel Duncan Chua and Kueh Xiu Ying (Drew & Napier LLC) for the plaintiffs; Sivakumar Murugaiyan and Melissa Leong (Genesis Law Corporation) for the 3rd defendant Deborah Barker SC, Ang Keng Ling and Noelle Seet (KhattarWong) for the 5th to 9th defendants.
Parties	: Ching Chew Weng Paul, deceased, and others — Ching Pui Sim and others

Civil Procedure – Judgments and Orders – Setting aside a Judgment made after Trial – Order 35 Rule 2 – Alleged Fraud – Reasons for absence from trial – Reasons for delay in application – Ambit of Fraud Exception – Actual Fraud must be proved – An erroneous and inadvertent adduction of incorrect evidence does not amount to deliberate fraud – Failure to adduce corroborative evidence does not amount to actual fraud – An erroneous insistence on rights based on an opinion or inference reasonably drawn does not amount to actual fraud

28 March 2011

Steven Chong J:

Introduction

1 In an earlier decision *Ching Chew Weng Paul v Ching Pui Sim and others* [2010] 2 SLR 76 ("the Judgment"), I described this case as "the unfortunate quest of the plaintiff to recover assets which his father, the late Ching Kwong Kuen ("KK Ching") had intended to leave behind for him". At the conclusion of the trial, the plaintiff substantially prevailed and the 1st, 2nd and 4th defendants were ordered to transfer various assets including shares in several companies back to the estate of KK Ching under which the plaintiff was the sole beneficiary. After the Judgment was delivered, the 5th to 9th defendants (*ie* the aunt and cousins of the plaintiff) representing the estate of the 2nd defendant (who *elected* not to participate in the trial following the demise of the 2nd defendant) filed a Notice of Appeal against the Judgment. The other defendants did not appeal. On 2 March 2010, I heard and dismissed the 5th to 9th defendants' application to stay the execution of the Judgment against an undertaking from the estate of KK Ching not to transfer the shares pending the outcome of the appeal. Two days later, on 4 March 2010, the plaintiff, who was suffering from terminal cancer (unknown to me during the trial), passed away. On 19 April 2010 the appeal lapsed when the 5th to 9th defendants failed to file their Record of Appeal, Core Bundle and the Appellants' Case altogether.

2 Six months later, this unfortunate and somewhat tragic case was "*resurrected*" by the 5th to 9th defendants (who had then instructed a new set of solicitors). An application was filed on 9 September 2010 in this action to set aside the Judgment on the limited ground that the Judgment, insofar as it affects the estate of the 2nd defendant, was procured by fraud. Recognising the issue of

prejudice to the estate of the plaintiff in view of his untimely demise, the 5th to 9th defendants astutely steered away from alleging fraud directly against the plaintiff. Instead they directed the fraud accusation solely against another cousin, the 1st defendant, and submitted that the plaintiff's evidence at the trial was entirely based on the evidence of the 1st defendant. I heard the application over 2 days and on 10 December 2010, I delivered my oral grounds in dismissing the application. I arrived at the firm conclusion that the "*fresh*" evidence raised by the 5th to 9th defendants did not even come close to establishing fraud. As the 5th to 9th defendants have since appealed against my decision, I now provide my full grounds for dismissing the application.

3 This decision will examine the applicable principles to set aside a regular judgment purportedly procured by fraud, in particular, the ambit of the fraud exception, the degree of proof required to establish fraud and the relevance and necessity, if any, for the applicant to sufficiently explain the reasons for the absence from the trial and the delay in filing the application.

Procedural history

4 The action was commenced by the plaintiff on 25 August 2008. Initially, each of the defendants (except the 1st defendant) was represented by different sets of solicitors and each of them filed their respective defences. In particular, the 2nd defendant filed a bare denial which merely put the plaintiff to strict proof. Shortly after his defence was filed, the 2nd defendant passed away on 21 October 2008. Thereafter, the plaintiff applied for the 5th to 9th defendants to be substituted as parties to continue the action against the 2nd defendant's estate.

5 More than a year after the death of the 2nd defendant, the trial of the action was eventually heard before me over four days on 2 to 4, and 6 November 2009. Despite being added as parties and being served with all the court papers, the 5th to 9th defendants elected not to participate in the proceedings at all. The plaintiff and all the other defendants testified at the trial.

6 I delivered my decision on 4 December 2009. I found, *inter alia*, that the following assets were held on trust by the various defendants for the estate of KK Ching:

1st defendant

(a) 2 shares in KK Holdings (Pte) Ltd ("KK Holdings");

(b) 72,270 shares in National Aerated Water Singapore Pte Ltd ("National Aerated");

(c) 233,700 shares in National Aerated Water Co Sdn Bhd;

(d) 240,000 shares in Kwong Soon Engineering Company Pte Ltd ("Kwong Soon Engineering");

(e) 100,000 shares in Kheng Cheong & Co Pte Ltd;

(f) 10,000 shares in Kheng Cheong & Co Sdn Bhd;

(g) 100 shares in Siong Heng Realty Pte Ltd ("Siong Heng Realty"); and

(h) 765,000 shares in Seng Realty & Development Pte Ltd

2nd defendant

(a) 1 share in KK Holdings;

(b) 117,374 shares in National Aerated; and

(c) 32,000 shares in Seng Heng Realty Ltd ("Seng Heng")

4th defendant

1 share in KK Holdings

7 On 4 January 2010, a Notice of Appeal was filed by the 5th to 9th defendants. It should be noted that the appeal was filed within time. In tandem with the appeal, the 5th to 9th defendants also applied to stay the execution of the Judgment pending the outcome of the appeal. It is pertinent to highlight that the ground for the stay application was essentially the uncovering of "*fresh*" evidence which contradicted the findings in the Judgment. As explained above, the stay application was heard and dismissed by me on 2 March 2010. Shortly after the stay application was dismissed, the appeal lapsed. No attempt was made by the 5th to 9th defendants for extension of time to pursue the appeal.

8 Some five months after the appeal had lapsed and some nine months after the Judgment was delivered, the 5th to 9th defendants on 9 September 2010 applied to set aside the Judgment insofar as it affects the 2nd defendant's estate.

9 On 10 August 2010, the executors of the plaintiff's Will were added as 2nd and 3rd plaintiffs to the action. Unless the context otherwise requires, all references to the plaintiff in this decision shall refer to Paul Ching Chew Weng.

10 The application to set aside the Judgment was initially fixed before Chan J on 14 September 2010. During the hearing, Ms Deborah Barker representing the 5th to 9th defendants clarified that the application was made under O 35 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") which empowers the court to set aside any judgment or order granted in the absence of a party. However, under O 35 r 2, such an application must be made within 14 days from the date of

the judgment. As the Judgment was delivered on 4 December 2009, the application was out of time by almost nine months. Accordingly, Chan J directed the 5th to 9th defendants to file an application to extend time. Both applications were heard together before me. I will deal with the reasons proffered by the 5th to 9th defendants for their inordinate delay in filing the application as well as their absence from the trial separately below.

11 In deciding whether to set aside a judgment after trial under O 35 r 2, the following factors are relevant (see *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 at [44]) ("*Su Sh-Hsyu*"):

(a) the reasons for the defendant's absence at the trial;

(b) whether the successful party will be prejudiced;

(c) the length of the applicant's delay;

(d) whether a complete trial is required;

(e) the prospects of success; and

(f) considerations of public interest.

12 At the outset of the hearing, Ms Barker made clear that the application was based entirely on the premise that the Judgment was procured by actual fraud and the fraud accusation was directed solely at the 1st defendant. On this note, I will consider each of the above factors in turn.

Reasons for the 5th to 9th defendants' absence from trial

13 The Court of Appeal in *Su Sh-Hsyu* held that (at [44]), where judgment has been entered after trial in the defendant's absence, the predominant consideration in deciding whether to set aside the judgment is the reason for the defendant's absence. The authorities are clear that the burden is on the party who was absent to provide sufficiently cogent reasons to explain the absence from trial. As emphasised in *Su Sh-Hsyu* at [57], a Court is reluctant to set aside the judgment if the absence was deliberate and contumelious:

> In summary, it can be seen that *the reasons for non-attendance will be most severely viewed (vis-à-vis the other relevant factors set out in*[44] *above) in instances where the applicant's omission was deliberate and contumelious. In such cases, the court will be most reluctant to set aside the judgment even though there may be other countervailing factors in favour of setting aside*. Any such countervailing factors would necessarily have to be very compelling to tilt the balance in favour of setting aside the judgment. On the other hand, where the reason for non-appearance was wholly innocent or due to mistake or unavoidable accident, the court will be more inclined to set aside the judgment. In exercising its discretion, the other factors, such as

whether the other party would be irremediably prejudiced, will feature more heavily in the court's consideration.

[emphasis added]

14 It would seem from the authorities that absence from trial due to personal reasons or personal difficulties would not necessarily prevent the Court from finding that the absence was nonetheless deliberate. Such was the case in *Shocked v Goldschmidt* [1998] 1 All ER 372 ("*Shocked*") where the applicant, a musician, was recording and touring around the world at the time when the trial took place. Although the applicant was informed in advance by her counsel of the trial date, she explained that she could not attend the trial as she was on tour, and was without a personal manager, a backing band, and money (see *Shocked* at p 375). The English Court of Appeal (at p 382) was unconvinced that these personal reasons could justify her absence from trial and observed that even with these personal difficulties, no explanation was provided for her failure to apply for an adjournment. No allegation of fraud was raised and in view of the applicant's deliberate choice to be absent from trial, the English Court of Appeal decided to dismiss the application to set aside the judgment. In similar vein, the defendant in *Lee Ngiap Pheng Tony v Cheong Ming Kiat (Zhang Minjie) (trading as Autohomme Automobiles)* [2010] 4 SLR 831 ("*Lee Ngiap Pheng*") explained that his absence from trial was because he was hounded by creditors, that he did not think that the trial would be fruitful and that he did not fully appreciate the necessity for his trial attendance. The Court held that these did not constitute valid reasons to explain his deliberate absence from the trial. The Court observed that unlike the case of *Su Sh-Hsyu*, no allegation of fraud was raised as a basis to set aside the judgment; and in view of the unsatisfactory attempts to explain the absence from trial, the Court decided against setting aside the judgment. Nevertheless, I must emphasise that there is no overriding principle that personal reasons or personal difficulties will never be accepted as valid reasons to explain the absence from the trial. A Court would be inclined to set aside the judgment where the personal reasons given, if accepted, could show that the absence from the trial was wholly innocent or due to mistake or unavoidable accident (see *Su Sh-Hsyu* at [57]).

15 In the present case, there is no dispute that the 5th to 9th defendants were well aware of the trial dates. Despite so, they chose not to participate or even attend the trial. The 5th to 9th defendants explained that their absence from trial was due to certain subjective assumptions on their part. The 5th to 9th defendants made the following claims: [note: 1]

> [the 5th to 9th defendants] thought they would not be able to contribute and trusted Paul to do the right thing. They did not expect Paul and Sally to withhold information from this Court, as there was no reason to suspect their motives at that time.

This was reiterated by the 6th defendant's claim that: [note: 2]

> After [the 2nd defendant] passed away, we [the 5th to 9th defendants] trusted Paul to conduct the matter in a just and reasonable manner, as we did not have personal knowledge of the alleged Trust Assets.

In particular, the 6th defendant stated the following: [note: 3]

> On hindsight, had we [the 5th to 9th defendants] known that Paul would withhold material information from this Honourable Court, we would have actively participated in the proceedings and challenged his claim. We had mistakenly trusted our cousin.

16 In my view, the above reasons were completely unconvincing. The assertion that they trusted the plaintiff to conduct the matter in a just and reasonable manner was disingenuous as it runs contrary to the complaints by the 6th defendant about the plaintiff's allegedly unreasonable behaviour: [note: 4]

> Only two days after [the 2nd defendant's] death, we received the *flurry of letters from Paul* and his solicitors...Paul *expressed no concern* over my father's death save that it should not delay the proceedings...
>
> ...soon after my father's death, Paul...*began to hassle us* in respect of our father's will.
>
> [emphasis added]

17 In view of such significant insinuations of unreasonable behaviour on the plaintiff's part before the trial, it was plainly disingenuous of the 5th to 9th defendants to claim that they had trusted the plaintiff to conduct the proceedings in a just and reasonable manner.

18 Even more pertinently, the 5th to 9th defendants' explanation that there was no reason to suspect that the plaintiff or the 1st defendant would withhold information is no excuse for being absent from trial. It is common ground that the writ with the Statement of Claim was served on the 5th to 9th defendants in February 2009 after they were added as parties to the action pursuant to an order for substituted service following unsuccessful attempts at personal service. It was also undisputed that copies of all subsequent pleadings were duly served on the 5th to 9th defendants. From the pleadings, the plaintiff's and 1st defendant's Affidavits of Evidence in Chief ("AEIC"), the 5th to 9th defendants were fully aware of the evidence that was alleged against the 2nd defendant from the outset. It is that same evidence which the 5th to 9th defendants have now alleged to be fraudulent. The 5th to 9th defendants could easily have adopted the same position to contest the trial. Accordingly, in the face of the pleadings and the AEICs of the plaintiff and the 1st defendant, the 5th to 9th defendants, based on their own case theory, could not have reasonably believed that the plaintiff would conduct the trial in a fair and reasonable manner. Therefore, they had every reason to contest the claims and yet they chose to absent themselves from the trial altogether.

19 Crucially, the 2nd defendant's position as regards the claims was expressed in his defence that was filed and served before he passed away. The 2nd defendant clearly denied the plaintiff's claims (notwithstanding the bare denial) regarding the 1982 trusts, [note: 5] and put the plaintiff to strict proof regarding his claims as regards the 1984 trusts. [note: 6] It was further stated that the 2nd defendant was unable to look for or locate all the relevant documents to respond to the plaintiff's claims regarding the 1982 trusts. [note: 7] In view of the 2nd defendant's position before he passed away, there was more than sufficient reason for the 5th to 9th defendants to verify and contest the claims made by the plaintiff, and more significantly, there was more than sufficient time for them to do so.

20 The 5th to 9th defendants claim that they were deeply grieved by the 2nd defendant's death and were not in the proper frame of mind to deal with the proceedings at that time. [note: 8] I do not find this to be a persuasive reason. After the 2nd defendant passed away, the 5th to 9th defendants

had the proper frame of mind to handle matters relating to the companies which the 2nd defendant used to run. [note: 9] Furthermore, the trial was more than a year after the 2nd defendant's death. I have also taken into consideration the material admission that the 5th to 9th defendants could have instructed lawyers to advise them on the suit. [note: 10]

Reasons for the 5th to 9th defendants' delay in applying to set aside the Judgment

21 The Court of Appeal in *Su Sh-Hsyu* held that the applicant's delay in applying to set aside the judgment is a relevant factor to be taken into consideration. In *Vallipuram Gireesa Venkit Eswaran v Scanply International Wood Product (S) Pte Ltd (Kim Yew Trading Co, third party)* [1995] 2 SLR(R) 507 ("*Vallipuram*"), the application to set aside the judgment was made two years after the conclusion of the trial on the ground that it was a procedurally irregular judgment (there was no allegation of fraud). In dismissing the application, the Court took into consideration the fact that no explanation was provided for the delay. The same approach was adopted in *Perwira Habib Bank Malaysia Bhd v Wastecol Manufacturing Sdn Bhd & Ors* [1988] 3 MLJ 215 ("*Wastecoal Manufacturing*"), where the application to aside a default judgment was made nine months late. The application was based on the purported merits of the defence. Notably, no allegation of fraud was raised. The Court held that the applicant's failure to explain the inordinate delay of nine months raised much doubts as to the *bona fides* of his application, and thereafter dismissed the application.

22 In the present case, the 5th to 9th defendants were served with the Judgment on 4 December 2009, the very same day when the Judgment was delivered. [note: 11] In the hearing before me, Ms Barker explained that an appeal was filed on the instructions of the 5th to 9th defendants. The 5th to 9th defendants alleged that the appeal was allowed to lapse due to inadvertence of their former solicitors. [note: 12] However, no detail was provided to explain the nature of the inadvertence in filing the appeal documents. In this regard, it is helpful to refer to the observations of the Court of Appeal in *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 at [22] (in the context of granting leave to file a notice of appeal out of time) that mere inadvertence, in and of itself, is insufficient to constitute a good reason to explain the delay:

> If the delay is not merely *de minimis*, the court must examine the reasons for such delay. A mere assertion that there has been an oversight is obviously insufficient and, indeed, could lead to an abuse of process. In the decision of this court in *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 2 SLR(R) 336 ("*Denko*"), for example, Chao Hick Tin JA (as he then was), who delivered the grounds of decision of the court, observed thus (at [18]):
>
> Not only was the length of the delay quite substantial (bearing in mind [that] the prescribed period of time within which a party must apply to the judge for further arguments was only seven days), there were no extenuating circumstances offered for the 'oversight' of the solicitor. Some explanation should have been offered to mitigate or excuse the oversight. If, in every case, 'oversight' is *per se* a satisfactory ground, we run the risk of turning the rules prescribing time into dead letters. It would be observed in breach. It would be all too simple for a party to run to a judge to ask for indulgence because of oversight. The need for finality must be borne in mind.

23 In any event, the 5th to 9th defendants could have applied for leave to file and serve the appeal documents out of time given that the Notice of Appeal was filed within time. No reason was provided to explain the 5th to 9th defendants' omission to make such an application.

24 Furthermore, I did not see how the explanation for the lapse in filing the appeal documents could be a valid excuse for the delay in bringing the application to set aside the Judgment. It is to be noted that the appeal lapsed on 19 April 2010 but the application by the 5th to 9th defendants to set aside the Judgment was only filed on 9 September 2010. Indeed, according to the 5th to 9th defendants, they claimed to have "inklings of doubt" as regards the authenticity of the evidence as early as December 2009. [note: 13] They tried to explain the delay by claiming that they encountered difficulties in procuring some documents: [note: 14]

> ...the 5th to 9th Defendants encountered difficulties when they tried to find other documents pertaining to National. This was because, in April 2009, Ching Kwong Hoong (KY Ching's youngest brother) moved all documents pertaining to National from National's office to the office of Kwong Soon Engineering company Pte Ltd, on the pretext of clearing the debris in National's office...when [the 5th to 9th Defendants] started searching for National's documents in December 2009 after doubt had been triggered, they realised they no longer had access to those documents because Ching Kwong Hoong, Sally, George Ching Chew Foon (Sally's step-brother) and Alan ran Kwong Soon Engineering Pte Ltd.

25 This, in my view, was not a convincing reason. It was all along open to the 5th to 9th defendants to apply to court for assistance in procuring the relevant documents. Indeed, O 24 r 6 of the Rules of Court allows for the application for discovery of documents before the commencement of proceedings.

26 Although I have found the purported reasons for the 5th to 9th defendants' absence from trial and the late application to be wholly unconvincing, and some even to be disingenuous, it would still be necessary to examine the allegations of fraud raised by the 5th to 9th defendants. The statement of law propounded in *Su Sh-Hsyu* that the predominant consideration in deciding whether to set aside a judgment under O 35 r 2 is the reason for the defendant's absence was intended to be of general application. The situation is quite different when the application is founded on actual fraud. In this regard, the authorities are clear that a judgment obtained by fraud cannot be allowed to stand, as Denning LJ observed in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712:

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. *Fraud unravels everything*. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments...
>
> [emphasis added]

27 Indeed, the Court of Appeal in *Su Sh-Hsyu* at [65] endorsed Denning LJ's observations and set aside the judgment even though the reasons furnished by the applicant to explain her absence were found to be unconvincing. Here, Mr Hri Kumar, counsel for the plaintiff, sensibly accepted that if there is clear and egregious fraud, delay would not be an obstacle. As such, there was a need to examine the specific allegations of fraud made by the 5th to 9th defendants in relation to the 1st defendant's evidence in respect of each of the trust assets.

Irreparable prejudice

28 As a matter of principle, it is uncontroversial that the unavailability of any key witness to a re-

trial is typically a bar to setting aside a judgment whether regularly obtained or obtained in default. This principle is illustrated by the decision of the Manitoba Court of Queen's Bench in *Bank Canadian National v Krause and Krause* (1979) 2 Man R (2d) 221 ("*Bank Canadian*") at [14] – [16]:

> [14] Since mere delay need not be a bar to the application unless there is an irreparable injury, I turn now to a consideration of the prejudice that the plaintiff might suffer if the default judgment is set aside...
>
> [15] *There is...[a] matter of concern to which there is no satisfactory answer. I refer to the intervening death of Mr. Krause*. He was a co-defendant, and it is apparent that he would have been a key witness. The loans at issue related to his businesses, and it is clear from the affidavits of the applicant that, if a trial of the action were to take place, Mr. Krause's evidence would be required to establish facts and to assess credibility.
>
> [16] Counsel for the applicant has argued that since Mr. Krause was a co-defendant, it is her client and not the plaintiff who would be prejudiced. I cannot accept that argument. It is wrong to assume that Mr. Krause's evidence would only benefit his co-defendant. Examinations for discovery, and cross-examination of Mr. Krause might well have been of great assistance to the plaintiff. To deprive the plaintiff of these rights would be most unfair. *For this reason, I find that there is a real and substantial risk of irreparable injury to the plaintiff in setting aside the judgment*.
>
> [emphasis added]

29 The case of *Bank Canadian* concerned a default judgment and it applied with greater force in the present case which concerned a regular judgment obtained following a trial. From the decision, it was clear that real and substantial *risk* of irreparable prejudice to the plaintiff would generally be sufficient to preclude the setting aside of the judgment.

30 In the Judgment, the 2nd defendant was found to have held the following assets on trust for KK Ching:

(a) One share in KK Holdings;

(b) 117,374 shares in National Aerated;

(c) 32,000 shares in Seng Heng Realty – this company was subsequently wound-up on or about 1996 and a sum of $2,113,398.18 was received from the liquidation of these shares; and

(d) $1 million cash.

31 Before examining the allegation of fraud in respect of each of the assets listed above, it is useful to set out some relevant information to place the entire case in its proper context. First, at all material times, the plaintiff had openly asserted that the 2nd defendant held the above trust assets for KK Ching. This was clearly stated in the letter of demand dated 28 April 2008, the Statement of

Claim and his AEIC at the trial. I observe here that the plaintiff's evidence was corroborated by the 1st defendant's evidence both in her AEIC and her oral testimony at the trial, as well as the 3rd defendant's testimony. I was, therefore, not concerned with a situation where findings were made from evidence which had only emerged in the course of the trial. These assertions were clearly stated from the outset even *prior* to the institution of the legal proceedings.

32 Subsequent to the pronouncement of the Judgment, the plaintiff passed away through illness on 4 March 2010. It is obvious that any retrial, if ordered, could no longer involve the participation of the plaintiff. The 5th to 9th defendants recognised that the demise of the plaintiff was a serious impediment to the application. To avoid any issue of irreparable prejudice, the 5th to 9th defendants submitted that it was the 1st defendant who had liedin her AEIC and at the trial in relationto the trust assets purportedly held by the 2nd defendant. It should be emphasised that the 5th to 9th defendants made no allegation of fraud against the plaintiff. Instead, they submit that the plaintiff's evidence was entirely based on what the 1st defendant had told him about the trust assets held by the 2nd defendant, and since the evidence of the 1st defendant was allegedly tainted by fraud, no weight should be attached to the plaintiff's evidence either.

33 However, the plaintiff's evidence was not limited only to the information provided to him by the 1st defendant. The plaintiff testified that he spoke to the 2nd defendant who admitted to the existence of the 1982 and 1984 Trusts and that the trust assets belonged to the plaintiff. This was very clearly stated in [54] – [55] of his AEIC dated 5 October 2009 which have been reproduced below for completeness:

> 54. On or about 26 December, at my request, Sally arranged for me to meet with Uncle Kwong Yew at the office of National Aerated Singapore at 1177 Serangoon Road. *At this meeting, Uncle Kwong Yew acknowledged and admitted to me the existence of the 1982 Trusts and the 1984 Trusts*.
>
> 5 5 . *Uncle Kwong Yew further acknowledged and admitted that Uncle Kwong Yew's Trust Assets belonged, and ought to be returned, to me. Uncle Kwong Yew, however, explained that he did not want to effect the transfer of Uncle Kwong Yew's Trust Shares to me immediately, and would do so only when he was ready*. Thereafter, Uncle Kwong Yew changed the topic to something else, and our meeting ended on that note. I was naturally disappointed that my attempt to have the assets transferred back from Uncle Kwong Yew hit a brick wall. However, at that time, I was still hopeful that Uncle Kwong Yew would voluntarily return Uncle Kwong Yew's Trust Assets to me, and therefore did not want to anger him, or put him off, unnecessarily. Hence, I left the matter alone for the time being.
>
> [emphasis added]

34 The 5th to 9th defendants, however, alleged that the plaintiff's discussion with the 2nd defendant was in general terms and that no specific asset was discussed. This was incorrect. In the plaintiff's AEIC at [20(b)], he identified all the assets which were held on trust by the 2nd defendant. In any event, even if the discussion was in general terms without reference to any specific asset, the 5th to 9th defendants were not able to identify what other trust assets the discussion related to. This aspect of the plaintiff's evidence was not challenged at the trial and was also not challenged by the 5th to 9th defendants in the present application. Based on the plaintiff's evidence, the 2nd defendant had admitted to the existence of the trust assets and that the trust assets *ought to be returned* to

the plaintiff, although he told the plaintiff that he was not ready to transfer the assets at that time. In my view, the plaintiff's unchallenged evidence as regards the 2nd defendant's admission to the trust assets was *fatal* to the 5th to 9th defendants' application. This was so even if I were to disregard the 1st defendant's evidence in its entirety. It was clear that the Judgment was in part based on the unchallenged evidence of the plaintiff that the 2nd defendant had acknowledged his obligation under the 1982 and 1984 Trusts:

> 27 Both the first defendant and the plaintiff testified that between 1999 to 2007, they met several times with the second defendant to recover Trust Assets (B). On those occasions, *the second defendant acknowledged the existence of both the 1982 Trust and the 1984 Trust in relation to Trust Assets (B*). The second defendant acknowledged his obligation under the 1984 Trust but said that he would transfer Trust Assets (B) back to the plaintiff when he was ready without explaining when that would be accomplished.
>
> 28 In the light of the *unchallenged evidence*, I am satisfied that the second defendant was instructed by KK Ching in 1984 to hold Trust Assets (B) (previously held on trust for KK Ching under the 1982 Trust) on behalf of the plaintiff.
>
> [emphasis added]

35 Finally, from the evidence, there could be no doubt that the 2nd defendant did hold various assets on trust for KK Ching. The 3rd defendant in cross-examination testified that at the request of the plaintiff, he met the 2nd defendant and requested him to transfer the trust assets back to the plaintiff and that the 2nd defendant did not deny that he held assets on trust for KK Ching. The material portion of his evidence at the trial is reproduced in verbatim below:

> NE p 108 dated 3 November 2009
>
> Q: Ms Ching Pui Sim said that she told you she was holding assets on trust for Paul –
>
> A Yeah.
>
> Q *And the 2nd defendant confirmed that he was holding assets on trust for Paul*.
>
> A *Yeah*.
>
> Q *So you do remember them telling you this?*
>
> A *Yeah, they are holding assets for Paul*.
>
> Q Thank you. Did you ask what these assets were?
>
> A No.
>
> Q And you did not enquire as to the circumstances behind this transfer?
>
> A I never enquired.
>
> [emphasis added]

36 There was no suggestion by the 5th to 9th defendants that the evidence of the 3rd defendant was not truthful. Further the 3rd defendant also testified that KK Ching had approached him to hold assets on trust but he refused:

NE p 95 dated 3 November 2009

Q Right. So to clarify, the first time you became aware the transfers was *(sic)* after KK Ching had passed away.

A In fact, KK wanted to transfer to me – I refused – before he died.

Q Ms Ching Pui Sim's evidence is that you had told her that's what KK wanted to do, so can I just clarify, that prior to Mr KK Ching passing away, he did approach you and asked whether you would hold shares on trust for him?

A He did.

37 Thus the clear picture which emerged from the evidence was that KK Ching wanted his relatives to hold assets on trust for him. This was the evidence of the 1st, 3rd and 4th defendants. During the hearing before me, I quizzed Ms Barker that if the 2nd defendant did not hold the above assets on trust for KK Ching, then what other assets did the 2nd defendant hold on trust for him? She was unable to provide any satisfactory explanation other than to say that the burden was on the plaintiff to prove his case. However, it cannot be gainsaid that the plaintiff had already proved his claims and had obtained judgment to that effect. The burden was therefore on the 5th to 9th defendants to prove otherwise. The 5th to 9th defendants were plainly unable to discharge this burden given their case that no fraud was alleged against the plaintiff.

The ambit of the fraud exception

The law

38 It ought to be emphasised here, that the application before me was premised solely on allegations of fraud. The 5th to 9th defendants did not submit that the Judgment can or should be set aside on any basis other than fraud. During the hearing, the parties were *ad idem* on the following principles:

(a) The burden was on the applicant to prove that the Judgment was procured by actual fraud.

(b) The fraud must strike at the root of the litigation. In other words, the fraudulent evidence must be pivotal to the findings made by the trial judge.

39 Where the parties departed, as is often the case, was the proper interpretation of the fraud exception. What is the level of proof required to establish fraud in order to set aside an otherwise regular judgment? From my review of the authorities, it was clear that errors short of fraud are insufficient to set aside a regular judgment.

40 The requirements of establishing fraud in order to set aside a judgment were succinctly summarised by the Supreme Court (Court of Appeal) of New South Wales, Australia, in *Wentworth v*

Rogers (No. 5) (1986) 6 NSWLR 534 (per Kirby J):

> *First*, the essence of the action is fraud. As in all actions based on fraud, *particulars of the fraud claimed must be exactly given* and the allegations must be established by the *strict proof* which such a charge requires. *Jonesco v Beard* [1930] AC 298, 301; *McHarg v Woods Radio Pty Ltd* 119481 VLR 496, 497.
>
> *Secondly*, it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a *new discovery* of *something material*, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, *would provide a reason for setting aside the judgment*. See Lord Selborne LC in *Boswell v Coaks (No 2)* (1894) 6 R 167. 170. 174: (1894) 86 LT 365. 366. 368: *Cabassi v Vila* (1940) 64 CLR 130, 147; *McDonald v McDonald* (1965) 113 CLR 529, 533; *Everett v Ribbands* (1946) 175 LT 143, 145, 146; *Birch v Birch* [1902] P 130, 136, 137-8; *Ronald v Harper* 119131 VLR 311, 318. This rule has an ancient lineage. See eg *Shedden v Patrick* (1854) 1 Macqueen 535, 615, 622; 26 Halsbury Laws of England (4th ed), para 560. It is based upon a number of grounds. There is a public interest in finality of litigation. Parties ought not, by proceeding to impugn a judgment, to be permitted to relitigate matters which were the subject of the earlier proceedings which gave rise to the judgment. Especially should they not be so permitted, if they move on nothing more than the evidence upon which they have previously failed. If they have evidence of fraud which may taint a judgment of the courts, they should not collude in such a consequence by refraining from raising their objection at the trial, thereby keeping the complaint in reserve. It is their responsibility to ensure that the taint of fraud is avoided and the integrity of the court's process preserved.
>
> *Thirdly*, mere suspicion of fraud, raised by fresh facts later discovered, will not be sufficient to secure relief. *Birch v Birch* [1902] P 130, 136, 139; *McHarg v Woods Radio Pty Ltd* [1948] VLR 496, 498; *Ronald v Harper* [1913] VLR 311, 318. The claimant must establish that the new facts are so evidenced and *so material* that it is reasonably probable that the action will succeed. This rule is founded squarely in the public interest in finality of public litigation and in upholding judgments duly entered at the termination of proceedings in the courts.
>
> *Fourthly*, although perjury by the successful party or a witness or witnesses may, if later discovered, warrant the setting aside of a judgment on the ground that it was procured by fraud, and although there may be exceptional cases where such proof of perjury could suffice, without more, to warrant relief of this kind, the mere allegation, or even the proof of perjury will not normally be sufficient to attract such drastic and exceptional relief as the setting aside of a judgment; *Cabassi v Vila* (1940) 64 CLR 130, 147, 148; *Baker v Wadsworth* (1898) 67 LJ QB 301; *Everett v Ribbands* (1946) 175 LT 143, 145, 146. The other requirements must fulfilled. In hard fought litigation, it is not at all uncommon for there to be a conflict of testimony which has to be resolved by a judge or jury. In many cases, of contradictory evidence, one party must be mistaken. He or she may even be deceiving the court. The unsuccessful party in the litigation will often consider that failure in the litigation has been procured by false evidence on the part of the opponent and the witnesses called by the opponent. If every case in which such an opinion was held gave rise to proceedings of this kind, the courts would be even more burdened with the review of first instance decisions than they are. For this reason, and in defence of finality of judgments, a more stringent requirement than alleged perjury alone is required.
>
> *Fifthly*, it must be shown by admissible evidence that the successful party was responsible for the fraud which taints the judgment under challenge. The evidence in support of the charge ought to be extrinsic. Cf *Perry v Meddowcroft* (1846) 10 Beau 122; 50 ER 529, 534, 535. It is not

sufficient to show that an agent of the successful party was convicted of giving perjured evidence in the former proceeding, the result of which it is sought to impeach. It must be shown that the agent, in so acting, was in concert with the party who derived the benefit of the judgment. *Ronald v Harper* [1913] VLR 311, 318; *Sheddon v Patrick* (1854) 1 Macqueen 535, 643.

Sixthly, the burden of establishing the components necessary to warrant the drastic step of setting aside a judgment, allegedly affected by fraud or other relevant taint, lies on the party impugning the judgment. It is for that party to establish the fraud and to do so clearly.

In summary, he or she must establish that the case is based on newly discovered facts; that the facts are material and such as to make it reasonably probable that the case will succeed; that they go beyond mere allegations of perjury on the part of witnesses at the trial; and that the opposing party who took advantage of the judgment is shown, by admissible evidence, to have been responsible for the fraud in such a way as to render it inequitable that such party should take the benefit of the judgment.

[emphasis added]

41 The Court of Appeal in *Su Sh-Hsyu* made pertinent observations to elaborate on the second requirement as stated by Kirby J (the second requirement as stated above by Kirby J coincided with the first and second requirements of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*")). Although the court would, in the interests of finality of judgments, generally expect the applicant alleging fraud to adduce new evidence which could not have been discovered at the time of trial with due diligence, this requirement ought not to be imposed rigidly such as to cause injustice in a situation where the fresh evidence uncovers fraud on the other party. Nonetheless, the Court of Appeal emphasised that the fraud must strike at the very root of the litigation (per V K Rajah JA at [36]):

...the court should always bear in mind that its overriding constitutional remit and objective is to promote, dispense and achieve justice between the parties as well as uphold public confidence in the even-handed observance of the rule of law. This objective is entirely consistent with the policy of *finis litium*. As Laddie J has astutely pointed out in *Saluja v Gill* ([25] *supra*), the justice of the case usually requires the *Ladd v Marshall* conditions to be applied strictly because it would be unfair to repeatedly subject a litigant to retrial merely upon the discovery of new evidence. In a similar vein, *finis litium* cannot be invariably and/or rigidly imposed to such an extent that would allow a miscarriage of justice to go uncorrected. In particular, where the fresh evidence uncovers the fraud or deception of the other party, and such fraud ***strikes at the very root of the litigation*** , then, provided the second and third conditions in *Ladd v Marshall* are cumulatively satisfied, the court would, in exceptional circumstances, be prepared to exercise measured flexibility in relation to the application of the first *Ladd v Marshall* condition (see [37] below). After all, a judgment that is corrupted at its core by fraudulent conduct is tainted in its entirety, and the whole must fail: *Hip Foong Hong v H Neotia and Company* [1918] AC 888 at 894. However, we ***emphasise that the alleged fraud should strike at the very root of the litigation*** in the sense that the fresh evidence would be crucial to, or determinative of, the final outcome to be ultimately reached by the court.

[emphasis added]

42 The requirement that the fraud must strike at the ***very root of the litigation*** is reinforced by the House of Lords' holding in *Boswell v Coaks* (No 2) (1894) 86 LT 365n at p 366 that there must be a "new discovery of something ***material*** ...that...would be a reason for setting the judgment aside if

it were established by proof". Even before this requirement is considered, however, the applicant has to first discharge its burden of proving ***actual fraud*** . If this burden is not discharged, it would be superfluous to consider whether the alleged fraud (that was not established) struck at the root of the litigation. As emphasised by the English Court of Appeal in *Patch v Ward* (1867 – 68) LR 3 Ch App 203 at p 212 (per Sir John Rolt LJ) ("*Patch v Ward*"), this is not a burden to be taken lightly:

> ...the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and obtaining that decree by that contrivance. Mere constructive fraud not originating in actual contrivance, but consisting of acts tending possibly to deceive or mislead without any such intention or contrivance, would probably not be sufficient...

43 As will be illustrated by the case authorities discussed below, *dishonesty* is the cornerstone of actual fraud (see also *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884 at [34]).

Actual fraud must be shown

44 The evidence presented by the party alleging fraud may, upon a proper analysis, reveal a case of erroneous or misleading evidence short of fraud. This would be so when the evidence was led erroneously without any dishonest intention to mislead the court. The Malaysian High Court in *Seng Huat Hang Sdn Bhd & Ors v Chee Seng & Co Sdn Bhd* [1987] 1 MLJ 413 ("*Seng Huat Hang*") held that the purported evidence of fraud in that case was at most "misleading or even erroneous" but it fell short of actual fraud. Chee Seng & Co Sdn Bhd ("Chee Seng") had instituted proceedings against Seng Huat Hang Sdn Bhd ("Seng Huat") for possession of a number of bays comprised in various godowns. Chee Seng stated in its Statement of Claim that it was the owner and landlord of the godowns concerned, and that it was therefore entitled to possession. Seng Huat admitted in its Defence that they were the tenants of the godowns liable to pay monthly rent to Chee Seng, so long as Chee Seng was able to acquire a Temporary Occupation Licence ("TOL") from the Government of Penang. Subsequent to the filing and service of the claim, Chee Seng's solicitors sent some correspondence to Seng Huat's solicitors which were apparently left unread. The correspondence actually showed that Chee Seng did not have the requisite TOL. Subsequently Chee Seng applied for a consent order in the Magistrate's Court whereby Seng Huat was required to account for monthly rent. Seng Huat's solicitors consented on its behalf. Chee Seng's supporting affidavit averred that Seng Huat had admitted in its Defence that they were liable to pay a monthly rent to Chee Seng. It appears that no mention was made as regards the lack of the requisite TOL. On the date of hearing, neither Seng Huat nor its solicitors were present and default judgment for possession was duly entered in favour of Chee Seng.

45 Thereafter, Seng Huat discovered that Chee Seng did not possess the requisite TOL. It applied for a declaration that the possession orders made by the Magistrate's Court had been fraudulently obtained by wilful concealment from the court of the material fact that the State Authority did not issue the TOL to Chee Seng, and that the orders were therefore null and void. The Malaysian High Court found that the correspondence (which showed that Chee Seng did not have the requisite TOL) sent by Chee Seng's solicitors well before the Magistrate Court action showed that there was no deliberate fraud on Chee Seng's part. In that context, Chee Seng's failure to disclose its lack of title was at most misleading or erroneous. In particular, Edgar Joseph Jr J held:

> I have already observed that the [correspondence] made it clear that [Chee Seng]`s Temporary Occupation Licence had expired or, at the very least, should have put [Seng Huat] on enquiry that this was so.

> Yet, [Seng Huat's] solicitors took no step whatsoever to write to the Land Office for confirmation as to the date of its expiry. Had they done so, no doubt, they would have been informed that it had expired on 31 December 1978 and had not since been renewed. What were the reasons for this inaction?
>
> None was vouchsafed to this court, although during the argument counsel for [Seng Huat] was queried by me on this very point.
>
> In my opinion, the [correspondence] which were received by [Seng Huat's] solicitors, well before the hearing of the Magistrate`s Court Actions, puts paid to the argument that the present defendant was guilty of a ***deliberate fraud*** as alleged or at all. Although they were armed with the facts appearing in the [correspondence], [Seng Huat] did nothing to verify their contents or to amend their defence to challenge [Chee Seng's] title to sue.
>
> ...having regard to the [correspondence], the failure on the part of [Chee Seng] to disclose its want of title in the Magistrate`s Court Actions may, at most, *have been misleading or even erroneous but it falls far short of the requirements of deliberate fraud* ...
>
> It follows, therefore, that far from there being a strong case, there was not an iota of evidence of fraud on the part of [Chee Seng] as alleged or at all.
>
> [emphasis in italics added; emphasis in bold in original]

46 The observations above are consistent with the general principle stated by the Malaysian Court of Appeal in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 ("*Chee Pok Choy*") that:

> …a judgment may be impeached for deliberate fraud practised upon the court, and it is insufficient to show that a litigant merely convinced the court through *misleading or erroneous evidence*. Whether the test has been met in any given case must, I think, depend on the facts and circumstances of the particular case. [emphasis added]

47 The Malaysian Court of Appeal also endorsed the observations in *Satish Chandra v Satish Kantha Roy* [1923] AIR 73 at p 76 that mere suspicion or conjecture is insufficient to establish fraud to set aside a judgment:

> Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them - proved by established facts or inferences legitimately drawn from those facts taken together as a whole. *Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences*…
>
> [emphasis added]

48 In *Chee Pok Choy*, the appellant-applicant's evidence of fraud was not challenged by the respondent. The court held that the trial judge had wrongly decided that there was no fraud given that he did not investigate or scrutinise the allegations of fraud, as he ought to have.

49 It was emphasised in *Price v Stone* [1964] VR 106 ("*Price*") that there must be something more than false evidence in order to establish actual fraud. The Supreme Court of Victoria, Australia, held that a witness's *accidental* or *inadvertent* swearing of false evidence does not amount to deliberate fraud. In *Price*, Mrs Stone had been a lodger at Mrs Price's house, and had placed several belongings

in the latter's home. After Mrs Stone moved out, she claimed that she had left some furniture at Mrs Price's place. At trial during cross-examination, Mrs Stone stated that she did not sign a document which purported to be a list of furniture which Mrs Price alleged was provided by Mrs Stone as a receipt of the goods taken. Mrs Stone also testified during cross-examination that she was not present when the movers came to load the furniture, contrary to Mrs Price's allegation. Judgment was granted in favour of Mrs Stone.

50 Subsequently, Mrs Price applied to set aside the judgment on the ground that Mrs Stone had committed perjury, as it appeared that the furniture movers could give evidence to prove that Mrs Stone was present when they loaded the furniture. The Supreme Court held that the *inadvertent* giving of false evidence at most goes to affect the *credibility* of the witness; it does not equate to deliberate fraud. To prove the latter, it must be shown that the witness had a predetermined intention to mislead the court, which was not found to be the case. Gillard J held (at 109 – 110):

> ...the action is for fraud, *something not merely incidental or accidental*, but deliberate and intended...
>
> ...In my opinion, it is difficult in these circumstances to imply from false evidence led from a party by the other party's counsel [in cross-examination] that there was a fraud on the court. *There must be something more than the false evidence. The false swearing must be deliberate and designed, not merely adventitious*in the course of trial...
>
> …If the carrier witnesses had been called to prove Mrs Stone was present when the goods were loaded onto their truck, *such evidence could have reflected greatly on Mrs Stone's credit*, but the ultimate issue would still have been, did she receive the goods…
>
> …the plaintiff must prove that a fraud was perpetrated on the court by Mrs Stone. I do not believe the present plaintiff has demonstrated a likelihood of doing this in these proceedings. Mrs Stone's denials, if any, were probably made casually, *without any predetermined intention to mislead the court*.
>
> [emphasis added]

51 From the above, it is clear that *falsity* due to inadvertence, without more, does not amount to fraud.

52 It would seem that the Privy Council's decision of *Hip Foong Hong v H Neotia and Company* [1918] AC 888 ("*Hip Foong Hong*") suggests the principle that a party's failure to adduce evidence to corroborate *the opponent's case* does not amount to fraudulent conduct that taints a judgment. In *Hip Foong Hong*, the respondents had a dispute over a sale of goods transaction with the appellants. The appellants sued the respondents for non-delivery of goods, while the respondents alleged that the relevant contract had already been terminated. After the appellants' claim was dismissed, the appellants filed a motion for a new trial of its action on the ground that the judgment had been obtained by fraud. The appellants asserted that the respondents had failed to adduce certain documentary evidence in their possession which showed that there was an existing contract between the parties at the material time.

53 The *corroborative* nature of the undisclosed evidence is evident from Lord Buckmaster's explanation at p 892 that the undisclosed evidence added nothing beyond a mere repetition of evidence that was already adduced by the appellants, and that the evidence did not disclose any new fact:

It was alleged at the hearing that no other books existed beyond those disclosed bearing on this matter; and it is plain that this book was *material* and should have been produced. It must, however, be remembered that it *added nothing beyond a repetition* of the statements made on February 17, 1913 - a circumstance which, as has already been pointed out, the learned judge had fully and duly weighed in arriving at his conclusion, and *the production of this book discloses no new fact*.

[emphasis added]

54 In the final analysis, the Privy Council was of the view that the respondents' failure to adduce the evidence did not amount to fraud. This was so even though the evidence was found to be material.

55 Further, it is pertinent that the erroneous insistence on rights based on an *opinion* or an inference that was fairly and reasonably reached does not amount to fraud either. This remained so even if it was subsequently found, with hindsight, that the inference or opinion was overstated or overestimated. This principle can be gleaned from the case of *Patch v Ward* which concerned two mortgages over a property. Ward was the solicitor for the second mortgagee. In May 1847, a bill was filed by the first mortgagee for foreclosure. In October 1847, the mortgagor signed an authority for the tenants to pay to Ward their rents due. Ward would at times receive the rent in his own name, and at times receive rent in the second mortgagee's name. Subsequently, Ward became the equitable owner of the first and second mortgage by making payment to the first and second mortgagees. Although the payment to the first mortgagee was funded by Ward, it was made in the second mortgagee's name such that it seemed that it was the second mortgagee who had redeemed the first mortgage. Before an order absolute for foreclosure was made, a supporting affidavit was filed in the second mortgagee's name which stated that the mortgagor has failed to make payment of the whole outstanding sum of £6870 to the second mortgagee. An order absolute for foreclosure was made on the strength of this affidavit. The mortgagor was absent during the proceedings leading up to the order absolute as he was overseas.

56 Subsequently, the mortgagor sought to set aside the order for foreclosure as having been obtained by fraud. According to the mortgagor, he had indeed paid the sum of £161 as rent to Ward, and that this rent was received by the second mortgagee. As such, the assertion in the second mortgagee's affidavit that the whole sum of £6870 was unpaid was false and untrue.

57 According to Ward's case, he had become the equitable owner of the first two mortgages when he made payment towards them. In addition, he had a third equitable charge over the same property under a memorandum signed in October 1847 where the mortgagor agreed that Ward would receive payment of rent. Ward had admitted to the receipt of £161 as rent, but he applied them not towards the first or second mortgage, but towards the third equitable charge which he obtained from the mortgagor.

58 The Court of Appeal held that Ward had acted on his own *opinion*, and that it was one which was fair and reasonable. Although Ward might have insisted on rights which were subsequently found to be overstated, it did not constitute fraud. Lord Cairns LJ held at pp 207 and 210:

I apprehend the fraud...must be fraud which you can explain and define upon the face of a decree, and that ... *the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated*, is not the kind of fraud which will authorize the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled...

> ... it might have been argued that *Ward*, having legitimately become owner of the first and second mortgages, and having an undisputed subsequent equitable charge, had the right to tack his third charge to his first and second, and to hold everything which the first and second gave him for the purpose of procuring payment, as far as he could, also of his third charge, and that if this receipt of rents was originally destined for the security of payment of [the second mortgagee], Mr. *Ward* by becoming the transferee of [the second mortgagee] became also the transferee of the right to receive the rents, and that as [the mortgagor] could have taken nothing away from *Ward* without satisfying fully every part of every security which *Ward* held, *Ward* would be justified in applying the rents subsequently received in discharge, not of the first or second mortgage, but of the third. It is not necessary to consider which of those two views must have prevailed, because, in my opinion, *Ward might fairly entertain the opinion that the view upon which he acted was the right and true view in point of law. I think it was an opinion that any person, whether a professional man or not, might fairly be supposed to entertain, and that it would be going far beyond any conclusion which the Court is authorized to draw from the facts, to say that a person who acted upon that opinion was influenced by any fraudulent motive or design towards the mortgagor*.
>
> [emphasis added]

59 In examining whether fraud was established, I adopted the principle of law from my review of the cases that dishonesty is the cornerstone for fraud. Indeed, the case authorities have shown that inadvertent errors in the evidence, the drawing of wrong inferences, conjectures, lack of corroborative evidence or even *false* evidence (*ie incorrect* evidence) short of actual and deliberate fraud would not be sufficient to discharge the burden of proof. To hold otherwise would mean that the 5th to 9th defendants would effectively be permitted to proceed with the application as if it was an appeal. In the cases where fraud was found to justify the setting aside of the judgment, they typically involved objective evidence to establish actual fraud as in *Su Sh Hsyu* where the fresh evidence in the form of a scientific report from the Health Sciences Authority ("HSA") on its face suggested that the deposit slip evidencing payment of the shares contained the genuine signature of the respondent. The respondent who had alleged that he did not receive any payment, however, did not adduce any evidence to contradict the findings by the HSA. If the HSA report were established to be accurate, it would follow that the respondent had perjured on the question of payment which went to the root of the case. Furthermore, the high threshold in establishing fraud can also be seen in the decision of *Chee Pok Choy*, where the respondent was found to have *actively concealed* the fact that it was a licensed moneylender. If the respondent's status had not been concealed, it was required under several statutory provisions to provide specific information and particulars of the loan. The non-compliance of such provisions rendered the respondent's originating summons a nullity. The Court also found that the respondent had *deliberately misled* the court into making the relevant order for sale. In such circumstances, actual fraud was established and the order for foreclosure was consequently set aside. Likewise, the exceptional circumstances of finding actual fraud can be seen in *SP Chengalvaraya Naidu v Jagannath* AIR 1994 SC 853 ("*SP Chengalvaraya*") where Jagannath had purchased a property on behalf of Chunilal at a court auction. The latter had obtained a decree against the appellants (judgment debtor), and the court sale was made in execution of the said decree. The appellants paid the full decretal amount to Chunilal. By a registered deed, Jagannath relinquished all his rights in the property to Chunilal. However, without disclosing that he had executed the release deed, Jagannath filed a suit for partition of the property and obtained a preliminary decree. The appellants were not aware that Jagannath had no *locus standi* to file the suit as he had already executed a registered release deed and relinquished his rights in the property to Chunilal. In this regard, the *very basis* for which the preliminary decree was procured was found to be missing. The Supreme Court of India found that there was "*no manner of doubt*" that the situation

was one of fraud which was opined as "an act of *deliberate deception* with the design of securing something by taking unfair advantage of another", and "*a deception in order to gain* by another's loss[;] ... *a cheating intended to get an advantage*". See *SP Chengalvaraya* at [6]. The Supreme Court upheld the trial court's decision that the decree was obtained by fraud and was consequently a nullity.

60 In my view, there is a clear and rational reason for imposing such a high standard of proof on an applicant such as the 5th to 9th defendants to establish actual and deliberate fraud. In the usual course of events, if a party is dissatisfied with a decision, typically an appeal is filed to prove that it was wrongly decided. If fresh evidence is to be adduced in support of the appeal, such an applicant is required to satisfy the stringent test laid down in *Ladd v Marshall*. There can be no doubt that the 5th to 9th defendants would not have satisfied the first requirement laid down in *Ladd v Marshall* given that the fresh evidence which they had sought to adduce to prove the alleged fraud comprise essentially the share registers of the companies which would have been available at the trial with the exercise of a modicum of due diligence. It is also uncontroversial that although the civil standard of proving on a balance of probabilities applies, the Court has a higher expectation of proof when it comes to allegations as serious as that of fraud, as was decided by the Court of Appeal in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263.

61 As I have observed above, the fact that the 5th to 9th defendants did not challenge the plaintiff's evidence was fatal to the application. That alone was sufficient to dispose of the application. Nonetheless, I reviewed the evidence in relation to each of the above trust assets and arrived at the determination that the 5th to 9th defendants had failed to discharge their burden to prove actual and deliberate fraud in respect of any of the trust assets which the 2nd defendant was found to have held on trust for KK Ching. The challenge mounted by the 5th to 9th defendants extended to each of the assets which were found to be held on trust by the 2nd defendant for KK Ching. They alleged that each of the findings was tainted by fraud. They sought to rely on the following "*fresh evidence*" to show that the Judgment was procured by the "*perjured evidence*" of the 1st defendant:

(a) the financial journal for the year 1982 purportedly maintained by the 2nd defendant;

(b) the 1982 bank statement of the 2nd defendant's account with Overseas Union Bank Limited ("OUB");

(c) the share register of National Aerated;

(d) certified true copies of documents extracted from the Accounting and Corporate Regulatory Authority of Singapore ("ACRA") relating to National Aerated, KK Holdings and Seng Heng Realty; and

(e) an affidavit of Chua Hwee Kiang who was the Liquidator of Seng Heng Realty.

62 It would be a misnomer to describe any of the above evidence as "*fresh evidence*". All of them were either in the possession, custody and control of the 2nd defendant at all material times (and consequently the 5th to 9th defendants) or could have been made available without any difficulty. Further in the course of the hearing, Ms Barker submitted that the 5th to 9th defendants' case in relation to Seng Heng Realty was clear and strong though she accepted that their case in relation to KK Holdings and National Aerated was not as strong.

KK Holdings

63 There were altogether four shares issued in KK Holdings. The 5th to 9th defendants submitted that the one share in KK Holdings was not *transferred* from KK Ching to the 2nd defendant in 1982 as alleged by the 1st defendant. Instead, from the share register of KK Holdings adduced by the 5th to 9th defendants, one share was *allotted* to the 2nd defendant in 1982. It is pertinent to note that at the same time one share was also *allotted* to the 1st defendant. Nonetheless, the 1st defendant testified erroneously in [23] of her own AEIC that KK Ching had *transferred* his shares to various parties which included the one share that was actually *allotted* to her under the 1982 Trust. Therefore, taking the 5th to 9th defendants' case at its highest, at best the 1st defendant had merely made an error in using the word "transfer" instead of "allot" in her evidence. Significantly, she made the same error in respect of the one share which she acknowledged was held on trust for KK Ching. In my view, the burden of proving fraud cannot be discharged by pointing out the 1st defendant's inadvertent use of imprecise language.

64 The 5th to 9th defendants further alleged that apart from the allotted share, the other share held by the 1st defendant in KK Holdings was transferred to her by Ching Kwong Hoong and not by KK Ching, and that this would suggest that the 1st defendant could not have held that share on trust for KK Ching. If this were right, that would logically mean that the 1st defendant also held one share in KK Holdings on trust for Ching Kwong Hoong. However, to-date Ching Kwong Hoong (who is still alive) has notably not come forward to claim the one share in KK Holdings. Further, the 4th defendant had also admitted that she held the balance one share in KK Holdings on trust for KK Ching. In fact this merely went to prove that all the four shares in KK Holdings were at all material times held on trust for KK Ching. It was probably no coincidence that KK Holdings bore the initials of KK Ching.

65 I therefore held that there was no fraud whatsoever in the evidence of the 1st defendant in relation to the one share in KK Holdings that I found was held by the 2nd defendant on trust for KK Ching.

National Aerated Water Singapore Pte Ltd (referred to as "National Aerated")

66 The 5th to 9th defendants' case was that the 1st defendant's evidence in relation to National Aerated was fraudulent because the shares were not transferred to the 2nd defendant in 1982. Instead, from the share register of National Aerated, they were only transferred from KK Ching to the 2nd defendant in 1985. To understand this error, it was necessary to note that it was never disputed that KK Ching was the registered owner of 62,250 shares as at 3 October 1981. At that time, the shareholding of National Aerated was as follows:

(a) 2nd defendant – 35,000 shares;

(b) KK Ching – 62,250 shares;

(c) 3rd defendant – 62,250 shares;

(d) Ching Kwong Hoong – 62,250 shares;

(e) 1st defendant – 31,500 shares;

(f) Ching Pui Harn – 31,500 shares; and

(g) the Yap family – 194,250 shares

67 It was also not disputed that a rights issue (1 for 1 share) was made on 8 January 1982. KK Ching, like the other shareholders (except the Yap family who did not subscribe), was allotted one share in National Aerated for every one share owned. Consequently, KK Ching was issued with a further 62,250 shares. A further 38,350 shares were allotted to KK Ching from an excess rights issue in February 1982. On 15 October 1982, KK Ching transferred 62,250 shares to the 1st defendant to hold on trust for him. On 8 July 1985, KK Ching transferred his balance 101,100 shares (a sum of 62,250 and 38850 shares) in National Aerated to the 2nd defendant. Arising from the above, it could at best be said that the 1st defendant made an error in stating that the transfer of KK Ching's shares in National Aerated to the 2nd defendant occurred in 1982 instead of 1985.

68 In 1989, the Yap family shares in National Aerated were acquired by the Ching family and the 2nd defendant distributed the Yap family shares to the members of the Ching family in proportion to their respective shareholdings in the company. Following the acquisition, the 2nd defendant distributed 10,020 National Aerated shares to the 1st defendant in respect of the 62,250 shares which she was holding on trust for KK Ching. A total of 16,274 shares were proportionately distributed to the 101,100 shares held on trust by the 2nd defendant for KK Ching, thus making the total number of shares held on trust to be 117,374 shares (a sum of 16,274 and 101,100 shares).

69 Before me, the 5th to 9th defendants also sought to prove that the shares owned by KK Ching in National Aerated were actually paid by the 2nd defendant and hence the shares could not have been held on trust for KK Ching. This was based on a journal maintained by the bookkeeper of the 2nd defendant. It was unclear how this journal was relevant to the allegation of fraud, given that the 5th to 9th defendants have not disputed the fact that at the time when the plaintiff and 1st defendant gave evidence at the trial, they had no access to the financial journal. More pertinently, I found that

the entries in the journal were inconclusive and at best equivocal. They certainly did not prove that the National Aerated shares registered in KK Ching's name were paid by the 2nd defendant. In particular, the journal entry dated 12 January 1982 merely stated "NAWC [Rights Issue] [note: 15] ", while the entry dated 11 February 1982 stated "NAWC (KK Ching Excess Shares)". These entries do not conclusively show that the 2nd defendant had paid for the 62,250 shares and could equally be consistent with the 2nd defendant making payment on behalf of KK Ching. In any event, the entry for "NAWC [Rights Issue]" reflected a payment of $152,250, and not $62,250. Furthermore, with regard to the entry which stated "NAWC (KK Ching Excess Shares)", the very same language was used in respect of the payment for the shares in the 6th defendant's name, as the journal entry also dated 11 February 1982 stated "NAWC ([Zhaoliang] [note: 16] Excess Shares)"; yet it was not asserted that the 6th defendant was holding these shares on behalf of the 2nd defendant. Lastly, in view that both the 2nd defendant and the bookkeeper have since passed away, the Court would not be assisted on whether the journal was genuine, accurate or complete, and even on the proper interpretation of the entries therein. As such, there remained unresolved doubts on the reliability and accuracy of the journal. For example, although the journal entry dated 20 April 1982 stated "NAWC [Change to Cash] [note: 17] ", there was no corresponding record of the 2nd defendant liquidating his National Aerated shares during this period. This demonstrated the questionable accuracy and completeness of the journal entries.

70 If KK Ching had indeed held his shares in National Aerated on trust for the 2nd defendant, KK Ching would be the only brother in the Ching family who had no beneficial interest in the shares of National Aerated. The 5th to 9th defendants were not able to provide any conceivable explanation to account for this improbable discrepancy in the familial distribution of shares. In any event, even if the shares had been paid by the 2nd defendant, this would at most go to the merits of the 5th to 9th defendants' case which properly belonged as an issue for the trial or an appeal subject to compliance with the test in *Ladd v Marshall*. Further, Mr Hri Kumar drew my attention to the 6th defendant's 2nd affidavit wherein he alleged that the 2nd defendant had complained that the other members of the Ching family had not repaid him for the monies spent for the Yap family shares. By their own case, the 2nd defendant treated the payment as a loan to his family members which would displace the contention that KK Ching had held the National Aerated shares on trust for him. In my view, these allegations do not even come close to establishing fraud in the evidence of the 1st defendant in relation to the National Aerated shares.

$1 million cash

71 Put simply, the 5th to 9th defendants' case was that no documentary evidence was adduced by the plaintiff to prove the existence of the trust in respect of the $1 million cash. The finding was based on the evidence of the 1st defendant. Since the evidence of the 1st defendant in relation to KK Holdings and National Aerated was purportedly unreliable, her evidence in relation to the $1 million should likewise be tainted.

72 In the present case, the 5th to 9th defendants contended that no documentary evidence was adduced by the plaintiff to prove the existence of the trust in respect of the $1 million cash. However, the production of any such documentary evidence *would not have disclosed any new fact*. The only function of any such documentary evidence would have been to *corroborate* the plaintiff's position. It could hardly be said that the non-disclosure of evidence which would not have disclosed

any new fact could constitute actual fraud. Furthermore, to the extent that the Privy Council in *Hip Foong Hong* had opined that a party's failure to disclose corroborative evidence to support the *opponent's case* does not amount to fraud, it is all the more so in the case of non-production of evidence to corroborate *one's own case*. This claim was asserted by the plaintiff from the very outset in the letter of demand. The absence of corroborative evidence was apparent to the 5th to 9th defendants from the outset. This point could have been raised at the trial and the relevant witnesses (*ie* the plaintiff and the 1st defendant) cross-examined on it. The failure to produce corroborative evidence was not tantamount to actual fraud.

73 In further support, the 5th to 9 defendants produced the 2nd defendant's UOB bank statements to show that there was no deposit of $1 million in 1982. This was an argument on the merits which should and could have been raised at the trial. In any event, the 5th to 9th defendants' argument did not inexorably lead to the conclusion that the evidence of the 1st defendant in relation to the $1 million trust was necessarily fraudulent. During the hearing, Ms Barker accepted that the 2nd defendant might well have other bank accounts which have not been disclosed.

Seng Heng Realty

74 I come to the 5th to 9th defendants' case in respect of the Seng Heng Realty shares which Ms Barker described as their strongest case. They submitted that the plaintiff's evidence that KK Ching had transferred 32,000 shares in Seng Heng Realty to the 2nd defendant under the 1982 trusts was fraudulent. They pointed out that since the company records showed that KK Ching did not at any time prior to his death own any shares in Seng Heng Realty, it was not possible for KK Ching to have transferred any shares in Seng Heng Realty to the 2nd defendant.

75 The allotment of shares in Seng Heng Realty was a general familial arrangement to distribute to each brother an approximately equal share in the company. The shares were distributed in 1975 and the Ching brothers held 32,000 shares each but the 2nd defendant held twice the amount of shares which totalled 64,001 shares. The 5th to 9th defendants offered no explanation as to why KK Ching would be excluded from this familial arrangement, and why the 2nd defendant would hold twice the amount of shares held by the other brothers individually. The fact that the 2nd defendant was the original shareholder in Seng Heng Realty did not explain the difference as Ching Kwong Lum, who was the 1st defendant's father and one of the original shareholders together with the 2nd defendant, was distributed the same number of shares (32,000 shares) as the other Ching brothers.

76 The 5th to 9th defendants submitted that the evidence of the 1st defendant in [21] of her AEIC, where she explained that she became aware of the transfer of shares (which included the Seng Heng Realty shares) in the course of updating the register of shareholders for these companies, was false because the shares in Seng Heng Realty were never registered in KK Ching's name in the first place and hence no question of transfer arose. It was therefore suggested that if she had indeed updated the register of Seng Heng Realty, she would have realised that KK Ching had not at any time held shares in Seng Heng Realty. This allegation, however, presupposed that that was the only reason the 1st defendant came to know of the trust assets including the Seng Heng Realty shares held by the 2nd defendant. She had indeed come to know of the trust assets from several other sources, none of which were challenged. The 1st defendant's unchallenged evidence was that [note: 18] :

> In the course of my dealings with KK Ching, I was informed by him that he had also reached an agreement with the 2nd and 4th Defendants to respectively hold the 2nd Defendant's Trust Assets and the 5th defendant's Trust Share on trust for him, in the same way that he had asked me to hold the 1st Defendant's Trust Shares for him...
>
> After the 1982 Trusts were created by KK Ching, KK Ching and I would on occasion, in the presence of Paul, speak about the 1982 Trusts...These conversations took place at KK Ching's residence at 46 Nassim Road...

In addition, the 1st defendant also gave undisputed evidence that:

> The 2nd Defendant also confirmed to both the 3rd Defendant and I that in or around late 1982, he also received similar instructions from KK Ching to terminate the 1982 Trusts and to create the 1984 Trusts under which the 2nd Defendant held the 2nd Defendant's Trust Assets for Paul until he reached 30 years of age... [note: 19]
>
> During my discussions with the 2nd Defendant, between the period 1999 to 2007, he acknowledged the existence of the 1982 Trusts and the 1984 Trusts, and his obligations thereunder...I cannot now remember when exactly these discussions took place, but am able to recall that it happened on several occasions, and that they took place at the 2nd Defendant's office. [note: 20]

77 The 2nd defendant received the sum of $2,113,398.18 on trust (referred to as "Seng Heng monies") after Seng Heng Realty went into voluntary liquidation. The 5th to 9th defendants relied on an affidavit filed by Ms Chua Hwee Kiang as liquidator in the voluntary liquidation of Seng Heng Realty which was filed in response to a discovery order obtained by the plaintiff before the trial. The 5th to 9th defendants purported to rely on Ms Chua's affidavit to support their contention that the 2nd defendant did not receive any part of the Seng Heng monies. If it was not received by the 2nd defendant, then who received it? Ms Chua's statements in her affidavit provided no assistance to the 5th to 9th defendants. The affidavit only stated that Ms Chua did not have in her possession, custody or power the documents evidencing the respective amount of funds returned to each of the shareholders of Seng Heng Realty. Ms Chua stopped short of saying that she has never seen them or that payments to the shareholders of Seng Heng Realty never took place. I emphasise that the burden was on the 5th to 9th defendants to prove that the 2nd defendant did not receive the Seng Heng monies, and that any evidence which asserted otherwise must necessarily be fraudulent or tainted with fraud. They did not discharge this burden by simply raising the unlikely possibility that the Seng Heng monies may not have been received by the 2nd defendant. If so, the monies must be still in Seng Heng Realty but no evidence to that effect was adduced by the 5th to 9th defendants.

78 In the final analysis, I found that the 5th to 9th defendants had failed to adduce sufficient or cogent evidence to establish fraud in relation to any of the trust assets. In fact, the 5th to 9th defendants had referred to matters which dealt with the merits of issues which have been conclusively decided, rather than challenging the authenticity of evidence relied upon. The 5th to 9th defendants have also attempted to disguise a challenge on the sufficiency of evidence as equivalent to a challenge to its authenticity. Any attempt to reargue the merits of the case in the guise of

allegations of fraud is, in my view, an abuse of process. It was also obvious that the documents relied upon by the 5th to 9th defendants, such as the company records of KK Holdings, the share register of National Aerated and the doubtful financial journal purportedly maintained by an unnamed bookkeeper for the 2nd defendant, had existed at the time of the trial and were clearly accessible to the 5th to 9th defendants either through their own means or through an application to the Court. To set aside the Judgment would be tantamount to permitting the 5th to 9th defendants to challenge or disregard the evidence of the plaintiff. As he had since unfortunately passed away, the prejudice to the plaintiff and now his estate could not be compensated by any cost order.

79 Furthermore, in the stay application filed by the 5th to 9th defendants on 26 February 2010, it was stated in the supporting affidavit [note: 21] that they have procured documentary evidence from the National Aerated Share Register and the 1982 financial journal, to show that the transfer of shares had allegedly taken place in 1985 instead of 1982, and that the shares issued to KK Ching were paid for by the 2nd defendant. Although the *same arguments* based on the *same documents* (with regard to disputes over the shares in National Aerated) were made as in the present application before me, the 5th to 9th defendants conspicuously did not *make any allegation of fraud* for the stay application. Instead, in the same supporting affidavit, they merely stated that they "verily believe that there are *merits* to [their] appeal". [note: 22] In these circumstances, it was manifestly evident that even the 5th to 9th defendants were themselves not convinced that there was fraud involved notwithstanding their access to the purported "new evidence" in the form of National Aerated's Share Register and the 1982 financial journal. The application to set aside the Judgment on grounds of fraud was clearly an afterthought contrived as an attempt to revive the case after having allowed their appeal to lapse. At the highest, by their own case, the "new" evidence would merely establish that there might be some "merits" in their appeal.

Conclusion

80 One of the reasons proffered by the 5th to 9th defendants to explain their absence from the trial was their lack of personal knowledge of the alleged trusts and their belief that they "*would be unable to make any meaningful contribution to the proceedings*". However, everything that they have now alleged in their attempt to set aside the Judgment were matters which they could have raised at the trial and, more importantly, when the plaintiff was still alive. In the context of the required threshold to set aside the Judgment, the 5th to 9th defendants were indeed unable to make any meaningful contribution. They made a conscious and deliberate judgment call and "*buried their heads in the sand*" (see *Shocked* at p 382) when they had the opportunity to properly contest the claims. Under such circumstances, the observations of Browne-Wilkinson VC in *Craddock v Barber* [1986] CA (19 February 1986) that: "*I [can] see no manifest injustice in not offering him a second opportunity*", are particularly apposite. To do the contrary would result in manifest injustice to the plaintiff and now his estate.

81 Accordingly, I dismissed both applications with costs which I fixed at $40,000 excluding disbursements.

[note: 1] 5th to 9th defendants' written submissions dated 23 November 2010 at para [95].

[note: 2] 6th defendant's affidavit dated 9 September 2010 at para [92].

[note: 3] 6th defendant's affidavit dated 12 November 2010 at para [40].

[note: 4] 6th defendant's affidavit dated 12 November 2010 at para [35] and [37].

[note: 5] *2nd defendant's defence dated 9 October 2008 at para*[7].

[note: 6] *Ibid* at para [9].

[note: 7] *Ibid* at para [7].

[note: 8] 6th defendant's affidavit dated 12 November 2010 at para [35].

[note: 9] *Ibid* at para [38].

[note: 10] *Ibid* at para [39].

[note: 11] 5th to 9th defendants' written submissions at para [95].

[note: 12] 5th to 9th defendants' written submissions at para [25].

[note: 13] 5th to 9th defendants' written submissions at para [95].

[note: 14] 5th to 9th defendants' written submissions at para [96].

[note: 15] Original in Mandarin.

[note: 16] Original in Mandarin.

[note: 17] Original in Mandarin.

[note: 18] See 1st defendant's AEIC dated 5 October 2009 at para 21(c) and 22.

[note: 19] *Ibid* at [39].

[note: 20] *Ibid* at [72].

[note: 21] Supporting affidavit of 6th defendant deposed on behalf of the 5th to 9th defendants, dated 26 February 2010.

[note: 22] *Ibid* at [3a].