**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2020] SGCA 68**

Civil Appeal No 141 of 2019 and Summons No 23 of 2020

Between

JWR Pte Ltd

… *Appellant*

And

(1) Edmond Pereira Law Corporation
(2) Edmond Avethas Pereira

… *Respondents*

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# GROUNDS OF DECISION

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[Civil Procedure] — [Appeals]
[Civil Procedure] — [Pleadings] — [Amendment]

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# JWR Pte Ltd
# v
# Edmond Pereira Law Corp and another

**[2020] SGCA 68**

Court of Appeal — Civil Appeal No 141 of 2019 and Summons No 23 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Tay Yong Kwang JA
10 June 2020

16 July 2020

**Tay Yong Kwang JA (delivering the grounds of decision of the court):**

1 The present appeal arose from a claim by the appellant, JWR Pte Ltd, against the respondents, its former solicitors, for the negligent conduct of an action in the High Court. The claim was dismissed in its entirety following a three-day trial. On appeal to this court, the appellant sought to abandon its case at trial and instead decided to rely on a single new allegation of negligence which was not raised at all during the trial. For this purpose, the appellant applied by way of CA/SUM 23/2020 ("SUM 23") to seek leave from the Court of Appeal under O 57 r 9A(4)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) to raise this new point on appeal and to amend its Statement of Claim ("SOC") to plead the new allegation.

2 In our judgment, it was too late and totally unjust for the appellant to change its case in so fundamental a manner on appeal. We therefore dismissed SUM 23 and consequently, also the appeal. We now give our reasons for doing so.

**Background facts**

3 Dr Chen Walter Roland ("Dr Chen") is currently the appellant's sole shareholder and director.[1] According to Dr Chen, in 2006, one Lee Fichow Helen ("Helen Lee") offered to appoint him the sole distributor of products ("Immunotec Products") manufactured by a Canadian company, Immunotec Incorporated ("Immunotec Inc") (see [3] of the judgment of the High Court ("GD") at [2019] SGHC 266). Helen Lee allegedly told Dr Chen that she was a director of Immunotec Research (S) Pte Ltd ("IRS") and that she was the sole distributor of Immunotec Products in Singapore. On 24 March 2006, the appellant was incorporated by Dr Chen and two other doctors.[2] On the same day, the appellant signed an agreement with IRS pursuant to which the appellant was appointed as the sole distributor of Immunotec Products in Singapore ("the IRS Distributorship Agreement").

4 Sometime in July or August 2006, the appellant believed that there was another distributor of Immunotec Products in Singapore. However, it was assured by Helen Lee that it was the sole distributor here. Around this time, Helen Lee also informed Dr Chen that IRS had changed its name to United Yield International Pte Ltd ("UYI") and that the distributorship agreement had

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1 Edmund Pereira ("Pereira")'s AEIC at p 98.

2 ACB.II 277; Statement of Claim in the Original Suit at para 6.

to be changed accordingly.[3] Accordingly, a new agreement was signed between the appellant and UYI on 18 August 2006 ("the UYI Distributorship Agreement") (GD at [4]).

5 Dr Chen alleged that he subsequently discovered that IRS and UYI were in fact two separate companies and that there were other parallel importers in Singapore distributing Immunotec Products (GD at [5]). Further, the appellant was not recognised by Immunotec Inc as its sole distributor in Singapore because Helen Lee had not sought approval for this arrangement. However, after Dr Chen raised these matters to Helen Lee, UYI sent the appellant a notice on 18 October 2006 purporting to terminate the UYI Distributorship Agreement.

6 On 8 October 2012 (ten days short of six years from the date of UYI's notice of termination), Dr Chen met Mr Edmond Pereira (the second respondent) and informed him that he wanted his law firm, Edmond Pereira Law Corporation (the first respondent), to commence legal proceedings against Helen Lee and UYI (GD at [6]). On 13 October 2012, Dr Chen wrote to the respondents giving his views on the dispute. On 15 October 2012, Dr Chen wrote again to the respondents instructing them to commence action against Helen Lee and UYI as soon as possible. The same day, the respondents advised him that proceedings against UYI would not be easy as it had been struck off the register of companies. The respondents also advised that the claim against Helen Lee was unlikely to succeed as the agreement was between the appellant and UYI. On 16 October 2012, Dr Chen replied maintaining that Helen Lee had acted in her personal capacity. The same day, the respondents advised that both IRS and UYI had been struck off the register of companies, that Helen Lee had

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[3] ACB.II 55.

signed the distributorship agreements in her capacity as a director of IRS and UYI respectively and that piercing the corporate veil would require fraud and/or deceit. The respondents' opinion was that there was insufficient evidence to succeed against Helen Lee but Dr Chen was adamant that there was sufficient evidence.

7 In the morning of 17 October 2012, the second respondent met Dr Chen and advised him of the difficulties in his case and also the urgency to commence action before the limitation period set in. The second respondent also advised that UYI could not be sued as it had been struck off and that there was insufficient evidence to substantiate the appellant's claim. However, Dr Chen instructed that an action be commenced against only Helen Lee so as to stop the claim from being time-barred. It was in these circumstances that the respondents commenced HC/S 896/2012 ("the Original Suit") against Helen Lee that same evening. It was not disputed that there was urgency in filing the Original Suit as the action would become time-barred the following day (GD at [42]).

8 In April 2013, Helen Lee filed an application to strike out the appellant's claim in the Original Suit ("the Striking Out Application"). The Striking Out Application was allowed by an Assistant Registrar ("AR") who held that the claim against Helen Lee could not succeed because it would require the piercing of the corporate veil of IRS and/or UYI and this was not adequately pleaded. Moreover, there was no evidence to suggest that the corporate veil could be pierced.

9 Following the AR's decision, the respondents recommended to the appellant not to appeal to a Judge of the High Court.[4] As a result, no appeal was filed and the Original Suit remained struck out.

### The trial in the High Court

10 In September 2015, the appellant commenced the present suit, HC/S 992/2015 ("the Negligence Suit"), against the respondents. The appellant's pleaded claims against the respondents at the trial were encompassed in para 16 of the SOC which was in the following terms:[5]

> 16. In breach of the said term and/or duty and negligently, [the respondents] failed to exercise any due care, skill or diligence in or about the prosecution of the said claim or proceedings.
>
> **Particulars**
>
> i. Failing to render appropriate legal advice to [the appellant].
>
> ii. Advising that [the appellant] could not sue [IRS] and/or [UYI].
>
> iii. Commencing proceeding in [the Original Suit] against the wrong party.
>
> iv. Failing to file an application under Section 340 of the Companies Act for an order declaring that [Helen Lee] be personally responsible, without any limitation of liability, for all or any of the debts or liabilities of [IRS] and [UYI].
>
> v. Failing to include in the Statement of Claim sufficient particulars that would support [the appellant's] claim against [Helen Lee].
>
> vi. Failing to apply for leave to amend [the appellant's] Statement of Claim to show that [the

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4 ACB.II 128, 135.

5 ROA Vol II 36–38.

> appellant] [has] a reasonable cause of action against [Helen Lee].
>
> vii. Failing to consider and advise [the appellant] on Section 343 of the Companies Act.
>
> viii. Allowing [the appellant's] claim in [the Original Suit] to be struck out.
>
> ix. Failing to provide competent representations to [the appellant] as required by the Legal Profession (Professional Conduct) Rules 1998 section 16, for a lawyer with insufficient knowledge, skill or experience to obtain such knowledge and skill through study and research or through the association with him of another lawyer of established competence in that field (i.e. company law).

11 Pursuant to the respondents' request, the appellant served further and better particulars ("F&BP") in relation to the SOC, including the above-mentioned para 16. The F&BP elaborated on the precise nature and scope of the appellant's allegations of negligence against the respondents. The pertinent portions are the following:

> (a) In respect of para 16(i) of the SOC, the respondents had sought particulars of the "appropriate legal advice" which they had allegedly failed to render. The F&BP stated that the respondent had failed to adequately advise the appellant on ss 340 and 343 of the Companies Act, to advise the appellant to commence proceedings against all three parties (Helen Lee, IRS and UYI) and to take the appropriate steps to lift the corporate veil of IRS and UYI or to show that they were Helen Lee's alter egos.[6]

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6 ROA Vol II 121–124.

(b) In respect of para 16(vi) of the SOC, the respondents had sought particulars of the alleged amendments to the Statement of Claim in the Original Suit which should have been applied for. The F&BP stated:[7]

> Amendments which [the respondents] should have applied for includes the application for leave to amend the pleadings to include the lifting of the veil of incorporation, include the evidence to support the claim for the alter ego of [Helen Lee], and the applications under Company Act (Chapter 50) Sections 340 and 343, on the grounds of fraud and or fraudulent misrepresentations.

(c) In respect of para 16(viii) of the SOC, the respondents had requested particulars on how they had allegedly allowed the appellant's claim in the Original Suit to be struck out. The F&BP stated:[8]

> [The respondents] failed to apply for the necessary leave to proceed with the claim against Helen Lee.

12 The appellant pleaded that by reason of the respondents' negligence, it lost its prospects of recovering damages from Helen Lee for fraudulent misrepresentation in the Original Suit.[9] The appellant also sought repayment of the legal fees charged by the respondents as well as the $3,500 paid by the appellant to Helen Lee for the costs of the Striking Out Application.

13 The trial proceeded on the basis of the appellant's case as pleaded and particularised in the SOC and the F&BP. In the GD, the High Court Judge ("the Judge") dealt with the appellant's claims along these lines. As the Judge summarised it, the appellant's case at trial, both as to the respondents' negligent

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7 ROA Vol II 131.

8 ROA Vol II 133.

9 ROA Vol II 38–39.

advice and negligent conduct of the suit, was intertwined with its central argument that the respondents' advice fell short in that they advised the appellant that it could not sue IRS and/or UYI and they failed to consider and advise on the possibility of making an application under s 343 of the Companies Act to restore IRS and/or UYI, followed by an application under s 340 of the said Act to impose personal liability on Helen Lee: GD at [30] and [33].

14 The Judge dismissed the Negligence Suit in its entirety as he held that none of the allegations of negligence was made out by the appellant. The Judge also held that even if there was negligence on the respondents' part, the appellant could not prove that it had suffered loss, commenting that the appellant's claims on the amount of its alleged loss were weak and unsubstantiated (GD at [98]). The appellant's claim on its alleged losses changed significantly as the matter proceeded. In the Original Suit, the appellant asserted that it had suffered loss of profits amounting to $43.2m due to Helen Lee's fraudulent misrepresentations. The amount was then changed to about $115m. In the Negligence Suit, the amount swung from about $2m to $4.5m. The appellant then filed two valuation reports which estimated its loss of profits at about $9m and from $3.1bn to $8.9bn respectively.

15 The Judge found that the respondents had considered adequately the possibility of reinstating IRS and UYI to the register of companies, that the respondents had acted reasonably in the light of the impending time bar, that they had advised the appellant of the weakness of its case and that the merits of invoking ss 343 and 340 of the Companies Act were questionable in any case (the GD at [40]–[46]). The respondents had also asked the appellant to consider seeking legal representation by other law firms. The Judge also found that the respondents had highlighted to the appellant that there was insufficient evidence to prove fraud and/or deceit on the part of Helen Lee and had asked persistently

for more evidence from the appellant. However, the appellant did not provide adequate instructions to allow the respondents to present a stronger case in the Original Suit (GD at [50]–[72]). The Judge therefore held that the appellant had failed to prove negligence on the respondents' part.

16 The Judge also held that the appellant had not shown that it had a substantial chance of success in the Original Suit. This was because it was questionable whether UYI and IRS could have been reinstated under s 343 Companies Act before the time bar set in (GD at [85]–[86]). There was also no authority for the proposition that reinstatement of a company that had been struck off the register would confer validity retrospectively on an action commenced at the time when that company did not have a legal status. The appellant also could not show that the necessary elements to establish Helen Lee's personal liability under s 340 Companies Act could be satisfied (the GD at [91]–[92]).

17 The Judge further held that the appellant could not prove its loss. First, neither of the valuations of the appellant's loss of profits was reliable (the GD at [101]–[102]). Second, the appellant could not show that Helen Lee, IRS and UYI could satisfy any award in its favour (GD at [103]). Third, since the respondents had complied with the appellant's instructions and did not breach their duty of care, the Judge dismissed the appellant's claim for the legal fees that it had paid to the respondents for the Original Suit (GD at [104]).

18 Finally, towards the end of the GD and just before the Judge dealt with the issue of costs, the Judge made the following comments in a single paragraph at [105] under the heading "Miscellaneous":

> It appeared to me that parties took the view that the claim against [Helen Lee] for fraudulent misrepresentation in [the

> Original Suit] required a piercing of the corporate veil. I had some doubts as to the correctness of this view. A director is *personally liable* for his own torts committed in relation to the company's affairs: see *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [84], citing *Company Directors: Duties, Liabilities and Remedies* (Simon Mortimore ed) (Oxford University Press, 2009) at para 27.22. However, as neither parties' pleaded case turned on this point, I need not say more.
>
> [emphasis in original]

It appeared that the above paragraph was the inspiration for the appellant to abandon the entire case put forward at the trial and to pursue a totally different line of attack against the respondents.

### The parties' cases on appeal

19 Represented by new counsel on appeal, the Appellant's Case made the following statements[10] ("DPL" was the abbreviation used for Director's Personal Liability in the sense articulated by the Judge at [105] of his GD quoted at [18] above):

> 44 As our focus on appeal is on the new point, namely the respondents' failure to appreciate the DPL Principle, we will not deal with the Judge's findings as to why the particulars of negligence pleaded below were not made out. The issue is whether the new point constitutes negligence on the respondents' part.

20 Before us, the appellant presented an entirely new argument. It contended that it was abundantly clear from the respondents' conduct of the Original Suit and the second respondent's evidence at the Negligence Suit that the respondents were unaware of the possibility of making Helen Lee personally

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10 Appellant's Case ("AC") para 44.

liable for her torts pursuant to the DPL Principle and that this clearly constituted negligence on their part.[11]

21 The appellant's case on appeal in relation to the loss of a chance it had suffered by virtue of the Original Suit being struck out also changed. As the appellant stated in its Appellant's Case at para 74, "We will *not* be claiming damages anywhere near the order of the magnitude claimed below." [emphasis in original]. The loss was limited to its operating loss for 2006 of $196,524.35, in addition to the legal fees and liability for costs which the appellant continued to claim.[12] The operating loss was based on the difference between income of $384,181.99 and expenses of $580,706.34. The appellant submitted that this loss was recoverable as the Original Suit had a more than negligible prospect of success and the evidential burden was on the respondents to prove otherwise.[13]

22 Pursuant to the appellant's new case on appeal, on 18 February 2020, it applied in SUM 23 to seek leave under O 57 r 9A(4)(*b*) of the Rules of Court to raise a new point on appeal and to amend its SOC by inserting the following underlined words at para 16(viii) which contained the particulars of the alleged negligence:[14]

> viii. Allowing [the appellant's] claim in [the Original Suit] to be struck out by failing to advance, at the hearing of the striking out application, the argument that a director is personally liable for his torts and thereafter advising the Plaintiffs not to appeal the Assistant Registrar's decision to strike out the claim.

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11 AC paras 45–50.

12 AC paras 74–87.

13 AC paras 56–73.

14 Amended SOC in SUM 23 at p 19.

23 The appellant submitted that SUM 23 should be allowed as it raised a question of law which did not require any fresh evidence and that even if this instance of negligence had been raised at the trial, the respondents could not have offered any satisfactory response to it.[15] The appellant also argued that the amendment to the SOC should be allowed as it was not seeking to introduce a new cause of action and was therefore not asking for a second bite of the cherry. It would also not occasion any prejudice to the respondents.[16]

24 In response, the respondents argued that the appellant could not cross each of the hurdles required for it to succeed in its appeal. They submitted that the new instance of negligence put up by the appellant was mere conjecture as the respondents did not have the opportunity to respond to this allegation at trial.[17] They further argued that the appellant could not show that it had a sufficient chance of proving the alleged fraudulent misrepresentations in the Original Suit, that the appellant's figures for its 2006 operating loss were not properly substantiated and that the appellant could not show it could have recovered any award of damages from Helen Lee.[18]

25 The respondents submitted that SUM 23 should not be allowed as they would be prejudiced by the introduction of a new case on appeal, leaving them no opportunity to respond to the new allegation. Further, there was no good reason for the delay.[19] The respondents argued that the basis of the appellant's new case was entirely different from that pursued during the trial, which had

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15 AC paras 96–111.

16 AC para 113; appellant's SUM 23 subs at paras 34–40.

17 Respondents' Case ("RC") paras 40–52.

18 RC paras 68–96.

19 RC paras 28–37.

focused on the contentions that the respondents ought to have invoked ss 343 and 340 of the Companies Act or that the wrong party had been sued in the Original Suit.[20]

26 The parties also made submissions on the issue of whether the amendment in SUM 23 would introduce a new cause of action which was already time-barred. The period for an appeal against the AR's decision in the Striking Out Application expired on 13 May 2013.[21] The limitation period for a claim in negligence arising from this would have expired by 13 May 2019. However, the appellant's application in SUM 23 was filed only on 18 February 2020. As this court explained in *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd* [2016] 2 SLR 1 at [32]–[34], the threshold question in determining whether such an amendment to pleadings should be allowed was whether it would introduce a new cause of action. This was the key point of contention in the parties' supplemental submissions. However, we decided that there was no need for us to deal with this issue in the light of our view explained below that the appellant should not be allowed to pursue an entirely new case on appeal.

**Our decision**

27 SUM 23 comprised two related applications. They were for leave to raise a new point on appeal and for leave to amend the SOC to plead the same. The considerations which apply in the court's exercise of its discretion to grant both these applications are broadly similar: see *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*") at [59]. The essential question in

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20 See also respondents' submissions for SUM 23 at para 22.

21 RC at para 26.

both cases is whether the opposing party is unduly prejudiced by the raising of a new point or a totally new case against it.

28 In an application for leave to raise a new point on appeal, a key question is whether the new point effectively turns solely on questions of law or whether it raises new issues of fact. The applicable principles were summarised in the recent decision of this court in *Abhilash s/o Kunchian Krishnan v Yeo Hock Huat and another* [2019] 1 SLR 873 ("*Abhilash*"):

> 39 The principles governing the granting of leave to raise new points on appeal were considered by this court in *Feoso (Singapore) Pte Ltd v Faith Maritime Co Ltd* [2003] 3 SLR(R) 556 ("*Feoso*"), which at [28] endorsed the following passage from *Connecticut Fire Insurance Company v Kavanagh* [1892] AC 473 at 480:
>
> > When a *question of law* is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. … But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. [emphasis added]
>
> 40 … [I]n *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 ("*Grace Electrical*") … [t]his court held that there is strictly speaking no legal impediment to an appellant raising new points of law on appeal even if they were not specifically pleaded *provided* that the existing pleadings were sufficiently wide to permit the new points to be raised. Further, the mere fact that the new point sought to be raised *contradicts* the case as pleaded below would not invariably lead to the denial of leave. We explained that in *Feoso*, leave was denied not merely because the new point contradicted the appellant's pleaded case, but, more importantly, because further findings might well have been made or raised had the arguments been raised below. In such a case, the court would thus be "deprived of any findings and reasoning" of the court below (at [36]).

> 41 … [In *Grace Electrical*] we concluded by stating that the following principles would apply when considering whether leave should be granted to introduce new points on appeal (at [38]):
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> > [W]hether a party is granted leave under O 57 r 9A(4)(*b*) … will be the subject of careful consideration in each case, having due regard to factors including (a) the nature of the parties' arguments below; (b) whether the court had considered and provided any findings and reasoning in relation to the new point; (c) whether further submissions, evidence, or findings would have been necessitated had the new points been raised below; and (d) any prejudice that might result to the counterparty in the appeal if leave were to be granted.
>
> [emphasis in original]

29 In *Abhilash*, the new points on appeal related to the probative value of an offer by a third party in the context of a valuation exercise. Those points were characterised by the court as "essentially … *questions of law*" [emphasis in original] which could be decided without further evidence (at [42]). The court therefore allowed those points to be pursued. A very different balance will be struck where the new argument to be raised on appeal would involve issues of fact, where it is almost inevitable that the failure to raise the point at trial had resulted in relevant evidence not being fully ventilated. This was the case in *Susilawati*, where on appeal, the appellant sought to make the fresh allegation that a third party owed her fiduciary duties and had breached those duties. This court did not allow the new point to be raised. It summarised the relevant considerations as follows:

> 47 Arguably the most frequently cited (and authoritative) rendition of the principle governing the introduction of a new point of law on appeal is that expressed by Lord Herschell in the House of Lords decision of *The Owners of the Ship "Tasmania" and the Owners of the Freight v Smith and others, The Owners of the Ship "City of Corinth", The Tasmania* (1890) 15 LR App Cas 223 (at 225):
>
> > … [A] point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought

> to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, *first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.*
>
> [emphasis added]

…

48 … Lord Birkenhead LC's carefully measured caveat in *North Staffordshire Railway Company v Edge* [1920] AC 254 at 263–264, also merits very close attention and adherence:

> [T]here are very few cases of which it can be confidently stated that a failure to raise a relevant contention at the appropriate stage will not prejudice the other litigant. …
>
> … I desire to draw attention to a consideration which in my view is both more general and more important. … To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the Courts below. … *[S]uch attempts must be vigilantly examined and seldom indulged.*
>
> [emphasis added]

…

50 It is axiomatic that the "interests of justice" must be afforded a wider scope than to just merely encompass one party's (*ie*, the appellant's) expectation of "justice". … It has to be emphasised that finality in litigation is usually as much in the interests of justice as a party's interest in succeeding in its claim. … [T]he legitimate expectations of the respondent here are that the case should be resolved on the basis of arguments presented and evidence adduced in the court below, and not on newly minted arguments that require further testimony and

> forensic examination. Plainly there will be a grave and altogether understandable sense of palpable injustice felt by a respondent if a verdict is reversed on grounds that ought to have been raised earlier and could perhaps have been addressed by contrary evidence at the trial.

30 In the present case, we assume, without deciding, that the DPL Principle enunciated by the Judge was a correct statement of the existing law. On this basis, it was clear that if we were to entertain the appellant's new case on appeal, we would not have all the relevant evidence and findings of fact before us. The respondents have not been asked whether they considered the DPL Principle and if not, why not. If that principle were found to be applicable, would the available evidence be sufficient to find Helen Lee liable? All these gaps in the appellant's case before us would have been extremely prejudicial to the respondents who were told to defend a totally different case at the trial.

31 It must be emphasised that the appellant's case on appeal sought to do much more than merely raise an additional legal point in support of its appeal against the decision of the Judge. It was actually seeking to discard the entire basis on which its case proceeded during the three days of trial and to begin afresh with a new allegation of negligence before us. Even if it could be argued that the existing para 16(viii) of the SOC was sufficiently wide to encompass the new allegation of negligence anyway, the appellant had confined the scope of this pleading by its F&BP to a case based on either the piercing of the corporate veil or on liability under ss 340 and 343 of the Companies Act. This was further confirmed by the evidence adduced and the submissions made at trial. We would not know how the Judge would have decided this entirely new case because it was never before him and all the views and findings in his GD were premised on facts and arguments that have now been abandoned.

32 In addition to the issue of prejudice to the respondents, there was also the issue of abuse of the appeal process. The appeal before us would certainly not be an appeal arising from dissatisfaction with the Judge's decision (as the appellant was not even going to address the GD) but would essentially be an appeal arising from dissatisfaction with the way the appellant's previous counsel conducted the entire case in the High Court. In reality, there would be no appeal at all because the Court of Appeal would not be considering whether the Judge was wrong or otherwise in reaching the conclusions set out in his GD. Instead, the Court of Appeal would be effectively conducting a second trial. We have reminded counsel in various previous appeals that they should not be coming before the Court of Appeal as if it were a second trial court and we hope we do not need to sound the same admonition against such abuse of the appeal process for future appeals.

33 As this court made clear in *Susilawati*, an appellate court should be slow to come to the conclusion that there was no need for new issues of fact to be canvassed at trial on the basis that no satisfactory explanation could have been offered in response to the relevant allegations even if they had been made at first instance (see *Susilawati* at [47]–[48] set out at [29] above). Even if the parties had proceeded on agreed facts and only made submissions on specified questions of law, if the appellant decided to abandon the specified questions of law and to put forward new questions of law on appeal, that would also amount to abuse of the appeal process. This is again because the Court of Appeal would not be considering whether the Judge was wrong or otherwise in his decision but would instead be hearing arguments on an entirely new case for the first time. Such an unusual move by the appellant may be acceptable in a rare situation where the case law here or elsewhere has undergone significant developments or the relevant statutory provisions have changed between the

time of the Judge's decision and the appeal. The present case was nowhere near such a situation. The appellant's application in SUM 23 to amend its SOC and to change its entire case on appeal should therefore not be allowed.

34 Just as a matter of discussion and without expressing any view on the merits of the appellant's claims, it was conceivable that there might be a plausible explanation for the respondents not to have conducted the Original Suit on the basis of Helen Lee's personal liability for her alleged torts. The pleadings in the Original Suit were clearly aimed at recovering the loss of profits allegedly suffered by the appellant due to its inability to distribute Immunotec Products under the UYI Distributorship Agreement.[22] This was also the basis on which the appellant put forward the Negligence Suit at trial, as evidenced by its valuation of the loss of profits allegedly suffered. This was a measure of loss based on the benefits that the appellant would have obtained if the UYI Distributorship Agreement had been performed. Such a measure of loss might not be available to the appellant in a claim for fraudulent misrepresentation against Helen Lee, particularly since she was not a party to the contract on the face of the agreement. Indeed, the appellant, advised by its new counsel on appeal, appeared to recognise this as its claim on loss was reduced dramatically on appeal to $196,524.35, said to be its operating loss for 2006. The logic behind this new valuation of loss was that the appellant had been incorporated for the specific purpose of the IRS (and subsequently the UYI) Distributorship Agreement and therefore the appellant would not have suffered the operating loss if Helen Lee had not made the allegedly fraudulent misrepresentations.[23]

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22 ACB.II 77 at paras 19–24, 26.

23 AC at para 77.

This was a measure of loss based on restoring the appellant to its original position and not one for recouping loss of profits.

**Conclusion**

35 For the reasons we have explained above, the appellant's application to amend the SOC to include the new allegation of negligence and to put forward the new case on appeal was an abuse of the appeal process and would also have prejudiced the respondents in a manner which could not be compensated by a costs order. We therefore dismissed SUM 23. Consequently, the appeal was dismissed as well as there would be nothing for the appellant to proceed on.

36 Having considered the parties' costs schedules, we fixed the costs of the appeal and of SUM 23 at $60,000 in favour of the respondents, inclusive of disbursements. The usual consequential orders relating to the security for costs would apply.

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| Sundaresh Menon<br>Chief Justice | Andrew Phang Boon Leong<br>Judge of Appeal | Tay Yong Kwang<br>Judge of Appeal |

Chong Siew Nyuk Josephine and Navin Kangatharan
(Josephine Chong LLC) for the appellant;
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