Lau Hwee Beng and Another v Ong Teck Ghee
[2007] SGHC 90

Case Number : Suit 715/2006, SUM 5583/2006, 916/2007

Decision Date : 30 May 2007

Tribunal/Court : High Court

Coram : Paul Tan AR

Counsel Name(s) : Ang Cheng Koon Benjamin (Engelin Teh) for the plaintiffs; Cheo Chai Beng Benny (Cheo Yeoh & Associates) for the defendant

Parties : Lau Hwee Beng; Chong Shin Leong — Ong Teck Ghee

30 May 2007 Judgment Reserved

Assistant Registrar Mr Paul Tan:

1 At the end of a rather convoluted chain of events, which is not necessary to recount in detail, the plaintiffs settled on a relatively straightforward claim in respect of which they urged this court to grant summary judgment. That claim is this: having handed over some $350,000 to the defendant, who was their solicitor, with instructions (given orally) to pay these over to one Mr Lee Thiam Seng in order for the latter to invest the sum in Beijing Asean Union Consulting Co Ltd ("Beijing Asean") and Abundant Performance Ltd ("Abundant") in return for an issue of shares or rights in the respective companies, they now want the defendant to render an account of the sums paid to him, and in particular, to show whether the sum was, in fact, given to Mr Lee or that Mr Lee had received the same. The defendant acknowledged receiving these sums but insisted that he was not liable to account because he was acting as Mr Lee's solicitor, not the plaintiffs'. The defendant also added that, in any case, the sum was received by Mr Lee and that the plaintiffs got what they paid for. Accordingly, the defendant submitted that the plaintiffs' claim ought to be struck out as, *inter alia*, disclosing no reasonable cause of action. Although the facts relating to both the applications for summary judgment and striking out are not at all complex, the law relating to summary judgment (and incidentally, striking out) is, with respect, somewhat untidy and I have sought to unpack the fundamental principles governing the analysis of an application for summary judgment in the following pages.

The plaintiffs' case

2 In the plaintiffs' statement of claim ("SOC"), it is stated that on or about March 2004, the plaintiffs and the defendant agreed that the former would invest in Beijing Asean and Abundant; and to that end, the plaintiffs would pay the defendant a total of $350,000, which was to be paid to the companies on the plaintiffs' behalf. These instructions were given orally. The plaintiffs allege that the defendant was acting as their solicitor in this transaction.

3 In order to carry out the plan, the defendant drafted co-investment agreements setting out the terms of the plaintiffs' investments in the said companies. These agreements were executed by the first and second plaintiffs on 4 and 8 March 2004 respectively.

4 On 25 September 2006, the plaintiffs, through another set of solicitors, wrote to the defendant requesting an account of the moneys paid to him. The defendant did not reply. The plaintiffs followed up with a letter of demand dated 5 October 2006, seeking the repayment of the moneys given to the defendant. By a letter dated 10 October 2006, the defendant admitted to having

received the moneys from the plaintiffs but refused to return the moneys or give an account. The plaintiffs then replied, insisting, again, that the plaintiff render an account of the moneys, and also furnish the plaintiffs copies of all papers in his possession relating, in particular, to whether the moneys had, as agreed, been paid to Beijing Asean and Abundant.

5 Accordingly, the plaintiffs, at para 12 of their SOC, contend that the defendant is liable to account on the grounds that:

(a) the defendant was plaintiffs' solicitor at all material times;

(b) the defendant, as the plaintiffs' solicitor, is under a duty to provide a true and full account to the plaintiffs upon receipt of the request of the plaintiffs dated 17 October 2006;

(c) the plaintiffs had, on 17 October 2006, terminated their relationship as clients of the defendant and that the defendant is under a duty to furnish the plaintiffs with copies of all the papers relating to the moneys; and

(d) the plaintiffs have reasonable cause to believe that the moneys were not paid to Beijing Asean and Abundant.

6 The plaintiffs' position was elaborated by written submissions, which I had directed parties to file. It would appear that from 1999, the defendant had provided legal advice to the second plaintiff and that the latter had, in fact, been on the corporate retainer of a company known as Suncity Contracts Pte Ltd, which the second plaintiff is a shareholder in and director of.

7 Similarly, the defendant had, from 2001, provided legal advice to the first plaintiff, his family members (in particular, his brother and a transaction involving Kian Ann Engineering Ltd), as well as a company known as Bio-Green Agritech Pte Ltd, of which the first plaintiff was a director and shareholder in.

8 In March 2004, the defendant introduced an investment opportunity to the plaintiffs, namely, to invest in Beijing Asean and Abundant. Subsequently, the defendant informed the plaintiffs orally and by text message that he had prepared co-investment agreements for the plaintiffs to sign with Mr Lee. The defendant also sought to reassure the plaintiffs by representing that he had signed similar agreements with Mr Lee. I pause here to note that it was only in the plaintiffs' written submission that there was a mention of Mr Lee. As set out above, the SOC gives the impression that the defendant was to have invested the moneys received directly with Beijing Asean and Abundant. Notwithstanding that, it became clear, especially through the defendant's submissions and in the hearings before me, that the defendant was merely a stakeholder – either as Mr Lee's or the plaintiffs' solicitor – and that it was Mr Lee who was supposed to eventually invest the moneys in the said companies.

9 Reverting to the plaintiffs' narrative, the first plaintiff had, sometime in December 2004, requested that Mr Lee return the moneys to the plaintiffs. It was then that the plaintiffs say they were informed by Mr Lee that he had not received any of the moneys.

10 It was also asserted that the defendant had on 6 October 2006 sent a text message to the first plaintiff stating:

> Shd try to resolve amicably with him. His investments were v substantial in the 2 projects and I'm sure he wanted them to work out also and he's working on UIB still. To him, we are his partners in

the investments. The UIB investment has not matured. We shd be supporting him.

11 It was after this message that the plaintiffs insisted on an account of their moneys, which the defendant has refused to provide to date.

The defendant's case

12 The defendant's basic position, as outlined above, is that he received the investment moneys from the plaintiffs as Mr Lee's solicitor for the latter to invest in Beijing Asean and Abundant. As such, there is no basis on which the plaintiffs can seek an account of the moneys; and that in fact, the release of any such information would be privileged.

13 Mr Lee, according to the defendant, is a major shareholder of a public listed company known as Ecowise Holdings Ltd ("Ecowise"), of which the defendant was an independent director since 3 March 2003. The defendant's firm, M/s Ong & Lau, were solicitors for Mr Lee, EcoWise and its subsidiaries. Among other ventures, Mr Lee dabbles as an investor in initial public offers (commonly abbreviated as IPOs) in Chinese companies with potential to list in Singapore. At the material time, he had two investments in Beijing Asean and Abundant.

14 The plaintiffs expressed interest in investing in Beijing Asean and Abundant, and Mr Lee then instructed the defendant to prepare the co-investment agreements that were signed on 4 and 8 March 2004 (see [3] above). There were four agreements in all:

(a) The first plaintiff's agreement dated 4 March 2004 to invest $406,500 in Beijing Asean in return for a 4.065% equity stake in the company. Mr Lee or his nominees would then issue a letter of indemnity in favour of the first plaintiff;

(b) The first plaintiff's agreement dated 4 March 2004 to invest US$55,000 in Abundant in return for 25,000 rights shares, which Mr Lee would procure to be registered in the first plaintiff's name. If that could not be done, a trust would be executed in favour of the first plaintiff;

(c) The second plaintiff's agreement dated 8 March 2004 to invest $206,500 in Beijing Asean in return for a 2.065% equity stake in the company. Mr Lee or his nominees would then issue a letter of indemnity in favour of the second plaintiff; and

(d) The second plaintiff's agreement dated 4 March 2004 to invest US$55,000 in Abundant in return for 25,000 rights shares, which Mr Lee would procure to be registered in the second plaintiff's name. If that could not be done, a trust would be executed in favour of the second plaintiff.

15 It was stated in these agreements that Mr Lee acknowledged receipt of the amounts stated therein, which included the $350,000 paid by the plaintiffs to the defendant.

16 The defendant does not deny that he shared an interest in the investments in Beijing Asean and Abundant and therefore supported Mr Lee's ventures. Nor does the defendant deny acting for the plaintiffs in the manner described at [6] and [7] above. However, the defendant argues that these did not mean that he acted for the plaintiffs in the particular transaction in question. In fact, in early March 2004, the first defendant had forwarded proposed amendments to the co-investment agreements relating to Beijing Asean that he (*ie* the first plaintiff) represented his own solicitor had drawn up.

17 In addition, the defendant alleges that the plaintiffs have already acquired their equity in Beijing Asean and Abundant but that they were trying to rescind the co-investment agreements because the investments had turned out poorly.

Assessment of SUM 5583 of 2006 – the application for summary judgment

Principles governing summary judgment

18 The specific command in O 14 r 3(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is that unless there is an issue or question in respect of a claim or part of a claim that "ought to be tried" summary judgment should be granted in favour of the plaintiff on that claim or part thereof. Case law has since developed a veritable trove of idioms and expressions in an attempt to explain precisely what the standard of proof ought to be, or in any event, how a judge assessing an application for summary judgment should approach his task. We are told, in some instances, that the test is whether there is a "fair or reasonable probability of [the defendant] setting up a defence": see *Apollo Enterprises Ltd v Dynasty Theatre Nite-Club KTV & Lounge Pte Ltd* [1995] SGHC 72, citing *National Westminster Bank v Daniel* [1994] 1 WLR 1453 at 1457. In other cases, we are asked to home in on whether the defendant has a "real or *bona fide* defence": *Paris et des Pays-Bas (Suisse) SA v Costa de Naray* [1984] 1 Lloyd's Rep 21 at 23; cited in *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32 at [25]. On yet other occasions, we must look further than the immediate case and take into account policy considerations: see, *Jones v Stone* [1894] AC 122 ("*Jones*"), where the court held that the proper inquiry is whether there is reasonable doubt that the plaintiff is entitled to judgment, and whether it is inexpedient to allow [the] defendant to defend for mere purposes of delay. See also, *Habibullah Mohamed Yousoff v Indian Bank* [1999] 3 SLR 650, which at [21] endorses *Jones*. More apparently synonymous terminology abound: see, for example, *Maybank Finance (Singapore) Ltd v Yap Thiam Sen and Anor* [1990] SLR 501 at [5], 504; and *Bhojwani and Anor v Chung Khiaw Bank Ltd* [1990] SLR 128 (whether "triable issues" are raised); *Stone Forest Consulting v Wee Poh Holdings* [2004] 3 SLR 216 at [18] (whether the defendant has a "fairly arguable point"); *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400 at 414-415, (per Gunn Chit Tuan SCJ, dissenting) (whether the claim is "virtually unconstested or uncontestable"); *Syn Lee & Co v Bank of China* [1961] MLJ 87 at 87 (whether there is a "moral improbability of a very high degree that the defendant can succeed"); *Hua Khian Ceramics Tiles Supplies v Torie Construction* [1992] 1 SLR 884 at 890 (a "robust approach" to ensure that the true purpose of the arguments raised by the defendant is not to cause delay to the plaintiff).

19 If we move to England, the test there is now defined by r 24.2 of the Civil Procedure Rules 1998 (SI 1998/3132) ("the CPR") as being whether there is a "reasonable prospect of success", a test that the courts have not found to require further amplification: see, *Swain v Hillam* [2001] 1 All ER 91. The intention behind this particular reform was to make it more difficult to get past summary judgment: see, U.K., Department of Constitutional Affairs, *Access to Justice Final Report* by The Right Honourable the Lord Woolf (1996), online: Department of Constitutional Affairs <http://www.dca.gov.uk/civil/final/index.htm> (accessed: 19 April 2007) at chp 12; Derek O'Brien, "The New Summary Judgment: Raising the Threshold of Admission" (1999) 18 C.J.Q. 132 at 135. In Australia, descriptions of what would justify summary judgment include whether there is "no real substantial question to be tried" and whether there is no "plausible ground of defence." See, Bernard Cairns, *Australian Civil Procedure* (Sydney: Lawbook Co., 2002) at 387-388. The Supreme Court of Canada has said that a party opposing summary judgment must show "a real chance of success": *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165 at [15]; *Guarantee Co. of North America v Gordon Capital Corp* [1999] SCR 423 at [27]; whereas in Ontario, statute requires that there be a "genuine issue for trial": see, r 20.04(2) of the Rules of Civil Procedure;*Irving Ungerman Ltd v Galanis* (1991) 83 D.L.R. (4th) 734 ("*Ungerman*").

20 The cases do not draw any distinction among these formulations; indeed, several cases employ these different tests interchangeably. Be that as it may, there are clear practical and conceptual differences among these expressions. To ask whether a defence is *bona fides* would lock the inquiry on the motivations of the defendant in opposing the claim, and to that extent, may compel a decision to grant summary judgment even though the defendant may have some otherwise legally valid arguments. Similarly, divergent conclusions may flow from a focus on whether it is inexpedient to allow a claim to go to trial as opposed to whether the defendant has a realistic or plausible defence. Setting the bar at whether the defence has a real chance of success involves weighing just how strong the defendant's position is apropos the plaintiff's; but determining whether there are triable issues requires merely that the defendant's case has a credible substratum of supporting facts and law. Here, whether the defendant is likely to win at trial is only secondary, if at all relevant.

21 A diffusion of opinion has also surfaced in relation to the appropriate approach to take in assessing the evidence in an application for summary judgment. As comprehended by Webster J in *Paclantic v Moscow Narodny Bank* [1983] 1 WLR 1063 at 1067, a judge should only reject evidence in an affidavit if it is inherently unreliable in the sense that it is self-contradictory, inadmissible or irrelevant. The mere fact that the evidence appears to be inconsistent with other evidence or implausible is not sufficient to reject it. On appeal to the English Court of Appeal ([1984] 1 Lloyd's Rep 469 at 475), Goff LJ cast doubt on the correctness of this approach; and in *Banque de Paris v Costa de Nary* [1984] 1 Lloyd's Rep 21 at 23, the English Court of Appeal took a somewhat less categorical approach, as follows:

> It is of course trite law that O 14 proceedings are not decided by weighing the two affidavits. It is also trite that the mere assertion in an affidavit of a given situation which is to be the basis of a defence does not, *ipso facto*, provide leave to defend; the court must look at the whole situation and ask itself whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or *bona fide* defence.

22 While the latter analysis has the virtue of being less artificially restrictive, it puts in conflict two very different propositions. How can a judge decide whether the defendant's affidavit expresses sufficiently credible evidence so that "there is a fair or reasonable probability of the defendants having a real or *bona fide* defence" if he is not allowed to weigh the two affidavits? Lord Diplock in the Privy Council case of *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212 at 217 grasped this dilemma by acknowledging that:

> *Although* in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements or by the same deponent, or inherently improbable in itself it may be.
>
> [emphasis added]

23 Lord Diplock then concludes that it is for the judge exercising his discretion to determine whether statements contained in the affidavits have sufficient *prima facie* plausibility to merit further investigation as to their truth.

24 In the meantime, an intriguing development has taken place across the Causeway, in the High Court of Penang's decision in *Suppuletchimi v Palmco Bina* [1994] 2 MLJ 368. Vincent Ng J in that case proposed that there were three standards of scrutiny that a court could bring to bear on affidavit evidence: minimal, optimal and maximal evaluation. According to Ng J, the growing backlog of

cases there demanded that the "minimum evaluation approach in the past, of affidavit evidence when deciding the issue of whether there is a reasonable cause of action in the claim, or triable issue in a defence, would have to give way to the optimum evaluation approach." Perhaps appealing to intuition, it was not explained how these approaches differed from each other either in a conceptual or practical way.

25 In this swamp of judicial dicta, we return to first principles. What is the mechanism of summary judgment intended to achieve and on what basis is it justified? With these principles in mind, we may construct the beginnings of a litmus test for summary judgment applications that reflects those concerns.

26 At the broadest level, the rules of civil procedure are intended to ensure the just disposition of a claim while employing a reasonable amount of court resources. The grand architecture of the rules of court, through such procedures as pleadings, interrogatories and discovery, together with their attendant time-lines, seek to regulate the conduct of adversarial parties with the ultimate aim of arriving at a substantively just result, albeit through procedurally just means. In the UK, r 1.1 of the CPR sets out the governing philosophy of the amended rules:

> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
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> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in which ways are proportionate –
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> (i) to amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues;
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

27 Our Rules do not explicate anything so ambitious but it is implicit in O 34A r 1(1) that a judge's exercise of discretion under the Rules should comport with the "just, expeditious and economical disposal of the cause or matter."

28 At a more specific level, it is not difficult to justify summary judgment on the utilitarian ground of efficiency. It is so rationalised in *Access to Justice Final Report* (*supra* [19]) at para 31 of chp 12:

> [T]he important purposes of case management are stopping weak cases from dragging on and reducing complexity and cost by eliminating issues as the case proceeds. One means of achieving

these purposes is for the court to exercise its power of summary disposal on a wider basis than it does at present.

29 But an unhindered pursuit of efficiency as the predominant driver will lead to the imposition of an unreasonably high threshold for defendants to cross in their opposition to applications for summary judgment. To deny worthy defendants of their day in court is not only a breach of processural justice, it will often be a breach of their expectation of substantive justice as well. These two dimensions of justice – processural and substantive – are intrinsically intertwined. Indeed, a similar observation has also been made by Andrew Phang Boon Leong JC (as he then was) in *United Overseas Bank v Ng Huat Foundations* [2005] 2 SLR 425 at [9].

30 It is therefore not surprising to find some courts expressly repudiating the notion that summary judgments are simply procedural shortcuts. In *Ungerman* (*supra* [19]), the Ontario Court of Appeal correctly pointed out that far from depriving litigants of their day in court, summary judgment is a vindication of processural and substantive justice (at [20]):

> A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice. In such proceedings, the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. [Summary judgment] exists as a mechanism for avoiding these failures of procedural justice.

See also, *Dawson v Rexcraft Storage Warehouse Inc* (1999) 164 D.L.R. (4th) 257 at [29] and *Aguonie v Galion Solid Waste Material Inc.* (1998) 156 D.L.R. (4th) 222 at [35].

31 The appropriate test will seek to strike the proverbial balance between the primordial necessity to ensure a substantively correct decision and the wider interests of court efficiency. The threshold must not be pitched at a level that defendants get a free pass to trial regardless of the strength of their case; neither must it be pitched at a standard that would grant summary judgment even though the defendant might actually prevail at trial. In order to discern that sweet spot between the two extremes, it is necessary to appreciate first that the summary judgment mechanism is situated within what one commentator has called the "litigation matrix" (see, Martin H. Redish, "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix" (2005) 57 Stan. L. Rev. 1329). Several propositions flow from this understanding.

32 First, summary judgment takes place after only the pleadings have closed and the relevant affidavits have been filed in support of or in opposition to the application for summary judgment. Summary judgment, if any, is granted on this basis rather than any extended observation of witnesses under cross-examination. Because of this inherent limitation, and in order to prevent prejudicing the rights of the parties at trial if summary judgment is denied, a judge at this stage does not make "findings" on the merits of the case: see *Marina Sports v Alliance Richfield* [1990] 3 MLJ 5 at 6; John O'Hare and Kevin Browne, *Civil Litigation* (London: Sweet & Maxwell, 2005) at para 19.007. His only task is to divine whether there ought to be a trial. Whether there ought to be a trial must then depend on whether the record exhibits conflicts of fact or law that are material and relevant to the disposition of the plaintiff's claim. If the conflict does not relate to an issue that is at least potentially dispositive of the claim in the sense that the result of the action does not depend on the resolution of that conflict, then it must follow that there is "no issue or question in dispute which ought to be tried". See *Chung Khiaw Bank Ltd v Bhojwani* [1990] 2 MLJ 146 (noting that discrepancies pointed out by the defendant were immaterial), and affirmed by the Court of Appeal in [1990] SLR 128; see also,

Ungerman at [16], citing Charles Alan Wright et al, *Federal Practice and Procedure*, (Saint Paul, Mn.: West Publishing Co., 2nd ed, 1983) at 93-95.

33 Second, because the judicial exercise under O 14 is to determine whether a trial is necessary, not every indication of conflict will suffice. If that were the case, all a defendant will have to do is to suggest in his pleadings or affidavits that he takes issue with particular points. Yet the very purpose of O 14 is to prevent sham defences from defeating the rights of parties by delay and at the same time causing great loss to plaintiffs who are endeavouring to enforce their rights: *Jacobs v Booth's Distillery* (1901) 85 LT 262. This is also implicit in O 14 r 2(3), which requires the defendant to "show cause" why summary judgment would be inappropriate. As Sundaresh Menon JC noted in *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd*[2007] SGHC 42 at [38], it is not proper for the court to assume that every sworn averment is true. Instead, a judge should scrutinise the entire record with care so as to ensure that the defendant's position is articulated with sufficient particularity and supported by cogent evidence: *Uni-france Offshore Engineering v Owners of the 'Cotan Challenger'* [1996] 1 SLR 297 at [13], 300. Osborne JA put it starkly in *1061590 Ontario Ltd v Ontario Jockey Club* (1995) 21 O.R. (3d) 547 at 36, holding that the party responding to an application for summary judgment must "lead trump or risk losing". In this context, it is entirely proper for a judge to sift through the evidence with a critical eye – not in order to resolve conflicts of fact or law – but to determine whether the evidence presented is worthy of being tested at trial.

3 4 Third, understanding the relationship between summary judgment and the trial process also assists in formulating a more precise indication of what the burden of proof that the party responding to an O 14 application has to meet is. The nub of the issue is this: does the evidence show that the defendant could, with interrogatories, discovery, cross-examination and other trial processes, mount a defence against the plaintiff's case? As discussed above, case law has spawned many quantitative appellations: "a credible defence" or "a real defence" and so on. What ultimately matters is that the defendant must cast more than a mere "metaphysical doubt" (*Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 U.S. 574 (1986) at 586) upon the plaintiff's case such that if a judge is going to deny summary judgment, there should be an articulable reason which relates to the evidence before him for why the case is deserving of being put before a trial judge. In this regard, it may be helpful to bear in mind that the burden of proof in a civil trial is not extremely demanding: all that the defendant has to prove is that its position is more probable than the plaintiff's. *A fortiori*, at the O 14 stage, the defendant need not demonstrate that he is *going* to win at trial, or even that he is *likely* to win. To go that far would, in fact, usurp the function of the trial court. All a defendant needs to assure the judge at this stage is that he *could* win in the sense that his case is not unknown to the law and is reasonably supported by evidence that he has and may later obtain given the tools of the trial process at his disposal. This is sufficient to satisfy the court that the matter ought to go to trial.

35 At this juncture, a brief word about the obligations of the plaintiff in an O 14 application may be apposite. In Jeffrey Pinsler ed, *Singapore Court Practice 2006* (Singapore: LexisNexis, 2006) at para 14/3/1, it is observed that:

> Usually, the plaintiff will commence by making the appropriate introduction and describing his claim. He may also have to deal with preliminary matters raised by the court or the other party, such as irregularities in the documents. If everything is in order, the defendant will be called upon within a short time to make his case as the burden lies on him to establish his entitlement to defend the action. It is for the defendant to 'show cause' to the satisfaction of the court (r 2(3)).

36 This may give the impression that the plaintiff has nothing to do except perhaps to present a

prima facie case. It is easy to appreciate why the learned author might incline to such a view. In addition to O 14 r 2(3), which requires the *defendant* to show cause, r 3 is phrased in the negative ("*unless…the defendant* satisfies the Court that…an issue or question in dispute…ought to be tried") and appears to place burden of proof on the defendant. Yet, on principle, one might be forgiven for thinking this strange. Why, if the defendant is going to be deprived of his right to trial, should not the plaintiff be similarly required to prove that his claim would have been strong enough to win at trial? Indeed, in other jurisdictions, it is settled that the plaintiff bears the legal or persuasive burden in an application for summary judgment while the defendant only has an evidentiary burden to discharge: see, for example, *E.D. and F. Man Liquid Products v Patel* [2003] CPLR 384 for the UK position; and *Hi-Tech Group Inc v Sears Canada Inc* (2001) 52 OR (3d) 97 for the Canadian position. In the United States, facts must be interpreted in the light most favourable to the respondent of an application for summary judgment: *Scott v Harris* (No. 05-1631), available at: http://www.supremecourtus.gov/opinions/06slipopinion.html (accessed: 29 May 2007). Amendment to the Rules to resolve this conceptual ambiguity would be advisable, although even in its current incarnation, O 14 r 3 is flexible enough to address this concern so that the same outcome results. This is because the court may decline to award summary judgment if "there ought for some other reason to be a trial". Therefore, notwithstanding the strength or weakness of the defendant's case, a court may decline to award summary judgment where the court is convinced that the plaintiff's warrants closer examination. This was the approach taken by the Supreme Court of Victoria, which because of the inadequacies of the plaintiff's statement of claim, deficiencies in his proof and the nature and circumstances of the transaction on which he sued, refused summary judgment even though the defendant had failed to put up any defence: see, *Hills v Sklivas* [1995] 1 VR 599.

37 One final point may be made. It is common to find in many of the textbooks on this subject a recitation of categories of cases that are usually held to be suitable or unsuitable for summary judgment. While these are certainly helpful, it should not be forgotten that the Rules posit no such strict categorisation; and as such, whether summary judgment should be granted on a particular matter ought to depend on the specific factual paradigm of each case and guided by the overriding consideration of whether there "ought to be a trial".

Whether there ought to be a trial on the facts of this case

38 As stated above, the plaintiffs brought their case on the basis that the defendant had acted for the plaintiffs in their investments in Beijing Asean and Abundant, and that there were reasonable grounds to believe that the moneys paid to the defendant had not been given over to Mr Lee. In truth, it is not necessary to prove that the moneys were not disbursed as instructed. If the defendant had acted for the plaintiffs in the relevant transaction, the plaintiffs are entitled, as a matter of right, to an account of their moneys regardless whether they thought the moneys were properly expended: see, r 19 of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed); R P Meagher et al, *Equity: Doctrines and Remedies* (Sydney: Butterworths, 3rd ed, 1992) at [2504]. As to this proposition, there was no quarrel by the defendant.

39 As such, I now turn to the only material question, which is whether the defendant was the plaintiffs' solicitor at the material time.

40 In so far the plaintiffs' position is concerned, it is important to recall that their purported instructions to the defendant were given orally. No direct evidence was therefore available to support the plaintiffs' case.

41 In order to bolster their case, reliance was placed on, *inter alia*, three crucial pieces of evidence. First, documents were adduced to show that the defendant did act for the plaintiffs prior

to the transaction in question. Second, there was the text message by the defendant persuading the plaintiffs not to ditch the investments. In particular, the phrase, "to [Mr Lee], we are his partners in this investment" demonstrated that the plaintiffs and the defendant were in a close relationship with each other. Third, in a supplementary affidavit filed on 22 May 2007 (which I allowed the plaintiffs to adduce *vide* SUM 2226/2007), a letter dated 10 May 2007 from Mr Lee's present solicitors was exhibited. In this letter, it was stated that Mr Lee denied that the defendant had acted for him in the impugned transaction.

42 The defendants sought to cast doubt on the plaintiffs' position by adducing the following evidence in support of his own case:

(a) Records of M/s Ong & Lau showing that a file had been opened on 13 February 2004 for Mr Lee in respect of an "agreement relating to Beijing Asean Union Consulting Co Ltd and Abundant Performance Ltd";

(b) A fax from the first plaintiff to the defendant containing amendments to the co-investment agreements that were eventually entered into by the plaintiffs with Mr Lee;

(c) An email from the first plaintiff to the defendant on 12 September 2005, in which the former wrote, "As mentioned, please ask [Mr Lee] to show us his sincerity by signing the agreements to refund us the money by Dec 05";

(d) An attachment to the email mentioned in (c) containing an agreement for the plaintiffs to sell their equity in Beijing Asean back to Mr Lee;

(e) An image of a cheque dated 13 February 2004 for $30,000 made out to M/s Ong & Lau by the second plaintiff; and on its reverse, a notation that the moneys were for the firm's client, Mr Lee, in respect of an agreement involving Beijing Asean and Abundant;

(f) An image of a cheque dated 23 February 2004 for $50,000 made out to M/s Ong & Lau by the first plaintiff; and on its reverse, a notation that the moneys were for the firm's client, Mr Lee, in respect of an agreement involving Beijing Asean and Abundant;

(g) A letter dated 12 March 2004 on M/s Ong & Lau's letterhead informing Mr Lee that the plaintiffs had signed the co-investment agreements and paid over the moneys; and that these moneys would be paid into Mr Lee's DBS account as instructed; and

(h) Attendance notes by the defendant referring to Mr Lee as his client.

43 Looking at all the evidence in the round, it is my judgment that the defendant clearly has a case that ought to go to trial. In particular, the file-opening document, the notation on the cheques, and the attendance notes are all contemporaneous records that provide substantial and credible support for the defendant's position that he had treated Mr Lee as his client at the material time. In contrast, the plaintiffs have adduced evidence that, at best, is inconclusive. For instance, evidence that the defendant acted as the plaintiffs' solicitor in *previous* matters may or may not indicate that the defendant continued to act in that capacity in relation to the plaintiffs' investments. The text message does not go far either: that the plaintiffs and the defendant were Mr Lee's business partners does not prove that the defendant was the plaintiffs' solicitor in the investments. Perhaps the strongest evidence in the plaintiffs' favour is the letter by Mr Lee's present solicitors dated 10 May 2007 in which Mr Lee disputes that the defendant had acted as his solicitor. The plaintiffs' position was this showed at on their worst case, the defendant was acting for *both* Mr Lee *and* the plaintiffs.

Not only was this hypothesis rejected by the defendant (his unwavering position being that he had acted only for Mr Lee), there was no evidence adduced in support of Mr Lee's word. As stated, all the contemporaneous documentary evidence asserted that the defendant was acting for Mr Lee. It may well be that the plaintiffs are correct in suggesting that perhaps the defendant acted for both them and Mr Lee, but in the absence of conclusive evidence, it would be remiss to deny the defendant an opportunity of testing his case at trial. In my view, the defendant has raised allegations, grounded in documentary evidence, which goes to the heart of the plaintiffs' position.

44 In fact, when one examines the cases of the parties, it becomes obvious that this is a paradigmatic example of where summary judgment would be inappropriate. In the absence of directly relevant documentary evidence, the plaintiffs' case, as it stands, rests on the credibility of the plaintiffs themselves and on Mr Lee's word. Assessment of the testimonial credibility of witnesses cannot be conducted on the basis of affidavits alone. The reason why an appellate court seldom interferes in a trial judge's determination of the credibility of a witness is the same reason why it would be inappropriate to grant summary judgment in this case: the credibility of witnesses is best evaluated at trial, where a judge will have the benefit of hearing the witnesses and studying their demeanour under the anvil of cross-examination. This underscores the point made earlier, which is that the decision as to whether to grant summary judgment should be examined within the litigation matrix. Understanding the limitation of affidavit evidence against the unique advantages of trial assists in appreciating which cases ought to proceed to trial, and which out to be put out of their misery.

45 Accordingly, I dismiss SUM 5583 of 2006, with the usual costs to follow.

Assessment of SUM 916 of 2007 – the striking out application

General principles on striking out

46 Many defendants retaliate against an application for summary judgment by bringing their own application to strike out the plaintiff's case. Although it may be thought that the regimes governing summary judgment and striking out are similar and mirror each other, this is not so. On the contrary, the power of a court to strike out pleadings is limited to examining the plaintiff's statement of claim on its face in order to ascertain whether it falls within any one of the enumerated grounds under O 18 r 19 of the Rules:

> 19. —(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

47 The reluctance of the court to strike out a claim summarily was explained by GP Selvam JC

(as he then was) in *Tan Eng Khiam v Ultra Realty* [1991] 3 MLJ 234 at 237:

> This is anchored on the judicial policy to afford the litigant the right to institute a *bona fide* claim before the courts and to prosecute it in the usual way. Whenever possible, the courts will let the plaintiff proceed with the action unless his case is wholly and clearly unarguable.

48 The strictness with which the courts review applications to strike out is apparent in the way that O 18 r 19 is phrased, *ie*, that the defect must be evident in "any pleading or in the endorsement". Further, unlike O 14, the Rules do not require the filing of any affidavit in support of the application. In fact, r 19(2) states that in relation to applications under r 19(1)(*a*), "no evidence shall be admissible."

49 Along similar lines is the Court of Appeal's decision in *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and Ors* [1998] 1 SLR 374 ("*Gabriel Peter*") at [21], 348:

> The guiding principle in determining what a "reasonable cause of action" is under O 18 r 19(1)(a) was succinctly pronounced by Lord Pearson in *Drummond- Jackson v British Medical Association* [1970] 1 All ER 1094. A reasonable cause of action, according to his lordship, connotes a cause of action which has some chance of success when *only the allegations in the pleading are considered*. *As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out*. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O 18 r 12 and not for an order to strike out the statement.
>
> [emphasis added]

50 That the court is confined to examining the pleadings themselves was also affirmed by the Court of Appeal in *Ko Teck Siang v Low Fong Mei* [1992] 1 SLR 454 ("*Ko Teck Siang*"), citing *Wenlock v Moloney & Ors* [1965] 2 All ER 871 at 874:

> The position under two former rules has been incorporated in the present RSC, O 18 r 19 of the new rules. There is no doubt that the inherent power of the court remains; *but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way.* This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.
>
> [emphasis in original]

51 While these remarks were made in the context of O 18 r 19(1)(*a*), I see no reason why they should not apply to the other limbs of r 19(1). For instance, in *Ko Teck Siang*, the court also approved of the following *dictum* by Lord Herschell in *Lawrence v Lord Norreys* [1886–90] All ER 858 at 863 in relation to r 19(1)(*d*),:

> It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. *It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe*

could be proved.

[emphasis in original]

Whether the plaintiffs' claim ought to be struck out

52 The defendant in the present case applied to strike out the pleadings of the defendant on all four grounds under r 19(1) but, in my view, it is clear that the only relevant provisions that I need to consider are rr 19(1)(*a*) and (*d*). This is because the defendant's position in respect of the striking out application is that, first, the pleadings disclose no reasonable cause of action in respect of the allegation that the defendant acted for the plaintiffs in the transactions in question; and second, that the plaintiffs are fishing for evidence to establish a claim against Mr Lee.

53 As stated above, applications for striking out are not concerned with evidence. Put another way, that a pleading is unsupportable by the evidence need not necessarily mean that the *pleadings* disclose no reasonable cause of action. Having alleged that the defendant was their solicitor at the material time, it is incontrovertibly reasonable for the plaintiffs to seek an account of moneys handed to the defendant. I realise that in para 14 of the plaintiffs' reply, it is pleaded that regardless of whether the defendant was the plaintiffs' solicitor at the material time, they are entitled to an account of the moneys. To the extent that the plaintiffs otherwise appear to have anchored their entire case on the premise that the defendant was their solicitor, this pleading in the reply would seem contradictory. To be sure, counsel for the plaintiffs did, at one time, consider amending the statement of claim to make it explicit that there were alternative grounds on which the plaintiffs were entitled to an account, and in this regard, an adjournment was granted for him to take instructions. However, he chose *not* to do so. Be that as it may, it is clear that para 14 of the plaintiffs' reply is really a throw-away-line (given the true focus of the plaintiffs' case); and when I asked counsel for the defendant what it was that he wanted struck out, he merely pointed me to the parts alleging that the defendant had acted for the plaintiffs as their solicitor. In any event, the plaintiffs are entitled to suggest that even apart from a solicitor-client nexus, the relationship between the plaintiffs and the defendant was sufficient to found liability on the part of the latter to account for the moneys received. Contrary to the defendant's written submission, such a claim is not unknown to law: see, *Equity: Doctrines and Remedies* (*supra* [39]) at [2504].

54 Finally, I turn to the defendant's submission that the plaintiffs' case is for a collateral purpose, and to that end, amounts to an abuse of process: on what constitutes abuse of process, see the definitions set out by V K Rajah J (as he then was) in *Chee Siok Chin and Others v Minister for Home Affairs and Another* [2006] 1 SLR 582 at [34], which includes "proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior or improper purpose or in an improper way." See also, *Lonrho v Fayed (No 5)* [1993] 1 WLR 1489, followed in *Gabriel Peter* at [22], 384.

55 On the face of the pleadings, there is no indication that the plaintiffs' claim is animated by a clandestine motive. Even if one were to examine the evidence presented before me, all there *appears* to be is a weak case on the part of the plaintiffs. That the plaintiffs potentially have another claim against Mr Lee in respect of the same transaction does not *ipso facto* suggest a collateral purpose in instituting the present proceedings. In this regard, I accepted the plaintiffs' counsel's submission that the claims against the defendant and Mr Lee are different. Against the defendant, the plaintiffs merely allege that he is liable to provide an account of the moneys. If this account shows that the moneys were deposited with Mr Lee, the plaintiffs' claim against Mr Lee will be for these moneys directly. On the basis that the defendant had admitted to receiving moneys from the plaintiffs, and the fact that the parties enjoyed a solicitor-client relationship that may have extended to cover the

transaction in question, the plaintiffs are entitled to pursue an independent claim against the defendant. While evidence obtained in the present proceedings may also be relevant to a claim against Mr Lee, that is not sufficient to hold that the plaintiffs' application is motivated by an ulterior purpose.

56 For the reasons canvassed above, I also dismiss SUM 916 of 2007, with the usual costs to follow.

Coda

57 The facts of the present case illustrate an anomaly in the present incarnation of the Rules. Under the existing Rules, only a plaintiff may bring an application for summary judgment. The only recourse that a defendant has if it believes that the plaintiff's case is without basis is to strike out the latter's pleadings pursuant to O 18 r 19. However, as explained above, the court's power to strike out pleadings is much more constrained and is limited to examining the claim on its face. This leaves a defendant in a rather unfortunate, indeed disadvantaged, position. While the plaintiff can seek summary judgment against a weak defence, the defendant may not. I am aware of *David v Wee, Satku & Kumar* [1993] 2 SLR 126, in which GP Selvam JC (as he then was) granted summary judgment to the defendant. But this holding was not on the basis of the Rules but on a general notion of the inherent powers of the court. While I agree with the principle that "to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless" (*Dyson v A-G* [1911] 1 KB 410 at 418), it would probably be best if the Rules could be amended to make this power explicit as it is in other jurisdictions: see, for example, r 24.2 of the CPR, which allows for both the plaintiff and defendant to bring an application for summary judgment. This might have made a difference in the present case before me. Had the defendant been able to bring an application for summary judgment, he may have been successful. But because the threshold for a striking out application is extremely high, I am compelled to dismiss both parties' applications.

Applications in SUM 5583/2006 and SUM 916/2007 dismissed; costs to be taxed if not agreed.