IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 20

Civil Appeal No 82 of 2021

Between

Yee Heng Khay (alias Roger)

… *Appellant*

And

Angliss Singapore Pte Ltd

… *Respondent*

Summons No 4 of 2022

Between

Angliss Singapore Pte Ltd

… *Applicant*

And

Yee Heng Khay (alias Roger)

… *Respondent*

In the matter of Suit No 284 of 2018

Between

Angliss Singapore Pte Ltd

… *Plaintiff*

And

Yee Heng Khay (Roger)

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure — Appeals]
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v
Angliss Singapore Pte Ltd and another matter

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Belinda Ang Saw Ean JAD, Woo Bih Li JAD and Quentin Loh JAD
18 April 2022

9 May 2022

Belinda Ang Saw Ean JAD (delivering the grounds of decision of the court):

1 In *Angliss Singapore Pte Ltd v Yee Heng Khay (alias Roger)* [2021] SGHC 168 (the "Judgment"), the trial judge (the "Judge") found that the appellant, Mr Yee Heng Khay ("Yee"), had breached his duty of confidence in equity and in contract, and his contractual duties of loyalty and fidelity. The Judge found that Yee's breach had caused losses to the respondent, Angliss Singapore Pte Ltd ("Angliss"), and the Judge awarded damages to Angliss. Yee appealed against the Judge's decision. His main contention in the Appellant's Case was that the Judgment was obtained by fraud in that not only was critical documentary evidence in the respondent's possession concealed, but the respondent's witnesses also committed perjury by lying on oath. Yee mounted this challenge following his successful application to adduce further evidence on appeal in AD/SUM 19/2021 ("SUM 19" and the "SUM 19 Evidence").

2 Besides Yee's appeal, there was before this court AD/SUM 4/2022 ("SUM 4"), which was Angliss' application to adduce further evidence on appeal in response to the SUM 19 Evidence and Yee's case on fraud.

3 It is important to note the following matters that transpired at the appeal. First, Yee's counsel, Mr Arthur Yap ("Mr Yap"), sensibly did not oppose SUM 4 upon hearing this court's observation that the further evidence sought to be adduced on appeal in SUM 4 was in response to the SUM 19 Evidence. Secondly, in light of the way the hearing proceeded, Mr Yap confirmed that fraud, including the deliberate suppression of discoverable documents, was no longer being alleged and pursued in this appeal. It would follow, logically, that perjury would no longer be pursued. Thirdly, as a newly advanced fall back, Yee sought a retrial on the basis that there was a "miscarriage of justice" in circumstances where the SUM 19 Evidence was not available before the Judge and the issue of causation was not fully and properly tried by reference to all the available evidence. The Judge was wrong to hold that Yee had caused Angliss' loss of the distributorship agreement and Yee should not be made liable for damages in the sum of S$729,423.

4 We allowed SUM 4 and dismissed the appeal for the reasons below. In explaining our reasons for the dismissal of the appeal, we will first explain why we would have dismissed the appeal even if Yee had persisted with his arguments on fraud, deliberate suppression of documentary evidence and perjury. We will then explain why there is no miscarriage of justice that justified a retrial.

Brief facts and background to the appeal

5 Angliss is a food distributor and Yee was its former employee. Angliss contended that Yee had, without authorisation, copied and shared restricted files

from its information systems. As a consequence of Yee's misuse of confidential information, one of Angliss' suppliers, Arla Foods Ingredients Singapore Pte Ltd ("Arla") bypassed Angliss and entered into a distributorship agreement with another distributor, Indoguna Singapore Pte Ltd, ("Indoguna"), where Yee was employed at the time of commencement of the suit. Angliss sued Yee on four causes of action, namely, (a) breach of confidence; (b) breach of contractual duties of confidence; (c) breach of duty of loyalty and fidelity; and (d) breach of fiduciary duties. Save for the last cause of action, Angliss succeeded on the first three causes of action. The Judge found, among other things, that the relationship between Arla and Angliss was "robust", such that *but for* Yee's breaches, Angliss would have secured the Arla distributorship agreement. The Judge found that Yee had breached his duty of confidence in equity and his contractual duties of confidence, duty of loyalty and fidelity, and accordingly awarded damages to Angliss for loss of profits.

6 No one from Arla testified during the trial. Yee claimed that after the Judgment was rendered, he showed the Judgment to Arla who then swore an affidavit on behalf of Yee. On 20 September 2021, Yee filed SUM 19 to adduce further evidence contained in the affidavit of one Henrik Bo Peter Eidvall ("Eidvall") of Arla. Eidvall's affidavit sought to explain the relationship between Angliss and Arla leading up to the cessation of their over four-decade long distributorship arrangement, and also exhibited emails between Arla and Angliss from three periods: December 2016, May 2017, and January 2018 (the "Emails"). These emails were not disclosed by Angliss during the trial. On 14 December 2021, SUM 19 was allowed. Costs of SUM 19 was reserved.

7 On 13 January 2022, Yee filed his Appellant's Case. The SUM 19 Evidence was the central pillar of Yee's case. Broadly, Yee's argument was that the SUM 19 Evidence showed that the relationship between Arla and Angliss

was not "robust", and that Angliss' witnesses had lied on oath. As such, Angliss had committed fraud on the Judge. In short, the Judgment was obtained by fraud in light of the new evidence (*ie*, SUM 19 Evidence) that was concealed by Angliss. As will be explained below, Yee's position as explained in his Appellant's Case was that the court should *proceed* with the appeal in light of the SUM 19 Evidence.

8 On 14 February 2022, Angliss filed SUM 4 to adduce further evidence on appeal in response to the new points made by Yee in his Appellant's Case in reliance of the SUM 19 Evidence. Specifically, Angliss sought to adduce the affidavits of Ms Ding Siew Peng Angel ("Ms Ding") and Ms Watt Wai Leng ("Ms Watt"). Pending the hearing of SUM 4, Angliss filed its Respondent's Case on 15 February 2022 that addressed, amongst other things, the SUM 19 Evidence.

Issues before this court

9 There were three main issues before this court:

(a) Should SUM 4 be allowed?

(b) How should this court proceed in light of the allegation that the Judgment was obtained by fraud?

(c) Was there a miscarriage of justice that justified a retrial?

Issue 1: Whether SUM 4 should be allowed

10 The three cumulative requirements to adduce further evidence on appeal as set out in in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") are well established:

(a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial ("First Limb");

(b) the evidence must be such that, if given, would probably have an important influence on the result of the case, though it need not be decisive; and

(c) the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

11 Yee's initial position was that SUM 4 should be dismissed because Angliss had not satisfied all three limbs of *Ladd v Marshall*. Angliss' broad argument was that the further evidence directly addressed new points raised by Yee after SUM 19 was allowed. Further, even though Angliss was in possession of the Emails, Angliss did not provide discovery of the Emails simply because they were not relevant and necessary to the issues at trial.

12 We agreed with counsel for Angliss, Mr Ng Lip Chih ("Mr Ng"), that Angliss' further evidence sought to be adduced in SUM 4 was intended to address new points raised by Yee in his Appellant's Case. At this stage, we did not have to evaluate the evidential weight of the further evidence.

13 In our view, the *Ladd v Marshall* criteria did not govern and apply to the further evidence sought here on appeal. The English High Court in *Bioconstruct GmbH v Winspear and another* [2020] EWHC 2390 (QB) at [62.2] opined that the *Ladd v Marshall* criteria are not applicable in relation to further evidence in response to a new claim. Whilst the *Ladd v Marshall* criteria apply to preserve finality and ensure fairness (see *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [23]–[26]), the situation here was

different when Angliss was not only responding to new points made against it, but also new evidence such as Arla's internal communication and Eidvall's assertions in his affidavit. In context, finality was less of a concern, and it would be just to allow Angliss to respond. When we pointed this out to Mr Yap, he did not oppose the application further, and rightly so.

14 For completeness, we would add that where leave to adduce further evidence is granted, typically, a consequential order would be for the respondent to file affidavits in reply (see for example see *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [20] and *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 at [35(c)]). Besides, Yee's case on appeal was significantly different from the case he ran at trial. It would be unfair or defy common sense to deny Angliss an opportunity to respond to the SUM 19 Evidence.

15 For the reasons above, we allowed SUM 4.

Issue 2: The appropriate course of action in light of the allegation that the Judgment was obtained by fraud

General observations

16 As a starting point, the Court of Appeal in *Pradeepto Kumar Biswas v Sabyasachi Mukherjee and another and another matter* [2022] SGCA 31 ("*Pradeepto Kumar*") stated (at [28]), that a court's jurisdiction must be established before that court can consider what powers it possesses and may exercise. Hence, this court must first answer the anterior inquiry on *appellate jurisdiction* before considering what *powers* it may exercise and the appropriate course of action it should take.

17 Next, s 43(1) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) gives the Appellate Division the power to order a new trial in exercise of its civil jurisdiction: see *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 at [53] ("*Basil Anthony Herman*"). Section 43(4) further provides that the court may order a new trial on limited questions without affecting other parts of the judgment. The Court of Appeal in *Basil Anthony Herman* noted (at [54], citing *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737), that the grounds on which a new trial may be ordered have not been statutorily fleshed out but offered some guidance on its scope (see [37] below).

18 Specifically, in a case where the obtaining of a judgment is said to have been procured by fraud, a new action for fraud may be brought. Alternatively, the same allegation may be raised in an appeal if fraud is admitted or there is incontrovertible evidence of fraud. As the Court of Appeal explained in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR(R) 673 ("*Su Sh-Hsyu*") at [66]), a party seeking to set aside a judgment by adducing fresh evidence to show that the earlier court was fraudulently deceived can adopt one of two alternative procedures. He can appeal and seek on appeal, to adduce the fresh evidence. Alternatively, he can bring a fresh action in which the relief sought is the setting aside of the judgment fraudulently obtained.

19 After referring to the two alternative procedures (*ie*, two alternative routes), the court elaborated (at [67]) that the case authorities have established that the preferred practice is for the party seeking to impugn the judgment to bring a fresh action to set aside the judgment on the basis of fraud. The reason is that fraud is a serious allegation, and the court is required to look into all the particulars of the fraud, examine all the affidavits and apply the strict rules of evidence (at [73]). The court should not find fraud merely upon the basis of

affidavit evidence: *Su Sh-Hsyu* at [69]. Again, this remark is not surprising since the threshold for establishing fraud, which is rooted in dishonesty, is a high one: see *BNX v BOE and another appeal* [2018] 2 SLR 215. Thus, inadvertent errors in the evidence, the drawing of wrong inferences, conjectures, lack of corroborative evidence or incorrect evidence short of actual and deliberate fraud would not be sufficient to discharge the burden of proof: *Ching Chew Weng Paul, deceased, and others v Ching Pui Sim and others* [2011] 3 SLR 869 at [59].

20 The Court of Appeal's acknowledgment of the preferred practice is well in line with commonwealth jurisdictions such as England, Australia and Malaysia: see *Takhar v Gracefield Developments Ltd and others* [2020] AC 450 (referred to in *Dale v Banga and others* [2021] EWCA Civ 240 ("*Dale*") at [39]); *Clone Pty Ltd v Players Pty Ltd (in Liq)* [2018] HCA 12 at [32]; *K Ramalingam v Mohammad Razin* [2017] 3 MLJ 103 at [75]; and *Seruan Gemilang Makmun Sdn Bhd v Kerjaan Negeri Pahang Darul Makmun* [2016] 3 MLJ 1 at [32]–[33].

21 Notably, instead of a new action for fraud, a retrial was ordered on the facts of *Su Sh-Hsyu*. There, the appellant and her witnesses did not turn up for the first day of trial and an adjournment was sought on the basis that they were unable to be present for the duration of the trial because they were engaged in last-minute business meetings. A last-minute application to vacate the trial was rejected, and the trial proceeded in the appellant's absence and judgment was entered against the appellant. The appellant then made an application to set aside the judgment under O 35 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"). On appeal, the appellant sought to adduce additional evidence in the form of, *inter alia*, a Health Sciences Authority report (the "HSA Report"), which concluded that the respondent's signature on a key

document was genuine. The respondent testified that he had never signed that document but he did not challenge the HSA Report or adduce a report to counter it. The Court of Appeal allowed the HSA Report to be adduced in evidence and further concluded that it was unnecessary for the appellant to commence a fresh action to impugn the judgment allegedly obtained by fraud and ordered a retrial instead. Several reasons were given by the Court of Appeal. First, there had not been a full hearing and judgment was entered solely on the basis of the respondent's uncontested evidence. Secondly, the appellant had acted promptly to set aside the judgment within the relevant time limits prescribed in O 35 r 2(2) of the Rules of Court. Thirdly, the appellant had paid the judgment debt into court to demonstrate her good faith in pursuing the setting aside application. The Court of Appeal noted that this was not an irrelevant consideration. Finally, there was minimal prejudice suffered by the respondent. Any prejudice the respondent would suffer in terms of the wastage of time and expenses was easily remediable by an appropriate costs order. Further, the HSA Report was unchallenged during the appeal proceedings.

22 In *Su Sh-Hsyu* the appellate court allowed the appeal, set aside the judgment obtained pursuant to O 35 r 2 of the Rules of Court and ordered a retrial instead of requiring the appellant to bring a new action for fraud.

23 Within the appeal route (*ie*, second procedure or route), there are two identifiable settings or scenarios depending on the facts and circumstances.

24 The first is where the appellate court is able to determine the issue of fraud since fraud is admitted: the incontrovertible conclusion is that the respondent deliberately mislead the court at the trial and procured his judgment by fraud. In the event the appeal is allowed, the extent to which the judgment is set aside (after the issue of fraud is determined) would depend on two things.

First, the relief sought by the parties. Second, on all the evidence placed before the appellate court, it is possible within the appeal proceedings, for the appellate court to adjudicate on the merits of the appeal. Put simply, the appellate court is in as good a position as the court of first instance to take a fresh view of the facts only if the evidence can be clearly and objectively established before the appellate court. In such a situation, orders can be made on the judgment. Another way is to allow the appeal and order a retrial where the fraud is either admitted or the evidence of it is incontrovertible (per Smith LJ at [27] of *Noble v Owens* [2010] 3 All ER 830 ("*Noble v Owens*")). A retrial is required where the appellate court is in no position to evaluate the new evidence and, in particular, the effect of the new evidence on the relevance and weight of the rest of the evidence. This can be evaluated only after subjecting the necessary witnesses to cross-examination.

25 The second setting or scenario is where the evidence on the issue of fraud does raise questions, but it does not lead to the incontrovertible conclusion that the respondent deliberately misled the court at the trial and procured his judgment by fraud. At this stage, the appellate court simply looks at the matter on the basis of the evidence that has been placed before the appellate court. Not only is the evidence placed before the appellate court disputed, but there may be other evidence arising from cross-examination of witnesses that may be produced in support or in opposition to the allegations of fraud as they may be later pleaded. To be clear, fraud has not yet been established. Until fraud is established, the judgment will not be set aside. Within this second scenario, the appellate court may prefer the traditional approach that requires a new action for fraud. Hence, the appeal would be dismissed without an adjudication of the merits. Another approach, which has the advantages of speed and economy, is what is now known in England as the "*Noble-Owens*" order. The approach taken in *Noble v Owens* is that a new action for fraud is not always necessary and

directions for the issue of fraud to be determined first are made within the appeal proceedings.

26 In that case, the plaintiff was seriously injured by the defendant in a motor accident. The trial judge awarded damages assessed on the basis that the plaintiff's mobility was severely restricted and would remain so. After the judgment was rendered, the plaintiff was filmed on several occasions walking around without aid and driving. The defendant sought to adduce the video evidence on appeal and argued that the plaintiff had committed fraud on the trial judge. The plaintiff contested the fraud allegation and argued that his activities caught on video were explicable and not inconsistent with the evidence he gave at trial. Smith LJ, with whom Elias LJ agreed, held (at [27]) that, "where fresh evidence is adduced in the Court of Appeal tending to show that the judge at first instance was deliberately misled, the court will only allow the appeal and order a retrial where the fraud is either admitted or the evidence of it is incontrovertible. In any other case, the issue of fraud must be determined before the judgment of the court below can be set aside".

27 Smith LJ found that the video evidence was "sufficiently cogent that it is possible that a judge would find that the claimant had deceived the court below", but that it was "far from incontrovertible". Hence, the judgment should not be set aside unless fraud is proven. However, instead of directing the defendant to commence a fresh action to prove fraud (which is the traditional approach as identified in *Su Sh-Hsyu*), Smith LJ ordered, as a first step, for the *issue of fraud* be referred to and determined by the same trial judge ("the *Noble-Owens* order") within the *same set of proceedings*. Smith LJ opined (at [29]) that such a course of action would be better as it would save time and costs. Further, the appellate court would be able to direct that the issue of fraud be tried by the same trial judge, who would be in the best position to do so. As

elaborated in *Mary Mavris v Maria Xylia, Marina Xylia* [2017] EWHC 2949 (Ch) ("*Mary Mavris*"), a *Noble-Owens* order will direct the trial of the issues of whether the judgment was procured by fraud and of whether the court was deliberately misled by the other party at the trial be determined by the same judge or before another judge if that is more convenient. If fraud is established before the judge, the appeal will be allowed and in that event, the judge will be at liberty to proceed to hear a retrial of the issues that have given rise to the appeal. If the issues of fraud are determined in favour of the respondent, the appeal shall be dismissed.

28 In *Jason William Gann v Joseph Hosny* [2015] VSCA 43 ("*Gann v Hosny*"), the course taken following the approach of the English Court of Appeal in *Noble v Owens* was to *allow the appeal to the extent* that the issue of fraud was ordered to be tried in the County Court. As it was unsatisfactory for the appeal to otherwise remain, the judge ordered (at [12]) that "the appeal be otherwise dismissed without an adjudication of the merits" and the costs of the appeal were reserved.

29 We will now turn to Yee's Appellant's Case. The main question was not between a new action for fraud or a retrial. It was instead on Yee's decision to proceed with the appeal on the issue of fraud and perjury, as the relief he sought was for the judgment to be set aside and for the appeal to be allowed. In that regard, he sought an adjudication of the merits in light of the SUM 19 Evidence to correct the injustice of the decision below.

Yee's course of action

30 In his Appellant's Case, Yee argued that "the judgment is corrupted at its core" in light of the SUM 19 Evidence. At para 89 of Yee's Appellant's Case, he argued:

> It is therefore submitted that this Judgment, which held that the Appellant had caused Arla to appoint Indoguna instead of the Respondent, cannot be allowed to stand and must be set aside. At this juncture, there are two options viz., refer the matter back to the Judge for a retrial or proceed with the appeal in light of Arla's evidence. The Appellant's position is that this Honourable Court should proceed with the latter. The following passage in [*Su Sh-Hsyu*] (at [70]) is instructive:
>
> "When is it preferable for a party to commence a fresh action to impugn the judgment instead of applying for a retrial? In *Al Fayed* ([66] supra), Lord Phillips held at [8] that where the fresh evidence, or its effect, was "hotly contested", the procedure of directing the party to bring a fresh action may prove to be more satisfactory. By "hotly contested", Lord Phillips meant that the veracity of the fresh evidence proving fraud was questionable and could not clearly establish fraud. Thus, in *Baldev Singh Sohal v Hardev Singh Sohal* [2002] EWCA Civ 1297 ("*Sohal*"), Sir Martin Nourse remarked as follows at [25]:
>
> > There is no jurisdictional bar to this court admitting the fresh evidence and dealing with the allegation by way of an appeal. But it ***should only*** *do so if*, in the words of Lord Woolf [in *Woods v Gahlings* The Times (29 November 1996)], ***the allegation of fraud "can be clearly established" or if, in the words of Lord Phillips [in Al Fayed] (which come to the same thing) the fresh evidence or its effect is not "hotly contested"***. In any other case, the party who complains about the judgment should be left to bring a fresh action to set it aside."
>
> [emphasis in original]

31 Yee relied on *Su Sh-Hsyu.* His position was to *proceed* with the appeal. Mr Ng argued that the appropriate course was to start a new action for fraud.

32 Relying on the SUM 19 Evidence, Yee was essentially asking this court to allow the appeal on the basis of: (a) evidence not presented before the Judge; (b) evidence not tested by cross-examination; and (c) arguments not made before the Judge. These matters would not come within the normative question of the standard of review of appellate jurisdiction of the court. In addition, Angliss rejected the allegation that fraud was perpetrated on the court below. In our view, Yee was seeking a reversal of the Judgment without the new evidence

being tried and this approach was at odds with the exercise of appellate jurisdiction. In particular, we found ourselves effectively in the position of a court of first instance, and as the Court of Appeal observed in *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [44] and *Sunbreeze Group Investments Ltd and others v Sim Chye Hock Ron* [2018] 2 SLR 1242 at [27], this would be at odds with the exercise of appellate jurisdiction.

33 We would also not have set aside the judgment and ordered a retrial, as was the case in *Su Sh-Hsyu* which can be distinguished on the facts. In the present case, there was a full trial before the Judge. More importantly, Yee's arguments on the SUM 19 Evidence were disputed.

34 This was a case "where one person's word is pitted against another's" (as described in *Su Sh-Hsyu* at [73]). In other words, the issue of "fraud" was contested and the evidence of fraud was not incontrovertible. Eidvall needs to be cross-examined on the SUM 19 Evidence and Ms Watt and Ms Ding need to be cross-examined on their evidence in reply. At this juncture, we repeat that just because the SUM 19 Evidence was allowed, and SUM 4 was allowed, it did not mean that the evidence need not be tested. Further, Yee's arguments on fraud and other new points raised in his Appellant's Case were either not raised in SUM 19 or at the least, not fully developed at that point in time.

35 Although the authenticity of the Emails was not contested, the *interpretation* of the Emails was contested by Angliss. Further, Eidvalls' evidence in SUM 19 was not limited to the Emails. He also explained the relationship between Angliss and Arla leading up to the eventual termination of the distributorship agreement. In response, Angliss contested Eidvall's explanation and also argued that they did not disclose the Emails because in their view, the Emails were not relevant. Mr Ng cited the case of *Dale* for the

proposition that the SUM 19 Evidence is far removed from the relevant events to be capable of showing that the judgment was obtained by fraud and is, at most, tangential to the Judge's findings.

36 As this was not an exceptional case like *Su Sh-Hsyu*, Yee would traditionally have needed to commence a fresh action to prove fraud in order to set aside the Judgment. However, this court recognised the advantages of a *Noble-Owens* order as enunciated by Smith LJ (see above at [25]). *Noble v Owens* was cited most recently in *Dale* and was referred to in the most recent edition of Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 4th Ed, 2021) at pp 1167–1168. In fact, *Noble-Owens* orders have been made in both Australia and England: see *Gann v Hosny*; *Mary Mavris*; *Floorweald Ltd v Francesca Elu* (17 May 2019, High Court of Justice Queen's Bench Division). However, as allegations of fraud were no longer pursued by Yee, we did not have to decide on the applicability of *Noble v Owens* in Singapore and its appropriateness as a course of action in the context of this case.

Issue 3: Whether there was a miscarriage of justice that justified a retrial

37 After Mr Yap confirmed that Yee was no longer making allegations of fraud, he was asked to state the legal basis for a retrial in the light of the SUM 19 Evidence. Mr Ng directed the court's attention to *Basil Anthony Herman*. As mentioned above (at [17]), the Court of Appeal observed (at [54]) that the grounds on which a new trial may be ordered have not been statutorily fleshed out. The Court of Appeal further observed that each case must turn on its own facts, although it was possible to lay down some general guidelines. The Court of Appeal cited the judgment of Ma JA in the Hong Kong Court of Appeal decision of *Ku Chiu Chung Woody v Tang Tin Sung* [2003] HKEC 727 at [24]:

> The Court of Appeal will not order a retrial (which inevitably involves further costs) *unless some substantial wrong or miscarriage of justice has taken place*. This usually involves two facets:- identifying some error that has taken place (for example the wrongful rejection of evidence) and next, determining whether the error so identified has deprived the party complaining of a substantial and realistic chance of success in the case. In other words, however serious the error, if the Court of Appeal takes the view that ultimately it would have made no difference to the outcome of the case, a new trial will not be ordered. There is a third facet to the exercise:- the Court of Appeal's discretion. A retrial will be ordered not only where it is just to do so (see above), but where it is right to do so. If the Court of Appeal is in as good a position as the Court of First Instance to take a fresh view of the facts, a new trial will not be ordered. One sees the Court of Appeal operate in this way on a regular basis. It is only where the Court of Appeal is somehow disadvantaged in looking at and determining questions of fact that an order for a new trial will be seriously countenanced.
>
> [emphasis added]

38 The Court of Appeal then observed the following at ([55]):

> Although we have already determined that evidence was improperly rejected, it goes without saying that if the improperly rejected evidence *will not*, if admitted, meaningfully vary the outcome of the case, no new trial will be ordered (see, also, s 169 of the Evidence Act). Equally, if the improperly rejected evidence will vary the outcome of the case if admitted, but can be *clearly and objectively established* before the appellate court, no new trial will ordinarily be ordered, because in such a situation the outcome of the case should simply be varied accordingly. Thus, a new trial would ordinarily be ordered only where (a) the improperly rejected evidence would, if admitted, have a substantial and realistic prospect of making a meaningful difference to the outcome of the case, and (b) the appellate court is in no position to evaluate the improperly rejected evidence itself (see, eg, *Chia Bak Eng v Punggol Bus Service Co* [1965–1967] SLR(R) 270). Whether this is indeed the position would depend, of course, on the facts of each case. Whether a complete or partial retrial is necessary would also depend on the facts of each case, and, in particular, the effect of the improperly rejected evidence on the relevance and weight of the rest of the evidence. We would emphasise that an appellant seeking a new trial for the reason of improperly rejected evidence bears the heavy burden of establishing that a new trial is the appropriate remedy in the circumstances.
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> [emphasis in original]

39 In essence, Yee argued that Arla's evidence showed that within the management of Arla, it had already made up its mind in August 2017 not to continue its distributorship relationship with Angliss, and in Arla's communications with Angliss, the overtures were to lead Angliss on – the loss caused to Angliss had nothing to do with Yee in the sense that he was not involved in Arla's ploy and eventual decision to terminate its distributorship relationship with Angliss. This contention was intended to challenge the Judge's finding that it was because Yee had taken confidential information and shared the information with Indoguna that his actions assisted Arla in coming to the decision to terminate its distributorship relationship with Angliss.

40 In his closing submissions below, Yee emphasised that causation was a key issue to be determined. He argued that he did not have any contact with Indoguna or Arla prior to December 2017/January 2018. Yee also admitted that he had forwarded and copied files from Angliss in December 2017, but disputed that his actions were intended to help Indoguna. Hence, the fact that Arla had decided not to continue its relationship with Angliss in August 2017 was a crucial point to his case below. If the decision not to proceed with Angliss was already made in August 2017, then Yee's copying and using files from Angliss in December 2017/January 2018 would not have caused the loss of the distributorship agreement.

41 We note that even though the SUM 19 Evidence was allowed to be adduced, this did not detract from the fact that Yee was the author of his earlier decision not to call Arla to testify at the trial. Yee had testified during cross-examination and in his closing submissions below that his decision not to call representatives from Arla as witnesses was due to legal advice from his lawyers, and as a matter of "legal strategy". The consequence of that decision was the exclusion of information that Arla had given his former solicitors as early as

3 May 2018 and before the trial in February 2021. In this appeal, Yee contended that the SUM 19 Evidence, which comprised the excluded information provided on 3 May 2018, would have made a difference to the issue of causation and that there would be a miscarriage of justice if a retrial was not ordered. This contention was ill-founded. There was no miscarriage of justice for the reasons explained below.

42 During the appeal, Mr Yap explained that based on the evidence available to him at the trial, it appeared that Arla was still making overtures and was desirous of working with Angliss. On that basis, he crafted a case theory and ran the case as he did. His case below was that as late as December 2017 (*ie*, just before the termination of the distributorship relationship between Arla and Angliss), Arla was still keen on "expanding its business with Angliss" and Arla was the party "courting" Angliss' business and the relationship fell apart because the parties could not agree on certain terms. His case theory must be understood in context of his decision to exclude information that was provided to his former solicitors as early as 3 May 2018. We will elaborate.

43 Eidvall was already providing information, such as Arla's sourcing of an exclusive foodservice distributor, Arla's discussions with Indoguna as early as April 2017, and its signing of a formal distributorship agreement with Indoguna, as early as 3 May 2018 by way of a letter to Yee's former solicitors (the "3 May 2018 Letter"). Angliss' counsel, Mr Ng had challenged the authenticity of the 3 May 2018 Letter and in a letter dated 24 August 2020, reminded Yee's former solicitors that the necessary witnesses had to be called to prove the authenticity of the 3 May 2018 Letter. The SUM 19 Evidence contained evidence to substantiate the information contained in the 3 May 2018 Letter. Yee therefore knew that if he wanted to show that there was no causation as Arla had decided not to continue on with Angliss in August 2017, he would

have had to call Eidvall as a witness. Eidvall was on Yee's list of witnesses as early as 7 June 2019 and was dropped only in September 2020, about five months before the trial. In light of Yee's own decision not to call Arla's representatives as witnesses as well as his knowledge of the information provided to him by Eidvall, there can be no miscarriage of justice.

44 In the circumstances, Yee did not identify exactly *how* and *where* any miscarriage of justice had occurred. He also did not show that if the Judge had the SUM 19 Evidence before her, her decision would have been so different. In fact, the SUM 19 Evidence do not point to the inevitable conclusion that Arla had already decided not to proceed with Indoguna by August 2017. Mr Ng pointed to internal emails within Arla dated 28 August 2017, which formed part of the SUM 19 Evidence. These emails show that there was no firm conclusion on whether Arla would continue with Angliss in August, and that more time was needed for consideration. Mr Yap did not offer any satisfactory response to this point. The argument Yee made to persuade this court that there was miscarriage of justice therefore did not even stand on firm ground.

45 Accordingly, we were not persuaded that there was any miscarriage of justice that justified a retrial.

Conclusion

46 For the reasons above, we allowed SUM 4 and dismissed the appeal. We made the following orders on costs:

(a) Each party was to bear own costs for SUM 19 and SUM 4; and

(b) Yee was ordered to pay the costs of the appeal fixed at $40,000 (all-in).

47 The usual consequential orders applied.

Belinda Ang Saw Ean
Judge of the Appellate Division

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Arthur Yap and Ong Hui Jing (CHP Law LLC) for the appellant;
Ng Lip Chih (instructed) (Foo & Quek LLC) (instructed), Jennifer Sia Pei Ru and Rezvana Fairouse d/o Mazhardeen (NLC Law Asia LLC) for the respondent.