Tan Boon Hai (on behalf of himself and all other unsuccessful candidates in the Singapore Hainan Hwee Kuan 1999/2000 Management Committee Elections) v Lee Ah Fong and Others [2001] SGCA 77

Case Number	: CA 600043/2001
Decision Date	: 27 November 2001
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Lai Kew Chai J; L P Thean JA
Counsel Name(s)	: Yang Ing Loong and Christopher Tan Teow Hin (Allen & Gledhill) for the appellant; Lee Chin Seon and John Tan Kim Chiang (Angela Wong & Co) for the respondents
Parties	: Tan Boon Hai (on behalf of himself and all other unsuccessful candidates in the Singapore Hainan Hwee Kuan 1999/2000 Management Committee Elections) — Lee Ah Fong

Civil Procedure – Costs – Taxation – Application for review of registrar's taxation of costs – Nature of judge's jurisdiction in dealing with application for review of registrar's decision – Whether judge's discretion fettered in reviewing registrar's decision – Rules of Court O 59 r 36

(delivering the judgment of the court): This appeal arises out of the decision of GP Selvam J (see [2001] 2 SLR 496), in which he held that a judge, hearing an application for review of taxation of costs under O 59 r 36 of the Rules of Court, is not fettered by the discretion exercised by the registrar in determining the quantum of any item under review, and may, if he considers appropriate, substitute his award on the quantum in place of that awarded by the registrar. The issue raised in this appeal is of considerable importance and relates to the nature of the jurisdiction of a judge in dealing with an application for review of taxation of costs under O 59 r 36 of the Rules of Court.

Background facts

The relevant facts giving rise to the appeal are as follows. The appellant, Mr Tan Boon Hai, and those whom he represents in this appeal, and the 33 defendants against whom proceedings were brought in the court below, are all members of a clan association called the Singapore Hainan Hwee Kuan (`the association`). Some two years ago, a dispute arose over the election of members to the management committee of the association. It was alleged by some members that there were irregularities at the election of the association`s 1999/2000 Management Committee during the Annual General Meeting held on 30 May 1999. Mr Tan in a representative capacity on behalf of himself and all the unsuccessful candidates at the election initiated proceedings against the association and 33 members of the association, who were the successful candidates. In those proceedings, Mr Tan sought a declaration that the election held on 30 May 1999 was null and void for irregularity, and, alternatively, an order restraining the 33 members from acting or holding themselves out as members of the association`s management committee. Mr Tan also sought an order for a fresh election to be held and an order to freeze the funds of the association.

Soon after the commencement of the proceedings, on 29 July 1999, an interim order was obtained by Mr Tan partially freezing the association`s bank account. The case proceeded to trial and was heard for some nine days with the cross-examination of witnesses. A further period of 15 days was given by the court for the continuation of the hearing. However, no further hearing took place, as the parties came to a settlement. The action was then discontinued by Mr Tan with the consent of the defendants, but the consent was given subject to Mr Tan paying 80% of the costs, such costs to be taxed on the standard basis, if not agreed. The parties failed to reach agreement on the quantum of

the costs, and accordingly the costs had to be taxed.

In those proceedings, there were three groups of defendants. The first defendant, the association, was independently advised and at the trial was represented by its own counsel. The second group consisted of 17 defendants, namely, the second to seventeenth and twenty-first defendants. They were separately advised by their solicitors and at the trial they were represented by their own counsel. The remaining defendants formed the third group and they had their own solicitors and counsel in those proceedings.

Pursuant to the terms on which Mr Tan discontinued the action, the second to seventeenth and the twenty-first defendants (collectively called `the 17 defendants`) proceeded first to present their bill of costs for taxation. Pending the taxation of this bill, the other two groups of defendants held back the submission of their respective bills of costs. Hence, there will be another two bills of costs for taxation relating to the same proceedings.

In their bill of costs, the 17 defendants claimed a sum of $250,000 for work done in the cause or matter as described in section 1 of the bill. The bill was taxed by an assistant registrar, who allowed a sum of $100,000 for this section of the bill. Both Mr Tan and the defendants were dissatisfied with the amount awarded and applied to the assistant registrar to review her decision with respect to this amount pursuant to O 59 r 34 of the Rules of Court. On review, the assistant registrar reduced the amount to $70,000. The 17 defendants, being dissatisfied with this amount allowed by the assistant registrar on such review, applied to a judge-in-chambers for an order to review the taxation of this amount pursuant to O 59 r 36 of the Rules of Court.

The decision below

The application came before GP Selvam J who dealt with it in the following manner. He considered that he was not bound by the decisions of the Court of Appeal in **Diversey (Far East) v Chai Chung Ching Chester (No 2)** [1993] 1 SLR 542 , and **Jeyaretnam Joshua Benjamin v Lee Kuan Yew** [1993] 1 SLR 185 on the ground that the law had undergone a `sea of change` since the two cases. He held that the `new rule` in the present Rules of Court, which he said `came into effect on 1 February 1992`, allowed him to have the right and duty to hear the matter de novo, and take into account all the circumstances of the case and make a completely fresh decision. He relied on the decision of the English Court of Appeal in **Madurasinghe v Penguin Electronics (a firm)** [1993] 3 All ER 20[1993] 1 WLR 989, where the court considered a similar rule under the County Court Rules 1981 in England. He also relied by analogy on those cases where a judge hears an appeal from the decision of the registrar on assessment of damages. In such case, it has been held by this court that a judge in hearing such appeal is not fettered by the amount awarded by the registrar and is entitled to deal with the appeal as if the matter came before him the first time: see **Chang Ah Lek v Lim Ah Koon** [1999] 1 SLR 82 which followed and adopted the decision of the House of Lords in **Evans v Bartlam** [1937] AC 473[1937] 2 All ER 646. Selvam J then expressed his opinion that the power of a judge in dealing with an application for review of taxation of costs and with an appeal from the decision of the registrar on assessment of damages does not depend on the terminology of `review`, `rehearing` or `appeal` as found in the rules; these terms mean the same thing, namely, the judge hearing the matter deals with it de novo. Thus, considering himself armed with an unfettered discretion, the judge proceeded to reconsider the circumstances of the case. He set aside the amount awarded by the assistant registrar and awarded the sum of $100,000 in lieu. He further awarded $1,500 as the costs of the review before him. Against his decision, this appeal is now brought.

The appeal

Before we turn to consider the arguments raised in the appeal we should mention one preliminary matter. The 17 defendants, the respondents in this appeal, did not file the respondents` case, as they were required to do under the rules. However, through their counsel they put in a written `skeletal submission` and intended to obtain leave of the court, by an oral application, to argue against the appeal before us. Counsel for the appellant objected to this course of conduct on the part of the respondents. In response, counsel for the respondents explained that the reason for not filing the respondents` case was that the respondents wished to save further costs and expenses in the litigation, and applied orally for leave to make submission before us in this appeal. We did not find such explanation acceptable, and accordingly we refused leave to counsel for the respondents to make any submission on behalf of the respondents in resisting the appeal. We also refused to consider the written skeletal submission filed in court.

We now turn to the merits of the appeal. Before us, Mr Yang Ing Loong, counsel for Mr Tan, contends that the judge erred in holding that there was a `sea of change` in the Rules of Court, and that the decisions of this court in ***Diversey*** (supra) and ***Jeyaretnam*** (supra) are still good law and the judge therefore was bound by these decisions and ought to follow them. Had the judge followed these decisions, he would not have interfered with the amount awarded by the assistant registrar, as he did not find that the assistant registrar had committed an error of principle or any material error on the quantum.

Rules of Court

We need to consider first whether there has been a `sea of change` in our rules of court governing the review by a judge of taxation of costs since the decisions of this court in ***Diversey*** (supra) and ***Jeyaretnam*** (supra) . At the time when these two cases were decided, the rules then in force were the Rules of the Supreme Court 1970 (`the 1970 Rules`), and the relevant rules governing the review by a judge of taxation of costs were found in O 59 r 36, which so far as relevant provided as follows:

> *(1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under Rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with Rule 35 (3) to state the reasons for his decision in respect of that item or part on the review.*
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> *...*
>
> *(4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this Rule, and no ground of objection shall be raised which was not raised on the review by the Registrar but, save as aforesaid, on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject-matter of the application.*
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> *(5) On an application under this Rule, the Judge may make such order as the circumstances require, and in particular may order the Registrar`s certificate to be amended or, except where the dispute as to the item under review is as*

to amount only, order the item to be remitted to the Registrar for taxation.

(6) In this Rule "Judge" means a Judge in person.

On 27 November 1991, amendments were made to the 1970 Rules by the Rules of the Supreme Court (Amendment No 3) Rules 1991, which came into effect on 1 February 1992. The amendments then made included the repeal of the entire O 59 and the replacement with a new O 59; but the text of r 36 in the repealed O 59 and that in the new O 59 were exactly the same. Thus, in effect no amendment was then made to r 36. The judge, with respect, was in error when he said at [para]13:

> *The new rule came into effect on 1 February 1992. But because the taxation in both cases [ie **Diversey** and **Jeyaretnam** cases] had taken place before 1992, they were governed by the old rule.*

In our opinion, whether the taxation of the costs in the two cases took place before or after 1 February 1992, the application for review of taxation of costs before a judge was governed by the same rule.

The 1970 Rules remained in force until 1 April 1996, when the entire rules (subject to a couple of transitional provisions) were repealed and replaced by the present Rules of Court. The provisions of the present rules governing the review of taxation by a judge are found in O 59 r 36 which, so far as relevant, are as follows:

> *(1) Any party who is dissatisfied with the decision of the Registrar to allow or to disallow any item in whole or in part on review under Rule 34 or 35, or with the amount allowed in respect of any item by the Registrar on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the Registrar requested the Registrar in accordance with Rule 35 (3) to state the reasons for his decision in respect of that item or part on the review.*
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> *...*
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> *(4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this Rule, and no ground of objection shall be raised which was not raised on the review by the Registrar but, except as aforesaid, on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject-matter of the application.*
>
> *(5) On an application under this Rule, the Judge may make such order as the circumstances require, and in particular may order the Registrar`s certificate to be amended or, except where the dispute as to the item under review is as to amount only, order the item to be remitted to the Registrar for taxation.*
>
> *(6) In this Rule, "Judge" means a Judge of the High Court or a District Judge in*

person.

As can be seen from the relevant provisions of the present Rules of Court and the 1970 Rules, which we have set out, there were no material changes made to O 59 r 36 by the Rules of Court in 1996. In fact, the provisions of O 59 r 36 of the 1970 Rules and those of O 59 r 36 of the Rules of Court are the same in all material respects. With the utmost respect to the judge, we do not find that there was any `sea of change` in the law, whether on the basis of the amendments made to the rules on 1 February 1992 or the amendments made on 1 April 1996. In our judgment, the judge, with respect, erred in regarding himself as not being bound by the decisions of this court in ***Diversey*** (supra) and ***Jeyaretnam*** (supra). In conformity with the principles of stare decisis the judge ought to have followed the rule as laid down in the two cases.

Reconsideration of Diversey and Jeyaretnam

Having said that, in view of the very full arguments addressed to us by Mr Yang, we take this opportunity to reconsider the basis on which ***Diversey*** (supra) and ***Jeyaretnam*** (supra) were decided, and in particular whether the rule accepted by this court there as settled is correct, namely: that, on a review of taxation of costs under O 59 r 36, the judge ought not to interfere with the decision of the taxing officer on the mere question of quantum, unless the taxing officer applied the wrong principles or unless the quantum awarded was obviously wrong.

The starting point is the decision in **Re Kana Moona Syed Abubakar, decd, Khatijah Nachiar v Sultan Allaudin** [1940] MLJ 4 . The facts in that case were rather complicated and were set out at great length in the judgment of Aitken J, and it is not necessary to recount them here. In the course of his judgment, Aitken J said at pp 7-8:

> *Now I have set out all the facts and circumstances out of which this application to me under Order LXII, r. 73 arises, because I have found great difficulty in dealing with Mr. Conaghan`s objection to the reduction of his getting up fee from $500/- to $200/-. I am abundantly satisfied that he went to very great pains indeed to find out whether, or not, it was in the best interests of the testator`s infant grandchildren that the sale of the Theatre Royal to the first defendant should be upheld or set aside. If I were the Registrar I should have allowed Mr. Conaghan the greater part of his fee, because I realise that the work he did was very considerable indeed, and was well and properly done. However, I am not the Registrar, and the rule that a Judge must not interfere with the decision of a taxing officer on a mere question of quantum, unless very exceptional circumstances are present, is both settled and of long standing. I suppose that a Judge would be justified in reducing a very exorbitant charge, in the unlikely event of the Registrar allowing one; and* ***Smith v Bullu*** *lends some support to that proposition. Per contra I suppose that a Judge would be justified in allowing more than the Registrar has allowed, if the Registrar`s disallowance amounted to an affront to reason and common sense ...*

Aitken J`s pronouncement was followed by Choor Singh J in **Starlite Ceramic Industry v Hiap Huat Pottery** [1972-1974] SLR 440 , where he said at p 442:

> *Another general rule is that the court will not interfere with the discretion of the taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after considering all the circumstances and if no*

question of principle arises.

Choor Singh J then quoted the above passage of the judgment of Aitken J, and continued:

> *And 12 years later Thomson J (as he then was) expressed the same view in* ***Chin Cham Sen v Foo Chee Sang*** *[1952] MLJ 99 , at p 100:*
>
> *`... It is well settled in England that as a general rule the court will not interfere with the discretion of a taxing officer upon a mere question of quantum if the taxing officer has exercised his discretion after consideration of all the circumstances and if no question of principle arises (see* ***Re Estate of Ogilvie*** *[1910] P 242) ...`*
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> *Similar views were expressed by Gordon-Smith JA in* ***Malayan Trading Co v Lee Pak Yin*** *[1941] MLJ 207 at p 209:*
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> *`... It is, I think, unnecessary to quote any authorities in regard to the powers, and I would add, assumed competency, of a judge sitting in appeal on a taxation matter, as it is well settled that in regard both to quantum and to the exercise of a discretion vested in a taxing master, it is only when such discretion has been exercised on a wrong principle or the quantum allowed is obviously wrong that a judge will interfere ...`*

Choor Singh J then held that the dispute before him was not on mere quantum, but raised a question of principle. There, the plaintiffs accepted a sum paid into court by the defendants and thereafter discontinued the claim. The plaintiffs then presented a bill of costs for taxation and the question was whether they were entitled to a getting up fee. The registrar disallowed that fee, but on appeal the judge held that although the plaintiffs were not entitled to a getting up fee, they were entitled to a fee which was at the discretion of the court. He therefore allowed a fee, which he quantified in the sum of $200.

At the time when these two cases were decided, the relevant rule governing the application for review of taxation by a judge was O LXII r 73 of the Rules of the Supreme Court 1934, which provided as follows:

> *(1) Any party who is dissatisfied with the certificate or allocatur of the Registrar, as to any item or part of an item which has been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur, or such other time as the Court, or a Judge or Registrar at the time he signs his certificate or allocatur allows, apply to a Judge at Chambers for an order to review the taxation, as to the same item or part of an item.*
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> *(2) The Judge may thereupon make such order as the Judge thinks just; but the certificate or allocatur of the Registrar shall be final and conclusive as to matters which have not been objected to in manner aforesaid.*

It seems to us that ***Kana Moona*** (supra) and ***Starlite Ceramic*** (supra) were decided on the basis of this rule, and in our opinion no criticism can be made as to the basis of these two decisions.

At this point, we should mention that there are significant differences between O LXII r 73 of the Rules of the Supreme Court 1934 and O 59 r 36 of the present Rules of Court. In particular, O LXII r 73 did not have, inter alia, the equivalent of para (4) of r 36, which provides that, on the hearing of an application for review, the judge may exercise `all such powers and discretion as are vested in the Registrar in relation to the subject-matter of the application`.

We now come to ***Diversey (Far East) v Chai Chung Ching Chester (No 2)*** (supra). In that case, the plaintiffs were a chemical company incorporated in Singapore and belonged to the Diversey group of companies carrying on business in various parts of the world. They commenced an action on 12 November 1986 against various defendants for, inter alia, unlawfully conspiring together to injure and/or defraud the plaintiffs, for breach of the defendants` duties of fidelity under their respective contracts of employment with the plaintiffs and for breach of fiduciary duties as directors. Three days before the trial, the parties reached a settlement. A consent judgment was entered. Under both the settlement agreement and the consent judgment, the plaintiffs were entitled to taxed costs on a party and party basis. Their bill of costs was taxed by the assistant registrar, but both parties were dissatisfied with the taxation of two items of the bill and filed separate notices of objection and applied to the assistant registrar for review. The assistant registrar made no order on either party`s application for review of his taxation of the two items. They applied for a review before a judge, and the judge upon review reduced the amounts awarded by the registrar. The plaintiffs appealed to the Court of Appeal. The defendants contended that the principle in ***Re Kana Moona Syed Abubakar, decd*** (supra) and ***Starlite Ceramic Industry v Hiap Huat Pottery*** (supra) was no longer applicable, because the relevant provisions of the Rules of the Supreme Court 1970 were different from those of the Rules of the Supreme Court 1934, on the basis of which those cases were decided. The defendants further contended that the review by the judge operated as a rehearing and the judge was entitled to exercise his discretion in substitution for that of the assistant registrar in respect of the amounts awarded.

The court, however, rejected these contentions. It considered the provisions of O LXII r 73, and compared that part of r 73(2), namely: `[t]he Judge may thereupon make such order as the Judge thinks just` with the following part in O 59 r 36: `the Judge may make such order as the circumstances require` and concluded that even though the wording might have changed, the rules, in substance, provided for the same thing. The court said at pp 551-552:

> *We were unable to accept the submissions of counsel for the respondents relating to the principles applicable on review of the registrar`s certificate by a judge in chambers. In our view, what is germane to the issue is a consideration of O 59 r 36(5), in particular the opening words:*
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> *`On an application under this Rule, the Judge may make such order as the circumstances require, and in particular may order the Registrar`s certificate to be amended or, except where the dispute as to the item under review is as to amount only, order the item to be remitted to the Registrar for taxation.` [Emphasis added (**sic**).]*
>
> *This was the successor to that part of [O LXII r 73(2) of the Rules of the Supreme Court 1934] which sets out the power of the judge in the following terms:*

> *`... and the Judge may thereupon make such order as the Judge may think just ...`*
>
> *Looking at the two sub-rules, the wording may have changed but in substance, the rules provide for the same. The phrase `as the circumstances require` confers on the judge a discretion. This discretion, however, is not unfettered and must be judicially exercised. The judge should not interfere with the registrar`s decision unless there is an error of principle or some other material error. The dicta of Aitken J in* ***Kana Moona Syed Abubakar*** *to the effect that a judge would be justified in interfering where the registrar`s decision was `an affront to reason and common sense` is, in our opinion, too harsh a standard to apply. What is required is a broad overview of the matter by the judge and if there is an error in principle or some other material error, he will be justified in interfering with the decision below.*

The court further said at p 553:

> *In our opinion, the differing amounts awarded by the learned judicial commissioner and the AR were the result of a mere difference of opinion that did not warrant any interference by the learned judicial commissioner.*

The court`s interpretation of O 59 r 36(5) in ***Diversey*** (supra) was based on its view that r 36(5) was substantially similar to the corresponding provision of r 73(2) of O LXII of the Rules of the Supreme Court 1934. There is, however, a material difference between O LXII r 73 of the Rules of the Supreme Court 1934 and O 59 r 36 of the Rules of the Supreme Court 1970, which was not considered by the court. As we have pointed out, the former did not have the equivalent of para (4) of r 36 and in particular the following material part:

> *(4) ... on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the Registrar in relation to the subject-matter of the application.*

It is clear to us that the court`s attention was not focused on this material part of para (4) of r 36. In fact, the court did not consider this part of r 36(4) at all. Its attention was directed mainly at O 59 r 36(5).

We now turn to ***Jeyaretnam Joshua Benjamin v Lee Kuan Yew*** (supra). The decision was given by this court (of a different composition) barely a month after the decision in ***Diversey*** (supra), without however being influenced by the earlier decision in ***Diversey*** . In that case, the bill of costs of the plaintiff was taxed by the senior assistant registrar, and the defendant applied to him for a review of several items of the bill under O 59 r 34. At the conclusion of the review, the senior assistant registrar dismissed the application. The defendant being dissatisfied with the decision of the senior assistant registrar on review applied to a judge-in-chambers for review of the several items allowed by the senior assistant registrar under O 59 r 36. However, before the judge only the items of getting up fee of Queen`s Counsel and getting up fee of the solicitors for the plaintiff were in dispute. The judge dismissed the application and the defendant appealed to the Court of Appeal. The court held that the senior assistant registrar did not err in principle in deciding on the amount of getting up fee

allowed for the Queen`s Counsel but erred in principle in deciding on the amount of the getting up fee allowed for the solicitors and reduced the amount allowed by the senior assistant registrar. In the course of the judgment, this court said at p 189:

> *It is settled law that in regard both to the quantum and to the exercise of the discretion vested in a taxing officer, the court will only interfere if such discretion has been exercised on a wrong principle or the quantum allowed is obviously wrong.*

In support, it cited **Malayan Trading Co v Lee Pak Yin** [1941] MLJ 207 , **Chin Cham Sen v Foo Chee Sang** [1952] MLJ 99 and **Gorfin v Odhams Press** [1958] 1 All ER 578[1958] 1 WLR 314.

It is plain to us that no arguments were considered on the issue as to the powers and discretion of the judge on hearing the application for review of taxation of the two items of costs. There was no analysis or discussion by the court of the terms of O 59 r 36. The court merely accepted the two Malaysian authorities and the English authority in support of the `settled law`. It is necessary now to examine these authorities and see whether they could afford any support to what the court held was `settled law`, regard being had to the terms of O 59 r 36 of the 1970 Rules which were in effect.

We deal first with the two Malaysian authorities referred to. They were referred to by Choor Singh J in ***Starlite Ceramic*** (supra) and the relevant passages of the judgments given in those two cases were quoted with approval in his judgment. It is unnecessary for us to restate them. Suffice it here to say that in both cases, the court held that it was well settled that, as a general rule, on a review of taxation of costs the judge would not interfere with the discretion of the taxing officer upon a mere question of quantum, if no question of principle arises. In neither of these two cases was there any examination of the basis on which the settled rule was founded.

We now turn to the English case, ***Gorfin v Odhams Press*** (supra). There, the plaintiff brought an action claiming damages for personal injuries against the defendants who admitted liability. At the trial, the plaintiff was represented by leading and junior counsel and the quantum of damages was assessed at o650. On taxation of the plaintiff`s costs, the taxing master disallowed the fee of leading counsel and upon review before a judge the decision of the taxing master was upheld. Being dissatisfied with this decision, the plaintiff appealed to the Court of Appeal. The appeal was dismissed. The court held that it was not shown that the master had erred in arriving at his decision. In England, at that time, the relevant rule governing the review of taxation of costs by a judge was RSC O 65 r 27(41), which provided:

> *Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may within fourteen days from the date of the certificate or allocatur, or such other time as the Court or a Judge, or taxing officer, at the time he signs his certificate or allocatur, may allow, apply to a Judge at Chambers for an order to review the taxation as to the same item or part of an item, and the Judge may thereupon make such order as the Judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.*

It should be noted that this rule was identical in all material respects with O LXII r 73 of our Rules of the Supreme Court 1934. It is clear that the case was decided on the basis of this rule. Parker LJ,

who delivered the main judgment of the court, said ([1958] 1 All ER 578 at 579, [1958] 1 WLR 314 at 316):

> *Although the terms of R.S.C., Ord. 65, r. 27(41), are very wide, and, in effect, treat the matter before the judge in chambers as a re-hearing, I think it is now clear in practice and on authority that the court will only interfere with the exercise of the master`s discretion if it is clear that the master has gone wrong in principle. It is for this reason that matters of quantum only, where no principle is involved, are rarely, if ever, interfered with. In other matters, as, indeed, the question whether two counsel or one counsel should be allowed, it is impossible to say that there is no principle involved; and, accordingly, if it can be shown that the master has erred in principle, then the court will exercise its own discretion in the matter.*

The terms of RSC O 65 r 27(41), though very wide, did not have the equivalent of para (4) of O 59 r 36 of our Rules of Court. Having regard to the material difference between our O 59 r 36 and RSC O 65 r 27(41), we do not consider that ***Gorfin*** (supra) was really applicable as an authority in support of what this court accepted as the `settled law` in ***Jeyaretnam*** (supra). There was therefore actually no authority in support.

We should say a word or two on the changes made to the RSC in England. RSC O 65 r 27(41) remained in force until 1960. By the Rules of the Supreme Court (No 3) 1959, which came into operation on 1 January 1960, the whole of O 65, RSC, with the exception of a few rules and a couple of appendices, was revoked, and in its place the Supreme Court Costs Rules 1959 and Apps 2 and 3 were enacted, which applied in relation to business done since 1 January 1960. Rule 35 of this set of rules, which replaced O 65 r 27(41), was in all material respects similar to O 59 r 36 of our Rules of Court. The Supreme Court Costs Rules 1959 and the Appendices formed part of the RSC.

In 1965 there was revision of the rules, and the Rules of the Supreme Court 1965 were enacted, which came into operation in 1 October 1966. The relevant rule governing the review of taxation of costs before a judge was O 62 r 35 which, so far as material, was as follows:

> *(1) Any party who is dissatisfied with the decision of* ***a taxing officer*** *to allow or disallow any item in whole or in part on review under* ***rule 33 or 34*** *, or with the amount allowed in respect of any item by* ***a taxing officer*** *on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item if, but only if, one of the parties to the proceedings before the* ***taxing officer*** *requested* ***that officer*** *in accordance with* ***rule 34(4)*** *to state the reasons for his decision in respect of that item or part on the review.*
>
> *...*
>
> *(4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this rule, and no ground of objection shall be raised which was not raised on the review by the* ***taxing officer*** *but,* ***save*** *as aforesaid, on the hearing of any such application the Judge may exercise all such powers and discretion as are vested in the* ***taxing officer*** *in relation to the subject matter of the application.*
>
> *(5)* ***If the Judge thinks fit to exercise in relation to an application under this***

> ***rule the power of the Court to appoint assessors under section 98 of the Act, the judge shall appoint not less than two assessors, of whom one shall be a taxing officer*** *.*
>
> *(6) On an application under this rule the Judge may make such order as the circumstances require, and in particular may order the* ***taxing officer`s*** *certificate to be amended or, except where the dispute as to the item under review is as to amount only, order the item to be remitted to the* ***same or another taxing officer*** *for taxation.*
>
> *(7) In this rule, "Judge" means a Judge* ***in person, and "taxing officer" means a taxing master, a registrar of the principal probate registry, the Admiralty registrar or the registrar of a district registry*** *. [Emphasis is ours.]*

These provisions, with the exception of those words which we have italicised, were identical with those of O 59 r 36 of our rules. In fact, our O 59 r 36, which first appeared in our Rules of the Supreme Court 1970, was derived from these provisions of O 62 r 35.

There has been no decision in England pertaining to the interpretation and application of O 62 r 35. But there are two decisions of the Court of Appeal on a similar rule in the County Court Rules 1981 of England. The first is ***Madurasinghe v Penguin Electronics (a firm)*** (supra). In that case, the solicitors submitted a bill to their client for work done in representing him in the county court. The bill was taxed by the district judge who allowed a sum of o554. The solicitors were dissatisfied with the taxation and applied to the district judge to reconsider it However, he upheld it. The solicitors then applied to the judge for a review of the taxation under O 38 r 24 of the County Court Rules. The judge held that the district judge`s taxation could only be interfered with, if he had taken into account irrelevant consideration or had failed to take into account relevant consideration or the taxation had been plainly wrong. Applying that principle the judge dismissed the application. The solicitors appealed to the Court of Appeal. The court held, inter alia, that the judge was entitled in accordance with O 38 r 24 to exercise all such powers and discretion as were vested in the district judge, and as such had unfettered discretion on hearing of an application for a review of taxation. Order 38 r 24(4) and (6) of the County Court Rules 1981 provided respectively as follows:

> *(4) Any party who is dissatisfied with the [district judge`s] decision on the reconsideration may, within 14 days, after being notified of it, apply to the judge to review the taxation as to the item or items to which it relates.*
>
> *(6) Unless the judge otherwise directs, no further evidence shall be received on the hearing of an application under paragraph (4), and no ground of objection shall be raised which has not been raised in the applicant`s notice, but, save as aforesaid, on the hearing of the application the judge may exercise all such powers and discretion as are vested in the [district judge] in relation to the subject matter of the application.*

McCowan LJ, delivering the main judgment of the court, said ([1993] 3 All ER 20 at 23; [1993] 1 WLR 989 at 993):

> *The vital words are `all such powers and discretion as are vested in the [district judge] in relation to the subject matter of the application`. In my judgment, since the district judge and the judge have the same powers and discretion in relation to the subject matter of the application, the judge`s discretion cannot be fettered by the manner in which the district judge exercised his discretion. It follows that I consider the judge was plainly wrong in believing himself to be bound by* ***Hart v Aga Khan Foundation (UK)*** *[1984] 2 All ER 439[1984] 1 WLR 994 only to interfere if he thought that the registrar or district judge had not taken into account something he ought to have taken into account or had taken into account an irrelevant matter or that his opinion was clearly wrong.*

The second case is **Kawarindrasingh v White** [1997] 1 All ER 714[1997] 1 WLR 785. There, the plaintiff brought an action against the defendant for breach of contract. He was awarded the costs of two interlocutory applications and submitted a bill of costs for taxation. The district judge taxed his costs at o67.66 and later on review reconfirmed the amount. The plaintiff then sought a review of the taxation by the judge. The judge held that he could find no ground for interfering with the decision of the district judge. The plaintiff appealed. The Court of Appeal held that, on an application for review of taxation of costs, the judge had, in accordance with O 38 r 24(6) of the County Court Rules 1981, all such powers and discretion as were vested in the district judge, and that in that case the judge had misdirected himself. The court approved the passage of the judgment of McCowan LJ in ***Madurasinghe*** (supra) which we have quoted above. Brooke LJ, delivering the main judgment of the court, said ([1997] 1 All ER 714 at 718; [1997] 1 WLR 785 at 789):

> *The present application provides an appropriate occasion for this court to resolve any doubts which may still linger as to the nature of a judge`s jurisdiction on an application to review a taxation of costs, whether made by a taxing officer or by a district judge, and whether made by a firm of solicitors or a litigant in person under RSC Ord 62, r 35(4), or under CCR [ie Country Court Rules 1981] Ord 38, r 24(6), whose words are identical, mutatis mutandis, so far as the provisions relating to the judge`s powers and discretion are concerned. The words, as McCowan LJ said in* ***Madurasinghe****`s case, mean exactly what they say.*

Construction of O 59 r 36(4)

Mr Yang submits that the `powers and discretion` conferred on the judge by virtue of r 36(4) should be read subject to r 36(5), which provides that the judge `may make such order as the circumstances require`. We do not follow this argument. Of course the provisions of O 59 r 36 must be read together as a whole, and reading paras (4) and (5) of r 36 together, we do not see how a judge equipped with the powers and discretion conferred on him under r 36(4) can, in making an order in exercise of such powers and discretion, be restricted or constrained by the general words `such order as the circumstances require` as found in r 36(5). Each of these paragraphs serves a purpose. Paragraph (4) vests in the judge, on hearing an application for review of taxation, the `powers and discretion` vested in the registrar, and para (5) empowers the judge in exercising such powers and discretion to make `such order as the circumstances require`. Paragraph (5) complements para (4) and does not restrict or limit the latter. It is clear to us that, in both ***Diversey*** (supra) and ***Jeyaretnam*** (supra), paras (4) and (5) of O 59 r 36 were not considered together and no effect was given to para (4). The effect of these decisions as they stand seems to us to undermine the efficacy or force of para (4). In our opinion, there is no justification for placing any fetter on the `powers and

discretion` conferred on the judge under O 59 r 36(4); the words there are quite clear that the judge `may exercise all such powers and discretion as are vested in the Registrar`. In other words, the judge has the same powers and discretion as the registrar in taxing a bill of costs. Nowhere in the entire O 59 r 36 does it say that the judge has a fettered discretion when he reviews the taxation of an item or an amount in a bill of costs or that he should not interfere with the registrar`s decision, unless there is an error of principle or some other material error. As Bowen LJ in **Gardner v Jay** [1885] 29 Ch D 50 at 58 said:

> *[W]hen a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the Rules did not fetter the discretion of the Judge why should the Court do so?*

In our judgment, a judge on hearing an application for review of taxation of costs under O 59 r 36 hears the matter de novo, and is not fettered by the discretion exercised by the registrar in determining the quantum of any item in the bill under review before him. The judge is entitled to exercise the powers and discretion vested in him by the rules and make a completely fresh decision, among other things, substituting his own discretion for that of the registrar and awarding a different figure altogether in place of that awarded by the registrar. Of course, in this exercise the judge should give due weight to the registrar`s decision on the quantum that was allowed. For the reasons we have given, ***Diversey*** (supra) and ***Jeyaretnam*** (supra), in relation to the application of O 59 r 36 of the Rules of Court, were wrongly decided and we depart from these decisions which, in so far as they are inconsistent with our decision here, should not be followed in the future.

Our decision here is consistent with the approach adopted in cases of appeal to the judge from the decisions of the registrar on assessment of damages: ***Chang Ah Lek v Lim Ah Koon*** (supra). What was decided in ***Chang Ah Lek*** was reaffirmed by this court in **Ho Yeow Kim v Lai Hai Kuen** [1999] 2 SLR 246 and in the very recent case of **Singapore Airlines v Tan Shwu Leng** [2001] 4 SLR 593 .

Review and appeal

We now turn to deal with two other arguments raised by Mr Yang. First, he submits that there is a substantive difference in the procedures governing an appeal from the decision of the registrar to a judge, on one hand, and an application for review of taxation of a bill of costs by a judge, on the other. An appeal to a judge from the registrar`s decision is governed by O 56 r 1 of the Rules of Court, and there is only a single decision by the registrar before the matter proceeds on appeal to the judge. On the other hand, before a bill of costs comes on for review before a judge, the registrar would have made a decision on the bill of costs twice; first under O 59 rr 12 and 13 when he taxed the bill, and then under O 59 rr 34 and 35 when he carried out a review on the application of the aggrieved party. It follows that when the bill comes for review before a judge, the party or parties would in fact be having a `third bite of the cherry`.

We are unable to accept this argument. It is true that there is a difference in the procedures between an appeal from the decision of the registrar on a matter heard before him and an application to review an item or sum allowed or disallowed by the registrar on taxation. But in both cases, the process involved is an appeal from the decision of the registrar. It is true also that O 59 r 34 provides an additional procedure for a review of taxation by the registrar before the matter goes before a

judge on review. However, that merely serves to afford the registrar an opportunity to reconsider the item or amount he allowed or disallowed with a view to enabling him to correct any errors. We do not see how this extra procedure for review by the registrar can afford any ground for saying that the powers and discretion given to a judge in reviewing the taxation of any item or amount allowed or disallowed by the registrar should be fettered or in any way restricted.

Secondly, Mr Yang submits that the taxation of a bill of costs is a matter of practice and procedure, which is wholly distinct from the determination of the substantive rights of the parties by the registrar which later goes by way of an appeal to a judge. As a result of this difference, the approach of a judge in an appeal and in a review of taxation of costs should be different. He relies on the case of **Re Will of FB Gilbert (decd)** [1946] 46 SR (NSW) 318at 323, where Jordan CJ said:

> *[T]here is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with orders of Judges of first instance, the result would be disastrous to the proper administration of justice.*

In addition, counsel submits that the `doctrine of unfettered discretion` in ***Evans v Bartlam*** (supra) should not be applicable in matters of procedure and practice, because Lord Atkin, in that case, in declaring the doctrine said ([1937] AC 473 at 478; [1937] 2 All ER 646 at 648-649):

> *I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master`s discretion. His own discretion is intended by **the rules to determine the parties` rights**: and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it. This in my experience has always been the practice in Chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in **Cooper v Cooper** [1936] WN 205, with which I entirely agree. [Emphasis is that of counsel.]*

The short answer to this argument is that the process of taxation of costs is not a matter of practice or procedure. The manner of how a bill of costs after taxation by the taxing officer may be brought to a judge for a review may be a matter of procedure, but the process of taxation itself is not one of procedure; it is a determination by the taxing officer of the amount or amounts which one party is to pay to the other. It is a matter affecting the substantive rights of the parties.

Secondly, the above passage from ***Re Will of FB Gilbert (decd)*** (supra) cited by counsel is of no assistance to him in support of his submission. To illustrate this point, we need only to set out a fuller passage of Jordan CJ`s judgment at pp 322-323:

> *Next, it was said that for the applicant, that, since by s 3 the question whether any and if so how much provision should be made for an applicant is in terms left to the discretion of the Court, it is only in the most exceptional circumstances that a **Court of Appeal** could regard itself as justified in interfering with the exercise of a discretion by a judge of first instance - only where he has misapplied the law, or his order is likely to lead to a miscarriage of justice: **Evans v Bartlam** [1937] AC 473 at 480-1, 486-7 ... there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determined substantive rights. In the*

> *former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications* ***from a Judge in chambers to a Court of Appeal****. [Emphasis is ours.]*

It is obvious that Jordan CJ was actually referring to the Court of Appeal`s restraint in interfering with the exercise of discretion of a judge-in-chambers, especially in procedural matters. No doubt, it is settled law that an appellate court is particularly slow to interfere with the exercise of discretion of a trial judge. The decision relied upon by counsel is totally inappropriate.

Lastly, the pronouncement of Lord Atkin in ***Evans v Bartlam*** (supra) relied upon by Mr Yang cannot be said to be confined to instances where the appeal from the registrar to the judge involves only substantive rights and not rights of a procedural nature. There is nothing in that pronouncement to restrict the `parties` rights` to only substantive rights. No such distinction was contemplated in the speech of Lord Atkin. In our opinion, it is not correct to say that the pronouncement made by Lord Atkin in ***Evans v Bartlam*** is not applicable to a judge hearing an appeal from the decision of the registrar on a matter concerning practice and procedure.

Quantum

We now turn to the question of quantum. On this issue, we should first clarify a point with regard to the bill of costs submitted by the 17 defendants for taxation. Both counsel for Mr Tan and counsel for the 17 defendants have now clarified that the bill was made out on the basis that 100% of the costs would be allowed. Therefore, on the basis of the agreement reached with Mr Tan, the 17 defendants would be entitled to be paid an amount equal to 80% of the costs as taxed. It follows that, for every item of the bill allowed, only 80% thereof would be payable by Mr Tan to the defendants. So in this case, if $100,000 is to be allowed for section 1 of the bill as allowed by the judge, Mr Tan will be required to pay only $80,000.

We now turn to consider the quantum of $100,000 allowed by the judge. In dealing with this question it is relevant to go further and consider the grounds on which the assistant registrar allowed the amount of $70,000. At the initial stage, when she allowed the amount of $100,000, she bore in mind the following matters which were discussed in [para]3 of her grounds of decision:

> *Although the action involved multiple defendants who were represented by three different sets of solicitors, and although counsel for the defendants asserted that some 500 hours had been spent on getting up, the factual and legal issues in dispute did not appear to be complex. In essence, they centred on the question of whether the alleged acts of irregularity amounted to a breach of the applicable rules relating to the election so as to vitiate the election process or its results. The trial was also not document-heavy. When the action, which was commenced by way of an originating summons, was converted to a writ of action, no pleadings were ordered to be filed, and neither did parties have to prepare additional affidavits or undergo the usual discovery process. This was because the bulk of the affidavit and documentary evidence had already been tendered during the hearing of the plaintiff`s application for an interim injunction restraining the 2nd to the 34th defendants from acting as the 1st defendant`s Management Committee.*

She then said that on those grounds she allowed the sum of $100,000. But on review, she heard further arguments from counsel. Having considered these arguments, which she briefly set out in her grounds of decision, she reduced the amount to $70,000. She was obviously persuaded by the arguments advanced on behalf of Mr Tan, which she rehearsed as follows:

> *7 ... The bulk of the allegations of irregularity were directed principally at only five out of the 34 defendants. More importantly, counsel for the plaintiff pointed out that there had been a considerable degree of overlap between the work done by the different sets of solicitors for the defendants, not least where the cross-examination of some of the plaintiff`s witnesses and the preparation of the bundle of authorities were concerned.*

We think that this is a highly relevant consideration in determining the amount to be allowed.

Turning to the judgment of the judge, we find that none of the matters discussed by the assistant registrar were considered by the judge. In his judgment, the judge said at [para]20:

> *In connection with this, there were certain significant features which bore upon the work done. First, the choice of putting the 34 defendants through the mill was made by the plaintiff. The defendants came from different educational backgrounds. Next as the plaintiff put it, the matter incurred `the benefit of the Hainanese community`. In other words, it was not a run of the mill claim. In the event, what was in issue was reputation of the parties and partly high emotion. Indeed fraud and theft of ballot papers became part of the case. The plaintiff himself retained an eminent senior counsel as his advocate and the senior counsel was assisted by a team of lawyers. In the circumstances, it was reasonable and proper for the 17 defendants to seek separate representation. This would necessarily involve consultation with all the 17 defendants. There would inevitably be some overlap and joint work. That does not mean there was no separate preparation for the 17 defendants.*

It seems to us that some of the matters considered by the judge, with respect, are not quite relevant in relation to the question of the appropriate quantum to be allowed. First, joining 34 defendants may be a necessity in the proceedings; second, the fact that the defendants came from different backgrounds has no relevance on the issue of the quantum; third, the fact that the matter was incurred `for the benefit of the Hainanese community` is again irrelevant; and last, the fact that the reputation of the parties was involved and the matter generated `high emotion` is also not relevant.

It may be reasonable for the 17 defendants to have a legal representation separate from those of the association and the remaining defendants, as the judge held. Having said that, we think that there must be considerable areas, where the works carried out by the different sets of solicitors or counsel were common to all and were carried out jointly or in consultation with each other. In other words, there must be considerable overlap in the various matters dealt with in the defences to the claim resulting in the same work being carried out by the respective solicitors or counsel. Therefore, the load on each of the solicitors or counsel was lightened. Bearing this in mind, we think that a reasonable discount should be allowed for the separate fee awarded to each set of solicitors or counsel. Having regard to this factor and all the relevant circumstances, we think that the sum of

$70,000 allowed by the assistant registrar was fair and reasonable. It should not be forgotten that this is only the bill of costs of the 17 defendants, and that there are two other bills of costs to follow: one by the first defendant, the association, and the other by the remaining defendants. The total amount eventually to be paid by Mr Tan and those whom he represents to all the defendants would well exceed $100,000.

Conclusion

In conclusion, we allow the appeal, set aside the amount of $100,000 allowed by the judge and reinstate the amount of $70,000 allowed by the assistant registrar.

Costs

We now come to the question of costs. First the costs before the judge. The judge ordered Mr Tan to pay the costs of the hearing before him, which he fixed at $1,500. That order we set aside, and if that amount or any part thereof had been paid by Mr Tan, we order that it be refunded. Mr Tan should have his costs before the judge. As the judge had fixed costs at $1,500, we would adopt this amount and fix the costs at $1,500 to be paid by the respondents.

Next, the costs of the appeal. Although Mr Tan has succeeded in this appeal, his arguments on the various points failed. Even on the quantum he did not really focus on the points on which we have allowed the appeal. In the circumstances, we would not allow him the full costs of the appeal. He should be allowed only 30% of the costs of the appeal, and we so order. There will be the usual consequential order for the refund to Mr Tan or his solicitors of the deposit in court, with interest, if any.

Outcome:

Appeal allowed.