Ng Chee Weng *v* Lim Jit Ming Bryan and another
[2011] SGCA 62

Case Number : Civil Appeal No 190 of 2010

Decision Date : 18 November 2011

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Tan Cheng Han SC (instructed), Vijay Kumar and Periowsamy Otharam (Vijay & Co) for the appellant; Cavinder Bull SC, Woo Shu Yan, Lin Shumin and Priscilla Lua (Drew & Napier LLC) for the respondents.

Parties : Ng Chee Weng — Lim Jit Ming Bryan and another

Civil procedure – pleadings – amendment

Civil procedure – pleadings – striking out

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2011] SGHC 120.]

18 November 2011 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 This is an appeal against the judgment of the High Court Judge ("the Judge") in *Ng Chee Weng v Bryan Lim Jit Ming and another* [2011] SGHC 120 ("the Judgment"). It concerns an application to amend a Statement of Claim. However, since the case involves both an alleged settlement agreement as well as an original cause of action based on a trust, difficult questions of procedure are raised.

Background history

2 On 26 May 2009, Ng Chee Weng ("the Appellant") commenced an action in Suit No 453 of 2009 against Bryan Lim Jit Ming ("the First Respondent") and Teo Soo Geok Josephine ("the Second Respondent"). The First Respondent and Second Respondent are husband and wife. Since the Second Respondent plays no material role in the present proceedings, all subsequent references to "the Respondent" shall refer to the First Respondent only.

3 In the original Statement of Claim, the Appellant alleged that the Respondent held some shares in SinCo Technologies Pte Ltd (the "Company") on trust for him. The Appellant wanted to claim the dividends declared by the Company between 2003 and 2007 from the Respondent, amounting to some $8.88 million. We shall refer to the dividend claim as "the original cause of action".

4 Besides the original cause of action, the Statement of Claim also contained certain paragraphs that made reference to settlement discussions between the Appellant and the Respondent. We note that the Appellant stopped short of alleging that he arrived at a settlement with the Respondent in the Statement of Claim itself.

5 The Respondent applied to strike out those paragraphs in Summons No 2966 of 2009

("SUM 2966/2009") on the basis that the discussions were "without prejudice" communications that were privileged from disclosure.

6 The High Court judge who heard SUM 2966/2009 granted the application and struck out the paragraphs in question. The Appellant then appealed to the Court of Appeal in Civil Appeal No 93 of 2009 ("CA 93/2009").

7 Over the course of arguments before the Court of Appeal, the Appellant put forward amendments to his Statement of Claim ("the First Proposed Amendment") to plead a claim to enforce a settlement agreement as an alternative claim to the original cause of action. The essence of this amendment is found in paragraph 33 of the First Proposed Amendment, as follows: [note: 1]

> On 31 March 2009 the Plaintiff and the 1st Defendant entered into another oral Settlement Agreement under which agreement *the 1st Defendant agreed to pay the Plaintiff S$4.5 million* in discharge of the 1st Defendant's liability as trustee to account for dividends declared and paid by the Company to the 1st Defendant for the period 2003-2007, ... [emphasis added]

The critical change in the First Proposed Amendment was that the Appellant now alleged that settlement negotiations had in fact concluded in a settlement agreement under which the Respondent agreed to pay the Appellant $4.5 million.

8 The Court of Appeal dismissed the appeal in CA 93/2009 and disallowed the First Proposed Amendment. However, the Court of Appeal issued the following addendum to their order of 19 May 2010, as follows: [note: 2]

> Addendum to Order of 19 May 2010 in CA 93 of 2009
>
> The dismissal of the appeal should not be taken as precluding the appellant from applying for leave to make such further amendments to his statement of claim as he may deem fit, subject always to the right of the respondent to object to the same in accordance with general principles. *However, any proposed amendment which is in the precise form and sequence as set out in the draft enclosed in the appellant's submission to this court on 18 May 2010 should not be allowed as we have already ruled that that draft was not in order.*
>
> Whether any "without prejudice" evidence ("the contested evidence") may be permitted to be adduced in the proceedings would have to be determined in accordance with the general law and in the light of any future amendments to pleading (if any) as may be allowed. For the avoidance of doubt we should state that the dismissal of the appeal does not mean that we have ruled that the contested evidence is inadmissible under any circumstances. We have only determined that the contested evidence is inadmissible on the basis of the existing pleadings.
>
> [emphasis added]

9 The Appellant then brought the present application to amend his Statement of Claim for a second time ("the Second Proposed Amendment") in Summons No 3969 of 2010 ("SUM 3969/2010"). This time, the Appellant has *reversed* the order of his respective causes of action. In particular, the Appellant is now pleading that he had arrived at a settlement agreement with the Respondent, pursuant to which he (the Appellant) would receive $4.5 million; and, in the alternative, if the court finds that there is no settlement agreement, that he is entitled to the dividends declared on the shares held on trust for him by the Respondent.

10 The essence of this amendment is contained in paragraphs 29 to 37 of the Second Proposed Amendment, as follows: [note: 3]

B. COMPROMISE OF THE PLAINTIFF'S CLAIM FOR AN ACCOUNT OF HIS SHARE OF THE DIVIDENDS

29. On or around 23rd March 2009, the Plaintiff and the 1st Defendant began negotiations with a view to reaching an amicable settlement of the Plaintiff's claim for an account of his share of the dividends ...

30. *The Plaintiff's primary case is that those negotiations culminated in a binding oral agreement between himself and the 1* st *Defendant*, which was made on 31 March 2009 ... by which it was agreed that the 1st Defendant would pay the Plaintiff the sum of $4,500,000 in full and final settlement of his claim in respect of the dividends. …

PARTICULARS

...

(f) *…The 1st Defendant made an offer to pay $4.5 million which the Plaintiff verbally accepted then and there.*

...

C. BREACH BY THE 1ST DEFENDANT OF THE SETTLEMENT

31. In breach of the aforementioned settlement agreement, the 1st Defendant has failed to pay any part of the sum of $4.5 million to the Plaintiff within a reasonable time or at all.

32. Moreover on 13th May 2009 the 1st Defendant sent an e-mail to the Plaintiff refusing to pay him anything and thereby evincing a clear intention not to be bound by the terms of the settlement.

...

D. ALTERNATIVE CLAIM FOR AN ACCOUNT OF DIVIDENDS

34. *Alternatively if, contrary to the Plaintiff's primary case based upon the oral settlement agreement, the Court concludes that there was no binding settlement agreement made on 31st March 2009* or that the 1st Defendant is not bound by that agreement for any reason, *then the Plaintiff is entitled to continue to pursue the claim for an account of the dividends that was ostensibly compromised by the said agreement.*

...

E. CLAIM AGAINST THE 2ND DEFENDANT

37. For the avoidance of doubt, this claim is only made if the Plaintiff's primary case that his

claim in respect of the dividends is the subject of a binding compromise agreement fails.

…

[original emphasis in bold, emphasis added in italics]

11 The Assistant Registrar ("AR") who heard SUM 3969/2010 disallowed the Second Proposed Amendment. The Appellant appealed against the AR's decision in Registrar's Appeal No 379 of 2010 ("RA 379/2010"). The AR's decision was affirmed by the Judge, from whose decision the Appellant has brought the present appeal.

The decision below

12 In the Judgment, the Judge affirmed the AR's decision in RA 379/2010 on different grounds. The learned Judge held (see the Judgment at [17], [18], [21], [22] and [34]) that:

17 The plaintiff's submission that he was not seeking to run two mutually inconsistent cases called for scrutiny. Two claims were pleaded, the first for the dividends, ... and the second under contract, on the basis that the plaintiff and the first defendant had agreed to settle his claim for the claim for dividends.

18 These two claims are mutually exclusive. *If there was a settlement agreement*, it extinguished the dividends claim. If the defendants did not honour the agreement, the plaintiff can sue on the agreement or repudiate it. If he sues on the agreement, he cannot pursue the dividends claim. If he repudiates the agreement, he cannot claim for the settlement sum.

...

21 ... [The plaintiff] argued that this did not call for election, that [he] is entitled to plead in the alternative, with the claim for the $4.5m as the main claim and to fall back on the dividends claim if it is found at trial that there was no settlement agreement. That explanation did not remove the need to elect if he was allowed to plead in the alternative in the manner set out in the application. ...

2 2 *The plaintiff had to confront a basic issue, whether he was entitled to plead in the alternative as set out in his application. Holding the plaintiff to his case, he had compromised the dividends claim by the time he commenced this action*. There was one surviving claim, the claim under the settlement agreement. He cannot be allowed to maintain the dividends claim when his case was that the claim had been compromised. It is not a question of election because election implies that the elector has two proper claims between which he must choose, and there was only one claim.

...

34 For the reasons stated in [21] and [22] *supra*, the alternative claim for the dividends disclosed no reasonable cause of action and is an abuse of the process of court, and the [Second Proposed Amendment] cannot be allowed.

[emphasis added]

13 From the extract above, it is clear to us that the Judge was not persuaded by the Appellant's submissions that he was entitled to plead in the alternative in manner as set out in the Second

Proposed Amendment.

14 The Judge also found that the Appellant could not maintain the original cause of action when his case was that the original cause of action had been compromised by a settlement. Therefore, the learned Judge concluded that Second Proposed Amendment could not be allowed because it disclosed no reasonable cause of action and was an abuse of the process of court.

Arguments on appeal

Appellant's arguments

15 On appeal, the Appellant's main case is that if he were to be put to an election as to which cause of action (*ie*, the dividend claim or the settlement claim) he wishes to pursue, this would result in patent unfairness to him. This is because, at this stage, the question of whether or not there was a settlement agreement has not been determined by the Court. If he were compelled to elect, and he chose to pursue the settlement claim, then he would be left with nothing should that claim fail.

16 The Appellant submits that, as a matter of law and logic, this outcome cannot be right because it is settled law that, if the court determines that there is no settlement agreement reached, the original cause of action survives as a matter of law.

17 Furthermore, the Appellant submits that his application satisfies the requirements at law that govern amendments because the Second Proposed Amendment is not substantially in the same form and sequence as the First Proposed Amendment which this court previously disallowed. Indeed, as we have noted above (at [9]), the Appellant has *reversed* the order of his respective causes of action.

18 The Appellant also submits there is no rule of law that requires him to issue fresh proceedings in order to bring a claim; conversely, bringing both claims in the same suit prevents duplicity of actions and hence leads to savings of cost and time.

Respondent's arguments

19 The Respondent's main case is that an issue of election arises, and that the Appellant has chosen and must stand by his choice.

20 The Respondent further submits that the Second Proposed Amendment is inconsistent, dishonest and an abuse of process and that the Appellant is estopped from pleading both claims in the same action.

Issues on appeal

21 The main issues that have arisen for decision in the present appeal are as follows:

(a) Whether the Appellant can plead in the alternative in the manner set out in the Second Proposed Amendment ("the First Issue").

(b) Whether the Appellant is precluded from amending his pleadings because he had elected otherwise, or because, for some other reason, allowing the amendment will result in injustice to the Respondent ("the Second Issue").

(c) Whether the appeal ought, in any event, to fail as the Second Proposed Amendment

discloses no reasonable cause of action, or, alternatively, is an abuse of the process of court ("the Third Issue").

Our decision

The First Issue

The law on the amendment of pleadings

22 The law that governs amendment of pleadings is well-established. This court held in *Wright Norman and another v Oversea-Chinese Banking Corp Ltd* ("*Wright Norman*") [1993] 3 SLR(R) 640 (at [6]) that:

> It is trite law that an amendment which would enable the real issues between the parties to be tried should be allowed subject to penalties on costs and adjournment, if necessary, *unless the amendment would cause injustice or injury to the opposing party which could not be compensated for by costs or otherwise* ... [emphasis added]

23 We pause to observe that, over the course of the parties' lengthy submissions, there was not a single occasion where the principle in *Wright Norman* was mentioned, either expressly or otherwise.

24 The rationale behind the principle in *Wright Norman* is obvious. The court should be extremely hesitant to punish litigants for mistakes they make in the conduct of their cases, by deciding otherwise than in accordance with their rights: see, for example, *per* Bowen LJ in the English Court of Appeal decision of *Cropper v Smith* (1884) 26 Ch D 700 ("*Cropper*").

25 However, the principle in *Cropper* has been qualified by Lord Griffiths in the House of Lords decision of *Ketteman v Hansel Properties Ltd* [1987] AC 189 ("*Ketteman*"), where the learned law lord observed that the judge must also consider all the circumstances of the case because "justice cannot always be measured in terms of money".

26 The qualification in *Ketteman* has been repeatedly endorsed in local cases, and most recently in the Singapore High Court decision of *Tang Chay Seng v Tung Yang Wee Arthur* [2010] 4 SLR 1020, where Tan Lee Meng J held (at [10]–[11]) that:

> 10 It does not always follow that an amendment should be allowed where the other party can be compensated with costs. In *Ketteman v Hansel Properties Ltd* [1987] AC 189 ("*Ketteman*") Lord Griffiths, who pointed out, at 220, that "justice cannot always be measured in terms of money" explained as follows:
>
> > [A] judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other.
>
> 11 The courts have been careful to differentiate between an amendment that merely clarifies an issue in dispute and one that raises a totally different issue at too late a stage. As Lords Griffiths said in *Ketteman*, at 220, "to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence".

27 Indeed, in has been stressed in the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 that procedural justice is an important aspect of the holistic ideal and concept of justice itself. It was held in that case (at [5]) that:

> … the court must be extremely wary of falling into the flawed approach to the effect that "the ends justify the means". This ought never to be the case. The obsession with achieving a substantively fair and just outcome does not justify the utilisation of any and every means to achieve that objective. There must be fairness in the *procedure or manner* in which the final outcome is achieved. [emphasis in original]

28 Applying the above principle in the context of amendment of pleadings, even if a litigant has a seemingly meritorious claim, an amendment to the pleadings will be refused if it causes injustice to the opposing party. This is because, if the procedure used to achieve the outcome is not fair, that itself will taint the outcome.

29 However, it also follows that, if there will be no injustice caused save some inconvenience that can be compensated by costs, and the amendment is in order, the court will lean favourably towards allowing the amendment.

Whether the Second Proposed Amendment is in order

30 An amendment is in order if it complies with the established rules of pleading set out in Order 18 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court") as well as under the common law. Specifically, the rules under Order 18 that arise as issues for consideration in this appeal are as follows:

(a) Order 18 Rule 7; and

(b) Order 18 Rule 19.

As the applicability of Order 18 Rule 19 is more germane to the Third Issue, we will discuss Order 18 Rule 7 first.

Order 18 Rule 7

The applicable law on alternative pleadings

31 Order 18 Rule 7 requires that only facts, and not evidence, be pleaded. However, unlike the civil procedure rules of many other jurisdictions, our Rules of Court are silent as to whether inconsistent alternatives can be pleaded. Hence, the common law rules on alternative pleadings continue to apply in Singapore.

32 The common law rules on alternative pleadings are succinctly explained by the authors of *Mallal's Supreme Court Practice* (Vol 1, 2nd Ed, 1983), which refer (at para 18/7/4) to a rule that is *in pari materia* to our Order 18 Rule 7, as follows:

> **Alternative pleas:** A plaintiff may base his claim alternatively, upon two or more different sets of facts, each entitling him to the relief sought, or of some modifications of it. A plaintiff may rely upon different rights alternatively and there is nothing in these rules to prevent a party from making two or more inconsistent sets of allegations and claiming relief in the alternative. *The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity*

of another litigation to dispose of the same controversy or the subject-matter of the same relief, though the ground upon which the relief is claimed may be different. [original emphasis in bold, emphasis added in italics]

33 The above passage is an accurate statement of the common law. Brett LJ held in the English Court of Appeal decision of *Philipps v Philipps* (1878) 4 QBD 127 ("*Philipps*") that a party is allowed to include two or more inconsistent sets of material facts and claim relief to each set in the alternative. He held (at 134) that:

> The plaintiff is relying upon several different rights, and I may take it that he is relying upon them alternatively although they may be inconsistent. *As to each of those he ought to set out the facts upon which he would have to rely as facts to maintain that right.* [emphasis added]

34 The requirement that the facts relied upon by each alternative separately be set out is important, because failure to do so will likely result in confusion and embarrassment. The learned authors of *Singapore Civil Procedure 2007* (G P Selvam ed-in-chief) (Sweet & Maxwell Asia, 2007) explain (at para 18/7/20) that, as a matter of practice:

> Whenever alternative cases are alleged, the facts belonging to them respectively ought not to be mixed up, but should be stated separately, so as to show on what facts each alternative relief is claimed.

35 The above principles were endorsed and qualified by our High Court in *Chong Poh Siew v Chong Poh Heng* [1994] 3 SLR(R) 188 ("*Chong Poh Siew*"), where M P H Rubin J held (at [61] and [62]) that:

> ... Given the conflicting nature of the interests, I am of the opinion that this alternative plea is simply not available to the plaintiff. It is settled law that a plaintiff may rely on several different rights alternatively though they may be inconsistent (*per* Brett LJ in *Philipps v Philipps* (1878) 4 QBD 127 at 134). ...
>
> Though the plaintiff is technically the legal owner of the disputed share by virtue of the deed of assignment, having regard to his underlying stance denying the existence of the trust on which the court has reached a finding unfavourable to him, *it will not, in my opinion, commune with common sense and justice* to order the release of the proceeds of the disputed share to him. …
>
> [emphasis added]

36 The suggestion in *Chong Poh Siew* that, while a party has the right to plead inconsistent rights in the alternative, the alternatives cannot offend common sense and justice represents the law in Singapore. Indeed, in *Brailsford v Tobie* (1888) 10 ALT 194 ("*Brailsford*"), it was held that an exception to the general rule is that alternative statements of fact are not permitted if one statement or the other must, to the knowledge of the pleader, be false.

37 This exception highlights the tension the law faces in deciding whether or not to permit parties to plead inconsistent causes of action in the alternative. While the pleader should be free to plead inconsistent causes of action in the alternative, the inconsistency cannot – particularly in relation to the facts pleaded – offend common sense. One obvious example of an inconsistency that will offend common sense is when the pleader has actual knowledge of which alternative is true, as was the case in *Brailsford*.

38 Indeed, in the latest edition of a leading practitioners' text on civil procedure in Singapore, it

was observed as follows (see *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) at para 18/1/5):

> ***Combining various causes of action, pleas and parties***
>
> ... Claims which are inconsistent with each other may be pleaded but should be alleged in the alternative (*Bagot v Easton* (1877) 7 Ch D 1). For instance, a claim for fraud might be coupled with an alternative claim for negligence. If the plaintiff pleads fraud solely but is only able to prove negligence, he will not be able to obtain his remedy (*Connecticut Fire Insurance v Kavanagh* [1892] AC 473). However, the court may be unwilling to accept an alternative plea if, in the circumstances, this would not be in the interests of justice (see *Chong Poh Siew v Chong Poh Heng* [1995] 1 SLR 135, at 151). ...

Conclusion

39 Applying the above principles to the facts of the present appeal, we are of the view that the approach taken in *Chong Poh Siew* is sound and that the Appellant is not precluded from pleading the inconsistent causes of action in the *alternative*, as long as the facts are not mixed up and are stated separately in order to demonstrate on what facts each alternative relief is based.

40 This is exactly what the Appellant did in his Second Proposed Amendment (as to which, see above at [10]):

> (a) At paragraphs 29 to 33, the Appellant sets out the facts that give rise to the settlement. At paragraphs 39(1) and (2), the Appellant sets out the relief sought under those facts.
>
> (b) At paragraphs 17 to 28, and 34 to 35, the Appellant sets out the facts that give rise to the original cause of action. At paragraphs 39(3) to (6), he claims, *in the alternative*, the relief sought under those facts.

41 What the Appellant has done is clearly in line with *Philipps* (see above at [33]), as well with the general practice set out in the relevant texts (see above at [34] and [38]). Therefore, the inconsistent causes of action pleaded do not form a basis for the court to deny the Appellant's Second Proposed Amendment because those inconsistent causes of action are indeed properly pleaded in the alternative.

The Second Issue

42 In addition to the submission that the Appellant's Second Proposed Amendment is not in order, the Respondent raised several other objections to the Second Proposed Amendment. The main objections can be summarised as follows:

> (a) The Appellant is precluded by the doctrine of *election* from making the amendment. From the way the Appellant conducted his case, he is no longer entitled to sue on the settlement agreement because he had already elected to sue on the original cause of action when he first commenced proceedings ("the issue of election").
>
> (b) By suing initially on the original cause of action, there is now total failure of consideration on the part of the Appellant ("the issue of total failure of consideration").
>
> (c) The Appellant is trying to use the Second Proposed Amendment as a backdoor to bring in

"without prejudice" evidence that was struck out by the Court of Appeal in CA 93/2009 ("the issue of "without prejudice" evidence").

(d) As a matter of policy, allowing the Second Proposed Amendment in this case would have a chilling effect on settlement proceedings in general ("the policy issue").

(e) Having dragged the Respondent through two years of litigation, it is now too late for the Appellant to change their mind because they are estopped from doing so ("the issue of estoppel").

43 We have considered all the above submissions and are not persuaded by any of them for reasons set out below.

(a) The issue of election

44 The submissions on the issue of election formed one of the major planks in the Respondent's case before this court. The crux of the submissions on this issue is that the Appellant must elect which claim to pursue, because the Appellant cannot sue on both claims at the same time.

45 The Respondent further submits that, having elected to pursue the original claim for dividends, the Appellant must stand by his election and can no longer pursue the settlement claim.

46 We are unable to agree with the Respondent's submissions on this point. Keeping in mind the law on alternative pleadings, we have, with respect, found these arguments to be without merit. The fact that the Appellant cannot succeed on both claims at the same time does not disentitle him to plead both claims in the alternative within the same suit.

47 In our view, the question of election does not even arise at this stage. In order to understand why this is so, we must analyse the authorities cited by the Respondent in greater detail.

48 The Respondent relies, in the main, on three cases: *Lam Fung-ying v Ho Tung-sing and Another* [1993] 2 HKLR 187 ("*Lam Fung-ying*"); *Deman Construction Corp v 1429036 Ontario Inc.* 64 CLR (3d) 82 ("*Deman*"); and *The "Dilman Fulmar"* [2004] 1 SLR(R) 140 ("*Dilman Fulmar*") to support his argument that the need to elect arises at this stage.

49 In a more general vein, the cases relating to settlement agreements can be analysed from two perspectives – first, where the existence of the settlement is not in dispute and, secondly, where (in contrast) the existence of the settlement is in fact in dispute.

Where the existence of the settlement agreement is not in dispute

50 Issues of election might arise where the existence of the settlement agreement is not in dispute. The precise legal effect would depend on whether or not it is the defendant or the plaintiff who is in repudiatory breach of the settlement agreement. (see generally David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 7th Ed, 2010) ("*Foskett*") at Chapter 8) However, as this is not the situation that is before this court in the present appeal, we would venture to say no more.

Where the existence of the settlement agreement is in dispute

51 Where, however, the existence of the settlement agreement is in dispute (which is the situation in the context of the present appeal), *that* question *must first be settled by the court before* a party can be said to have breached the settlement. As a matter of logic, the existence of a settlement

agreement *must necessarily precede* a determination of whether either party breached the settlement.

52 At this stage, *neither* party is put to an election. The need for election *does not arise yet* because the question of whether or not there is a settlement agreement to breach *has not yet been decided* by the court.

53 Rather, the innocent party should apply for the question of whether or not a settlement agreement exists to be tried as a preliminary issue. There is local authority that adopts precisely such a n approach. Judith Prakash J in the Singapore High Court decision of *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR(R) 1 found no difficulty in dealing with the issue as to whether or not there was a settlement agreement as a preliminary issue. After Prakash J determined that there was no settlement agreement between the parties, she proceeded to determine the merits of dispute in the original cause of action. All these issues were determined within the same trial. Hence, we are of the view that, in the interests of practicality, a plaintiff is entitled to sue on both the alleged settlement agreement and the original cause of action (by way of alternative pleadings) in the same suit.

54 If the court determines that there was indeed a settlement agreement, and one party is in repudiatory breach of the settlement, the other (innocent) party will then (as alluded to at [50] above) be put to an election as to whether to affirm or to terminate the settlement agreement instead.

55 On the other hand, if the court determines that there was no settlement agreement arrived at between the parties, the original cause of action is not affected. Since there was no settlement agreement, a plaintiff can proceed to sue, and a defendant remains liable to be sued, on the original cause of action. It is clear that no issue of election arises in such a situation.

56 Therefore, we consider, with respect, the Respondent's submissions on election to be both premature and, hence, misconceived, since the court has not yet decided whether or not there was a settlement agreement arrived at between the parties.

57 We pause for the moment to observe the reason as to why the present proceedings have unfolded in such a tangled fashion. Usually, if the terms of the settlement agreement are favourable to the defendant, he or she would want to enforce the settlement agreement rather than be sued by the plaintiff on the original cause of action. However, we could envision certain situations where the defendant would prefer to be sued on the original cause of action rather than on the settlement agreement. This might be due to various tactical reasons: for example, the defendant might think that t h e plaintiff's claim under the original cause of action is weaker than his or her claim under the settlement agreement; or, as appears to be the case here, there might be "without prejudice" evidence that can be kept out of the trial of the original cause of action, but not out of the trial of the settlement claim.

58 However, if the defendant chooses not ask the court to determine whether or not there was a settlement agreement, he cannot proceed to allege that the plaintiff is in repudiatory breach of the settlement *as if there was a settlement*. This is *not* permissible because, to use the words of the Respondent, a party cannot have his cake and eat it too. As we have emphasised earlier, the question of whether or not there is a settlement agreement *should always precede* the question of whether or not there was a repudiatory breach *of the settlement agreement*.

59 In fact, upon closer scrutiny, whilst the Appellant has put forth two inconsistent claims, the

Respondent has *himself also* put forth two inconsistent defences. Essentially, the Respondent is alleging that there was no settlement agreement and, *in the alternative*, if there was a settlement agreement, the Appellant had acted in repudiatory breach and the Respondent had thereby terminated the settlement agreement. The defences are inconsistent because surely the Respondent cannot succeed on both defences at the same time.

60 In future cases, and for the avoidance of doubt, if the existence of a settlement agreement is in question, it should generally be determined as a preliminary issue. Either party could make such an application. Where no application to such effect is made, but the pleadings disclose that such an issue exists, the court could, on its own motion, make a direction to determine the question as a preliminary issue.

The relevance of the cases cited by the Respondent

61 We have considered the three cases cited by the Respondent (see [48] above) to support his argument that the need to elect arises at this stage of the proceedings. However, we are not persuaded by any of the three cases cited. The factual matrix of the present appeal is very different from that in all of the three cases cited.

62 From the foregoing analysis, the issue of election might become relevant only *if the court were to find that a settlement agreement exists.* Since the court has not yet made a finding of whether or not a settlement agreement exists between the Appellant and the Respondent, cases where the existence of a settlement agreement is not in dispute are relevant in so far as they analyse the rights of the innocent party (including the issue of election) only *after* the court makes a finding that a settlement agreement exists in the present case.

63 In the circumstances, it follows that all three cases cited are neither relevant nor persuasive authority for us to decide the present appeal. However, for completeness, we shall set out the specific reasons as to why we are not persuaded by those three cases.

Lam Fung-ying

6 4 *Lam Fung-ying* is a decision by the Hong Kong Court of Appeal. The Respondent cited *Lam Fung-ying* as authority for the proposition that the Appellant, having elected to prosecute the original action, could not later resile from that election and set up the compromise instead.

65 In *Lam Fung-ying*, settlement negotiations were entered into only after the trial of the original cause of action had begun. The parties discussed compromise in the middle of trial, and it was unclear on what terms the oral compromise was reached. The plaintiff then tried to assert the compromise by consent judgment in the original cause of action and this was denied by Master Woolley. Instead of appealing against Master Woolley's decision, the plaintiff elected to proceed with the original cause of action. Subsequently, the plaintiff then tried to institute fresh proceedings to set up the compromise. The Hong Kong Court of Appeal held that the fresh proceedings should be struck out on the basis that the plaintiff, having elected to pursue her original claim rather than appeal against the Master Woolley's finding, could not now resile from that and set up the compromise instead.

66 We agree with the outcome of the case. Initially, the plaintiff thought that she had come to a compromise with the defendant. However, when the plaintiff tried to enter a consent order, the defendant resisted the order by alleging that no compromise had been reached. Godfrey J held (at 190) that, in that situation, the plaintiff is faced with three options, specifically:

Her first option was to accept the defendants' repudiation of the compromise and to get on, or attempt to get on, with the original action. This was not ideal, for she would thereby lose the benefit of the compromise which she had obtained (or, at any rate, thought that she had obtained).

Her second option was to attempt to assert the compromise by seeking to enforce it in the original action. This was not ideal, either; for, in the absence of an endorsed consent summons, she might have difficulty in persuading the court to make the appropriate order. ... And even if the issue *was* decided in favour of the plaintiff, it might be possible for the defendants, having lost on the issue, then to go on to argue that the compromise had the effect, not of entitling the plaintiff to an order in the terms of the proposed consent summons, but of entitling the plaintiff merely to damages for breach of the compromise agreement (a claim which she would be able to advance only in a fresh action).

The plaintiff's third option was to attempt to assert the compromise in precisely that way; i.e. by bringing a fresh action against the defendants for damages for breach of the compromise agreement. But this would be even less satisfactory; for the plaintiff would have lost her right to get on with her original action (if indeed that right had survived the compromise agreement) and also her right to a consent order embodying the terms which had been agreed.

[emphasis in original]

67 With the greatest respect, we are unable to agree with the Hong Kong Court of Appeal's analysis of the plaintiff's options. We would have thought that, in so far as the first option is concerned, if the plaintiff had chosen to accept the defendants' repudiation of the compromise, she would not have lost the benefit of the compromise because she would have been entitled to sue on the defendants' repudiatory breach of the settlement to recover damages. Therefore, we reject the Respondent's submissions on this particular aspect of *Lam Fung-ying*.

68 In any event, the above passage was strictly *obiter* to the resolution of *Lam Fung-ying*. Indeed, by the time of the trial, the plaintiff had already elected to proceed on the second of the three suggested options. Godfrey J proceeded to hold (at 190) that:

The first step the plaintiff took after the defendants repudiated the compromise was to apply for a judgment on terms carrying into effect the compromise agreement; ***she went for the second option*** . But, on 23rd January 1992, Master Woolley rejected her application. ...

The plaintiff was now faced with another choice; i.e. whether or not to appeal against Master Woolley's refusal of her application or to write off the repudiated compromise and get on with her original action.

She elected not to appeal against the decision of Master Woolley. Instead, she elected to get on with her original action ... ***The conduct of the plaintiff just described is consistent only with an election*** (it does not matter whether it was wise or foolish, or even whether it was permissible) ***to get on with the original action rather than to seek to assert the compromise.*** By her conduct, too, the plaintiff communicated her election to the defendants who, by giving the particulars requested, accepted and acted on it, incurring costs in doing so.

But then the plaintiff had second thoughts.

On 1st April 1992, the plaintiff instituted the subsequent action, setting up the compromise

agreement and seeking to enforce it. ...

In our judgment, this was a step which the plaintiff was not entitled to take, having regard to her earlier election (in the light of the defendants' repudiation of the compromise agreement and the master's rejection of her application to enforce it) to prosecute the original action.

[emphasis added in bold italics]

69 It is clear to us that the passages in bold italics above form the *ratio decidendi* in *Lam Fung-ying*.

70 We agree fully with the *ratio decidendi* in *Lam Fung-ying*. By not appealing against Master Woolley's decision, and by, instead, reverting back to the original cause of action and taking active steps in those proceedings, the plaintiff in *Lam Fung-ying* had made an unequivocal election and was therefore estopped from subsequently instituting fresh proceedings to set up the settlement. Indeed, when the plaintiff in *Lam Fung-ying* purported to institute fresh proceedings, the Court of Appeal struck out her claim on the basis of abuse of process. This was because, so long as Master Woolley's decision stood, the settlement claim was bound to fail even if the amendment was allowed.

71 However, we are of the view that the *ratio decidendi* in *Lam Fung-ying* can be distinguished from the present appeal on the following grounds. In *Lam Fung-ying*, Master Woolley had already decided that there was no settlement between the parties, and this decision constituted a binding judicial pronouncement on the merits of an issue, *ie*, whether a settlement agreement was reached. This must be contrasted with the present appeal, where there has not been a judicial pronouncement on whether or not settlement has been reached.

72 The distinguishing feature of *Lam Fung-ying* from the present case is that plaintiff in *Lam Fung-ying* had an opportunity before Master Woolley to be heard on her claim that there was an oral compromise. The fact that Master Woolley found against her was irrelevant. This must be contrasted once again with the present appeal, where the Appellant has not been heard on the issue of whether or not a settlement agreement had been reached. In fact, the actual trial has not even begun. One must not lose sight of the fact that the Appellant is simply applying to amend his Statement of Claim in the context of the present appeal.

73 In the circumstances, we are not persuaded that *Lam Fung-ying* is relevant to the present appeal.

Deman

74 *Deman* is a decision by the Ontario Superior Court of Justice. The Respondent cited *Deman* for the proposition that where an offer to settle had been repudiated and where the plaintiff had continued his original claim, the plaintiff did not have the option of pursuing the settlement agreement as well.

75 It should, however, be noted that the existence of a settlement was not in dispute in *Deman*, where van Rensberg J held (at [23]–[24]) that:

In my view the evidence is clear and beyond doubt that the parties entered into a binding settlement agreement. ...

> *The defendants failed to perform their obligations under the Settlement Agreement and instead took the position that there was no enforceable agreement* because the Rompsen financing had fallen through. Contradictory evidence was offered by the defendants on this point. ...
>
> [emphasis added]

76 Furthermore, whether or not the plaintiff in *Deman* could enforce the settlement turned chiefly upon the interpretation of Rule 49.09 of the *Rules of Civil Procedure* (RRO 1990, Reg 1994) in Ontario: a rule which has no direct or close equivalent in Singapore. Therefore, we are not persuaded that *Deman* is relevant in the context of the present appeal.

Dilman Fulmar

77 We now turn to the third case relied upon by the Respondent. The Respondent cited *Dilman Fulmar*, a Singapore High Court decision, for the proposition that in the event of a repudiation of a settlement agreement, the innocent party is required to elect between suing on the settlement agreement and suing on the original claim. We agree with the Respondent's interpretation of what *Dilman Fulmar* stands for. However, we do not, with respect, see the relevance of that case to the present appeal.

78 In *Dilman Fulmar*, as in *Deman*, the existence of a settlement was not an issue. The defendant in *Dilman Fulmar* repudiated the settlement and on a true construction certain clauses of the written settlement agreement, Belinda Ang Saw Ean J held that the original claim could be revived by the plaintiff.

79 The factual context in *Dilman Fulmar* is therefore quite different from that in the present appeal. In particular, we emphasise once again that, in the present appeal, the question as to whether a settlement exists has not yet been resolved. Therefore, we are also not persuaded that *Dilman Fulmar* is relevant in the context of the present appeal.

Conclusion

80 For the foregoing reasons, we conclude that, before a court determines the issue of whether or not a settlement exists between the parties, the doctrine of election does not apply. This is precisely the situation in the present appeal. We now turn to the four other issues raised by the Respondent under the Second Issue.

(b) The issue of total failure of consideration

81 The Respondent submits that, by putting himself in a position where it becomes impossible to perform his obligation, the plaintiff is in repudiatory breach of the settlement. The Respondent further submits that this amounts to total failure of consideration on the part of the Appellant.

82 We do not see, however, how this question of a total failure of consideration can arise at this stage of the proceedings, which relates only to the pleadings. In his original Statement of Claim, the Appellant's cause of action was based entirely on a trust, although facts relating to a settlement negotiation were alluded to. When the matter came before us in CA 93/2009, the Appellant sought to amend his Statement of Claim by claiming, first, on a trust or, in the alternative, on the basis of a settlement. Whilst we dismissed that appeal and did not allow the First Proposed Amendment sought by the Appellant, we expressly stated (as noted above at [8]) that the dismissal of the appeal did not preclude the Appellant from making further amendments (albeit not in exactly the same form as those

which were sought to be made in CA 93/2009).

83 Now, in the Second Proposed Amendment, the Appellant wishes to amend his Statement of Claim to base his claim, firstly, on an alleged settlement arrived at between the parties or, in the alternative, on trust (which was, as noted above, the original claim) in the event that the court should hold that there had been no such settlement.

84 Looked at in this light, we are indeed surprised that this particular ground (*viz*, total failure of consideration) is being raised against the Second Proposed Amendment at this stage of the proceedings. At no time hitherto in the proceedings below (whether in the pleadings or in the affidavits filed) has the Respondent asserted that a settlement had in fact been arrived at between the parties. Neither has the Respondent alleged that he had either made or offered to make payment to the Appellant pursuant to a settlement. In the present circumstances, whether or not there was in fact such a settlement arrived at between the parties would be the first issue to be decided at during the trial. If the court should find that there had in fact been such a settlement, the next question to be determined would be whether any party was in breach of it. Both these issues are fact-sensitive. It is therefore, in our view, entirely premature to talk about a total failure of consideration in relation to the alleged settlement at this particular juncture.

85 Although we have explained above how no issue of failure of consideration would arise at this stage, we should, for completeness, add an observation. The doctrine of total failure of consideration operates as a restitutionary remedy enabling an innocent party to recover money paid under a contract because, by virtue of the other party's breach, the innocent party has not enjoyed the benefit of any part of what it has bargained for: see the oft-cited House of Lords decision in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. Under the common law, the failure of consideration must be *total*, and not *partial*. Hence, assuming that it is established that a settlement between the parties was arrived at and that the settlement sum had been paid by the Respondent to the Appellant, the Respondent would need to demonstrate that the Respondent has not enjoyed the benefit of any part of what was intended under the settlement – in particular, that he has not enjoyed the benefit of not being sued by the Appellant from the day the settlement was allegedly concluded right up to the commencement of the present suit. This is also a question of fact that ought to be placed before the trial judge.

(c) The issue of "without prejudice" evidence

86 The procedural question in the present appeal is whether the court can determine the issue of the existence of a settlement within the same trial as the original cause of action. This issue is complicated by the fact that "without prejudice" evidence can be adduced to at the trial of the settlement to prove its existence, but not with respect to the trial of the original cause of action.

Luk Por v Chau Kim Hung

87 The Respondent cited *Luk Por v Chau Kim Hung* [2001] 1 HKC 674 ("*Luk Por*") for the proposition that it is most undesirable that evidence of the "without prejudice" negotiations should be admitted at the trial of the original action as it might well prejudice the defendant.

8 8 *Luk Por* is a decision by the Hong Kong Court of First Instance. The plaintiff in *Luk Por* had a claim against the defendant and sued him on the claim. The parties then enter into settlement negotiations during trial. The plaintiff then applied to amend his pleadings to plead the new settlement claim in the alternative. The defendant denied reaching settlement with the plaintiff. The amendment was refused.

89 The chief distinguishing feature of *Luk Por* from the present appeal is that the settlement negotiations in *Luk Por* were entered into during the trial of the original cause of action. Therefore, even if the settlement existed, it did not exist as of the date of the plaintiff's original pleadings, and cannot be pleaded within the same action as the original cause of action. As Sakhrani J rightly held (at 677A):

> … this is the sort of situation which requires the plaintiff to bring a fresh action to seek redress under the compromise between the parties.

90 In addition, the plaintiffs in *Luk Por* pleaded the original claim as the primary claim, and the settlement claim in the alternative. It is in this context that Sakhrani J made the statement (at 677F) that:

> It is most undesirable that evidence of the 'without prejudice' negotiations should be admitted at the trial of the original action as it might well prejudice the defendant. The defendant might also be cross examined on the settlement terms.

91 Sakhrani J is undoubtedly correct on this point, because, quite apart from the issue of "without prejudice" evidence, pleading in that order would result in embarrassment. Indeed, this was that the Appellant attempted to do in his First Proposed Amendment, and this court had already disallowed the amendment on the basis that it was not in order. In fact, this court had expressly stated in the Addendum to CA 93/2009 (above at [8]) that:

> ... Whether any "without prejudice" evidence ("the contested evidence") may be permitted to be adduced in the proceedings would have to be determined in accordance with the general law and in the light of any future amendments to pleading (if any) as may be allowed. *For the avoidance of doubt we should state that the dismissal of the appeal does not mean that we have ruled that the contested evidence is inadmissible under any circumstances. We have only determined that the contested evidence is inadmissible on the basis of the existing pleadings.* [emphasis added]

92 Looking at the Second Proposed Amendment, the Appellant has sought to bring *the settlement claim* as his *primary* claim, and the original dividend claim as his *alternative* claim. In our view, the Second Proposed Amendment has cured the embarrassment that was inherent in the original Statement of Claim. We fail to see how this equates to exploiting a legal backdoor to the "without prejudice" rule in the manner argued for by the Respondent.

93 Therefore, we are of the view that the holdings in *Luk Por* are only relevant to the First Proposed Amendment and are not relevant to the present appeal.

Using "without prejudice" evidence to prove the fact that a settlement agreement exists

94 The law is well-established inasmuch as, when the issue is whether or not the negotiations resulted in an agreed settlement, "without prejudice" evidence exchanged over the course of negotiations is admissible at trial. *Foskett* (at para 19-28) states that:

> **The fact of agreement**
>
> One aspect of Hoffmann L.J.'s analysis that survives these reservations is the proposition that *the evidence showing that an agreement had been concluded is simply relevant to a fact that needs to be proved and there is no countervailing public policy requirement that the evidence to*

support such a fact should be excluded. On any analysis it has always been the position that the contents of without prejudice negotiations can be revealed and considered by the court if an issue arises as to whether an agreement has been concluded. *The whole purpose of the privilege would be negated if it were not possible to lift the veil on the negotiations to determine whether an agreement had crystallised.* If the result of that determination is that no agreement was concluded, the veil can be drawn again over the contents of the negotiations.

[original emphasis in bold, emphasis added in italics]

95 Indeed, this court held in Quek Kheng Leong Nicky and another v Teo Beng Ngoh and others and another appeal [2009] 4 SLR(R) 181 (at [23] and [24]) that:

23 The rule against the admission of "without prejudice" communications is, however, subject to a number of exceptions. The most important instances were set out by Robert Walker LJ in the English Court of Appeal decision of *Unilever Plc v The Procter & Gamble Co* [2000] 1 WLR 2436 at 2444-2445 ("*Unilever*") ...

2 4 *One key exception* (which is crucial to the determination of the present appeal) *is where "without prejudice" communications are admitted to determine whether there was a compromise reached and, if so, what the terms of that concluded compromise agreement were* (see, in particular, the oft-cited English Court of Appeal decision of *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 WLR 1378 ("*Tomlin*"), where Danckwerts LJ endorsed (at 1382-1383) the important *dicta* by Lindley LJ in the (also) English Court of Appeal decision of *Walker v Wilsher* (1889) 23 QBD 335). In *Walker v Wilsher*, Lindley LJ had observed as follows (at 337):

> What is the meaning of the words 'without prejudice'? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.

Danckwerts LJ went on to hold in *Tomlin* (at 1383) that:

> That statement of Lindley L.J. is of great authority and seems to me to apply exactly to the present case if, in fact, there was a binding agreement, or an agreement intended to be binding, reached between the parties, and, accordingly, it seems to me that not only was the court entitled to look at the letters, though they were described as 'without prejudice,' but it is quite possible (and, in fact, the intention of the parties was) that there was a binding agreement contained in that correspondence.

It should be mentioned that, although Ormrod J dissented in *Tomlin*, this was only on the issue of application and not principle. *Tomlin has, in fact, been cited and applied in numerous English decisions (including Rush & Tompkins at 1300 and Unilever at 2444). Indeed, this particular exception is firmly established in the local context* (see, *eg*, Jeffrey Pinsler, *Singapore Court Practice 2006* (LexisNexis, 2006) at para 24/3/10 (and the authorities cited therein) and *Halsbury's Laws of Singapore* vol 10(2) (LexisNexis, 2006 Reissue) at para 120.430; general reference may also be made, in the context of this particular exception, to Vaver ([23] *supra*) at 143-147).

[emphasis added]

96 From the foregoing analysis, it is clear that, in Singapore, the "without prejudice" rule is not an absolute rule and is subject to a number of exceptions, the most important being the exception in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280. In our view, the Appellant's case falls squarely within this exception to the "without prejudice" rule.

97 Hence, if a judge finds that a settlement agreement has not been concluded, the veil can be drawn over the "without prejudice" evidence again. As a matter of procedure, if a trial judge who is cognisant of the "without prejudice" evidence feels that he or she is unable to exclude such evidence from his or her mind in the subsequent trial of the original cause of action, he or she can recuse himself and have another judge conduct the trial of the original cause of action.

(d) The policy issue

98 The Respondent submits that allowing the Second Proposed Amendment will have a chilling effect on settlement negotiations in general; and therefore, as a matter of policy, the Second Proposed Amendment should not be allowed.

99 We do not think that allowing the Second Proposed Amendment in the present case would lead to the outcome suggested by the Respondent. On the contrary, we are of view that by *not* allowing the Second Proposed Amendment, we would disturb an entire line of local authority that makes it clear that there are certain exceptions to the "without prejudice" rule, and this would lead to a chilling effect on settlement negotiations in general. Therefore, we are not persuaded by the submissions on this issue.

(e) The issue of estoppel

100 Finally, the Respondent submits that having been dragged through two years of litigation, it is now too late for the Appellant to change his mind because he is estopped from doing so.

101 In our view, such an argument is circular in nature and therefore cannot be accepted. The fact that a party is seeking leave to amend suggests that his pleading is defective and he wishes the cure the defect. The other party cannot, as it were, put the cart before the horse and resist the amendment on the basis that the original pleading is defective. The rules that govern amendment of pleadings in this case are the rules stated in *Wright Norman*.

102 The law is trite that an amendment duly made takes effect from the date of the original document which it amends. After the amendment, the amended document will be taken to have existed in the amended form right from the start. Indeed, Sakhrani J in *Luk Por* held (at 677G to H) that:

> There is a further reason why the said amendment should not be allowed. *It must be remembered that an amendment duly made takes effect, not from the date when the amendment is made, but from the date of the original document which it amends.* The original statement of claim is dated 30 September 1997. As at that date the cause of action based on the new claim under the settlement agreement did not even exist. The settlement agreement is said to be made on 11 June 1999. [emphasis added]

103 The amendment application also failed in *Luk Por* because the settlement negotiations were entered into *after* the plaintiff had sued on the original cause of action, and therefore the settlement could not have been pleaded together with the original cause of action in the same statement of claim filed before the settlement negotiations.

104 However, in the present case, the alleged settlement negotiations were entered into and concluded on 31 March 2009, *before* the Appellant commenced Suit No 453 of 2009 on 26 May 2009. If the Second Proposed Amendment was allowed, there would be no problem of timing as there was in *Luk Por*. The amended pleading would be take effect from the date of the original pleading, as if the pleading existed in the amended form right from the start.

105 Hence, we cannot accept the Respondent's argument that it is now too late for the Appellant to turn back via the Second Proposed Amendment. In fact, more than two years has passed since the commencement of the suit, yet the actual trial has not even begun because the Respondent has been valiantly resisting every single application of the Appellant at the interlocutory stage. The Respondent cannot then set up this resistance as a reason to deny the Appellant his day in court.

The Third Issue

The law on striking out

106 Even if an amendment is in order, the court will not allow the amendment if it is obvious that the amended claim would be struck out at trial. We pause to observe – parenthetically – that, whilst the Respondent raised a whole battery of arguments in support of his argument that the Appellant's Second Proposed Amendment was an abuse of the process of the court, the only substantive argument centred, in our view, on Order 18 Rule 19 of the Rules of Court.

107 For ease of reference, the circumstances under which a pleading can be struck out pursuant to Order 18 Rule 19 of the Rules of Court are set out, as follows:

> **Striking out pleadings and endorsements (O. 18, r. 19)**
>
> **19.** —(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1) (*a*).
>
> (3) This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

Whether the Second Proposed Amendment ought to be struck out

108 The Judge held that the Second Proposed Amendment ought to be struck out pursuant to limbs (a) and (d) of Order 18 Rule 19(1) (see generally the Judgment at [29]–[34]).

Order 18 Rule 19(1)(a)

109 The Judge held that the claim for dividends disclosed no reasonable cause of action because:

(a) the Appellant had not taken a consistent position in his affidavits as to whether or not he had accepted an offer the $4.5 million or not; and

(b) the Appellant had taken opposite positions on different times with equal conviction.

110 We respectfully differ from the Judge with regard to this aspect of his decision. The draconian power of the court to strike out a claim at the interlocutory stage under limb (a) of Order 18 Rule 19(1) can only be exercised when it is patently clear that there is no reasonable cause of action on the face of the pleadings. The mere fact that a case is weak and not likely to succeed is not a valid ground for striking out a claim under this ground. In the Singapore High Court decision of *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1995] 3 SLR(R) 334, M P H Rubin J held (at [13]) that:

> … On the subject of reasonable cause of action, cases annotated in the *Supreme Court Practice* 1995 (see para 18/19/11) support the view that a reasonable cause of action means a cause of action with some prospect of success when only the allegations in the pleadings are considered (*per* Lord Pearson in *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094 (CA)). *Another principle enunciated by the courts over the years underpins the proposition that so long as the statement of claim or the particulars disclose some cause of action or raise some question to be decided by a judge or a jury, the mere fact that the case is weak and not likely to succeed, is no ground for striking it out.* The central point which seems to emerge in all the decided cases is that the object of the rule is to stop cases which ought not to be launched - cases which are *obviously unsustainable* or patently frivolous or vexatious (see the observations of Lindley LJ in *Attorney General of the Duchy of Lancaster v London And North Western Railway Company* [1892] 3 Ch 274 at 277). [emphasis added]

111 The above principles were cited with approval by this court in *The "Tokai Maru"* [1998] 2 SLR(R) 646. Although that case involved an application to strike out a defence, the principles enunciated by this court are equally applicable to a statement of claim as well. It was held (at [44]) that:

> …The hearing of the application should not therefore involve a minute examination of the documents or the facts of the case in order to see whether there is a reasonable defence. *To do that is to usurp the position of the trial judge and the result is a trial in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way* (see *Wenlock v Moloney* [1965] 2 All ER 871). … [emphasis added]

112 Therefore, we consider the law relating to Order 18 Rule 19(1)(a) to be relatively well established. We pause to emphasise that the requirement under Order 18 Rule 19(1)(a) is strict. The pleading itself must fail to make out a reasonable cause of action without reference to other evidence before it can be struck out under limb (a). Such is the rationale behind Order 18 Rule 19(2), which prevents parties from adducing evidence on an application under Order 18 Rule 19(1)(a).

113 In our view, a reasonable cause of action is disclosed on the face of the Second Proposed Amendment. It therefore follows that the Second Proposed Amendment cannot be struck out under Order 18 Rule 19(1)(a) if we were to allow it.

Order 18 Rule 19(1)(b)

114 We are of the view that there is no issue that the Second Proposed Amendment is scandalous, frivolous or vexatious within the meaning of Order 18 Rule 19 (1)(b).

Order 18 Rule 19(1)(c)

115 The First Proposed Amendment was disallowed on the basis that it was legally embarrassing. By pleading the dividend claim as the primary claim and the settlement claim in the alternative, the Appellant had put himself in a legally embarrassing position because, after the court rules on the original cause of action, the court cannot then proceed to rule on the settlement claim. A judicial pronouncement on the original cause of action is premised upon the absence of a settlement. Regardless of the outcome of the ruling on the original cause of action, the Appellant cannot subsequently sue on the settlement after obtaining judgment on the original cause of action.

116 An amendment that purports to do the above is undoubtedly embarrassing. However, we are of view that, by reversing the order of the claims and pleading the claims in the alternative, the Second Proposed Amendment has cured the embarrassment. Hence, Order 18 Rule 19(1)(c) does not apply in the present appeal.

Order 18 Rule 19(1)(d)

117 Besides holding that the amendment disclosed no reasonable cause of action, the Judge also held that the application to make the Second Proposed Amendment was an abuse of process because:

(a) after the First Proposed Amendment was rejected by the Court of Appeal, the Appellant simply reversed the order of the claims and filed the Second Proposed Amendment; and

(b) the Appellant has equivocated over the negotiations and the settlement since May 2009, and has taken contradictory positions without regard to consistency and credibility.

118 We respectfully disagree with the Judge on this aspect of his decision as well, because the Appellant did not simply reverse the order of the claims, but rather, as we have explained at [39]–[41] above, it is clear in the Second Proposed Amendment that the two causes of action are being pleaded *in the alternative*, with the relevant facts in support of these causes of action being pleaded separately.

119 Furthermore, taking inconsistent positions at different points during negotiations as shown in the affidavit only affects the fact finding exercise at trial, and is not, *per se*, an abuse of the process of court.

120 In the circumstances, we are of view that the Second Proposed Amendment does not constitute an abuse of the process of the court within the meaning of Order 18 Rule 19 (1)(d).

Conclusion

121 For the reasons set out above, we allow the appeal.

122 With regard to the issue of costs, however, we note that, by framing his respective causes of action in the way he did at the outset, the Appellant was, in part, the author of the manner in which the present events unfolded, culminating in the present appeal. That said, the present appeal was also due, in part, to the Respondent's misinterpretation of the Addendum issued by this court in

CA 93/2009.

123 In the circumstances, therefore, we order that the Respondent pay the Appellant half of the Appellant's costs of the present appeal. There will be no order as to costs with regard to the proceedings before the Judge and the AR. The usual consequential orders are to apply.

[note: 1] See Appellant's Core Bundle ("ACB") Vol II, p 96.

[note: 2] *Ibid*, p 61.

[note: 3] *Ibid*, pp 115 to 123.