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

**[1991] SGCA 17**

Motion in Civil Appeal No 17/1989, CA 17/1989

Between

The Nikko Merchant Bank (Singapore) Ltd

… *Plaintiff*

And

Syamsul Bachri
Sjafrudin Bachri

… *Defendant*

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# GROUNDS OF DECISION

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# The Nikko Merchant Bank (Singapore) Ltd v Syamsul Bachri and Another

**[1991] SGCA 17**

Motion in Civil Appeal No 17/1989, CA 17/1989
Lai Kew Chai J; L P Thean J; Yong Pung How CJ
06 June 1991

**Judgment:**

Coram: Yong Pung How CJ Lai Kew Chai J L P Thean J

< Delivered by Yong Pung How CJ >

**GROUNDS OF JUDGMENT**

In the present appeal, there was an application to adduce further evidence under Order 57, r 13 of the Rules of the Supreme Court, in addition to the main appeal against the decision of the learned Judge who gave summary judgment in favour of the respondents.

2 We shall deal first with the application to adduce further evidence. Order 57, r 13 (2) provides:

"13(2) The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in Court, by affidavit, or by

deposition taken before an examiner, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on special grounds."

The judgment, having been given under Order 14, is a judgment after a hearing on the merits. What constitutes "special grounds" was set out in the leading case of Langdale v Danby < 1982 > 1 WLR 1123 which, together with the cases which preceded it, was exhaustively reviewed by Ackner LJ in K/S A/S Oil Transport v Saudi Research and Development Corporation Limited ("The Gudermes") < 1984 > 1 Lloyd's Rep. 5 at p 9:

"This is a case where evidence is sought to be admitted concerning matters which occurred before the date of Mr Justice Mustill's decision and it is accordingly common ground that special grounds must be provided before that can be done.

What, then, is required to be established to constitute special grounds? In the words of Lord Bridge in Langdale v Danby, < 1982 > 1 WLR, 1123 at p. 1133:

The classic statement of what amounts to "special grounds" within the meaning of Ord. 59, r.10 (2) comes from the judgment of Denning LJ (as he then was) in Ladd v Marshall < 1954 > 1 WLR 1489 ...

Lord Bridge pointed out that part of the judgment was expressly approved by the House of Lords in Skone v Skone, < 1971 > 1 WLR 812 in the speech of Lord Hodson at p. 815, with which all the other members of the Appellate Committee agreed. Lord Justice Denning said this:

To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled; first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

It is the first condition with which we are concerned because it is accepted by the defendants that the material which they now seek to put before the Court was available to them prior to the hearing by Mr Justice Mustill. It is not even a case where, with reasonable diligence, the material could have been obtained. The material was already in their possession.

Lord Denning's reference to this first condition was not novel. In Shedden v Patrick, (1869) LR HL 1 Sc. & Div. 470 at p.545, Lord Chelmsford had observed:

It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.

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Those observations were quoted and adopted by Lord Justice Scrutton in Nash v Rochford Rural District Council, < 1917 > 1 KB 384 at p. 393, where the learned Lord Justice observed:

I take the reason of it to be that in the interests of the State litigation should come to an end at some time or other: and if you are to allow parties who have been beaten in a case to come to the Court and say "Now let us have another try; we have found some more evidence", you will never finish litigation, and you will give great scope to the concoction of evidence.

In that case it is clear that the observation of Lord Justice Lindley in In re Copiapo Mining Co. Ltd., (1893) 10 TLR 180 at p. 181 that:

... if the Court thought that the case had been decided on insufficient evidence, and that the evidence proposed to be adduced would be sufficient to enable the Court to discover the truth, that would be a special ground within the meaning of the rule ... < (an observation which was not concurred in by Lord Justice Kay) was disapproved by the Court. >

In Langdale v Danby, < 1982 > 1 WLR 1123 as Lord Bridge pointed out in his speech at p. 1129:

The primary and most important question for decision by your Lordships' House is whether, on hearing an appeal against a summary judgment given in favour of a plaintiff under RSC Ord. 14 or Ord. 86, the Court of Appeal had an unfettered discretion to receive further evidence or whether they may only do so on special grounds.

The House of Lords was told from the Bar that in recent years it had been treated as settled practice in the Court of Appeal that there was no fetter on the Court's decision to receive further evidence on appeal against a summary judgment.

Lord Bridge, with whose speech the other members of the Appeals Committee agreed, said, for reasons which he set out in detail but which I need not quote, that he had reached the conclusion that the language of O.59, r.10 (2) which excludes the admission of further evidence on appeal to the Court of Appeal except on special grounds is, in its ordinary meaning, applicable to appeals against summary judgments given for the plaintiffs under RSC O.14 or O.86. He then went on to say this in regard to O.14 proceedings:

In the situation arising on an appeal to the Court of Appeal from a summary judgment, the application of these conditions and perhaps the conditions themselves will require some modification. It may well be that the standard of diligence required of a defendant preparing his case in opposition to a summons for summary judgment, especially if under pressure of time, will not be so high as that required in preparing for trial. The second and third conditions will no doubt be satisfied if the further evidence tendered is sufficient, according to the ordinary principles applied on applications for summary judgment, to raise a triable issue. But I can see no injustice at all in requiring a defendant to use such diligence as is reasonable in the circumstances to put before the judge on the hearing of the summons, albeit in summary form, all the evidence he relies on in defence, whereas it would be a great injustice to the plaintiff to allow the defendant to introduce for the first time on appeal evidence which was readily available at the hearing of the summons but was not produced."

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3 In the present case both counsel addressed us on the first condition laid down in Ladd v Marshall that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the hearing before the learned Judge. Counsel for the appellants explained that the further evidence which they sought to adduce were merely supplementary documents which had been referred to in the affidavits. He did not address the court, however, on why these documents could not have been obtained with reasonable diligence for use at the hearing below. From the categorisation of the documents, it was clear that these documents not only were available for use but were or must have been in the possession of the appellants at the material time. More than two years had lapsed since the decision of the learned Judge, and there had been no application to adduce further evidence during this period. It was only at this late stage that the appellants sought to adduce further evidence. We therefore dismissed the application.

4 Turning now to the appeal proper, the facts relevant to this appeal were as follows. In July 1986, one Roy Gan operated a stock trading account 20111 with the appellants. Under the stock trading account, Roy Gan was required to maintain a margin ratio of less than 50%. In April 1987 Roy Gan's margin ratio of 56% exceeded the level acceptable to the appellants and he was asked to rectify the situation. There then came into existence, on 1 May 1987 or thereabouts, a letter (the "May 1987 letter") which purportedly authorised the appellants to use the sum of money in the respondents' bank account as additional margin for Roy Gan's account. This May 1987 letter will be dealt with fully later. On 5 May 1987, the respondents deposited US$413,799.00 (the first sum) with the appellants. This sum was put into a term deposit 2 days later. In May and June 1987, there followed several margin call letters sent by the appellants to Roy Gan. On 19 June 1987, the respondents deposited a further

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US$404,181.83 (the second sum) with the appellants. This sum was also put into a term deposit. From July onwards until about late September, several more margin call letters were sent by the appellants to Roy Gan. The two sums of US dollars which were placed on term deposit were renewed from time to time together with the accumulated interest. The last maturity dates would have been 9 February 1988 for the first sum and 21 December 1987 for the second sum. Together with accumulated interest, the first sum had grown to US$429,031.98 and the second sum to $411,569.38.

5 In October 1987, Roy Gan having failed to make good the margin short fall in his trading account, the appellants liquidated the position and used these US dollar deposits to reduce Roy Gan's liability to them. On 4 December 1987, Roy Gan was adjudicated bankrupt on his own petition. On 9 December 1987, the respondents through their solicitors purported to revoke the directions given to the appellants in the May 1987 letter. On 11 December 1987, the appellants replied that they had been authorised by the May 1987 letter to apply the US dollar deposits as additional margin for Roy Gan's account and they had already done so, prior to the respondents' letter of 9 December 1987 which purported to revoke the directions given in the May 1987 letter. The respondents thereupon commenced proceedings against the appellants to recover the amount of the US dollar deposits. On an application for summary judgment in May 1988, the Assistant Registrar granted the appellants unconditional leave to defend. In February 1989, however, on appeal from the decision of the Assistant Registrar, the learned Judge allowed the respondents' appeal and gave judgment for the respondents on the two US dollar deposits with interest thereon. The appellants appealed against this decision.

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6 The purpose of Order 14 is to enable a plaintiff to obtain summary judgment without trial if he can establish his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim, which ought to be tried. The summary jurisdiction conferred by Order 14 must be used with great care. A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. Summary judgment under this order should not be granted where any serious conflict as to matter of fact or any real difficulty as to matter of law arises but, however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable, it will give final judgment. More specifically, it is clear from case law that, where there is a fair dispute as to the meaning of the document on which the claim is based or denied, leave to defend should be given. This has been well established since the last century, see eg. Ironclad v Gardner < 1892 > 4 TLR 18 and Bowes v Caustic Soda < 1893 >9 TLR 328. There have also been many local cases both in Singapore and in Malaysia where unconditional leave to defend has been given where the dispute concerned the interpretation of a document and the facts surrounding the document: eg see UMBC Bhd v Palm and Vegetable Oils Sdn Bhd < 1983 > 1 MLJ 206; Ng Yik Seng v Perwira Habib Bank Malaysia Bhd < 1980 > 2 MLJ 83 and Brightside Mechanical and Electrical Services Group and anor v Hyundai Engineering and Construction Company Limited < 1988 > 1 MLJ 500.

7 In the present appeal, reference was made by both counsel to the May 1987 letter which is reproduced in full below:

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Nikko Merchant Bank 6 Battery Road #28-01 Standard Chartered Bank Bldg Singapore 0104

ATTENTION: MR KEE POIR MOK

Dear Sir

We wish to inform you that with effect from 1/5/87, Mr Roy Gan Teck Leng has been appointed as our proxy with full power of substitution. He is thereby authorised to act on our behalf in all financial matters related to our account (A/c No. 20221). We are also agreeable to our US$ balance to be used as additional margin balance for Roy Gan Teck Leng's trading account (Account No. 20111) if necessary.

Thank you for your kind co- operation.

Yours faithfully

Sjamsul Bachri

Acknowledged receipt

..... Kee Poir Mok Nikko Merchant Bank

The appellants contended that this letter was intended to give the appellants additional security for Roy Gan's trading account and that the security was given over the "US$ balance". The words were general and not limited to the respondents' account 20221. The appellants further contended that the "US$ balance" could only refer to the first and second sums received in May and June 1987 respectively, because they were the only monies received from the

respondent. These sums were paid into account 20221 and were transferred out to be held on deposit to earn interest. If the May 1987 letter did not apply to these two US dollar deposits, it did not apply to anything, and so did not give the appellants any additional security for Roy Gan's account, which could not have been the intention. The appellant contended therefore that, in so far as there was any uncertainty in the interpretation of the May 1987 letter, there was need for oral evidence to explain the surrounding circumstances, including evidence as to the US dollar funds which were in existence or in contemplation of being paid to the appellants at that time. The appellants relied on Prenn v Simmonds < 1971 > 1 WLR 1381 and Reardon Smiths Line v Hansen Tangen < 1976 > 1 WLR 989. In the appellants' submission, if final judgment was given to the appellants at this stage, the appellants would never be able to investigate at the trial the true relationship between Roy Gan and the respondents and the state of the respondents' knowledge as to the trading account arrangements. The US dollar term deposits could be appropriated by the appellant before their maturity dates to offset the losses in Roy Gan's account, and in any event the May 1987 letter did not limit the appellants' rights to use these monies to make good losses in Roy Gan's account.

8 The respondents' argument was a fairly simple one. What they contended was that they had an account with the appellants number 20211, into which the respondents paid the two sums of US dollars. Money was withdrawn from that account and placed on term deposits. Since the term deposits were not in account 20221, the appellants therefore could not appropriate the two term deposits to offset the losses in Roy Gan's trading account. The respondents further contended that the phrase "our US$ balance" in the May 1987 letter did not refer to the term deposits and therefore could only refer to any US dollars that might be found in account 20221. Counsel for the respondents referred us

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to various textbooks on banking law and also to Bank of Ireland v Martin < 1937 > Irish Report 189 and also the Australian case of Dixon v Bank of New South Wales < 1896 > 12 WN (NSW) 101.

9 While it was not necessary for us to express any opinion on the merits in this case, it was very clear to us that, apart from the issues surrounding the May 1987 letter, there were several other arguable issues in this case. We were of the view that this was clearly not a suitable case for summary judgment and ordered unconditional leave to defend.

Lai Kew Chai J
L P Thean J
Yong Pung How CJ

Christopher Bathurst QC with Paramjit Singh Gill for the appellants
Leolin Price QC with H L Wee for the respondents

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