Wellmix Organics (International) Pte Ltd v Lau Yu Man
[2006] SGHC 14

Case Number : Suit 642/2001, RA 166/2005

Decision Date : 26 January 2006

Tribunal/Court : High Court

Coram : Andrew Phang Boon Leong J

Counsel Name(s) : Melvin Lum Kwong Hoe (Rajah and Tann) for the plaintiff; Michael Por Hock Sing, Anand Kumar and Siva Krishnasamy (Tan Lee and Partners) for the defendant

Parties : Wellmix Organics (International) Pte Ltd — Lau Yu Man

Civil Procedure – Judgments and orders – Unless order – Nature of order – Test for determining whether order is unless order or consent unless order – Objective approach in ascertaining parties' intentions – Whether clear evidence of agreement between parties – Whether clear terms of agreement between parties

Civil Procedure – Jurisdiction – Inherent – Court's discretion to interpret and enforce unless orders – Relevant principles – Whether party's conduct so extreme that consent order should deprive it of rights in litigation – Order 92 r 4 Rules of Court (Cap 322, R 5, 2004 Rev Ed)

Contract – Mistake – Mutual or unilateral mistake – Whether agreement giving rise to consent unless order existing between parties – Parties at cross-purposes – Whether parties bound by agreement

26 January 2006

Andrew Phang Boon Leong J:

Introduction – unless orders and consent unless orders

1 The issue in this case is a simple one. The plaintiff alleged that the defendant was in breach of a consent unless order, whereas the defendant denied the very existence of such an order in the first instance – at least in the manner the plaintiff had framed it. The assistant registrar found in favour of the plaintiff , and hence refused to set aside the interlocutory judgment entered in favour of the plaintiff for breach of the unless order, with damages to be assessed. The defendant appealed. I allowed the defendant's appeal. The plaintiff has appealed against my decision. I now give the detailed grounds for my decision.

2 The general law relating to unless (in contrast to *consent* unless) orders is clear. Such orders are issued by *the court* only when this is considered to be really necessary. To this end, they are draconian in nature and effect. Because this is so, courts will enforce such orders only if the party breaches the order both intentionally and contumeliously or contumaciously, although the Singapore Court of Appeal in *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR 750 ("the *Syed Mohamed* case") also pointed (at [13]) to an apparent requirement to the effect that "the failure to obey was due to extraneous circumstances". Tan Lee Meng J, who delivered the judgment of the court, further observed thus (at [15]):

> Whether or not there has been prejudice to the other party is also a factor to be taken into account. The nature of the relief sought by the party in default and whether or not the penalty imposed is proportionate to the default in question are also relevant. *In short, all the circumstances of the case must be taken into account.* [emphasis added]

3 In so far as the criterion of "extraneous circumstances" is concerned, however, this may not

be limited only to circumstances beyond the defaulting party's control, at least where exceptional circumstances can be demonstrated (see *Singapore Court Practice 2005* (Jeffrey Pinsler gen ed) (LexisNexis, 2005) at para 3/4/3; see also *RG Carter (West Norfolk) Ltd v Ham Gray Associates Ltd* (1994) 42 ConLR 68). What is clear, as embodied in the quotation above, is that all the circumstances of the case must be considered by the court concerned.

4 The principles set out briefly above reflect the important task of balancing the need to ensure compliance with the rules of civil procedure on the one hand and the need to ensure that a party is deprived of its cause of action only when its lack of compliance is so extreme as to justify such a drastic consequence.

5 Nevertheless, some modification to these principles appears to be required where the parties themselves enter into *an agreement* that if the unless order issued by the court is not complied with, the party in breach must, *without more*, suffer the drastic and draconian consequences of such a breach. Such unless orders are termed "*consent* unless orders".

6 However, consent unless orders are a rare species. Indeed, in the Singapore context at least, there has, to the best of my knowledge, been only one such reported decision – that of the Singapore High Court in *Wiltopps (Asia) Ltd v Drew & Napier* [2000] 3 SLR 244 ("the *Wiltopps* case").

7 The relative dearth of cases relating to consent unless orders is not surprising. It is hard to envisage a party consenting to such an order in order to "purchase" more time for, say, the filing and serving of an affidavit. After all, it is almost invariably the court which has charge of proceedings and which will therefore make an unless order in the event that one party in whose favour such an order is made can demonstrate to its satisfaction that there would otherwise be an abuse of process.

8 Given the drastic consequences that will ensue from the breach of a *consent* unless order, it is imperative that *the terms of the agreement in question be clear and unambiguous*.

9 As, if not more, importantly, the inquiry into whether or not there was indeed a consent unless order *must* be ascertained on an *objective basis*. This is consistent with the time-honoured approach towards the interpretation of contracts and is emphasised – time and again – in the case law (see, for example, the cases cited at [17] below) and is of the first importance in so far as the facts and outcome of the present proceedings are concerned. Indeed, as we shall see, it is precisely because counsel for the plaintiff had, with respect, omitted to apply this very basic principle that he arrived at the erroneous view that a consent unless order had been entered into between him and counsel for the defendant in the present proceedings.

10 Even assuming that the parties did *prima facie* enter into a consent unless order, I will also consider whether or not any contractual doctrine nevertheless operated to *vitiate* that agreement. As we shall see, the principal doctrine in this regard is that pertaining to the general doctrine of *mistake*.

11 I also consider a broader basis that, as we shall see, also supports the decision I have arrived at in these proceedings.

Did the parties enter into a consent unless order and, if so, was it vitiated?

The imperative of objectivity

12 In order to ascertain which party is correct, an examination of what *precisely* transpired between the parties is imperative. Before proceeding to analyse the salient facts and circumstances,

a general (and important) point of methodology which has a significant impact on this case ought to be considered.

13 Counsel for the plaintiff had, at the initial hearing in these proceedings, relied heavily on the learned assistant registrar's own interpretation of the order he (the assistant registrar) had earlier made and which the plaintiff had (as we have seen) argued (and which the assistant registrar accepted) was a consent unless order. I must confess that this had seemed to me a persuasive approach at first blush because one would have thought that the assistant registrar would have known best the type of order he had made. However, on further reflection, it was clear that such an approach was *flawed*.

14 The *general* (albeit crucial) starting-point is this: One has to adopt an *objective* approach towards ascertaining *the parties' intentions* at the initial hearing before the assistant registrar and, indeed, before he made the order concerned. In this regard, close attention had to be paid not only to the parties' own actions *in the context of the relevant surrounding circumstances* but also to the *language and terms of the actual order made by the assistant registrar himself*. Looked at in this light, it is clear that the assistant registrar's own *subjective* interpretation of the order he had made earlier on, whilst not totally irrelevant, was clearly not decisive by any means. Let me elaborate.

15 In the first instance, there had been an interval of time between the making of the order and the assistant registrar's interpretation of it subsequently, which interpretation constituted the factual pith and marrow of the present appeal. It is entirely possible that he might not have remembered what he had done. Human memories are fallible and recollections of events do fade with time. Indeed, given the intense hustle and bustle of everyday legal life, the lapse of a few days – or even a few hours, in some instances – might suffice to have this effect. This is *precisely why* an *objective* approach is not only desirable, but *imperative*.

16 *More fundamentally*, on *that subsequent* occasion, the assistant registrar would *himself* have been *interpreting* precisely what I had now to interpret – bearing in mind that the present proceedings are, in a sense, a rehearing of the matter. Indeed, he could *not* ignore the fact that his interpretation had to be consistent – to reiterate a very important point – not only with parties' own actions in the context of the relevant surrounding circumstances but also with his own minutes *as well as* the actual terms and language of the actual order he had made. In other words, even his own subjective understanding of the parties' intentions *had to be subject to the objective facts and circumstances concerned.* In this regard, he would, with respect, have been in *no better a position than I was in so far as this crucial issue (of interpretation) was concerned*.

17 *Even more* importantly, and taking the point in the preceding paragraph one logical step further, *the assistant registrar might, at the material point in time, himself have misunderstood the parties' intentions and, hence, might have recorded their intentions wrongly* (hence, the importance of his own minutes, as alluded to in the preceding paragraph). *If so, then his confirmation of what he thought he had done would still be erroneous, simply because he would be subjectively confirming something that he had erroneously recorded.* In this respect, *the learned assistant registrar's minutes as well as the actual language and terms of the order made* would also give us valuable clues as to the parties' actual intentions. And this is also why I have taken pains to emphasise – more than once – the importance of the parties' own objective actions in the context of the surrounding circumstances. What is crucial, taking the matter in the round, is *what the objective evidence tells us*. That is why it is now firmly established law and practice in the common law of contract that whether or not a valid agreement has been arrived at by the parties concerned (here, as between the plaintiff and the defendant) *must* be ascertained on an *objective* basis. The authorities, even in the local context alone, are legion (see, for example, the Singapore Court of Appeal decisions of *Tribune*

Investment Trust Inc v Soosan Trading Co Ltd [2000] 3 SLR 405 at [40]–[41]; *Projection Pte Ltd v The Tai Ping Insurance Co Ltd* [2001] 2 SLR 399 at [15]; *The "Rainbow Spring"* [2003] 3 SLR 362 at [20]; and *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 at [30] ("the *Digilandmall* case")). Let me now proceed to examine that evidence on precisely the objective basis that is, as I have just mentioned, an established (even mandatory) part of the contractual landscape of the common law.

Was there a consent unless order entered into between the parties?

18 Was there, on the *objective facts and evidence*, a *consent* unless order entered into by the parties in the present proceedings? Consistent with the need for adopting an objective approach, a review of the *relevant* facts *and* context would be appropriate.

19 What seems to me to be an important fact is something which was not in fact emphasised by either party. The significance of this fact will become clear in due course. And it is this: On 27 May 2005, during a pre-trial conference, the learned Registrar wanted, in fact, to impose *unless orders* on *both* parties. This is not surprising if one views the rather protracted nature of the proceedings themselves. In this regard, I should point out that the *plaintiff* also appeared to contribute, in no small measure, to the many delays concerned.

20 Returning to the specific facts surrounding the present proceedings in a more immediate fashion, it should be noted that the plaintiff was supposed to file four affidavits of evidence-in-chief ("AEICs") whilst the defendant was supposed to file three AEICs.

21 On the plaintiff's part, three AEICs were in fact filed on 9 June 2005 and served the next day, *viz*, on 10 June 2005. Hence, one AEIC remained to be filed. Two points should be noted at this juncture with respect to this particular AEIC. First, this AEIC was an important one inasmuch as it emanated from a *principal* witness. Secondly, no prior draft of this particular AEIC had been given to the defendant. The defendant only had sight of the final version of the AEIC when it was filed and served at 6.50pm on 21 June 2005. I shall return to the significance of this particular time frame later.

22 On the defendant's part, none of the AEICs had been filed prior to a further pre-trial conference before the learned senior assistant registrar ("SAR") on 10 June 2005. At that particular hearing, however, counsel for the defendant had promised the SAR to file and serve two out of the three AEICs by that day (*viz*, 10 June 2005) itself. It should be noted, at this point, that *no unless orders* had been made against *either* party up to that particular point in time. Indeed, as we shall see, the *first time* an unless order was made was by the learned assistant registrar on 14 June 2005 (against the defendant, and which is the principal focus of the present proceedings). But, of that, more later. In so far as the proceedings on 10 June 2005 were concerned, the learned SAR ordered the defendant to file and serve the abovementioned two AEICs by that same day (*viz*, 10 June 2005) *and* also ordered *both* parties to file and serve their remaining affidavits by 15 June 2005 (these would include the defendant's third AEIC and the plaintiff's remaining AEIC by its principal witness, respectively). What transpired thereafter is even more instructive and pertinent in so far as the genesis of the present proceedings is concerned.

23 The defendant did not file and serve the aforementioned two AEICs by 10 June 2005. There was thus a breach of the order of the SAR – albeit a technical one, given the time frame concerned. The plaintiff applied, on 13 June 2005, by way of Summons in Chambers No 2391 of 2005 ("SIC 2391/2005"), for an *unless order* against the defendant. In particular, the plaintiff applied (in so far as time frames were concerned) that unless the defendant filed and served these first two AEICs by 4.00pm on 14 June 2005 and its third (and remaining) AEIC by 5.00pm on 15 June 2005, "the

Amended Defence be struck out against the Defendants *without further attendance or order*" [emphasis added]. At this juncture, we have arrived at the heart of the present proceedings which centre on the application in SIC 2391/2005. Before the actual hearing of this application before the learned assistant registrar on 14 June 2005, counsel for both parties had had, in fact, a discussion outside the assistant registrar's chambers. This discussion is in fact extremely important but, as we shall see, the only real evidence of the contents of this discussion is embodied in the *minutes* recorded by the assistant registrar, to which I now turn.

24 Indeed, because of the importance of these minutes, the material part is set out in full, as follows (noting that these are the minutes *as recorded by the assistant registrar* himself):

> Defendant's Counsel : We had a short discussion and have come to a compromise. Initial order for us to *exchange* affidavits of evidence-in-chief (AEICs) by tomorrow. I am unable to comply with the timelines. *I had provided unaffirmed AEICs in advance*.
>
> : We have come to a compromise to fix *next Tuesday*, 21 June 2005 as the date *for exchange of AEICs. Learned friend wishes to record this as an unless order.*
>
> Plaintiff's Counsel : Objections to have been filed by this Thursday and set down this Friday. *Wish for unless order* for defendants *to files* [sic] *and serve their AEICs on us*. We have only 1 AEIC left, which is ready and we can *file* that next Tuesday. *Asking* for *this not* to be an unless order as no history of bridge [*sic*] [breach].
>
> Ct : Defendant to provide Plaintiffs with draft unsworn copy of remaining AEIC forthwith. Defendants to file and serve AEICs by Tuesday, 21 June 2005, failing which judgment for Plaintiffs. Plaintiff to file and serve remaining AEIC by Tuesday, 21 June 2005.
>
> : Objections by Thursday, 23 June 2005; set-down by Friday, 24 June 2005.
>
> [emphasis added]

25 It is important to note that the relevant order of court did *not* in fact state anywhere therein that this was one "By Consent" or anything to like effect. The relevant orders simply read as follows:

> 3. the Defendants file and serve their Affidavits of Evidence-in-Chief by Tuesday, 21 June 2005, failing which Judgment will be entered in the matter for the Plaintiffs.
>
> 4. the Plaintiffs file and serve their fourth Affidavit of Evidence-in-Chief by Tuesday, 21 June 2005.

26 What followed should also be noted. The defendant in fact managed to give *substantive drafts* of two out of three AEICs *one week prior to* the 21 June 2005 deadline (and as noted by counsel for the defendant during the hearing before the learned assistant registrar as noted above at [24]). In addition, the defendant *filed* the final version of these two AEICs on *21 June 2005*. *However*, it only *served* the final version of these two AEICs on the plaintiff on *22 June 2005 – one day after* the deadline imposed by the court. It has, I understand, since abandoned efforts to file and serve the third AEIC.

27 On the plaintiff's part, there was, it will be recalled, one remaining AEIC to be filed and served – although it was, as was already noted, a significant one. It will also be recalled that no prior draft

had been given to the defendant. This particular AEIC was in fact *filed and served* at *6.50pm on 21 June 2005*.

28 Before analysing the various arguments proffered by counsel for the respective parties and (more importantly) the objective evidence available, the key issue in these proceedings should be reiterated: Was the unless order made on 14 June 2005 a *consent* unless order? It is clear, in my view, that this particular unless order was *not* a *consent* unless order.

29 The simple conclusion that I am compelled by the objective evidence to arrive at is simply that the parties concerned did *not* enter into any *binding* agreement in the first instance. The guiding principles in this particular respect were laid down by Lord Denning MR in the English Court of Appeal decision of *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 ("the *Siebe Gorman* case"). In that case, the learned Master of the Rolls observed thus (at 189):

> We have had a discussion about "consent orders". It should be clearly understood by the profession that, *when an order is expressed to be made "by consent", it is ambiguous. There are two meanings to the words "by consent".* That was observed by Lord Greene M.R. in *Chandless-Chandless v Nicholson* [1942] 2 K.B. 321, 324. *One meaning is this: the words "by consent" may evidence a real contract between the parties.* In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. *The other meaning is this: the words "by consent" may mean "the parties hereto not objecting." In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?* [emphasis added]

The principles embodied in the above quotation have since been reaffirmed in a great many cases (see, for example, the English Court of Appeal decisions of *Greater London Council v Rush Tomkins* (1984) 128 SJ 722 (full transcript available on Lexis), *RG Carter (West Norfolk) Ltd v Ham Gray Associates Ltd* (1994) 42 ConLR 68 ("the *Carter* case"), *Boyle v Hagerty* (unreported, 29 October 1987, full transcript available on Lexis), as well as the English High Court decision of *Wembley Laboratories Ltd v Joyce Ground Engineering Ltd* (1989) 19 ConLR 143).

30 It is clear, in my view, that the fact situation in the present proceedings fell within the *second* category referred to by Lord Denning MR in the *Siebe Gorman* case and as set out in the preceding paragraph. The discussion between counsel for the parties outside the assistant registrar's chambers was, to all intents and purposes, a short one. There were apparently no prior negotiations and certainly no clear written correspondence – a point to which I shall have occasion to return below. *I should also point out, at this juncture, that nowhere in the order of 14 June 2005 are the words "By consent" or similar language used in the first place*. But *even if* we leave that aside for the moment (although it constitutes, in my view, a virtually insuperable obstacle to the plaintiff's case, in and of itself), it is clear that all counsel for the defendant was intending in the present proceedings was not to object to the making of an unless order against his client. As we shall see below, if he was intending to enter into a binding agreement at all, the terms he contemplated (centring on the *exchange* of AEICs) were *quite different*. I shall, in fairness to the plaintiff, be analysing the facts of the present proceedings from *that* possibility as well. For our present purposes, however, I need only point out that the facts of the present proceedings are very similar to those in the *Siebe Gorman* case itself. Indeed, Neuberger J, in the English High Court decision of *Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd* [2001] L&TR 10, observed at 101–102 that "[i]n *Siebe Gorman*, … the parties were *negotiating the terms of the alleged consent order at the door of the Master's room, and it was a*

fairly quickly agreed order" [emphasis added]. Indeed, that was why, in the *Siebe Gorman* case, the court held that the consent order concerned *did not even evidence a contract in the first instance, but only meant that no objection had been taken by the parties to the order that had been made*. In the event, the court held that the order concerned was subject to the court's power in the exercise of its discretion under Ord 3 r 5(1) of the (then) English Rules of Court to extend time for compliance with it. As importantly, in that particular case, the consent order actually contained the words "By consent"; indeed the relevant order there read as follows:

> *[B]y consent* it is ordered that the plaintiffs do within 10 days from inspection of the defendants' documents make and file an affidavit … and that in default of complying with this order the plaintiffs' claim against the defendants herein be struck out. [emphasis added]

Interestingly, Templeman LJ, in the English Court of Appeal decision of *Tigner-Roche & Co Ltd v Spiro* (1982) 126 SJ 525 (full transcript available on Lexis) ("the *Tigner-Roche* case"), observed, in a similar vein, that "[i]n the Siebe Gorman case, in effect, the plaintiffs merely bowed their heads and submitted to such an [unless] order".

31 The English Court of Appeal decision of *Greater London Council v Rush Tomkins* ([29] *supra*) may also be usefully noted. In this particular case (in which the court held that no binding contractual arrangement had been entered into between the parties on the facts), Kerr LJ observed thus:

> I do not think that, by making an agreement in the corridor outside the Court, the Plaintiffs were signing away by contract their whole position. It was not a contractual arrangement.

32 And in *Boyle v Hagerty* ([29] *supra*), it was held (applying the principles in the *Siebe Gorman* case) that no binding contract had been entered into between the parties. Sir George Waller observed that "the evidence [in this case] shows that this arrangement was made on the telephone, very much like the arrangement which was made in the corridor [in *Siebe v Gorman*]".

33 The fact situation that arose from the present proceedings as well as the sample of cases hitherto may be usefully contrasted with the respective fact situations where the respective courts in fact held that there were binding contracts entered into. These cases are discussed briefly below at [40]–[49] after considering the factual matrix on the alternative assumption that the parties *intended* to enter into a *binding* agreement.

34 However, even *assuming* that there was at least the *possibility* of a *binding* contractual agreement having been entered into between the parties in the present proceedings, it is my view that, based on established principles of contract law, no agreement had in fact been arrived at between the parties in any event. Let me elaborate. Looking, once again, at the minutes recorded by the learned assistant registrar who made the unless order, it is clear that there was *no consensus ad idem* between the parties. It was clear that counsel for the defendant was under the impression that the compromise arrived at between the parties outside the assistant registrar's chambers was one where the parties would *exchange* their respective AEICs. This is clear from counsel for the defendant's statement as recorded (and noted above at [24]). Indeed, counsel for the defendant is recorded as referring to an *exchange* of AEICs *twice*. It is true that counsel for the plaintiff is recorded as referring to the defendant having to *file and serve* its AEICs. It is clear, at this juncture, that even if I take the plaintiff's case at its best or highest, there was clearly *no* concluded agreement between the parties. They were simply at *cross-purposes* inasmuch as counsel for the defendant was under the impression that the parties were to *exchange* AEICs, whereas counsel for the plaintiff was not. Recall that the *essence* of the parties' arrangement had taken place *outside* the learned assistant registrar's chambers. What transpired *within* was merely a reflection of what had

already been agreed upon *outside*. Looking closely at the minutes as recorded by the assistant registrar, it is clear to me that in so far as counsel for the defendant was concerned, the agreement, if there was to be one, was for the *exchange* of AEICs. As it happens, counsel for the plaintiff wanted an *additional potential sanction* (of an unless order), which counsel for the defendant *did not object to* (hence, his reference at [24] above to the effect that "[l]earned friend wishes to record this as an unless order").

35 Counsel for the plaintiff did argue, *inter alia*, that as the plaintiff had already filed and served three out of the four AEICs, there was no requirement for an exchange of AEICs as such. Whilst seemingly attractive, this argument ignores the fact that the plaintiff's final AEIC was from a *principal* witness, the draft of which (as I have already noted) the defendant never had sight of. As I have also noted, the first time the defendant did have sight of it was when the final version was in fact filed and served on the defendant at 6.50pm on 21 June 2005 (and see [21] above). It should also be noted that the plaintiff had *not* in fact filed and served *all* its AEICs. Although only one remained to be filed and served, *this did not, ipso facto, preclude there being an exchange of affidavits* – particularly if we bear in mind the fact that an exchange can take place provided that each party has *at least one* AEIC to exchange with the other party *and* the fact that there can be a meaningful exchange of AEICs from not merely a quantitative but also from a qualitative perspective (bearing in mind the further fact that the plaintiff's remaining AEIC emanated from a *principal* witness).

36 More importantly, the objective evidence clearly indicates that in so far as the defendant was concerned, an *exchange* of AEICs was contemplated. In this regard, I want (and am, indeed, enjoined) to return to the *objective facts*. As already noted above (at [24]), the defendant had already given substantive drafts of two out of three of its AEICs to the plaintiff. More significantly (also noted at [24] above), it had *filed* these two AEICs on *21 June 2005*. In other words, the defendant had *filed* its two AEICs *within* the deadline (of 21 June 2005). The crucial question that arises is this: Why did the defendant not file *and serve* these two AEICs within the 21 June 2005 deadline? Indeed, it appears that there was no impediment whatsoever to its doing so. In this regard, I accept counsel for the defendant's explanation that this was due to the fact that the understanding between the parties (in so far as the defendant was concerned) was that there be an *exchange* of AEICs *on 21 June 2005*. This would explain why the defendant delayed *serving* the two AEICs on 21 June 2005 since, as just noted, it was under the distinct impression that the parties would *exchange* their AEICs *on that very same date*. That this was the defendant's understanding is underscored by the letters it had sent to counsel for the plaintiff *and* by the fact that, *in extremis*, it (the defendant) had applied for an *urgent* unless order of its own in order to compel the plaintiff to file and serve its AEIC when it became clear that it (the plaintiff) was not going to do so. In this last-mentioned regard, I note that although the plaintiff did ultimately file and serve its AEIC on the defendant, this was effected at *6.50pm on 21 June 2005 itself*. The plaintiff argued that it was within its rights to do so, so long as it did so prior to midnight on 21 June 2005. I must pause here to observe that this argument, even if legally acceptable, is highly technical. Indeed, I would have thought that the traditional assumption would be that an affidavit would be filed by 5.00pm or (at its latest) by 6.00pm (the extra hour taking into account the common five-day working week adopted by most organisations nowadays).

37 I note, further, that the defendant in fact served its two AEICs on the plaintiff at *the first opportunity it could after realising that the plaintiff had no intention of exchanging AEICs. This would explain why service of these AEICs was effected the very next day, albeit (unfortunately) after the deadline, viz, 22 June 2005, when having already been filed, they could otherwise have been so easily served on the plaintiff within the 21 June 2005 deadline*. I am prepared to assume that the plaintiff was under the impression that the arrangement did not entail the exchange of AEICs. However, as I have already pointed out, even allowing thus for what is in my view a generous interpretation of the

objective evidence available, this would still have meant that the parties were *not ad idem and* that, therefore, the order made by the learned assistant registrar on 14 June 2005 was not a consent unless order. All this, as I shall elaborate on later, has implications for various aspects of the law of mistake which would also, as we shall see, apply to the present proceedings. However, I should point out that it is not even necessary for me to go so far as to consider the law relating to mistake as, in my view, there was *no contract or agreement in the first instance*. However, as I have just indicated, if it is necessary, I would *further* hold that *even if* there had been an agreement (which I do *not* find), *this agreement had, in any event, been vitiated by the doctrine of mutual or unilateral mistake* (see generally at [55]–[77] below).

38 It bears repeating that *nowhere in the order of 14 June 2005 are the words "By consent" or similar language used* (see also at [25] and [30] above). This merely seals my conclusion that *no consent* unless order was made by the learned assistant registrar. The plaintiff argued (not surprisingly, of course) that the assistant registrar had subsequently interpreted his order otherwise. I have already dealt with this argument in some detail above (at [13]–[17]) and will therefore not repeat my analysis, save to point out, once again, that if the objective evidence and premises are otherwise, no amount of interpretation to the contrary would be of any avail in so far as the plaintiff is concerned. Indeed, the absence of such words ought, in my view, to have alerted the assistant registrar to the fact that perhaps the argument by counsel for the plaintiff that a consent unless order had been entered into was not really persuasive. Admittedly, there is reference to a compromise in the assistant registrar's minutes (see at [24] above). However, a compromise does not necessarily entail a binding agreement (and see the discussion of the *Siebe Gorman* case at [29] above). Further, if there had indeed been a binding agreement between the parties, then this would have been in respect of an *exchange* of AEICs, as already discussed above.

39 I am heartened to note that the relevant case law (including, significantly in my view, the *Wiltopps* case itself) supports my analysis of the facts in the present proceedings as set out above. A few of these cases have in fact already been referred to above. Before I proceed to consider briefly the other cases in the context of the facts in the present proceedings, I should state that there is at least one unifying thread that is of the first importance in the context of the present proceedings, and which has already been alluded to above: That in order for any contract or agreement to be concluded, it must be clearly established by the evidence *and* that its terms must be clear. This is, of course, basic contract law. It is, nevertheless, a basic point that is even more important in the light of the draconian consequences that would issue in the event of a breach of a consent unless order.

40 Turning to relevant decisions in general and (perhaps appropriately, in the circumstances) the *Wiltopps* case ([6] *supra*) first, default judgment was given against the plaintiffs whose conduct, it should be noted, was wholly unreasonable and dilatory on the facts of that particular case itself. This is significant as the facts of the present case are, as we have seen, quite different. Indeed, in the *Wiltopps* case itself, the learned judge, Lee Seiu Kin JC, did not even need to rely on the binding effect of the consent unless order as he found that the plaintiffs' conduct was so contumacious and contumelious that the court would not, in any event, exercise its discretion to set aside the order.

41 It is nevertheless admitted that Lee JC did in fact find that there was a consent unless order on the facts of that case. But what are important are the salient facts which led the learned judge to that finding. The first was that counsel for the plaintiffs was recorded as stating thus ([6] *supra* at 249, [13]): "We are prepared to accept an unless order, provided that the summons in chambers is for seven days." More importantly, the court gave the following consent order which counsel for the plaintiffs ultimately extracted, as follows:

> *By consent* the plaintiffs do exchange the affidavits of Evidence-In-Chief of Willard Choy Wai Lok

and Toshio Kosone with the defendants' affidavits of Evidence-In-Chief by 11 April 1998. In default, the plaintiff's action do stand dismissed with costs *without further order*. [emphasis added]

42 It will be seen that the context in the *Wiltopps* case involved an exchange of AEICs. More importantly, the order as recorded was clearly a consent order inasmuch as the words "By consent" were utilised. This is in marked contrast to the present proceedings, as already noted above.

43 Lest it be thought that the words "By consent" are merely redundant (this was in fact the argument which counsel for the plaintiff proffered with regard to the words "without further order" in the *Wiltopps* case, which were added at the end of the order in that case), it should be reiterated – and, indeed, emphasised – that because of the special (and, more importantly, draconian) nature of a *consent* unless order, the order itself has to be expressed with the *utmost clarity*. This was, as we have seen, in fact effected in the *Wiltopps* case itself. Indeed, the further words "without further order" at the end of the order in that case ought, in my view, to be read in conjunction with the words at the beginning, *viz*, "By consent". This approach is in fact supported by the language in the judgment of Lee JC himself in the *Wiltopps* case ([6] *supra* at [20] and, especially, [24]) and, incidentally, detracts from the argument of counsel for the plaintiff briefly alluded to above (especially since the learned judge expressly quoted (at [20]) the actual words, "without further order", which were expressly set out in the relevant order itself). In any event, I note, with some curiosity, that counsel for the plaintiff had in fact included the words "without further attendance or order" in its application (see [25] above), although no objections were apparently taken when these words or words to like effect were not ultimately included in the learned assistant registrar's order). Be that as it may, the critical words are "By consent". After all, that is what the order purports to be – a *consent* order.

44 I also note that the consent order made by the court in the English decision of *Mullins v Howell* (1879) 11 Ch D 763 also utilised the words "by consent" – again, in contrast to the order made in the present proceedings.

45 While one should not adopt too technical an approach, it is clear that because of the significant (and draconian) effects that the breach of a *consent* unless order could engender, it is, in my view, imperative that the nature of such an order be clear and unambiguous. Indeed, and as we have seen, the clearest method of effecting this has not only been adopted in the case law but is also the most obvious and commonsensical – and that is to utilise the words "by consent" or at least language to like effect in the order itself. This was clearly *not* done in the present proceedings. As I have already pointed out, this is not surprising as the order concerned did not reflect a *consensus ad idem* between the parties in the first instance. Indeed, the following observations by Lord Greene MR in the English Court of Appeal decision of *Chandless-Chandless v Nicholson* [1942] 2 KB 321 at 324 may also be usefully noted, especially in the light of my findings in the present proceedings:

> The original order which Master Ball made *is not on its face expressed to be a consent order, and if it was a consent order it can only have been a very regrettable mistake or inadvertence that that circumstance was not expressed in it. If an order is made by consent the practice should invariably be that it should on the face of it be expressed so to have been made. When the court finds an order which is not expressed to be made by consent it certainly is not going to treat it as a consent order unless it is satisfied that it was in fact a consent order. In the present case I am left in considerable doubt whether this order was a consent order in the strict sense*. There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning

of that expression, and I am not in the least bit satisfied, *having regard to the conflicting statements which we have before us as to how this order came to be drawn up*, that it was a consent order in the technical sense. [emphasis added]

46 I turn, now, to the English Court of Appeal decision of *Purcell v F C Trigell Ltd* [1971] 1 QB 358 ("*Purcell*"). It will figure again in a later part of this judgment. However, it is, as we shall see, of no less importance in the present part of this judgment. This decision in fact involved a consent unless order. However, what is important, in so far as the present proceedings are concerned, is the manner in which the consent unless order was arrived at in *Purcell* itself. This was by way of an exchange of letters as well as a subsequent telephone conversation. The contents of the letters themselves are instructive. On 6 August 1969, the defendants' solicitors had written to the plaintiff's solicitors as follows (see at 362):

> In an attempt to avoid our unnecessarily journeying to Winchester on the hearing of your application, would you please *agree* to the registrar making an order that *unless* the defendants answer the interrogatories as ordered *within 14 days that their defence be struck out*? [emphasis added]

The plaintiff's solicitors replied to the defendants' solicitors on 7 August 1969, as follows:

> We would *be prepared to agree* an order for interrogatories to be delivered *in seven days or defence of both defendants struck out* and with the costs of this application to be borne by the defendants in any event. [emphasis added]

There followed a telephone conversation. The result of all this was that, on 11 August 1969, a *consent* order was entered into between the parties on the following terms:

> It is ordered that *as agreed the defence of both defendants be struck out unless answers to the interrogatories ordered be delivered within ten days and unless a full disclosure as ordered be made within ten days.* [emphasis added]

47 I would note two points arising from the above factual matrix in *Purcell*. The first is that there was, *unlike* the *present* proceedings, *clear objective evidence* (much of it set out in *writing*) of an agreement or contract between the parties in question. It is no wonder, then, that Lord Denning MR, in *Purcell*, was of the view (at 364) that the consent order "was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides" (see also *per* Winn and Buckley LJJ at 365 and 366, respectively). The second is that the words "as agreed" were in fact utilised in the consent order made by the court. Again, this is in contrast to the situation in the present proceedings.

48 It is also significant that, in the English Court of Appeal decision of *Greater London Council v Rush Tomkins* ([29] *supra*), Kerr LJ observed that *Purcell* "was not a case of an agreement reached at the door of the court".

49 And in the *Tigner-Roche* case ([30] *supra*), it was held that the order in that particular case "embodied the result of detailed negotiations and formed a contract between the parties". In particular, Templeman LJ was of the view that "there was a contract, and the terms of that contract were detailed and precise"; indeed, "[t]he terms of that contract could not have been obtained by the plaintiffs by a mere submission on the part of the defendants". Similarly, in *Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd* ([30] *supra* at 102), Neuberger J noted that it appeared "that the terms of the order [in that case] were negotiated over a period of four or five days between

solicitors, and that the order, in its final form, was drafted by the landlord's solicitor and sent to the tenant's solicitor's office and approved by him". The learned judge added that "the landlord's solicitor has deposed, and I have no reason to doubt, that the landlord would have insisted on proceeding until the hearing of its application, if these precise terms had not been agreed".

50 I find, therefore, that, on the facts as well as relevant case law, no consent unless order was entered into by the parties in the present proceedings. At this juncture, some general observations might be apposite.

51 In the commercial context in general and in the context of litigation in particular, the quality of mercy is, unfortunately, strained – often to breaking point, and beyond. It not only does not drop like the gentle rain from heaven upon the place beneath but, on the contrary, is often swallowed up in the ensuing maelstrom generated as a result of the adversarial process. However, I hasten to add that the quality of *justice* ought not – indeed, cannot – be strained. The attainment of both procedural and substantive justice lies at the very core of the ideal of the enterprise of the law itself.

52 The Shakespearian allusion in the preceding paragraph can in fact be taken further: If a party seeks to exact its "pound of flesh", it must adhere to the legal requirements strictly. I am heartened to note, at this juncture, that an insistence on the fulfilment of strict compliance to the legal terms – occasionally resulting in substantive injustice – is, in the context of situations such as the present, in fact productive of precisely the opposite result. Put another way, the letter and the spirit of the law, on this particular occasion at least, go together, hand-in-glove. As we have already seen, the legal requirements for a clear and unambiguous agreement (here, of an alleged consent unless order) were missing and, hence, the interlocutory judgment entered in favour of the plaintiff, with damages to be assessed, had (in my view) to be set aside.

53 In other words, and speaking at the level of general principle, whilst structure might sometimes stifle substance, the aim ought always to be to integrate the two. The former ought to aid in the attainment of the latter. On occasion, however, the adherence to structure leads to substantive injustice when it is applied in a situation shorn of its proper context. This would in fact have been the (undesirable) result of accepting counsel for the plaintiff's arguments in the present proceedings.

54 I turn, now, to a related issue which has – unlike that of offer and acceptance – often been considered more at the level of substance as opposed to structure. This may, if I might observe parenthetically, be somewhat misleading inasmuch as, from some quarters at least, the law relating to mistake overlaps – and might even be coincident – with that relating to offer and acceptance. This is a point to which I return briefly below.

The doctrine of mistake

55 The doctrine has traditionally been classified into various categories. In the Singapore High Court decision of *Chong Sze Pak v Har Meng Wo* [1998] 1 SLR 472, Lim Teong Qwee JC observed as follows (at [26]):

> It seems to me that the principles which can be deduced from the cases are these. Equity will intervene to grant relief where a party is mistaken as to the terms of an offer and concludes a contract on the mistaken terms if in the opinion of the court it is unconscientious for the other party to avail himself of the legal advantage he has obtained. Relief may be granted in these cases:

(a) [I]f a party knows that the other is so mistaken and lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake …

(b) Where the mistake of a party is induced by the other even if innocently …

(c) Where hardship amounting to injustice would be inflicted on the mistaken party by holding him to his bargain and it is unreasonable to hold him to it …

(d) Where one party is aware that the other party is under some serious mistake or misapprehension about the content or subject matter of a fundamental term and deliberately sets out to ensure that he does not become aware of the mistake or misapprehension …

56 And, in a similar vein, in the recent Singapore Court of Appeal decision in the *Digilandmall* case, Chao Hick Tin JA, who delivered the judgment of the court, observed thus ([17] *supra* at [33]):

> Indeed, in law, there are three categories of mistake, namely, common, mutual and unilateral mistakes. In a common mistake, both parties make the same mistake. In a mutual mistake, both parties misunderstand each other and are at cross-purposes. In a unilateral mistake, only one of the parties makes a mistake and the other party knows of his mistake.

57 There are, in fact, two potential (and, as it will turn out, actual) applications of the doctrine on the facts of the present proceedings.

58 I find, first, that the doctrine of *mutual* mistake applies. This follows, in fact, from my finding above to the effect that there has been no concluded agreement to begin with. The doctrine of mutual mistake *overlaps completely*, in my view, with the doctrine of offer and acceptance, dealing with the issue of the *formation* of a pre-existing transaction as opposed to a mistaken payment *simpliciter* (and see, for this last-mentioned distinction, *per* Lai Kew Chai J in the Singapore High Court decision of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488, especially at [85]–[89]). Put simply, this particular aspect of the law relating to mistake is simply the result of *a lack of coincidence between offer and acceptance*. In other words, both parties are at *cross-purposes* and, hence, *no* agreement or contract has been formed as a result.

59 Secondly, assuming that the parties in the present proceedings were not in fact at cross-purposes, then I accept counsel for the defendant's argument that counsel for the plaintiff must, as a reasonable person, have known that the then counsel for the defendant was labouring under a mistake and that, therefore, the doctrine of *unilateral* mistake applied to vitiate the agreement between the parties. I have in fact just expressed the view that the situation was, rather, one of mutual mistake. However, taken at its *lowest*, I accept the argument that the situation in this case constituted, *alternatively*, a situation of unilateral mistake.

60 There was once some controversy as to the *type or kind of knowledge* required on the part of the non-mistaken party with regard to the mistake concerned. In particular, was *actual* knowledge of the mistake required, or would *constructive* knowledge suffice, assuming of course that there had been a sufficiently important or fundamental mistake as to a term in the first instance? This issue has now been resolved by the Court of Appeal in the *Digilandmall* case. In that case, the court clearly laid down the principle that, in so far as unilateral mistake at *common law* was concerned, *actual* knowledge was required (see generally the analysis in [17] *supra*, especially at [37]–[55]). Chao Hick Tin JA, who delivered the judgment of the court, observed thus (at [42]–[43]):

In order to enable the court to come to the conclusion that the non-mistaken party had actual knowledge of the mistake, the court would go through a process of reasoning where it may consider what a reasonable person, placed in the similar situation, would have known. In this connection, we would refer to what is called "Nelsonian knowledge", namely, wilful blindness or shutting one's eyes to the obvious. Clearly, if the court finds that the non-mistaken party is guilty of wilful blindness, it will be in line with logic and reason to hold that that party had actual knowledge.

This then gives rise to the question as to the circumstances under which a party should make inquiry. When should such a party make inquiries failing which he would be considered to be shutting his eyes to the obvious? We do not think this question is amenable to a clear definitive answer. Situations in which such a question could arise are infinite. But we could accept what Mance J said in *OT Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep 700 ("*OT Africa*") at 703 that there must be a "real reason to suppose the existence of a mistake". What would constitute "real reason" must again depend on the circumstances of each case. Academicians may well query whether this should be based on an "objective" or "subjective" test. At the end of the day, the court must approach it sensibly. The court must be satisfied that the non-mistaken party is, in fact, privy to a "real reason" that warrants the making of an inquiry.

61 The learned judge then proceeded to observe as follows (at [46]):

However, it is vital not to conflate actual knowledge of the mistake by the non-mistaken party with deemed or constructive knowledge by that party for the reason that the consequences *vis-à-vis* innocent third parties are different. A contract void under common law is void *ab initio* and no third parties can acquire rights under it … Where a contract is voidable under equity, the court in determining whether to grant relief would have regard to rights acquired *bona fide* by third parties.

62 Somewhat later on in his judgment, Chao JA summarised the position as follows (at [53]):

In our opinion, it is only where the court finds that there is actual knowledge that the case comes within the ambit of the common law doctrine of unilateral mistake. There is no *consensus ad idem*. The concept of constructive notice is basically an equitable concept: see *The English and Scottish Mercantile Investment Company, Limited v Brunton* [1892] 2 QB 700 at 707 *per* Lord Esher MR. In the absence of actual knowledge on the part of the non-mistaken party, a contract should not be declared void under the common law as there would then be no reason to displace the objective principle. To the extent that the judge below seems to have thought otherwise, *ie*, that where the non-mistaken party has constructive knowledge of the mistake the contract thus entered into would be void under common law, we would respectfully differ.

63 The court then proceeded to endorse the doctrine of unilateral mistake in *equity*, distinguishing the English Court of Appeal decision of *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 which had held (albeit in the context of *common* mistake) that there was no doctrine of mistake in equity. Indeed, Chao JA went further; in his words (at [74]):

However, we would go further than that. We would be loath to hold that there is no equitable jurisdiction in the courts with regard to unilateral mistake just because it may be difficult to delineate the scope or extent of that jurisdiction. By its very nature, the manner in which equity should be applied must depend on the facts of each case and the dictates of justice. Equity has intervened in many aspects of human dealings in the contractual setting.

64 The learned judge further elaborated on the above views at, especially, [77] and [88].

65 Most importantly, perhaps, the learned judge laid down the *criteria* under which the doctrine of unilateral mistake in *equity* would operate as follows (at [80]):

> Where the case falls within the common law doctrine of unilateral mistake, there is, in effect, no contract. There will be no room for equity to intervene. But where it does not and the court finds that there is constructive knowledge on the part of the non-mistaken party, the court would, in the exercise of its equitable jurisdiction, be entitled to intervene and grant relief when it is unconscionable for the non-mistaken party to insist that the contract be performed. Accordingly, we accept the *amicus curiae*'s submission that *constructive knowledge alone should not suffice to invoke equity. There must be an additional element of impropriety.* The conduct of deliberately not bringing the suspicion of a possible mistake to the attention of the mistaken party could constitute such impropriety. [emphasis added]

66 However, in situations of *both* actual *and* constructive knowledge, the evidence that is utilised and analysed by the court must *necessarily* be *objective in nature*. The question that arises, in my view, is whether or not the lines between the two become blurred as a result. Indeed, at certain points at least, what constitutes actual knowledge might well be a high (or, probably, even the highest) level of constructive knowledge. In my view, the paradigm model of this would arise in the situation of "Nelsonian knowledge" (as to which, see [60] above; see also Michael P Furmston, "Some Themes and Thoughts" (2005) 17 SAcLJ 141 at pp 144–147). Chao JA recognised the difficulty, for he did state thus (at [44]):

> While we recognise that the distinction between actual knowledge and constructive knowledge can be a fine one and can often be difficult to discern, it is nonetheless not something unfamiliar to the courts. The courts are accustomed to making such a distinction.

67 This difficulty was reiterated by the learned judge who, however, thought that it might actually furnish the courts with more flexibility by way of a potential application of the equitable doctrine instead; in his view (at [83]):

> In contrast, once the court should hold that a contract comes within the common law principle of unilateral mistake, it is void *ab initio* for all purposes. Moreover, as pointed out earlier, the line between actual knowledge and constructive knowledge may often be hard to draw. In a difficult case where the court is not convinced that the non-mistaken party has actual knowledge but is well satisfied that there is constructive knowledge and where there is evidence of unconscionable conduct or sharp practice on the part of the non-mistaken party, relief in equity may be granted on terms to ensure that justice is attained with regard to all affected parties.

68 Three observations might be usefully made at this juncture. First, one approach might be to accept that whilst the practical – as opposed to the conceptual – distinction between actual and constructive knowledge might not be as clear as we would like it to be, the difference is (given the reliance on the objective evidence in both these situations of knowledge) one of *degree rather than kind*. However, that still does not resolve the difficulties that will invariably arise in marginal cases where the objective evidence is such that it is difficult to decide, on the balance of probabilities, precisely what type of knowledge the contracting party concerned had. But that is perhaps inherent in the imperfection that is part of life and of the law itself. What is important and practical, however, is that *regardless* of whether or not actual or constructive knowledge is found by the court in the case concerned, the requirement of knowledge is satisfied and that justice is thereby achieved, assuming that the other necessary elements relating to the doctrine of unilateral mistake have been

satisfied.

69 My second observation might conceivably give rise to more controversy. The main reason why the court in the *Digilandmall* case endorsed the doctrine of unilateral mistake in an *equitable* context was in order to furnish the necessary flexibility; in the words of Chao JA (at [77]):

> Equity is dynamic. A great attribute, thus an advantage, of equity, is its flexibility to achieve the ends of justice.

70 It would appear that, in *addition* to constructive knowledge, the court in the *Digilandmall* case insisted on the demonstration of some "impropriety" (see [65] above) in order to enable the common law and equitable doctrines to be *distinguished effectively*. This, it should be noted, was effected by the court in the context of *unilateral* mistake. In point of fact, however, the similarity between the common law and equitable formulations in the law of mistake is not at all uncommon. In the context of *common* mistake, for example, the common law and equitable formulations are in fact very similar, if not (in substance at least) identical (see, for example, the House of Lords decision of *Bell v Lever Brothers, Limited* [1932] AC 161 and *Solle v Butcher* [1950] 1 KB 671, respectively). But this is not to state that there was no difference between the common law and equitable doctrines at all. The difference lay, however, not in the respective formulations as such but, rather, in the *consequences*.

71 Contracts which fall within the scope of the doctrine of common mistake at *common law* are rendered *void*, whereas contracts which fall within the scope of the doctrine of common mistake in *equity* are rendered *voidable*. Looked at in this light, it might well be appropriate to allow (as in the situation of *common* mistake noted in the preceding paragraph) both the formulations with regard to the common law and equitable doctrines in the context of *unilateral* mistake to remain the *same* – bearing in mind the fact that the courts would probably be more favourably disposed towards applying the equitable doctrine as the contract would be rendered only voidable, rather than void, and (in that sense) would not adversely impact *bona fide* third party rights (this point , interestingly, is in fact referred to in the *Digilandmall* case itself at [46]). In other words, the difference would lie not in the formulations as such but rather in the *consequences and* (if what I have said is accepted) the *actual application* of the respective doctrines themselves in the particular cases concerned. If so, then the distinction between actual and constructive knowledge would lose its importance.

72 I might also observe that the addition of the element of "impropriety" in so far as the doctrine of unilateral mistake in equity is concerned brings the entire doctrine itself close to – if not coincident with – the equitable doctrine of *unconscionability*. While it could be argued that the element of "impropriety" utilises the concept of unconscionability as a rationale rather than a substantive doctrine in itself, the substance of the matter might, with respect, suggest otherwise. The status of unconscionability as a substantive doctrine is still unsettled in the context of the Commonwealth and there has, in my view, been no definitive pronouncement by the Court of Appeal as such. If it is felt that the local courts are not yet ready to embrace this particular doctrine (of unconscionability), the addition of the element of "impropriety" in the context of the doctrine of *unilateral* mistake in equity might have some unintended side-effects in the manner just stated.

73 *However*, the approach I have just suggested – allowing the formulations of unilateral mistake at both common law and in equity to remain the same – would be *contrary* to that expressed by the Court of Appeal in the *Digilandmall* case, which is a decision which I am of course bound by. In this regard, it is important to emphasise that the principles laid down in the *Digilandmall* case continue as the law of the land unless the Court of Appeal itself sees fit to either change and/or modify them in the future.

74 My third observation relates to the references in the *Digilandmall* case itself (at [31] and [53]), where it is stated that where the doctrine of unilateral mistake at common law applies, there is no *consensus ad idem*. Looked at in this light, might it not be argued that the doctrine of unilateral mistake is (as is the case with mutual mistake) merely another way of stating that there has been no coincidence of offer and acceptance? If so, then the doctrine of unilateral mistake is simply another aspect of the doctrine of formation of contract in general and the doctrine of offer and acceptance in particular – at least in its common law incarnation.

75 Fortunately, the facts of the present proceedings do not require an excursus into the various difficulties I have referred to briefly above. It was clear to me that, regardless of whether the common law or equitable doctrines were applied, the result would still be the same.

76 I refer, in this regard, once again, to the minutes set out earlier in this judgment (at [24] above). It is clear that counsel for the plaintiff either knew or ought to have known that counsel for the defendant was mistaken inasmuch as the latter was having in mind an exchange of AEICs instead. Indeed, it is clear to me that there was actual knowledge on the part of counsel for the plaintiff. In the face of the discussion that took place outside the learned assistant registrar's chambers and as reflected in the assistant registrar's own minutes, counsel for the plaintiff had deliberately shut his eyes to the fact that what was desired on the part of counsel for the defendant was an *exchange* of AEICs.

77 In the circumstances, I do not find it necessary to decide whether there had been any element of "impropriety" on the part of counsel for the plaintiff in the context of unilateral mistake in an equitable context. I should add that there was surely constructive knowledge. However, if the point from "impropriety" is in fact raised upon appeal, then I would observe that counsel for the plaintiff had in fact taken advantage of the situation at hand.

Possible broader considerations

78 Although the application of traditional contractual principles is sufficient for the purposes of my decision in the instant case, at least a couple of broader considerations present themselves. Indeed, as we shall see, if they are in fact also applicable to the present proceedings, they would merely serve to *buttress* my decision in favour of the defendant. Indeed, this would constitute an *alternative ground* in itself.

79 First, there is the argument to the effect that notwithstanding the operation of normal contractual principles to consent unless orders, the courts ought still to have a residuary discretion to decide whether, in the circumstances of the particular case, *enforcement* of the consent unless order concerned ought to be effected. Such an approach is to be found in the observations of Lord Denning MR in the English Court of Appeal decision of *Purcell* as follows ([46] *supra* at 363–364):

> I think that a party, who gets leave, can appeal from a consent order on wider grounds, at any rate in interlocutory matters. He can appeal, for instance, on the ground of *his own mistake*: see *Mullins v. Howell* (1879) 11 Ch.D. 763, where Sir George Jessel M.R. said, at p. 766, "There is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments." But there is no ground here so far as I can see for setting aside this consent order. It was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. It cannot be set aside. *But, even though the order cannot be set aside, there is still a question whether it should be enforced. The court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.* [emphasis added]

80 Lord Denning MR's approach is not unattractive. Although the learned Master of the Rolls did not canvass this point, it seems to me that such an approach can also draw support from the inherent powers of the court to govern what is, in the final analysis, procedure that is peculiar to the governance of its own process – all with a view towards the attainment of both procedural as well as substantive justice. Indeed, such inherent powers do find their source (or recognition, rather) in, *inter alia*, O 92 r 4 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed). Order 92 r 4 itself reads as follows:

> For the removal of doubt it is hereby declared that nothing in
> these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

81 The parameters of O 92 r 4 are, understandably, not particularly precise. What does appear clear is that if there is an existing rule (whether by way of statute or subsidiary legislation or rule of court) already covering the situation at hand, the courts would generally *not* invoke its inherent powers under O 92 r 4, save perhaps in the most exceptional circumstances (see, for example, the Singapore Court of Appeal decision of *Four Pillars Enterprises Co Ltd v Beiersdorf Aktiengesellschaft* [1999] 1 SLR 737 at [27] and the Singapore High Court decision of *Tan Kok Ing v Tan Swee Meng* [2003] 1 SLR 657). It is commonsensical that O 92 r 4 was not intended to allow the courts *carte blanche* to devise any procedural remedy they think fit. That would be the very antithesis of what the rule is intended to achieve. The key criterion justifying invocation of the rule is therefore that of "need" – in order that justice be done and/or that injustice or abuse of process of the court be avoided. As Chao Hick Tin JA put it, delivering the judgment of the Singapore Court of Appeal in *Wee Soon Kim Anthony v Law Society of Singapore* [2001] 4 SLR 25 at [27]:

> It seems to us clear that by its very nature, how an inherent jurisdiction, whether as set out in O 92 r 4 or under common law, should be exercised should not be circumscribed by rigid criteria or tests. In each instance the court must exercise it judiciously. In his lecture on 'The Inherent Jurisdiction of the Court' published in *Current Legal Problems* 1970, Sir Jack Jacob (until lately the General Editor of the *Supreme Court Practice*) opined that this jurisdiction may be invoked when it is just and equitable to do so and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression and to do justice between the parties. Without intending to be exhaustive, we think an essential touchstone is really that of 'need'.

82 In the (also) Singapore Court of Appeal decision of *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR 353, Chao Hick Tin JA, delivering the judgment of the court, referred to the above principles and also observed thus (at [17]):

> Accordingly, this inherent jurisdiction should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands. The circumstances must be special.

83 The leading article in the local context, "The Inherent Powers of the Court" [1997] Sing JLS 1, is by Prof Jeffrey Pinsler ("Prof Pinsler"), the leading local scholar in the field of civil procedure. It is a scholarly and seminal article and, if I may say so, the local analogue of Sir Jack Jacob's article, I H Jacob,"The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23, which is not only cited in Prof Pinsler's article but is also widely recognised as the leading discourse on the inherent powers of the court in the Commonwealth. This last-mentioned fact is also evidenced by the citation of the article by the Singapore Court of Appeal itself (see [81] above) as well as by the Singapore High Court in *Heng Joo See v Ho Pol Ling* [1993] 3 SLR 850 at 855, [23].

84 Having embarked on a thorough review and scholarly analysis of the relevant decisions as well

as context, Prof Pinsler concludes thus ([83] *supra* at pp 48–49):

> Certainly, it would be pointless to have a provision such as Order 92, rule 4 (RC) to enable the court to exercise 'powers' beyond the rules (which are stated not 'to limit or affect' those powers), if such role is not permitted.
>
> … It is in the nature of the common law system that the court must have some flexibility to enable it to operate effectively within the parameters of statutory regulation. Certainly, procedural developments in recent years have emphasised the courts' more active role. The cases which have been considered reflect a range of approaches from the restrictive to the intrusive. It is not practical, and perhaps not possible, to identify specifically the ideal role of the court in areas not clearly or appropriately regulated by the rules. The court should always consider the state of the rules (which are usually the primary source of procedure), the circumstances of the case, and the abuse or injustice which would result if it did not exercise its inherent powers.

In a similar vein, Sir Jack Jacob observes thus ([83] *supra* at p 51):

> [T]he inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary *whenever it is just or equitable to do so, and in particular* to ensure the observance of the due process of law, to prevent improper vexation or oppression, *to do justice between the parties and to secure a fair trial between them*. [emphasis added]

85 However, Prof Pinsler, although admitting that the distinction between procedure and substance is not always easily made, suggests that O 92 r 4 only permits the courts to exercise its inherent powers *vis-à-vis* matters which are procedural (as opposed to substantive) in nature – in other words, "to govern and regulate the process of litigation" (see generally [83] *supra*, especially at pp 37–39).

86 Before proceeding to elaborate on why I favour the existence (and, if necessary, the exercise of) such discretion based on the general principles which I have briefly summarised above, it is also incumbent on me to first point out the arguments that tend to militate against the exercise of such a discretion by the courts. Foremost amongst these is the fact that Lord Denning MR's suggested approach was not expressly endorsed by his other two brethren in *Purcell*, Winn and Buckley LJJ. However, a close analysis of their respective judgments does not indicate an express and unambiguous rejection of the approach either. Indeed, on one reading of the concluding part of the judgment of Buckley LJ ([46] *supra* at 367), the issue of *enforcement* is referred to without ostensible rejection of the viability of the concept itself (though *cf* Templeman LJ's observations in the *Tigner-Roche* case ([30] *supra*) as well as *Wembley Laboratories Ltd v Joyce Ground Engineering Ltd* ([29] *supra*)). Nevertheless, it is at least arguable that there was at least some possible indication of an indirect rejection (*cf*, for example, the *Tigner-Roche* case ([30] *supra*)) – which brings me to the next argument.

87 All the judges in *Purcell* were nevertheless of the view that general contractual principles would continue to apply to consent unless orders. This is eminently logical and fair in the light of the fact that such orders constitute contractual arrangements (hence, the appellation "consent"). This also means that the various vitiating factors, amongst a myriad of other contractual principles, are potentially applicable (see also, for example, the English Court of Appeal decision of *Huddersfield Banking Company, Limited v Henry Lister & Son, Limited* [1895] 2 Ch 273; though *cf Mullins v Howell* ([44] *supra*)). Indeed, as I have ruled earlier in this judgment, the doctrine of mistake in its various

alternative forms did in fact apply to the present case (see generally [55]–[77] above). Would the potential as well as actual operation of (in particular) vitiating factors furnish sufficient safeguards so that the approach mooted by Lord Denning MR in *Purcell* is rendered unnecessary? This might, at least possibly, be the approach of the other two judges in *Purcell* itself – at least by implication. It should also be noted that Lee JC, in the *Wiltopps* case, was of the view that the majority in *Purcell* did not adopt Lord Denning MR's views and, indeed, preferred their approach ([6] *supra* at [26]–[27]).

88 There is yet another reason why the approach mooted by Lord Denning MR might be argued to be less persuasive. If, as the learned Master of the Rolls suggests, the residuary discretion is one that relates to *enforcement*, then its potential operation – in the absence of the operation of any vitiating factor – would, necessarily in my view, undermine the concept of a consent unless order. This is, to my mind, the most significant objection against the discretion Lord Denning MR has mooted. In other words, if a consent unless order is to be given effect to as a contract *and* if no vitiating factors in contract law operate on the facts of the case, to allow the courts a residuary discretion to decide, *nevertheless*, to refrain from enforcing the order (and, hence, the agreement) would necessarily undermine, as we shall see (albeit not in a widespread fashion (see [93] below)) the basic idea of consensus underlying every agreement. Such a discretion might also give rise to objections from uncertainty.

89 However, I would be prepared to accept that, the objections in the preceding paragraphs notwithstanding, it would still be desirable to allocate to the court a residuary discretion of the type suggested by Lord Denning MR in *Purcell*. In this regard, I also respectfully differ from the view preferred by Lee JC in the *Wiltopps* case, and I do so for the following main reason.

90 It must be borne in mind that a consent unless order, whilst technically a contract between the parties, is one that allows one party to wholly deprive the other of its legal rights in the context of litigation. Even though such an order has been agreed upon between the parties, there may, in my view, arise certain special circumstances where it would nevertheless be unjust for the party in whose favour the consent order operates to insist on its enforcement in the absence of a high degree of intentionally contumacious or contumelious conduct.

91 Such a discretion is, in the final analysis, merely an aspect of the court's power to have ultimate control over its own procedure. This is not at all unreasonable, in my view, and does, on balance, conduce to justice and fairness. The focus is still on procedure, rather than substance. It might be argued that the substantive rights of the plaintiff would be adversely affected. This is arguably the case but it must never be forgotten that an unless order is part of the procedural armoury and is not based on the substantive merits of the case as such. Thus, an unless order (whether by consent or otherwise) deals, in the final analysis, with the *litigation process and, on this score, the courts ought to have the final say.*

92 It is also imperative to note that the retention of such a discretion is wholly consistent with the *raison d'etre* of O 92 r 4, as set out above (see especially at [84]).

93 At this juncture, however, the objection from uncertainty is noted. Nevertheless, it seems to me that any "interference" by the court in this particular regard would be rare and would need to be thoroughly justified in the circumstances of the case. The exercise of the court's discretion in the manner Lord Denning MR put it in *Purcell* would, in other words, be analogous (and I would put it no higher than that) to that which operates under the doctrine of *illegality* under *contract* law. After all, the doctrine of illegality in contact law, whilst a recognised vitiating factor, is one that not only undermines the basic idea of consensus between the parties if applicable but is also one that is premised on *broader public policy factors* set out, in the main, in the preceding two paragraphs. I

would suggest that this is the *also* the case with regard to the residuary discretion proposed by Lord Denning MR.

94 Ormrod LJ, delivering the decision of the court in the English Court of Appeal case of *Thwaite v Thwaite* [1982] Fam 1, adopted a slightly different approach from the perspective of *detail*, although the broad approach was not dissimilar to that suggested in the preceding paragraph; in particular, the learned judge observed thus (at 8–9):

> Where the order is still executory, as in the present case, and one of the parties applies to the court to *enforce* the order, *the court may refuse if, in the circumstances prevailing at the time of the application,* it would be *inequitable* to do so: *Mullins v. Howell* (1879) 11 Ch.D. 763 and *Purcell v F.C. Trigell Ltd.* [1971] 1 Q.B. 358, 366, 367. *Where* the consent order derives its legal effect from *the contract, this is equivalent to refusing a decree of specific performance*; *where* the legal effect derives from *the order itself the court has jurisdiction over its own orders*: *per* Sir George Jessel M.R. in *Mullins v. Howell* (1879) 11 Ch.D. 763, 766. [emphasis added]

95 The reference to the circumstances surrounding the refusal of a decree of specific performance is both instructive as well as interesting since it is trite law that such a refusal can be based, *inter alia*, on the fact that damages would be an adequate remedy and generally when it would be just and equitable to do so (including severe hardship, unfairness and the conduct of the plaintiff): see generally Sir Guenter Treitel, *The Law of Contract* (Sweet & Maxwell, 11th Ed, 2003) ("Treitel") at pp 1026–1029.

96 I should, however, mention that I find, with respect, Ormrod LJ's interpretation of *Mullins v Howell* ([44] *supra*) just a little puzzling. It is by no means clear from Jessel MR's judgment in *Mullins v Howell* itself that the consent order in that particular case was not contractual in origin. It might well have been. Indeed, *Mullins v Howell* was cited and relied upon by Lord Denning MR in *Purcell* (see [79] above), which clearly related to a consent unless order. Nevertheless, what is even more significant in so far as the present proceedings are concerned are the observations by Jessel MR in *Mullins v Howell* as follows (at 766):

> I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the Court having a sort of general control over orders made on interlocutory applications.
>
> I do not think that the rules which have been laid down as the rules under which the Court will enforce agreements apply to enforcing orders of the Court, because the Court has jurisdiction over its own orders, and there is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments.
>
> [emphasis added]

It is, in my view, of no mean significance that *Mullins v Howell* was not only cited together with *Purcell* by Ormrod LJ (at [94] above), but was also (to reiterate the point already made in the preceding paragraph) cited by Lord Denning MR in *Purcell* itself. It is also very significant that Jessel MR, in *Mullins v Howell*, refers to a situation of *unilateral mistake, but without reference to (and, hence, without any application of) the general contractual principles*, which I have in fact considered at length in relation to the facts of the present proceedings (as to which, see generally [59]–[77] above). The significance may be lessened if we accept Ormrod LJ's characterisation in *Thwaite v Thwaite* ([94] above) to the effect that Jessel MR's observations in *Mullins v Howell* did not concern a consent unless order as such. However, as I have already observed in the preceding

paragraph, such a characterisation is by no means clear.

97 I also note that, in the *Carter* case ([29] *supra*), Judge Peter Bowsher QC was of the view that the jurisdiction of the court to order an extension of time under both the then English equivalent of O 3 r 4 of our present Rules of Court as well as under the inherent jurisdiction of the court itself could not be ousted, save in express terms and that, even then, there appeared to be a possible issue as to whether or not such an ouster of the court's jurisdiction could be effected in the first instance (and *cf* the observations of Kerr LJ in *Greater London Council v Rush Tomkins* ([29] *supra*), where the learned Lord Justice expressed the view that a term could *not* be *implied* in order to prevent a party from applying for an extension of time and where May LJ reserved for further consideration "the question whether parties can by agreement oust the court's jurisdiction to make orders in litigation otherwise pursuant to the provisions of the rules of the Supreme Court"). All this supports, in my view, the approach which I have adopted and as set out in more detail above.

98 But, if (as I have just suggested) we can justify the existence of such a discretion in law, how is it to be framed? There appear to be at least two possible approaches, one of which (the second) I have in fact already touched on.

99 The first approach is to argue that every consent unless order necessarily contains, as a *term implied in law to the effect that in order for the court to enforce such an order, the breach must be intentionally contumacious or contumelious*. Two further points might be usefully noted at this juncture. The term is one implied in *law* (in *contrast* to one implied in fact) because it would be implied in *every* contract of *this particular type* (here, that category pertaining to *consent unless orders* (and see generally Treitel ([95] *supra* at pp 206–213)). The other – and more important – point is that such an implied term can obviously be *excluded* by a clear *express* term to the contrary. At this point, it will be noticed that such an approach brings us back, in effect, to the *normal contractual position* and is also consistent with the approach adopted in the earlier part of this judgment where I held that in order for a consent unless order to come into legal existence, the terms concerned must be clear and unambiguous and that, in any event, vitiating factors might apply. What is *unsatisfactory* about such an approach is that it does *not* give effect to the *broader* public policy factors which I have referred to above.

100 The second approach is – to use a colloquialism – to "call a spade a spade" and to justify it (as I already have) by reference to O 92 r 4. In other words, the court recognises that there will be a limited number of situations where, despite the otherwise impeccable legal status of a consent unless order, the conduct by the party in breach is still insufficient to warrant the enforcement of that order, thus depriving the party in breach of all its rights in the litigation. At this juncture, the manner in which the court draws the line is to ascertain whether the conduct of the party in breach is not only intentionally contumelious or contumacious (this would suffice for relief for the party in breach under the *existing law*) *but also whether or not such conduct was of not such an extreme degree of contumeliousness or contumaciousness that the consent unless order ought to operate to deprive it of all its rights in the litigation*. Such an approach was in fact itself suggested by counsel for the plaintiff in the present proceedings on the assumption that I was minded to adopt the approach suggested by Lord Denning MR in *Purcell*. I would prefer this particular approach on the assumption that the discretion would be exercised by the court to bring relief to the party in breach where the breach was not truly egregious and that such occasions would not be so numerous as to undermine the concept of consent unless orders generally. Indeed, as already pointed out, consent unless orders appear, in any event, to be very rare in the first instance (see [6] above).

101 I turn now to the second broader consideration, which is not, as we shall see, unrelated to the first. As alluded to right at the outset of this judgment, I would also emphasise the fact that the

Singapore Court of Appeal in the *Syed Mohamed* case ([2] *supra*) might suggest that not only that the approach based on broader policy considerations is correct but might also go *further* inasmuch as it might suggest that *the very concept of a consent unless order might not be feasible in the first instance*. Unfortunately, the court in that decision did not deal *expressly* with these points. However, the decision did appear to deal with a *consent* unless order (see at [20]) *and* the court did in fact apply the *existing test* as to whether or not the defendant's conduct was intentionally contumelious or contumacious and whether or not there were extraneous factors excusing the defendant's conduct. All this suggests that *the highest court in the land* has at least cast a doubt on the legal status of consent unless orders – at least in so far as such orders purport to oust the residuary jurisdiction of the courts to refuse to enforce them, except in the most egregious circumstances. It is true that the *Wiltopps* case was affirmed on appeal by the Singapore Court of Appeal. Unfortunately, no written grounds were delivered. At the very least, therefore, we might possibly (and potentially) have two decisions of the Singapore Court of Appeal that might need to be explained and reconciled in a future decision of that same court (one of which, the *Wiltopps* case, has no written grounds as such). In the meantime, however, as a judge at first instance, the *Syed Mohamed* case is in fact binding on me and I am glad to note that it in fact supports the approach adopted in this part of my judgment.

102 I will in fact conclude this part of my judgment by stating that some clarification – preferably not only by the courts but also by way of amendment of the relevant Rules of Court – is both welcome and necessary. I would, as I have explained above, myself lean towards according to the courts some residuary discretion to control a process that is, after all, the court's primary responsibility and, therefore, concern. We are concerned here with the basic structure of the litigation process. On occasion, despite the parties' best intentions and despite even an agreement entered into by them, it turns out that depriving one party of all its rights in the litigation process is procedurally and (consequently) substantively unjust. The courts ought, in such limited situations, be allowed to do justice between the parties. The courts ought to be the channels through which procedural and substantive justice is achieved. The courts also exercise discretion virtually all the time and exercise such discretion in a structured and fair manner (and see also *per* Chao JA in the *Digilandmall* case ([17] *supra* at [81]). There appear to me, therefore, to be no real objections as to why such a residuary discretion ought not to be given to the courts – preferably in a clear and formal manner through the amendment of the Rules of Court. Such an approach is also buttressed by the arguments considered above with regard to the inherent powers exercisable by the court pursuant to O 92 r 4 (see generally above at [80]–[85]). Although the existence of such a discretion can in fact be premised on the inherent powers referred to in this rule, I would much prefer that the Rules of Court be amended to confirm, beyond peradventure, that such a jurisdiction exists.

103 As it turns out, having regard to the conclusion I have come to in the earlier part of my judgment, I did not, strictly speaking, need to be vested with such discretion in order to arrive at the decision I did, although this was, as I have already mentioned, possible (indeed, probable) even at the present time pursuant to O 92 r 4. Assuming, therefore (as I am minded to), I am vested with such discretion, it would merely serve to *buttress* the conclusion I had already arrived at in favour of the defendant in the present proceedings. Before proceeding to explain in the briefest of fashions why this would be so, I should point out, nevertheless, that in the light of the conclusion I had arrived at earlier – that the unless order was *not* a *consent* unless order but, rather, an "ordinary" unless order – it was necessary, in any event, to ascertain whether or not the defendant's breach in the context of the present proceedings was intentionally contumacious or contumelious. I found that it was *not* as I explain below. But, if so, then assuming that I was vested with the discretion mentioned at the outset of the present paragraph (which, it should be reiterated, was not at all impossible, even under the existing law), it would be clear that *even if* a *consent* unless order had been entered into by the plaintiff and the defendant in the context of the present proceedings, the defendant's breach would

not have been so egregious as to warrant the harshest of consequences ensuing as a result of that breach; indeed it was neither intentionally contumelious or contumacious to begin with. In other words, I would have exercised such a discretion in favour of *the defendant*.

Conclusion

104 In the circumstances, it is clear both from the surrounding circumstances as embodied in the record of proceedings *and* an interpretation of the order concerned in the light of the salient surrounding circumstances as a whole that the parties in question had *not* entered into a *consent* unless order. It bears reiterating that such an *objective* approach (and such an approach alone) can – and ought to be – applied. *No other* approach (particularly those premised on subjective considerations) is acceptable.

105 In any event, it is also clear that even if a contract had been entered into between the parties, this contract had been vitiated by the doctrine of mutual or unilateral mistake.

106 Returning to my findings, if the order made in the present proceedings was *not* a *consent* unless order, what *was* involved was nevertheless *still* an *unless* order. It thus became necessary, in any event, to ascertain whether or not the defendant's actions were in fact covered by the general principles just mentioned at [2]–[3] above.

107 Like the learned assistant registrar, I find that the defendant's action, whilst intentional, was neither contumelious nor contumacious. Indeed, it seemed clear to me that there was a misunderstanding that not only contributed to the absence of an agreement but which also led him to commit a merely technical breach of the order, having regard to the misunderstanding between the defendant and the plaintiff. These circumstances would themselves also constitute, in my view, extraneous circumstances, bearing in mind that this concept is neither mandatory nor writ in stone (see [3] above).

108 In any event, it is also unclear that consent unless orders will not, like the usual consent unless orders, be subject to the general principles just mentioned. Indeed, the *Wiltopps* case may need to be reviewed in the light of this ambiguity (as embodied, at least possibly, in the existing cases law (see [101] above) *and/or* because of broader considerations considered in the preceding section of this judgment.

109 The basic issue from the *broader* perspective, and already referred to earlier in this judgment, is this: *To what extent do broader reasons of justice and public policy require that an at least residuary discretion continue to reside in the courts with regard to the interpretation as well as enforcement of unless orders, even where they have been agreed upon between the parties?* It seems to me desirable that the courts be vested with such a discretion, given the draconian nature as well as consequences of an unless order. Such a discretion could possibly be justified, even at the *present* time, by recourse to the inherent powers of the court pursuant to O 92 r 4, although confirmation via an amendment to the existing Rules of Court might be preferable. I pause here to reiterate that, apart from the *Wiltopps* case, there appears to be no other local decision dealing with the issue of consent unless orders. Whilst not by any means conclusive, this is at least an indication that consent unless orders are rare in practice and perhaps an indication that this particular device is not really popular. Given the views I have expressed in this judgment, this situation is not unwelcome for, as I have pointed out, in this particular instance at least, the courts ought to be left to make the final decision.

110 I am therefore willing to go so far as to say that, even if I had found that what was involved

in the present proceedings was a consent unless order (which I do *not*), I would have been prepared to accept the existence of such residuary discretion (premised, at the present at least, on the inherent powers of the court pursuant to in O 92 r 4 and referred to in the preceding paragraph) and find – on this *alternative* ground – in favour of the defendant as well. In other words, if such discretion existed and was applied, I would still have had to consider whether the defendant's action was, in accordance with the established principles to be applied to unless orders generally, intentional as well as either contumelious or contumacious. As I have already stated above, I find that the defendant's action did not fall afoul of these general principles.

111 I therefore allowed the defendant's appeal. Costs would normally have followed the event. However, because the defendant had in fact been in (albeit only technical) breach of the unless order granted by the assistant registrar, I found it appropriate, in the circumstances, to make no order as to costs.

112 Finally, however, I note, in passing, that it is surprising that the present appeal was in fact brought in the first instance, simply because my decision was one setting aside a default judgment unconditionally. In this regard, I should have thought that s 34(1)(*a*) of the Supreme Court of Judicature Act ("SCJA") (Cap 322, 1999 Rev Ed) would have precluded such an appeal. The provision itself reads as follows:

> *No appeal shall be brought* to the Court of Appeal in any of the following cases:
>
> > (*a*) where a Judge makes an order giving unconditional leave to defend an action *or an order setting aside unconditionally a default judgment*; …
>
> [emphasis added]

113 Counsel for the plaintiff did refer to Singapore Court of Appeal decision of *S3 Building Services Pte Ltd v Sky Technology Pte Ltd* [2001] 4 SLR 241. However, I note that this particular issue (centring on what seems to me the clear and unambiguous language of s 34(1)(*a*) of the SCJA) was clearly not before (and, hence, was not considered by) the court as such. Since the final draft of this judgment was prepared, it has come to my attention that a notice of motion has in fact been filed by the defendant seeking to strike out the notice of appeal in the present proceedings (see Notice of Motion No 122 of 2005). I therefore say no more about this particular issue. I note, however, that s 34(1)(*a*) itself tends to buttress the view I expressed above to the effect that the situation before me related more to the procedural rather than the substantive sphere (see [91] above).

114 Be that as it may, I hold that, in any event, the defendant's appeal ought to be allowed for the reasons set out above.

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