IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 230

Suit 1728/1994

Between

Active Timber Agencies Pte Ltd

… *Plaintiff*

And

Allen & Gledhill

… *Defendant*

GROUNDS OF DECISION

Civil Procedure — Striking out

Version No 1: 29 Oct 2026 (23:45 hrs)

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Active Timber Agencies Pte Ltd v Allen & Gledhill

[1995] SGHC 230

Suit 1728/1994
MPH Rubin J
28 September 1995

1 This is an appeal by the plaintiffs against an order made by the learned assistant registrar, striking out their statement of claim on the ground that it discloses no reasonable cause of action against the defendants, pursuant to O 18 r 19 of the Rules of the Supreme Court (`RSC`).

2 The facts which gave rise to the action herein as could be gathered from the pleadings (including the further and better particulars) and the affidavits filed by both parties including the exchange of correspondence between the respective solicitors could be summarised as follows.

3 During the period August-September 1993, the services of the defendants, a firm of solicitors in Singapore, were retained by one Mr David Cam (`Mr Cam`) on behalf of Toro Holdings Ltd of Vanuatu and one Mr Noel A Adam. During this period Mr Tiang Ming Sing (`Mr Tiang`), who is said to be the beneficial owner of all the issued shares in the plaintiffs, a Singapore registered company, was in negotiation with Mr Cam in relation to the purchase of the entire shareholdings of another Vanuatu company known as Veneer Enterprises (Vanuatu) Ltd.

4 On or about 31 August 1993, Mr Tiang after signing the relevant sale and purchase agreement, caused to be paid to Mr Cam a sum of US$100,000 pursuant to the terms of the agreement. On or about 1 September 1993, Mr Tiang caused to be paid into the clients` account of the defendants, by way of telegraphic transfer, a further sum of US$250,000.

5 It is evident from the pleadings that apart from payment of the said sum of US$250,000 into the clients` account of the defendants, there was no communication of whatsoever nature between Mr Tiang and the defendants.

6 Apparently, Mr Tiang and Mr Cam encountered problems in connection with some proposed amendments to the agreement. Negotiations which ensued in August-September 1993 resulted in a stalemate. The said agreement came to grief and according to the plaintiffs consequently aborted.

7 After a lapse of about nine months, Mr Tiang instructed his then solicitors, Messrs Tan Lee & Partners, to demand from the defendants the return of the sum of US$250,000 which his solicitors labelled as `earnest money` paid into their clients` account by the plaintiffs. The said letter, insofar as it bespeaks the background scenario to the proceedings, is reproduced hereunder:

> *26 May 1994*
>
> *M/s Allen & Gledhill*
>
> *Claim for refund of earnest money paid*
>
> *We act for Tiang Ming Sing and understand that you act for Noel A Adam and Toro Holding Ltd of Vanuatu, represented by one David Cam, its managing director.*
>
> *2 We are instructed that sometime in August 1993, our client negotiated with your clients to buy over the entire shareholding of Veneer Enterprises (Vanuatu) Ltd and upon completion of negotiation, our client paid to you on 1 September 1993 a sum of US$250,000 being the earnest money. We enclose hereto a copy of remittance advice for your perusal.*

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> (3) On or about 31 August 1993, after our client signed the sale and purchase agreement, our client paid a further sum of US$100,000 pursuant to the said agreement. However, on the same day, and before your clients signed on the said agreement, our client also suggested some amendments and a subsequent discussion ensued. We are now informed that the proposed sale of shares under the said agreement had been aborted, and a refund of the said US$100,000 is pending.
>
> (4) We are instructed to and do hereby demand from you the refund of the said US$250,000 to our client and trust that the refund shall be forthcoming within the next seven days.
>
> *Yours faithfully*
>
> *(signed)*

8 The foregoing letter did not result in anything fruitful; no refund was forthcoming from the defendants, for as early as in September 1993 the defendants had paid out the said sum to their clients in accordance with their instructions. The matter then went into hibernation some time until 22 September 1994 when the present solicitors for the plaintiffs issued a fresh demand letter to the defendants. The tenor of this letter is somewhat different in substance from that of the plaintiffs` former solicitors. It introduced amongst other things, a new element, ie the interests of the plaintiffs. The letter reads:

> *22 September 1994*
>
> *M/s Allen & Gledhill*
>
> *Re: Refund of US$250,000*
>
> *We act for Mr Tiang Ming Sing and Active Timber Agencies Pte Ltd. We refer to the letter of 26 May 1994 from M/s Tan Lee & Partners and your reply dated 11 July 1994.*

9 Our instructions are that on or about 1 September 1993 our client M/s Active Timber Agencies Pte Ltd paid into your account at OCBC bank the sum of US$250,000. The said payment was made by M/s Active Timber Agencies Pte Ltd at the behest of Mr Tiang Ming Sing on per a transaction outlined in the

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letter of 26 May 1994 from M/s Tan Lee & Partners to yourself. A copy of the remittance advice is enclosed for your easy reference.

10 We have further been instructed that subsequent to the payment of the money into your account neither of our clients gave you any instructions as per the disbursement of the money.

11 We have now been instructed to and hereby demand from you the refund of the said US$250,000 to be paid in favour of our firm. If you have incurred any administrative expenses kindly inform us of same.

Yours faithfully
(signed)
...

12 The response from the defendants was crisp. They alleged that they received the sum of US$250,000 on their Vanuatu clients` instructions as their agents; those moneys were paid out from their account in September 1993 in accordance with their clients` instructions and that neither the plaintiffs nor Mr Tiang gave them any instructions nor imposed any conditions as to how the moneys should be dealt with.

13 In the context of the foregoing exchange, the action by the plaintiffs commenced. By para 10 of their statement of claim the plaintiffs alleged that the defendants received the said sum of US$250,000 into their clients` account as agents for the plaintiffs. The alternative contention under para 11 was that the defendants, by electing to retain the said sum and disbursing it subsequently, were also acting as solicitors for the plaintiffs. Additionally, it was averred that by disbursing the said sum without instructions and without prior communication from the plaintiffs, the defendants had acted negligently and

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were in breach of the duty of care owed to them in contract as well as in tort. Particulars provided by the plaintiffs straddle three distinct but inter-related causes of action, ie contract, tort (negligent action or omission) and trust. The trust aspect was however abandoned at the hearing of this appeal.

14 The defendants by their defence denied liability to the plaintiffs in contract or in tort. Their position was that they acted as agents for their own clients and were never the agents for the plaintiffs (see paras 10, 11 and 12 of the defence). Insofar as material to these proceedings, the particulars provided by the defendants under para 12 of their defence read as follows:

> *(1) The defendants did not know of the identity of the plaintiffs prior to the receipt of the said sum of US$250,000 in the defendants` client account;*
>
> (2) at all material times, there was never any contractual relationship between the plaintiffs and the defendants;
>
> (3) the plaintiffs did not appoint or retain the defendants to act as their solicitors;
>
> (4) there was no communication between the plaintiffs and the defendants prior to the letter from the defendants` solicitors dated 22 September 1994;
>
> (5) the defendants were instructed by their own client to receive the said sum of US$250,000 and did so receive the said sum of US$250,000 in the defendants` client account; and
>
> (6) the said sum of US$250,000 was disbursed from the defendants` client account in accordance with the instructions given to the defendants by their client.

15 The defendants further denied that there was any solicitor and client contract or relationship between them and the plaintiffs. They averred that they were under no duty to communicate with or seek instructions from or make inquiry of the plaintiffs before disbursing the said sum to their clients (para 18 of the defence).

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16 A threshold question in this appeal relates to the ambit of the court`s powers under O 18 r 19 of the RSC. The said rule provides, inter alia, that the court may at any stage of the proceedings order to be struck out any pleading on grounds that: (a) it discloses no reasonable cause of action or (b) it is scandalous, frivolous or vexatious. On the subject of reasonable cause of action, cases annotated in the ***Supreme Court Practice 1995*** (see para 18/19/11) support the view that a reasonable cause of action means a cause of action with some prospect of success when only the allegations in the pleadings are considered (per Lord Pearson in ***Drummond-Jackson v British Medical Association & Ors*** [1970] 1 All ER 1094 (CA)). Another principle enunciated by the courts over the years underpins the proposition that so long as the statement of claim or the particulars disclose some cause of action or raise some question to be decided by a judge or a jury, the mere fact that the case is weak and not likely to succeed, is no ground for striking it out. The central point which seems to emerge in all the decided cases is that the object of the rule is to stop cases which ought not to be launched - cases which are obviously unsustainable or patently frivolous or vexatious (see the observations of Lindley LJ in ***A-G of the Duchy of Lancaster v London And North Western Railway Co*** [1892] 3 Ch D 274 at p 277).

17 In ***Ban Guan Sdn Bhd v United Malaysian Steel Mills Bhd*** [1977] 2 MLJ 52 at p 53, the Malaysian High Court approved the following passage from ***Mallal`s Supreme Court Practice***

18 under O 25 r 4 under the heading `Striking Out a Pleading`:

> *It is only in plain and obvious cases that recourse should be had to the summary procedure under this rule, for example, where the statement of claim discloses no cause of action. Thus in* ***Prince v Gregory*** *[1959] 1 All ER 133; [1959] 1 WLR 177, a statement of claim which disclosed no cause of action in so far*

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> *as it affected the second defendant was struck out. As to the question whether a plaint discloses a cause of action, it was held in* ***Peek v Russell*** *(1923) 4 FMSLR 32 (CA) that the plaint and its documents alone should be considered and all the allegations in it should be assumed to be true. If there is a point of law which requires serious discussion, an objection should be taken on the pleadings, and the point set down for argument under r 2.* ***Low Yat v Grace*** *[1947] MLJ 115 ,* ***Cadam & Ors v Beaverbrook Newspapers Ltd*** *[1959] 1 QB 413; [1959] 1 All ER 453; [1959] 2 WLR 324 (CA). If there is an issue to be tried it can only be tried by the pursuing its normal course and being heard in open court.* ***Low Yat v Grace****, supra.*

19 This brings me to the consideration of the case of ***Prince v Gregory*** [1959] 1 All ER 133 referred to in the foregoing passage. In that case, the plaintiff, in an action for damages against the defendants, alleged that he had been injured by a piece of lime mortar thrown by another boy of 14 years of age, who had picked it up from a pile left by the second defendant in the gutter of the road outside his house. The mortar was so left, pending its use by the second defendant, presumably in connexion with repairs. The plaintiff claimed that the second defendant had been negligent in placing or leaving the lime mortar in the gutter of the road, when he knew that children habitually played in the said road.

20 The district registrar in the first instance ordered the statement of claim in the plaintiff`s action for damages so far as it related to the second defendant against whom negligence was alleged, to be struck out on the ground that it showed no cause of action against the second defendant and was vexatious and oppressive. On appeal Thesiger J allowed the plaintiff`s appeal against the order of the district registrar. On appeal by the second defendant, the Court of Appeal restored the decision of the district registrar and held that the statement of claim against the second defendant disclosed no cause of action and should be struck out, since the second defendant could not reasonably be expected to apprehend

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danger to children from the lime mortar being left where it was, pending its use for a useful purpose.

21 In ***Wenlock v Moloney & Ors*** [1965] 2 All ER 871, the English Court of Appeal counselled caution and extreme moderation in the exercise of the summary jurisdiction conferred on the court by O 18 r 19 of the RSC. The brief facts of the case as set out in the headnotes can be stated thus.

22 A plaintiff issued a writ, and delivered a statement of claim, alleging conspiracy which had caused him damage against three defendants. His statement of claim was a long and wandering document which he prepared himself, but his writ and statement of claim disclosed a cause of action. After this had been remodelled and re-delivered the defendants delivered lengthy defences, admitting some allegations, denying others, and making various affirmative allegations, and the plaintiff delivered replies to these defences. Although the plaintiff`s claim seemed unlikely to succeed, the case was not a plain and obvious one. The defendants applied under O 18 r 19 of the RSC and under the inherent jurisdiction of the court, to strike out the writ, statement of claim, and replies and to stay or dismiss the action on the grounds that these pleadings disclosed no reasonable cause of action, and were vexatious and an abuse of process. Eventually ten affidavits were filed on this application, five on each side. After a hearing which took more than two full days, and at which there was no oral evidence or cross-examination, the master delivered a 22-page judgment and struck out the plaintiff`s pleadings.

23 The Court of Appeal in allowing the appeal of the plaintiff, held that the course taken by the master amounted to a trial of the case in chambers, without discovery, oral evidence or cross-examination and so was neither authorised by

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the rules nor a proper exercise of the inherent jurisdiction of the court. Danckwerts LJ gave the following admonition in his judgment at p 874:

> *The position under two former rules ... has been incorporated in the present RSC, Ord 18 r 19 of the new rules. There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. ...*

24 The principles enunciated in ***Wenlock*** were adopted by LP Thean J in ***Low Fong Mei & Anor v Ko Teck Siang & Ors and other applications*** [1989] 3 MLJ 140 at p 149 (see also [1992] 1 SLR 454 (CA)).

25 However, as respects an application to strike out a statement of claim on the ground that it is frivolous and vexatious, it appears that the court is entitled to and ought to look at the whole history of the matter. The Divisional Court of England (Lord Parker CJ, Donovan and Salmon JJ) in ***Re Vernazza*** [1959] 2 All ER 200 observed that in such an application, the court in its inherent jurisdiction was entitled to look at affidavits as to the history of the matter and if in the light of that history the action was vexatious, the pleading could be struck out and the action dismissed. This decision was affirmed by the English Court of Appeal and reported in [1960] 1 All ER 183.

26 In Singapore, Yong Pung How CJ in ***Goh Koon Suan v Heng Gek Kiau & Ors*** [1991] 2 MLJ 307 when ordering that the plaintiff`s statement of claim be struck out on the ground that the proceedings instituted by the plaintiff against a number of defendants, were vexatious and an abuse of the process of

court, took into consideration all the relevant correspondence exchanged between the parties in addition to the pleadings.

27 With the above-stated principles in the forefront, I proceeded to consider the arguments presented by counsel first, with reference only to the statement of claim and the further and better particulars provided by the plaintiffs.

28 The chief element in the plaintiffs` statement of claim is that the defendants are in fact solicitors for the plaintiffs. In this regard, it is useful to have in view paras 1, 3, 5, 6, 7 and 8 of the statement of claim. They read:

> *1 The plaintiffs are a company incorporated in Singapore with a registered office at 7500 A Beach Road # 16-324 Singapore 0719.*
>
> (3) On 1 September 1993 the plaintiffs by telegraphic transfer through their bankers the Hongkong and Shanghai Banking Corporation Ltd paid into the defendants` client account the sum of US$250,000. The said payment was made in favour of the defendants.
>
> (5) Apart from the payment of the said sum of US$250,000 into the defendants` client account the plaintiffs at the material time:
>
> A Gave no instructions to the defendants pertaining to the disbursements of the said sum of US$250,000.
>
> B Gave no instructions appointing or nominating any other person to act as the plaintiffs` agent with authority to give instructions pertaining to the disbursement of the said sum of US$250,000.
>
> C Gave no instructions that the money was paid on behalf of any person or was to be held to the account of any other person.
>
> *6 Subsequent to the payment of the sum of US$250,000 into the defendants` client account there was no communication between the defendants and the plaintiffs.*
>
> (7) On 22 September 1994 the plaintiffs through solicitors demanded that the defendants refund the said sum of US$250,000 that was paid into the defendants` client account.
>
> (8) On 5 October 1994 the defendants by letter, inter alia, admitted the following:

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> A That they received the said sum of US$250,000 but contended that they received same as agents for their client. (Particulars of the client were not provided.)
>
> B That in September 1993 they paid out the said sum of US$250,000 from their account in accordance with their client`s instructions.
>
> C That they did not receive any instructions from the plaintiffs as to the disbursement of the said sum of US$250,000.
>
> D That the plaintiffs did not impose any conditions on how the said sum of US$250,000 was to be dealt with.

29 The background to the payment is provided by the plaintiffs under para 3 of their further and better particulars which is as follows:

> *1 The agreement was made in Singapore on or about 19 of August 1993 between one Mr Tiang Ming Sing (Mr Tiang) and the plaintiffs at a meeting between Mr Henry Lau, a director of the plaintiffs and Mr Tiang.*
>
> (2) Mr Tiang is the beneficial owner of all the issued shares of the plaintiffs.
>
> (3) The plaintiffs were to advance a sum of US$100,000 on behalf of Mr Tiang to one Mr Noel Adam and Toro Holdings Ltd (Toro) (a company incorporated in Vanuatu). Payment was to be made into the bank account of Toro in Vanuatu.
>
> (4) The plaintiffs were to make a further payment of US$250,000 on behalf of Mr Tiang to the defendants` client account on 1 September 1994.
>
> (5) Mr Tiang was to inform the plaintiffs when and to whom the said sum of US$250,000 was to be paid.
>
> (6) Upon being informed of the matters set out in No 5 above the plaintiffs were to give instructions to the defendants pertaining to the disbursement of the sum of US$250,000.
>
> (7) The plaintiffs would be appointed the commission agents for all sales made by Veneer Enterprises (Vanuatu) Ltd when Mr Tiang became the owner of all the shares of Veneer Enterprises (Vanuatu) Ltd.

30 By paras 10, 11, 12 and 13 of the statement of claim and the particulars provided thereunder, the plaintiffs alleged that there was in existence between the parties a solicitor-client relationship arising from an implied solicitor-client

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contract. They claimed that the contract of the defendants in receiving the said sum in their clients` account is indicative of the relationship. They further claimed that they were unrepresented at the material time and this fact was known to the defendants because the said funds were sent by an identifiable person. They also contended that they expected and were liable to be billed a reasonable sum by the defendants for services rendered after the plaintiffs had given instructions pertaining to the disbursement of the said sum of US$250,000. Their grievance is that the defendants by releasing the said sum to a third party and failing to advise the plaintiffs to seek independent advice before disbursing the said sum, amounted to a breach of duty concurrently under contract as well as in tort.

31 The principal question in this case is whether one could deduce a solicitor-client relationship between the parties from the circumstances outlined in the statement of claim. According to the learned authors of 44 ***Halsbury`s Laws of England*** (4th Ed) para 83, the act of authorising or employing a solicitor to act on behalf of a client constitutes the solicitors` retainer by the client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitors` employment and the rights and liabilities of the parties under the contract will depend partly on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed, and partly on such statutory provisions as are applicable to the particular contract.

32 The plaintiffs` particulars under para 3 of the statement of claim disclose that they transferred funds into the clients` account of the defendants, not pursuant to any arrangement or communication with the defendants but in order to underpin a commercial transaction put in place by their Mr Tiang with regard

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to a company incorporated in Vanuatu. Whatever transpired between Mr Tiang and the plaintiffs was res inter alios acta and was never made known to the defendants until particulars were provided. The plaintiffs` admitted role in the present case was unremarkable; what they did was nothing more than an act of faithful obedience to the wish of their owner (ie Mr Tiang). In the circumstances the assertion by the plaintiffs that by transmitting funds into the clients` account of a third party`s solicitors, they had also intended to enter into a solicitor-client relationship with the defendants, lacked credibility and substance. At any rate, if there was indeed any such intention, it is unclear from the pleadings who formed the intention. The curious phase of disinterest and deep slumber between 1 September 1993, the date on which the remittance was made and the time of their demand for refund many months later, does not bespeak for the proposition that the plaintiffs were earnest in entering into a solicitor-client relationship with the defendants.

33 The next submission by plaintiffs` counsel was that there was an implied contract of agency between the parties. He said that this implied contract came about by the defendants consenting to receive the plaintiffs` moneys into their clients` account. He argued that the consent by the defendants is to be inferred by the act of acceptance of the funds.

34 Basically agency is a relationship arising from consent usually expressed in the form of a contract (see GHL Friedman ***Law of Agency***

35 (6th Ed) at p 47). An agreement between a principal and agent may be implied in a case where each has contracted himself towards the other in such a way that it is reasonable for that other to infer from that conduct, consent to the agency relationship (***Boustead on Agency*** (15th Ed) art 8 at p 42).

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36 Nothing averred in the pleadings of the plaintiffs even faintly suggests that there was any consensual or contractual arrangement between the parties. The fact of the plaintiffs` forwarding funds to the clients` account operated by the defendants with their bankers does not in law give rise to an inference of an implied contract of agency between themselves. In my judgment, the defendants were acting solely for the third party and were contractually responsible only to them. In the premises, the contention by the plaintiffs that there was in fact a principal-agent relationship between them, is disingenuous and ill-conceived.

37 The next question straddles the issue of negligent act or omission. In this connection, the plaintiffs contend (see paras 17, 18, 19 and 20 of the statement of claim) that the defendants, by receiving the plaintiffs` moneys in their clients` account, owed a duty of care to the plaintiffs and they failed in that duty by disbursing it to the third party without the plaintiffs` instructions.

38 Mr Ponniah submitted that the fact moneys were received by the defendants in their clients` account from someone - in this case the plaintiffs - inferentially and otherwise created a degree of proximity between the parties. He submitted that the defendants owed in the circumstances a duty of care to the plaintiffs upon receipt and or upon electing to retain and or before dealing with the said sum of US$250,000 (see paras 17 and 18 of the statement of claim). Counsel contended that the matters pleaded showed that:

> (a) the plaintiffs paying the said sum into the defendants` clients` account and identifying themselves, created in law a duty situation;
>
> (b) the defendants assumed responsibility for the said moneys by their very conduct of retaining or disposing the same;
>
> (c) the payment of moneys into the defendants` clients` account created presently a fiduciary relationship between the parties;

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> (d) in the absence of instructions accepting the said payment, the defendants are duty bound to seek instructions, clarification, confirmation or approval from the plaintiffs before disbursing the said moneys to a third party; and
>
> (e) the plaintiffs suffered loss of the said sum of US$250,000 by reason of the defendants paying the said moneys negligently to a third party without any prior approval from the plaintiffs.

39 It was argued by Mr Ponniah that even if the facts did not satisfy the legal ingredients of fiduciary relationship or assumption of responsibility by the defendants, the facts pleaded showed that there is in law a duty situation. Reference was made to ***White v Jones*** [1995] 1 All ER 691 where the House of Lords, by a majority, held that a solicitor drawing up a will can be liable to an intended beneficiary if the solicitors` negligence forseeably deprives that beneficiary of a legacy. The relevant facts of the case are as follows. On 4 March 1986 the testator who was unhappy with the plaintiffs, his two daughters, executed a will cutting them out of his estate. In June the testator was reconciled with the plaintiffs and consequently sent a letter to his solicitors, the defendants, instructing them to prepare a new will to include a gift of Â£9,000 each to the plaintiffs. The letter was received by the solicitors on 17 July but had not been acted upon by September, when the testator died. As a result, the letter of instructions from the testator was not put into effect. The family were unable to agree on how the estate should be divided. The plaintiffs took the view that the solicitors` delay was the cause of their not having received Â£9,000 each from their father`s estate. Had the solicitor done what he should have done, the earlier will would have been revoked and replaced with a new will benefitting them. So they brought an action for damages for negligence.

40 At the first instance, Turner J dismissed the plaintiffs` claim on the basis that the solicitors owed no duty of care to the plaintiffs. The Court of Appeal

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reversed Turner J`s decision and in allowing the appeal, held that the solicitors owed a duty of care to the plaintiffs and were in breach of that duty.

41 The solicitors appealed to the House of Lords, where the House held by a majority that, where a solicitor accepted instructions to draw up a will and as a result of negligence, an intended beneficiary was forseeably deprived of a legacy, the solicitor was liable for the loss. The House held further that the solicitors` responsibility to his client should be extended in law to an intended beneficiary who was reasonably forseeably deprived of his legacy. The solicitor could be said to be in a special relationship with those intended to benefit.

42 Prior to the majority decision in ***White v Jones*** , the law as respects a solicitors` duty to third parties as annotated in ***Broom`s Legal Maxims*** (10th Ed, 1993) at p 516 on the authority of a 125-year-old House of Lords decision in ***Robertson v Fleming*** (1861) 4 Macq 167, is as follows:

> *A employs B, an attorney, to do an act for the benefit of C, A having to pay B, and there being no intercourse of any sort between B and C. If, through the negligence or ignorance of B in transacting the business, C loses the benefit intended for him by A, C cannot maintain an action against B to recover damages for the loss. If the law were otherwise, a disappointed legatee might sue the solicitor employed by a testator to make a will in favour of a stranger, whom the solicitor never saw or before heard of, if the will were void for not being properly signed and attested.*

43 Lord Goff of Chieveley declared in ***White v Jones*** that the propositions of law expounded in ***Robertson v Fleming*** are no longer relevant in the present day setting. He observed at p 701:

> *Statements such as these no doubt represented the law as understood in this country over a century ago. Moreover, as I have already observed, the general rule today is that, subject to his duties to the court and the professional duties imposed upon his profession, a solicitor when acting for his client owes no duty to third parties. But the problem which arises in the present case relates to the particular position of an intended beneficiary under*

> *a will or proposed will to which the solicitor has negligently failed to give effect in accordance with the instructions of his client, the testator; and the question is whether exceptionally a duty of care should be held to be owed by the solicitor to the disappointed beneficiary in those circumstances. I myself do not consider that the existence of such a duty of care can simply be dismissed by reference to the sweeping statements made in* ***Robertson v Fleming****. For the law has moved on from those days. Nowadays questions such as that in the present case have to be considered anew, and statements of the law, such as that of Lord Campbell LC, cannot be allowed to foreclose the argument of the plaintiffs in the present case; ...*

44 The essence of the plaintiffs` contention is that when a solicitor accepts moneys into his clients` account from an identified source, the law implies proximity and a special relationship between them. In such a situation, the solicitor cannot act willy-nilly in disbursing the moneys so paid and must seek prior consent or clarification from the person before paying out the moneys. Counsel in this regard referred the court to several passages from the speech of Lord Browne-Wilkinson in ***White v Jones*** . The highlights are:

45 At p 713g-j:

> *... The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B. A, having assumed responsibility, protanto, for B`s affairs, is taken to have assumed certain duties in relation to the conduct of those affairs, including normally a duty of care. Thus, a trustee assumes responsibility for the management of the property of the beneficiary, a company director, for the affairs of the company and an agent for those of his principal. By so assuming to act in B`s affairs, A comes under fiduciary duties to B. Although the extent of those fiduciary duties (including duties of care) will vary from case to case some duties (including a duty of care) arise in each case. The importance of these considerations for present purposes is that the special relationship (ie a fiduciary relationship) giving rise to the assumption of responsibility held to exist in* ***Nocton****`s case does not depend on any mutual dealing between A and B, let alone on any relationship akin to contract. Although such factors may be present, equity imposes the obligation because A has assumed to act in B`s affairs. ...*

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46 Later at p 714b:

> *... What is important is not that A knows that B is consciously relying on A, but A knows that B`s economic well being is dependent upon A`s careful conduct of B`s affairs. ...*

47 Then at p 714h:

> *... Therefore, although reliance by the plaintiff is an essential ingredient in a case based on negligent misstatement or advice, it does not follow that in all cases based on negligent action or inaction by the defendant it is necessary in order to demonstrate a special relationship that the plaintiff has in fact relied on the defendant or the defendant has foreseen such reliance. If in such a case careless conduct can be foreseen as likely to cause and does in fact cause damage to the plaintiff that should be sufficient to found liability.*

48 Dealing with the right of an intended beneficiary with whom the solicitor never had any communication or contact with, Lord Browne-Wilkinson had this to say (p 717d-h):

> *Has the intended beneficiary a cause of action based on breach of a duty of care owed by the solicitor to the beneficiary? The answer to that question is dependent upon whether there is a special relationship between the solicitor and the intended beneficiary to which the law attaches a duty of care. In my judgment the case does not fall within either of the two categories of special relationships so far recognised. There is no fiduciary duty owed by the solicitor to the intended beneficiary. Although the solicitor has assumed to act in a matter closely touching the economic well-being of the intended beneficiary, the intended beneficiary will often be ignorant of that fact and cannot therefore have relied upon the solicitor.*

49 However, it is clear that the law in this area has not ossified. Both Viscount Haldane LC (in the passage in ***Nocton v Lord Ashburton*** [1914] AC 932 at p 948, [1914-15] All ER Rep 45 at p 50 I have quoted) and Lord Devlin (in ***Hedley Byrne v Heller*** [1963] 2 All ER 575 at p 611, [1964] AC 465 at pp 530-531) envisage that there might be other sets of circumstances in which it would be appropriate to find a special relationship giving rise to a duty of care.

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In ***Caparo Industries plc v Dickman*** [1990] 1 All ER 568 at p 574, [1990] 2 AC 605 at p 618 Lord Bridge, quoting from Brennan J in ***Sutherland Shire Council v Heyman*** (1985) 60 ALR 1 at pp 43-44, recognised that ***the law will develop novel categories of negligence `incrementally and by analogy with established categories`. In my judgment, this is a case where such development should take place since there is a close analogy with existing categories of special relationship giving rise to a duty of care to prevent economic loss.*** [Emphasis added.]

50 Mr Shanmugam submitted that the speeches in ***White v Jones*** afford little comfort to the plaintiffs and in the circumstances of the present case where the plaintiffs had not even remotely retained the services of the defendants, the law as settled in Singapore and elsewhere precludes any inference let alone an imposition of liability in tort against the defendants. In this regard he referred me to a clutch of cases: ***Kamahap Enterprises Ltd v Chu`s Central Market et al; Chu`s Central Market Ltd et al, Third Parties*** 64 DLR (4th) 167, ***Hardware Services Pty Ltd v Primac Association Ltd*** [1988] 1 Qd R 393, ***Swiss Singapore Overseas Enterprise Pte Ltd v Horng Chang Enterprise Pte Ltd & Ors*** [1993] 2 SLR 478 , ***Morgan Crucible Co plc v Hill Samuel Bank Ltd & Ors*** [1990] 3 All ER 330 and ***Ikumene Singapore Pte Ltd & Anor v Leong Chee Leng (practising under the style of Elizabeth Leong & Co)*** [1993] 3 SLR 24.

51 An underlying principle which seemed to emerge from all these cases is that for there to be a duty of care owing by one person to another, outside contract or fiduciary relationship, there must be a degree of proximity or special relationship between the two persons (see ***Ikumene Singapore Pte Ltd*** , supra).

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52 Reverting to the pleaded facts, whichever way one looks at it, the degree of proximity between the plaintiffs and the defendants is such that the relationship between the parties is marked only by the extreme distance between them. The plaintiffs` self-confessed inaction for a prolonged period after the remittance of the funds does not support their counsel`s contention that the plaintiffs did, from the outset, contemplate bringing about reciprocal obligations characterised by mutual rights and duties between the parties. The contention that the plaintiffs expected to be billed and that they expected due care and advice is plainly absurd.

53 I next considered whether there are any other plausible causes of action open to the plaintiffs. Mr Shanmugam submitted that the plaintiffs` only recourse, if any, might have been under the head `money had and received`. However, this cause of action is again unavailable to the plaintiffs since it is common ground that at the time of the commencement of this action, moneys had already been paid over to the third party.

54 The law in this regard as succinctly summarised by the learned authors of ***The Law of Restitution*** (Lord Goff of Chieveley and Gareth Jones) (3rd Ed) at p 707 is that: an agent (including a banker, receiver, solicitor, churchwarden, parish officer, excise officer, sheriff or collecting bank) who has received money on his principal`s behalf may, if the money was not due, be liable to refund it. But if the agent before learning of the claim, has paid it over to his principal or does something equivalent thereto or otherwise has altered his position in relation to his principal on the faith of the payment, he will have a good defence to the claim and the claimant will have to sue the principal.

55 It is instructive at this stage to refer to a decision by the English Court of Appeal in ***Ellis v Goulton & Anor*** [1893] 1 QB 350. The facts and the ratio

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decidendi of the case as appear in the judgment of Lord Esher MR at pp 351 and 352 are as follows. The defendant Goulton had real property to sell, and put it up to auction; and the other defendant, Jackson, who was his solicitor, managed the putting up of the property for sale, and was the intermediary between the vendor and the vendees. There were conditions of sale to be observed by the purchasers, and one of them was that a purchaser should pay a deposit. In some cases, such a deposit is paid to the auctioneer; and it has been held that, in such a case, the auctioneer receives the deposit on behalf of both vendor and purchaser, to hand it over to one or the other, according to the event, and is, in fact, in the position of a stakeholder. In this case, the condition was to pay the deposit to the solicitor Jackson, as agent for and on account of the vendor; so that by the very terms of the condition the vendee was to pay the money, not to a person who could be agent for him, but to the vendor`s agent, who was to receive it for his principal. The plaintiff, who purchased part of the property, accordingly paid the deposit to Jackson, and got from him a receipt, in which he purported to receive the money as agent for the vendor. Subsequently, the vendor failed to make out a title to the property, so that as between him and the purchaser the latter became entitled to have the deposit paid back to him. He sued Jackson, who never had any relationship with him as his agent, to recover the deposit from Jackson.

56 Lord Esher in allowing the appeal and entering judgment for the defendant observed at p 352:

> *... In the first place, it cannot be said that* ***Jackson was in any respect trustee for the plaintiff; there was nothing in the circumstances to raise any trust. There was no relation of principal and agent,*** *and no bailment as between the plaintiff and Jackson; and* ***I have asked in vain for any authority to shew that there was any fiduciary relation between these parties. The cases cited draw the distinction between a stakeholder and an agent for one of the parties; the former is the agent of both, but the latter is the agent of one only,***

> *and responsible only to that one. The question of following the money has nothing to do with the decision of this case, for it can only arise where there is the fiduciary relation, which does not exist here. [Emphasis added.]*

57 Lord Bowen and AL Smith LJJ who agreed with Lord Esher, opined that moneys so received by the solicitor under the circumstances outlined, did not create any fiduciary relationship between the payer and the recipient of the money.

58 Stripped of all redundant phraseology, the gravamen of the plaintiffs` case as encapsulated in paras 16B(i) and 20(ii) of the statement of claim is that the defendants ought not to have released the moneys to their third party clients without instructions from the payer-plaintiffs.

59 Reverting to ***White v Jones*** on which much reliance was placed by Mr Ponniah, it should be remembered that the decision therein is predicated upon a special relationship discerned by their Lordships within the ambit of responsibilities expressly undertaken by the solicitor to his client with specific mention of a benefit to the intended beneficiary. As such, Lord Browne-Wilkinson held in that case (at p 717j) that: `the solicitor by accepting the instructions has entered upon, and therefore assumed responsibility for, the task of procuring the execution of a skilfully drawn will knowing that the beneficiary is wholly dependent upon his carefully carrying out his function.` Consequently, the majority opinion favoured a novel category of negligence, incrementally and by analogy with established categories (p 717g-h).

60 Lord Keith and Lord Mustill however, in their dissenting opinions, clearly distanced themselves from this `incremental approach`. Lord Mustill has this to say: `The purpose of the courts when recognising tortious acts and their consequences is to compensate those plaintiffs who suffer actionable breaches

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of duty not to act as second line disciplinary tribunals, imposing punishment in the shape of damages.`

61 The incremental approach and the duty of care for which Mr Ponniah contends cannot be extended to the present fact situation. There are no averments in the pleadings which indicate that the defendants knew, as was in ***White v Jones*** , that the plaintiffs were dependant upon the defendants carrying out any allotted task or assigned function. It is the plaintiffs` averment in para 5 of the statement of claim that after remitting the funds to the defendants, they remained silent without even bothering to know about the disposition of the funds. This silence and inaction led me inexorably to the conclusion that they did not at any time expect any duty to be undertaken for their benefit by the defendants. In my view, they used the defendants` clients` account only as a conduit to transfer funds to the Vanuatu parties. Based on the principles enunciated in ***Ellis v Goulton*** and the dictum of Lord Goff in ***White v Jones*** (at p 701g) ie, ` ***the general rule today is that, subject to his duties to the court and the professional duties imposed upon his profession, a solicitor when acting for his client owes no duty to third parties*** `, I held that the statement of claim did not disclose a reasonable cause of action and that the alleged breach of duty was an argument without any legal foundation and an enterprise in futility.

62 For the sake of completeness, I must also deal with the next contention raised by Mr Shanmugam that this action was in any event frivolous and vexatious having regard to the conduct of the plaintiffs and sequence of events. Mr Shanmugam urged the court to view all the documents included in the court file to arrive at a just conclusion. He submitted that the application by the defendants was not limited only to the point concerning `reasonable cause of action` but also to the question whether the action in the circumstances outlined

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by the plaintiffs and as contained in the court documents, amounted to being frivolous or vexatious under O 18 r 19(1)(b) of the RSC.

63 In this context there is an affidavit filed on behalf of the plaintiffs by one of their solicitors, Miss Liew May Cheng, on 25 November 1994 to resist the defendants` application for further and better particulars. In this affidavit the plaintiffs` solicitors make reference to three letters: (a) a letter dated 26 May 1994 from Tan Lee & Partners (the then solicitors for Mr Tiang) to the defendants, (b) a letter dated 22 September 1994 from Wong & Lim, the plaintiffs` present solicitors, to the defendants and (c) a reply dated 5 October 1994 from the defendants. The texts of the first two letters have been reproduced earlier in these grounds.

64 The letter from M/s Tan Lee & Partners label the funds remitted as `earnest money` pursuant to an agreement signed with the third party.

65 Earnest money which is sometimes called `down payment` is defined in ***Black`s Law Dictionary*** (6th Ed) in the following terms:

> *A sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract. Normally such earnest money is applied against the purchase price. Often the contract provides for forfeiture of this sum if the buyer defaults. A deposit of part payment of purchase price on sale to be consummated in future.* ***Bishop Ryan High School v Lindberg****, ND, 370 NW 2d 726, 728. Import of term in real estate contract is that when comparatively small sum is paid down, it is an assurance that party is in earnest and good faith and that if his being in earnest and good faith fails, it will be forfeited.* ***Mortenson v Financial Growth, Inc****, 23 Utah 2d 54, 456 P 2d 181, 184. See also Binder* ***Down Payment****.*

66 There is no suggestion in any of these demand letters that the plaintiffs ever stipulated that this earnest money or downpayment should be retained by the defendants as stakeholders or for any given length of time. Worse still, the

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plaintiffs by their own admission remained silent and did not make any contact with the defendants until the said letter of 26 May 1994 - nearly nine months later. Such a long stupor and indifferent resignation on the part of the plaintiffs, in my opinion, tend to oppugn against and undermine their much belated assertion that they expected the defendants to obtain their approval prior to the release of the funds.

67 In my view, the facts pleaded bring this case on par, in frivolity and in vexatiousness, with the fact situation dealt with by Yong Pung How CJ in ***Goh Koon Suan*** (supra). The expression `frivolous or vexatious` includes proceedings which are an abuse of the process of court as held by the English Court of Appeal in ***Ashmore v British Coal Corporation*** [1990] 2 All ER 981 (CA). Having regard to the manner in which the action was proceeded and the pleadings presented, to put this case forward for hearing, to my mind, would be an abuse of the process of court. In my view this is a plain and obvious case where the summary procedure provided under O 18 r 19 should be invoked. The allegations contained in the statement of claim do not support the view that there is a cause of action with any prospect of success. The plaintiffs would have to look elsewhere, ie to the Vanuatu parties for their relief and not to the defendants. The appeal therefore fails and is dismissed with costs.

68 Appeal dismissed.

MPH Rubin J

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James L Ponniah and Kenny Khoo (Wong & Lim) for the plaintiffs/appellants
Michael Hwang, K Shanmugam and Foo Maw Shen (Allen & Gledhill) for the defendants/respondents

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