IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 25

CA 269/1998

Between

Lian Soon Construction Pte Ltd

… Plaintiff

And

Guan Qian Realty Pte Ltd

… Defendant

GROUNDS OF DECISION

Civil Procedure — Appeals; Civil Procedure — Appeals

Version No 1: 20 Nov 2026 (00:35 hrs)

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Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd

[1999] SGCA 25

CA 269/1998
Karthigesu JA; L P Thean JA
05 April 1999

Judgment:

KARTHIGESU JA

(delivering the grounds of judgment of the court): This appeal arose from the two orders made by Lai Kew Chai J on 2 November 1998, namely, (i) allowing the respondents to file an additional affidavit for the purposes of the respondents` appeal to the judge-in-chambers against the judgment obtained by the appellants on 16 October 1998 and (ii) ordering a stay of execution of that judgment pending the disposal of the respondents` appeal.

2. ***The facts***

The appellants were the main contractors engaged by the respondents for a building project (the erection of a block of ten-storey residential apartments) at Kim Yam Road. The main contract signed between the parties on 18 July 1996 incorporated the Standard Form of Articles and Conditions of Building Contract (Lump Sum) (4th Ed) published by the Singapore Institute of Architects (the `SIA Conditions`).

3.Pursuant to the main contract, the appellants were to complete the main building works by 25 August 1997. During the course of the works, the architects issued Interim Certificates Nos 1 to 17. The appellants were paid a sum of $3,061,000.54 in respect of Interim Certificates Nos 1 to 10 only. The last payment in respect of Interim Certificate No 10 was received by the appellants on 22 January 1998. Interim Certificates Nos 18, 19 and 20 were later issued but these are not in issue here for they are the subject of separate proceedings commenced by the appellants.

4.By a letter dated 19 August 1998, the appellants` solicitors sent the respondents a letter of demand. On 24 August 1998, the appellants commenced proceedings against the respondents for non-payment of Interim Certificates Nos 11-17. On 7 September 1998, the appellants filed an application for summary judgment for the sum of $3,174,747.92 and interest, and the application was fixed for hearing on 16 October 1998. By a letter dated 8 September 1998, the appellants terminated the contract with the respondents. A joint inspection of the site was carried out on 30 September 1998 and by a letter dated 2 October 1998, the appellants informed the respondents that they were handing over the site to them. The respondents replied by letter dated 5 October 1998 to say that they had taken back possession of the site without prejudice to their contractual rights.

5.On 13 October 1998, the architects issued delay certificates for the main building and sub-station works. The architects computed the total liquidated and ascertained damages for the delay in the main building works at $3,270,000. The respondents filed two affidavits on 14 October 1998 and another on 15 October 1998 for the summary judgment hearing.

Version No 1: 20 Nov 2026 (00:35 hrs)

6.At the hearing on 16 October 1998, the learned deputy registrar gave final judgment for $2,212,435.63, interest and costs against the respondents. The sum allowed by the deputy registrar represented the sums under Interim Certificates Nos 11 to 17, after adjustments for arithmetical errors and deductions for GST and amounts previously paid to the appellants` subcontractors. No deduction was made in respect of liquidated and ascertained damages. By a letter dated 16 October 1998, that is to say on the same day the appellants got summary judgment, the appellants` solicitors served a statutory notice pursuant to s 254 of the Companies Act (Cap 50) and threatened to present a winding up petition against the respondents if they failed to pay the judgment debt within 21 days, ie by 6 November 1998.

7.On 20 October 1998, the respondents filed an appeal to the judge-in-chambers against the decision of the deputy registrar and the appeal was fixed to be heard on 17 November 1998. On 26 October 1998 the appellants obtained a garnishee order in respect of debts due or accruing due from Malayan Banking Berhad to the respondents. The show cause hearing has been adjourned pending the hearing of this appeal. On 28 October 1998, the respondents filed a summons-in-chambers for orders that they be at liberty to file an additional affidavit for the purpose of the appeal to the judge-in-chambers and further, that the execution of the summary judgment be stayed pending the respondents` appeal and that the costs of the respondents` application be costs in the appeal.

8.The respondents` application was heard by Lai Kew Chai J on 2 November 1998, and his honour made an order in terms of the respondents` application and fixed the costs of the application at $2,000.

9.On 6 November 1998, the appellants appealed against the decision of Lai Kew Chai J. Pursuant to the appellants` request, the respondents agreed that the

Version No 1: 20 Nov 2026 (00:35 hrs)

registrar`s appeal fixed for 17 November 1998 be adjourned to a date to be fixed after the outcome of this present appeal.

10. ***The decision below***

On the issue of the admission of fresh evidence, Lai Kew Chai J held that a distinction had to be drawn between the admission of fresh evidence by the judge-in-chambers sitting on appeals from the registrar and the Court of Appeal. A lower threshold was imposed for the former, and a judge-in-chambers could admit fresh evidence, even in the absence of special reasons, so long as the materiality of the fresh evidence was important, even though it was not conclusive.

11.The learned judge was mindful that an appeal did not operate as a stay of execution and that the likelihood of success was not by itself a sufficient ground for a stay. However, he was persuaded that there was a real risk that the repayment by the appellants upon a successful appeal would be seriously in doubt unless execution on the judgment was stayed. Further, he felt that there was a strong counterclaim which could overtop the judgment debt.

12. ***The appeal***

There were two issues in this appeal. Firstly, whether the learned judge had erred in the exercise of his discretion in granting a stay of execution on the summary judgment. Secondly, the principles governing the exercise of a judge`s discretion in determining whether leave should be given for further evidence to be admitted on an appeal against summary judgment from the registrar to the judge-in-chambers, and whether the learned judge had erred in the exercise of his discretion in this instance. A third question also arose. It was whether the

Version No 1: 20 Nov 2026 (00:35 hrs)

learned judge had erred in the exercise of his discretion in ordering costs of the respondents` application which he fixed at $2,000 to be costs in the appeal.

13. ***Stay of execution pending appeal***

The rule of thumb is that an appeal does not operate as a stay of execution. Regarding appeals from decisions of the registrar to the judge-in-chambers O 56 r 1(4) provides:

> *Except so far as the Court may otherwise direct, an appeal under this Rule shall not operate as a stay of proceedings in which the appeal is brought.*

Also, s 41 of the Supreme Court of Judicature Act (Cap 322) states:

> *An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.*

14.The position in Singapore was succinctly laid down by Yong Pung How CJ in **Lee Sian Hee v Oh Keng Soon** [1992] 1 SLR 77 at p 78H:

> *While the court has power to grant a stay, and this is entirely in the discretion of the court, the discretion must be exercised in accordance with well established principles (* ***Lee Kuan Yew v JB Jeyarenam*** *[1990] SLR 740 [1991] 1 MLJ 83). First, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which prima facie he is entitled, pending an appeal (* ***The Annot Lyle*** *[1886] 1 PD 114 at p 116). However, when a party is exercising his undoubted right of appeal, the court ought to see that the appeal, if successful, is not nugatory (* ***Wilson v Church (No 2)*** *[1879] 12 Ch D 454 at pp 458-59). Thus, a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting them back, if the appeal succeeds (* ***Atkins v Great Western Rly Co*** *[1886] 2 TLR 400).*

Then at p 80:

> *... In the affidavit filed, there are no indications of special circumstances other than the alleged likelihood of success in the appeal. ... the likelihood of success is not by itself sufficient, even in the context of an appeal against a summary judgment. The applicant has also contended in the affidavit that he has made an application to adduce further evidence. In our opinion, he appears to have many more steps to take to get his appeal off the ground. If a bald assertion of success is adequate, then a stay would be granted in every case, for every appellant must expect that his appeal will succeed (* ***Atkins v Great Eastern Rly Co****). This is quite contrary to the Supreme Court of Judicature Act, the Rules of the Supreme Court, and to established case law.*

15.The appellants` counsel asserted that the respondents` appeal against summary judgment was devoid of merit and the respondents had not shown that there was no reasonable probability of recovering the judgment debt in the event of a successful appeal. These assertions will now be discussed in turn.

16. ***Was the respondents` appeal against summary judgment devoid of merit?***

The appellants claimed for certified sums due under the interim certificates issued under the SIA form of contract. At the summary judgment hearing, the respondents contended that they were entitled to set-off liquidated damages against the certified amounts in the interim certificates. For this, the respondents relied on two delay certificates relating to the main building contract and sub-station works issued by the architect on 13 October 1998, three days before the hearing of the summary judgment application on 16 October 1998. In this present appeal, the respondents relied only on the delay certificate issued with respect to the main building contract as the liquidated damages claimed by the respondents therein ($3,270,000) exceeded the sum claimed by the appellants ($2,212,435.63, interest and costs). The liquidated damages claimed in respect of the sub-station works amounted to $209,000.

Version No 1: 20 Nov 2026 (00:35 hrs)

17.The appellants raised three main arguments. Firstly, they questioned the validity of the delay certificate. Below is an extract from Robinson and Lavers ***Construction Law in Singapore and Malaysia*** (2nd Ed, 1996) p 354, regarding the position with respect to set-off:

> *The SIA80-88 form alters substantially the common law position as regards the right of set-off and counterclaim available to the employer in relation to claims by the contractor for payment under payment certificates. It introduces the concept of `temporary finality` for the architect`s certificates, rulings and decisions. Under this concept, the architect`s certificates and decisions are temporarily binding as between employer and the contractor until such time as a court or arbitrator delivers final judgment or award in any dispute raised in relation thereto. In the meantime, either party may enforce the certificate or ruling as the case may be by summary judgment or interim award. It is noted that the architect`s certificates and decisions are not final and conclusive but may ultimately be set aside or varied by the court or arbitrator.*
>
> *Accordingly, payment certificates must be honoured by the employer without any set off or counterclaim except for such deductions as are expressly allowed under the Conditions of Contract. There are express provisions allowing the architect to certify or rule that the employer is allowed to deduct costs or damages incurred by him from money due to the contractor. Examples of such provisions are found in cl 1(7) (Certificate of Cost of Other Contractor`s Work) and cl 24(2) (Delay Certificates).Hence, where the SIA conditions applied, the employer must immediately pay the amounts due under the payment certificates notwithstanding any challenges to its validity or correctness, unless deductions are expressly sanctioned by the architect in his certificate, decision or ruling, in accordance with the conditions.*

18.Clause 24 of the SIA Conditions which deals with delay in completion and liquidated damages reads:

> (1) As soon as the latest date for completion of the Works pursuant to cl 22 [Time for Completion] of the Conditions has passed, then if at the said date there are no other matters entitling the Contractor to an extension of time and the Works nevertheless remain incomplete, the Architect shall issue a certificate setting out the Contract Completion Date (if

Version No 1: 20 Nov 2026 (00:35 hrs)

> necessary modified or re-calculated under cl 10(1) of these Conditions); the total period of extension of time (if any); the consequential extended Contract Completion Date (if any); and certifying that the Contractor is in default in not having completed the Works by the stated Completion Date or Extended Completion Date (as the case may be). Such certificate shall be issued to the Employer with a copy to the Contractor, and is hereinafter called a `Delay Certificate`.

Clause 24(2) provides that an employer may deduct liquidated damages from any moneys due under the contract upon receipt of the delay certificate.

19.The appellants said that the delay certificate (main building contract) was invalid because the extended completion date was stated as 8 September 1998 when it should have been 16 October 1997. Hence, the architect wrongly certified that the appellants had defaulted in completing the works on 8 September 1998 as opposed to 16 October 1997. Further, the Delay Certificate was issued only on 13 October 1998, more than a year after the latest date for completion, ie 16 October 1997. Clause 24(1) states that a valid delay certificate had to be issued `As soon as the latest date for completion of the Works ... has passed`.

20.The appellants` former challenge to the validity of the delay certificate was technical, and strict compliance with the requirements of cl 24(1) was advocated. The delay certificate set out the Contract Completion Date (25 August 1997) and the extension of time by 52 days, and that no grounds existed for any further extension of time to the main contractor. Although the extended completion date was wrongly set out, it did not appear to have caused any confusion to the appellants.

21.With respect to the one year delay in issuance of the delay certificate, in the respondents` application before the judge-in-chambers, they sought to adduce

Version No 1: 20 Nov 2026 (00:35 hrs)

further evidence from the architect which explained the delay. In essence, the architect stated that the appellants had failed to submit all the necessary information for the evaluation of extension of time. Further, the appellants had written to the architect for extension of time on 22 August 1997, 24 January 1998 and 11 June 1998. The appellants had also failed to comply with other contractual requirements relevant to the evaluation of extension of time. At a meeting between the appellants and the architect on 4 August 1998, the appellants confirmed various matters and submitted information necessary for the evaluation.

22.The admission of the architect`s affidavit was challenged by the appellants (this issue is discussed at [para ] 35 to 42). This evidence was not before the deputy registrar hearing the application for summary judgment, and it was clear that it was crucial to the respondents` case.

23.Secondly, the appellants argued a lack of bona fides in the issuance of the delay certificate. They highlighted the fact that the delay certificate was issued after they commenced legal proceedings, beyond the time limit prescribed under O 14 r 2 for filing an affidavit in response, and just three days before the hearing of the summary judgment.

24.As such, it has to be determined in the present circumstances whether the architect exercised his function as a certifier in good faith, even though he was appointed by the respondents. The respondents explained that the issuance of a delay certificate was a serious matter entailing grave consequences, therefore the architect chose to wait for the appellants to substantiate their claim for extension of time. Further, the respondents asserted that their relationship with the appellants remained good after August 1998 although the appellants had only completed 33% of the works. On the evidence, we found that the appellants

Version No 1: 20 Nov 2026 (00:35 hrs)

had not made out a clear case of lack of bona fides on the part of the architects in the issuance of the delay certificate.

25.Thirdly, the appellants claimed that the architect was functus officio and had no power to issue the delay certificate on 13 October 1998 once the main contract had been terminated on 8 September 1998. The respondents` raised pertinent arguments to refute this.

26.Assessing the three arguments canvassed, we were of the opinion that the respondents` appeal against summary judgment was not entirely devoid of merit.

27. ***Had the respondents shown no reasonable probability of recovering moneys paid if the appeal was successful?***

The appellants contended that the learned judge had drawn the wrong inferences from the accounts submitted by the appellants. Counsel for the appellants argued that the 1997 accounts were of no probative value with respect to the appellants` ability to pay in October 1998 and such a burden lay with the respondents. The relevant extract from Lai Kew Chai J`s grounds of judgement read:

> 7 The [respondents] further relied on the real risk that if the execution on the judgment was not stayed, any successful appeal by them would be rendered nugatory. There was a serious risk that the [appellants] would not be able to repay. They referred to the latest accounts of the [appellants]. I was taken through the [appellants`] accounts for year ended 31 December 1997. The fixed assets of the company were valued at $6m in round figures. The company was worth $3.5m. However, the current assets comprised of trade debtors amounting to $7.2m. In the light of the current recession, it was fair to ask how much of it would be collectible. It was noted that the directors of the [appellants] were owing the company $4.2m.

Version No 1: 20 Nov 2026 (00:35 hrs)

> Trade creditors totalled $5.2m. All told, the sum of $19m would be at stake. The company incurred a lost (sic) of $759,347 in 1997. Its landed asset, though booked at $4.85m, could have fallen significantly, which fall would be in line with current trend in property prices.

28.Firstly, the appellants claimed that the learned judge erred in questioning the recoverability of $7.2m from trade debtors as from Note 5 to the accounts, provisions for doubtful debts of $374,223 had been made. However, the fact was that even with the provision, a debt of almost $7m remained. Also, it was fair of Lai Kew Chai J to take account of the realities of the current economic situation.

29.Secondly, the appellants said that there was no indication of the directors being unable to repay the $4.2m owing to the company. Neither was there any indication of the directors being able to repay that sum. Further, Note 7 to the accounts stated:

> *The amounts owing by the directors are unsecured and interest free, with no fixed terms of repayment.*

30.Thirdly, the appellants claimed that the learned judge was wrong in observing that `the company incurred a loss of $759,347.00 in 1997`, for the loss after taxation was only $169,433. The appellants claim was baseless, for the net current liabilities as reflected by the balance sheet was $759,347, whereas the loss after taxation reflected by the profit and loss account was $169,433. A balance sheet was different in nature compared to a profit and loss statement. It showed the current financial status of the company at a particular date rather than reporting the activities and changes in a certain period. The net current liabilities reflected the ability of the company to repay its debts in the short term.

Version No 1: 20 Nov 2026 (00:35 hrs)

31.Fourthly, the appellants contended that the learned judge`s observation that the value of the landed assets booked at $4.85m could have fallen in line with current trend was purely speculative. Even so, Note 10 read:

> *The bank overdraft and term loan are secured on the company`s leasehold and freehold properties with a total net book value of $4,856,287 as at 31 December 1997 and by the personal guarantees of the directors.*

The bank overdraft as at 31 December 1997 stood at $2,137,688.

32.The appellants further urged that irreparable prejudice would be suffered should the stay be granted, for they were unsecured creditors and there existed other claims against the respondents. Among them were: (a) the sum of $385,835.36 for credit facilities granted by Sime Bank Bhd; (b) the sum of $23,656,975 for credit facilities granted by Tat Lee Finance Ltd; and (c) judgments in Suits 1421 of 1998 and 1422 of 1998 against the respondents for $358,571.93, interest and costs and $569, 486.68, interest and costs respectively obtained by Sea-Union Plasterglass Ceiling Industry and Sea-Union Industries Pte Ltd.

33.On the other hand, after the appellants obtained judgment against the respondents on 16 October 1998, they immediately served a statutory demand to wind up the respondents. The 21-day notice period under the statutory demand was due to expire on 6 November 1998. The appeal to the judge-in-chambers was to be heard on 17 November 1998, while the hearing for the stay application was on 2 November 1998. There was a short period of time between the hearing of the appeal and the expiry of the statutory demand. The respondents said that if the appellants had proceeded to wind them up after the expiry of the statutory demand, they would have suffered grave consequences. From the second affidavit filed by the respondents, they said that the project

Version No 1: 20 Nov 2026 (00:35 hrs)

would grind to a halt with consequential losses to them. The respondents were also involved in other projects and a winding up petition would have created disputes with all the purchasers of the condominium units.

34.It is trite law that an appeal against the exercise of a judge`s discretion will not be entertained unless it be shown that he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, or that he took account of irrelevant matters, or the decision reached was `outside the generous ambit within which a reasonable disagreement is possible`. The arguments which the parties now raised were clearly considered by Lai Kew Chai J. The learned judge was persuaded that unless a stay was granted, there was a real risk that a successful appeal would be rendered nugatory. The learned judge was perfectly entitled to base his decision on an analysis of the appellants` accounts for 1997. Although the respondents bore the burden of proving that the execution should be stayed, the fact remained that the accounts were those of the appellants. It was thus the appellants who must adduce more concrete evidence, say positive figures for 1998, if they wished to weaken the respondents` position. In the circumstances, we held that the decision of Lai Kew Chai J should be upheld for the respondents had clearly shown that there was a grave risk that any moneys paid to the appellants would have been irrecoverable, thus rendering a successful appeal by the respondents nugatory. Further, the respondents had a strong claim of set-off against the sums due to the appellants.

35. ***Admission of further evidence on appeal against summary judgment from the registrar to a judge in chambers***

The appellants contended that Lai Kew Chai J erred in failing to apply the higher ***Ladd v Marshall*** test in determining whether to allow the admission of the

Version No 1: 20 Nov 2026 (00:35 hrs)

architect`s affidavit. They argued that there had been a hearing on the merits of the summary judgment before the deputy registrar, hence special circumstances had to be shown before the affidavit was admissible before the judge-in-chambers. They relied on the decision in **Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Pte Ltd** [1992] 1 SLR 884 . The practice in the UK was to readily allow fresh evidence on appeal to a judge-in-chambers. The appellants argued that the position in the UK should no longer be followed since as of August 1991, the position with respect to the procedure for filing affidavits under O 14 r 2 was amended in Singapore. A strict timetable was now prescribed by the Rules of Court, and there was no such equivalent in UK. The appellants also cited the position in Malaysia, where O 14 r 2 was similar to the UK provision, yet O 56 r 3A incorporated the ***Ladd v Marshall*** test where fresh evidence was adduced before a judge-in-chambers.

36.The Rules of the Supreme Court (Amendment No 2) Rules 1991 (S 281/91) revamped the application process by introducing a newly structured time-table for the filing and service of documents and new requirements in relation to the affidavit in support of the application. The effect of the amendments have resulted in significant differences with the UK rules. The rationale behind summary judgments was that the plaintiff in respect of his claim, or the defendant in respect of his counterclaim, had such a strong case that there were no real issues to be determined at trial. In these circumstances, it would be unfair to compel the plaintiff or defendant to wait until the trial before his unchallengeable rights were recognised and enforced. In the absence of a summary procedure, the person defending the claim might exploit the litigation process and thereby delay the inevitable judgment against him as long as possible: **Jacobs v Booth`s Distillery Co** [1901] 85 LT 262; **Thompson v Marshall** [1879] 41 LT 720. Summary judgment is in fact, expedited relief.

Version No 1: 20 Nov 2026 (00:35 hrs)

With the new O 14 r 2, there is now a fixed time-table governing the filing and service of affidavits, and the process had to come to an end within 38 days of the filing of the application for summary judgment, unless the court otherwise gave leave. This new process, by which time started to run from the filing of the application, as opposed to the position under the former rules which geared the time limit backwards from the date of the hearing (`4 clear days before the return day`), ensured that the proceedings were expedited and delays minimised.

37.The position on evidence on appeals from summary judgment is found in the ***Supreme Court Practice 1999*** at 14/4/45:

> *The evidence on an appeal to the Judge in Chambers should ordinarily be the same as it was before the Master or District Judge; but since such an appeal is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge treats the matter afresh as though it came before him for the first time, save that the party appealing has the right as well as the obligation to open the appeal, it would seem that the judge in his discretion is free to admit fresh evidence, and he frequently does so in the absence of special reasons (see* ***Evans v Bartlam*** *[1937] AC 473 at 480;* ***Krakauer v Katz*** *[1954] 1 WLR 278[1954] 1 All ER 244, CA)*
>
> *On the other hand, the Court of Appeal does not have an unfettered discretion to receive further evidence on hearing an appeal against a summary judgment in favour of a plaintiff in proceedings under O 14 or O 86 and it might do so only on `special grounds` as provided by O 59 r 10(2) within the limits laid down, per Denning LJ in Ladd v Marshall ...*

Pinsler, in ***Singapore Court Practice 1999*** , agrees that this distinction should be drawn. The rationale behind the different thresholds employed in allowing evidence before a judge-in-chambers as compared to the Court of Appeal may be understood from an extract from the ***Supreme Court Practice 1999*** , at para 58/1/3:

> *An appeal from the Master or District Judge to the Judge in Chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge*

Version No 1: 20 Nov 2026 (00:35 hrs)

> *treats the matter as though it came before him for the first time, save that the party appealing, even though the original application was not by him but against him, has the right as well as the obligation to open the appeal. The Judge `will of course give the weight it deserves to the previous decision of the Master; but he is in no way bound by it` (per Lord Atkin in* ***Evans v Bartlam*** *[1937] AC 473 at 478). The Judge in Chambers is in no way fettered by the previous exercise of the Master`s discretion, and on appeal from the Judge in Chambers, the Court of Appeal will treat the substantial discretion as that of the Judge, and not of the Master (* ***Evans v Bartlam****, above;* ***Cooper v Cooper*** *[1936] WN 205; and* ***Cremin v Barjack Properties Ltd*** *[1985] 273 Est Gaz 299, CA).*

An appeal to the Court of Appeal also operates by way of a rehearing. Although it does not mean that witnesses are heard afresh, the court considers the whole of the evidence given below and the whole course of the trial. It is, as a rule, a rehearing on the documents of the evidence. The powers of the Court of Appeal are principally statutory, but supplemented where necessary by its inherent jurisdiction as a superior court of record. With regard to the adduction of fresh evidence before the Court of Appeal, O 57 r 13(2) specifically states that `in the case of an appeal from judgment after trial or hearing of any cause or matter on the merits` further evidence is not to be admitted `except on special grounds`. From the decision in **Langdale v Danby** [1982] 3 All ER 129[1982] 1 WLR 1123, this rule applies to appeals against summary judgment because such a judgment is concerned with triable issues and is therefore based on the merits of the case.

38.The amendments to O 14 r 2 follow the rationale of summary proceedings and seek to expedite relief. Failure to comply strictly with those time limits may lead to an order for costs being made against the defaulting party: O 14 r 2(7). The rationale behind the amendments is distinct from the rationale behind the adduction of fresh evidence before a judge-in-chambers. A judge-in-chambers who hears an appeal from the registrar is entitled to treat the matter as though it

Version No 1: 20 Nov 2026 (00:35 hrs)

came before him for the first time. The judge-in-chambers in effect exercises confirmatory jurisdiction. The judge`s discretion is in no way fettered by the decision below, and he is free to allow the admission of fresh evidence in the absence of contrary reasons. On appeal to the Court of Appeal, case law has established that the Court of Appeal will not interfere with the discretion of the judge unless satisfied that the judge`s discretion has been wrongly exercised. Order 57 rule 13 specifically states the manner in which further evidence may be received. There is no equivalent provision with respect to an appeal to a judge in chambers. The decision in ***Hua Khian Ceramics*** does not support the appellants` contention. There had been a hearing of the application for summary judgment before the registrar, then a hearing before GP Selvam JC (as he then was), at which he gave judgment for the plaintiffs. The defendants then applied to make further arguments before the learned judge, and sought to adduce further evidence at that stage. The learned judge regarded this as an abuse of process and accordingly applied the strict ***Ladd v Marshall*** principles. In the event, he disallowed the application. Lai Kew Chai J was thus correct in drawing a distinction between the admission of fresh evidence before a judge-in-chambers as opposed to the Court of Appeal.

39.In **Shunmugam Jayakumar & Anor v Jeyaretnam JB & Anor** [1997] 2 SLR 172 , GP Selvam J similarly held that an appeal against a decision of the registrar is different from an appeal to the Court of Appeal. The former is in effect a fresh hearing at which the matter is argued afresh. As a matter of convenience counsel may not present full arguments but that does not detract from the true nature of such appeals. This ruling is supported by what Chan Sek Keong J (as he then was) said in **Herbs and Spices Trading Post Pte Ltd v Deo Silver (Pte) Ltd** [1990] SLR 1234 at p 1238; [1991] 2 MLJ 311 at p 313: `... an appeal from the registrar of the High Court to the judge-in-chambers is

Version No 1: 20 Nov 2026 (00:35 hrs)

by way of an actual rehearing of the application and the judge treats the matter afresh as though it came before him for the first time.` This view was affirmed by the Court of Appeal in **Augustine & Anor v Goh Siam Yong** [1992] 1 SLR 767 .

40.In **Chang Ah Lek & Ors v Lim Ah Koon** [1999] 1 SLR 82 , the sums awarded for loss of earnings and loss of earning capacity by the assistant registrar had been varied by a judge-in-chambers. The Court of Appeal held that the judge-in-chambers was perfectly entitled to do so. See [para] 11 where the court said:

> *... when a judge in chambers hears an appeal from registrars the judge rehears the application as if he is sitting at first instance although he will accord the appropriate weight to the registrar`s decision but has complete freedom in the exercise of his own discretion. ...*

41.The appellants further argued that the respondents` attempt to file the affidavit at such a late stage in the proceedings was an abuse of process. They said that the respondents sought to adduce the affidavit to explain the reasons for the delay in the issuance of the delay certificates when in fact they had already given their reasons in the first affidavit filed pursuant to the hearing before the deputy registrar. Further, they alleged that the architect`s explanation was inconsistent with the respondents` earlier position.

42.On a perusal of the two affidavits, there appeared to be no inconsistency in the respondents` explanation. From the earlier affidavit filed, the respondents mentioned that the delay certificates were not issued earlier because the ongoing relationship between the parties was good after 22 August 1997. The certificates were issued after the appellants repudiated the contract on 8 September 1998, and a site inspection carried out on 30 September 1998. In the architect`s affidavit, he elaborated on the difficulties in issuing the delay certificate during

Version No 1: 20 Nov 2026 (00:35 hrs)

that period. Lai Kew Chai J therefore did not err in the exercise of his discretion in admitting the architect`s affidavit.

43. ***Costs of the respondents` application***

The appellants contended that the learned judge erred in ordering costs of the respondents` application to adduce further evidence to be costs in the appeal. In the circumstances, we believed the learned judge meant to order costs in the application rather than in the appeal.

44. ***Conclusion***

It was for all the above reasons that we dismissed this appeal.

Karthigesu JA
L P Thean JA

Christopher Chua and Lee Chau Ee (Drew & Napier) for the appellants
Giam Chin Toon SC and Peter Chow (Wee Swee Teow & Co) for the respondent

Version No 1: 20 Nov 2026 (00:35 hrs)