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SIC College of Business and Technology Pte Ltd
v
Yeo Poh Siah and others

[2016] SGCA 5

Court of Appeal — Civil Appeal No 45 of 2015
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Tay Yong Kwang J
6 November 2015

Evidence — Improperly rejected evidence

Civil procedure — Costs — Security

Civil procedure — Costs — Third party costs

22 January 2016 Judgment reserved.

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

Introduction

1 It is axiomatic that in order to arrive at a fully considered decision based on justice and fairness, the court concerned must have *all* the relevant evidence before it. The present appeal turns on this one fundamental point. Put simply, was *all* the relevant evidence before the judge in the court below? If it was not, then there would have been no way for the judge to have arrived at a *considered* decision simply because he would not have been in receipt of the *full* picture. It would be akin to a viewer focusing on only one part of a canvas instead of the

entire painting. Another analogy would be the old adage that one should not miss the wood for the trees. We hasten to add that this does not imply in the least that the trees are unimportant. After all, without the trees there would be no wood. When, however, one is lost in the midst of the wood and takes only *some* of the trees as representing the entire wood, the overall perspective may be skewed and distorted as a result.

2 With these important general observations in mind, we turn to consider the present case. This is an appeal against the decision of the High Court judge ("the Judge") in *SIC College of Business and Technology Pte Ltd v Yeo Poh Siah and others* [2015] SGHC 133 ("the GD"). The facts of the case are straightforward. However, the issue referred to in the preceding paragraph arises as a result of the manner in which the proceedings unfolded before the Judge in the court below. In essence, the case involved a claim and a counterclaim. The claim was dismissed as the plaintiff ("the Appellant") had failed to provide the requisite security for costs. There has been no appeal against that particular decision. However, the defendants ("the Respondents"), who included the former employees of the Appellant, succeeded in their counterclaim and this is the subject of the present appeal. It is against this backdrop that the complications arose. Whilst the Judge acknowledged (in the GD at [3]; emphasis added) that "a flavour of the allegations brought by the plaintiff [the Appellant, and in relation to *the main claim*] *provides helpful context*", he *refused to consider certain key pieces of evidence with respect to* ***the main claim in the trial of the counterclaim***, ***even though*** ***such evidence might conceivably have been relevant to refute the Respondents' evidence and case in the counterclaim***. The qualification in the aforementioned sentence is of the first importance because whilst any evidence led with respect to the main claim could not possibly have affected the determination of the main claim simply

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because it had already been *dismissed*, this does *not* mean that such evidence was *necessarily irrelevant vis-à-vis* ***the counterclaim***. In point of fact, however, because the Appellant was ***not*** permitted to lead key pieces of evidence *vis-à-vis* its ***main claim***, ***it is unclear (in the present circumstances) whether any such evidence would in fact have refuted the counterclaim – and herein lies the crux of the present appeal*** (as we shall elaborate upon below). In this regard, it ought to be borne in mind that ***both the main claim and the counterclaim were inextricably connected with each other***. Indeed, the Judge himself observed (significantly, in our view), as follows (see the GD at [17]):

> Admittedly, the plaintiff [the Appellant] *was* ***hamstrung*** *to the extent that its case was that the 18 transactions in the ledger was* [*sic*] ***just part of a larger scheme to defraud the plaintiff, but its inability to shed light on the purported bigger picture was a corollary of the failure to provide security for costs for the main claim.*** [emphasis added in italics and bold italics]

3 We proceed to analyse this case more *specifically* by turning, first, to the facts of the case and decision below before rendering our decision.

The facts

Parties to the dispute

4 The Appellant is a company in the private education business. Kannappan s/o Karuppan Chettiar ("KC") was the chairman of the Appellant at the material time. His wife (Cenobia Majella ("CM")) and brother (Subramaniam s/o Karuppan Chettiar) are directors of the Appellant. CM is the Appellant's majority shareholder while TSG Investments Pte Ltd ("TSG") and KC are the other shareholders. At all material times, TSG was controlled by KC and CM.

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5 The first three Respondents were the Appellant's employees at the material time – the first Respondent (Ken Yeo) was a director of the Appellant, the second Respondent (Koo Khee Chong ("Koo")) was the chief financial officer of the Appellant and the third Respondent (Chua Puay Choo Alvinna) was a senior management consultant of the Appellant. They were also the directors of the fourth Respondent, Lincoln Collegiate of Business and Technology Private Limited ("Lincoln College"), a company which was incorporated on 8 January 2009 and which had been contracted to operate the Appellant's business under certain licensing agreements.

Background to the dispute

6 KC and Ken Yeo had known each other since about 1991 when Ken Yeo was KC's personal assistant in the Singapore Institute of Commerce ("SIC"), which was the predecessor of the Appellant. KC lost touch with Ken Yeo sometime in 1992 or 1993 when KC left SIC, and Ken Yeo also later left SIC to set up Auston Business School.

7 Sometime in 2005, Ken Yeo was made an employee of TSG by KC. KC was the executive chairman of TSG, which had acquired SIC in 1999.

8 In 2007, there was a corporate reorganisation and Ken Yeo was appointed the executive director of the Appellant.

9 Between 2009 and 2010 a number of agreements were signed as follows:

(a) The Harbridge Agreement dated 16 January 2009 was an agreement between the Appellant and Lincoln College (which was then known as "Harbridge Holdings Pte Ltd") in which it was agreed that Lincoln College would be allowed to jointly operate a subsidiary of the

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Appellant known as SIC Tampines. Lincoln College agreed to be solely responsible for the operational expenses of SIC Tampines and agreed to pay the Appellant a licence fee. It was Ken Yeo's evidence that it was implied that Lincoln College was entitled to the income of SIC Tampines.

(b) The SICC Agreement dated 9 September 2009 was an agreement between TSG, the Appellant and SIC College Pte Ltd ("SICC") (incorporated by Ken Yeo and with Ken Yeo and Koo as the shareholders) in which SICC was appointed to manage the operations of the Appellant for an initial period of two years in return for SICC paying TSG a monthly fee of $150,000 during the period. Ken Yeo claimed it was obvious to all involved that SICC was entitled to the income of the Appellant while bearing the expenses.

(c) The Mutual Release Agreement ("MRA") dated 11 February 2010 was an agreement between TSG, the Appellant and SICC in which the parties released one another from liability and SICC warranted that the final payment of $150,000 due on 31 December 2009 for licensing fees from Lincoln College to the Appellant would be made.

(d) The Second Harbridge Agreement dated 11 February 2010 was an agreement between TSG and Lincoln College wherein it was agreed that the latter was to manage the business of the Appellant and pay TSG monthly licensing fees and that it would be entitled to claim management fees from TSG, which was defined as the surplus of the Appellant's licensed operation subject to the Appellant being able to accumulate an annual profit of $10,000 and being able to maintain its

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balance sheet as at 1 January 2010 or a net tangible asset of $600,000, whichever is higher.

10 It should be noted that the interpretation of the terms of the clauses in the above agreements was disputed.

11 Cracks in the relationship between KC and Ken Yeo emerged in February 2010 when KC sought arrears of the licensing fee and Ken Yeo wanted to terminate the SICC Agreement. These cracks were exacerbated when Ken Yeo shifted some furniture between the Appellant's premises at Upper Serangoon Road and SICC's premises. Eventually, a compromise was reached, resulting in the conclusion of the MRA and Second Harbridge Agreement.

12 On 10 December 2012, the Appellant and TSG filed a Writ of Summons against the first three Respondents. The Writ and Statement of Claim were subsequently amended for TSG to be removed as a plaintiff and for Lincoln College to be added as a defendant.

13 To summarise, the Appellant's claim – *ie*, the main claim – concerned a number of heads of claim, to the effect that the first three Respondents were parties to a scheme to enrich Lincoln College (*ie*, the fourth Respondent) at the Appellant's expense, and this included (amongst others) claims for a number of alleged unauthorised payments to Lincoln College between 30 October 2009 and 21 October 2010, the alleged misappropriation of funds from the Appellant's students, and the alleged making of fraudulent payments to the Respondents which were fraudulently authorised as personal claims. These alleged unlawful acts were accomplished (at least in part) by the entering of fictitious entries into the Appellant's books.

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14 The Respondent's defence against the aforementioned heads of claim were, besides the denial of the averments, essentially, that under the relevant licensing agreements, Lincoln College (or SICC) was entitled to the Appellant's proceeds less expenses.

15 At a hearing on 18 March 2013 (this was a few days after the original Defence was filed on 12 March 2013), the then-counsel for the Respondents indicated to a Senior Assistant Registrar that he had instructions to apply for security for costs against the Appellant. The Senior Assistant Registrar ordered that the application for security for costs should be made by 28 March 2013. However, no application was made by that date.

16 On 6 December 2013 (almost a year after the original writ was filed), the Defence was amended to institute the counterclaim by Ken Yeo against the Appellant. The counterclaim stated as follows:

> 71. The Defendants aver that at all material times, [Ken Yeo] had been making advances to the [Appellant] on a running account basis to supplement the cashflow of the [Appellant].
>
> 72. The balance owing from the [Appellant] to [Ken Yeo] is $244,844…

The running account, consisting of 18 transactions, is particularised in a table which is set out at [9] of the GD.

17 The Appellant's defence to the counterclaim stated as follows:

> 44. Paragraphs 71 and 72 of the Defence and Counterclaim (Amendment No 3) are wholly denied and [Ken Yeo] is put to strict proof thereof. The [Appellant] avers that there was no need and/or reason for the [Appellant] to receive any cash advances from [Ken Yeo] as it had its own finances to support itself. The [Appellant] avers that [Ken Yeo] had never made any advances to the [Appellant] but instead, used the [Appellant's] accounting books to create fictitious entries.

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18 On 10 July 2014, the Respondents filed Summons No 3367 of 2014 ("SUM 3367") to seek security for costs from the Appellant in the sum of $100,000. This was after timelines had already been set for the filing of affidavits of evidence-in-chief ("AEICs"). The AEICs were to be filed by 25 July 2014. At a hearing on 15 July 2014, the Respondents' counsel stated that the reason for taking out security for costs at that stage was because the Respondents were recently made aware of the fact that the Appellant's former lawyer had yet to be paid.

19 On 12 August 2014, an Assistant Registrar ordered the Appellant to furnish security for costs in the sum of $75,000 by 26 August 2014, and that the proceedings, in so far as they concerned the Appellant's claims, be stayed pending the provision of such security.

20 On 18 August 2014, the parties appeared before the Judge for a pre-trial conference ("PTC"). The Judge emphasised that security for costs must be paid in by 26 August 2014.

21 On 26 August 2014, the Appellant's former counsel, Mr Edmond Pereira ("Mr Pereira"), wrote to inform the court that the Appellant had failed to provide security for costs by the due date, and that his firm would be discharging themselves from acting in the matter.

22 At a PTC on 2 September 2014, Mr Pereira informed an Assistant Registrar that he would be discharging himself and his firm because his fees had not been paid. KC personally informed the Assistant Registrar that he was looking to be represented by a new law firm and that he needed more time to raise the funds for security for costs. At the same time, the Respondents' counsel gave notice to KC that they would, *inter alia*, be seeking personal costs against

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him and CM. In the circumstances, the Assistant Registrar declined to shift the trial and he kept the first two trial dates (9 and 10 September 2014) and vacated the remaining four days of the original six-day trial.

23 On 9 September 2014, the first day of trial, the Judge granted Mr Pereira's application to discharge himself. KC was allowed to conduct the trial as an officer of the Appellant. KC also made an oral application for an extension of time (until 30 September 2014) to furnish security for costs and to vacate the trial, while the Respondents' counsel made an oral application to dismiss the main claim for being in default for the furnishing of security for costs.

24 On 10 September 2014, the Judge dismissed the Appellant's application for extension of time for the furnishing of security for costs and consequently dismissed the main claim. He also formally granted leave to KC to represent the Appellant as an officer of the Appellant under O 1 r 9(2) of the Rules of Court (Cap 322, R 5, 2014 Ed) (pursuant to the Appellant's application in Summons No 4478 of 2014).

The decision below

25 As mentioned at the outset of this judgment, the main claim was dismissed owing to the Appellant's failure to provide security for costs by the 26 August 2014 deadline. As already noted, the Judge rejected KC's request for an extension of time to 30 September 2014 for the furnishing of the requisite security.

26 In so far as the counterclaim was concerned, the Judge referred to a ledger which had been printed out from the Appellant's system listing the

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alleged 18 transactions in the alleged running account showing a balance of $244,844 owing from the Appellant to Ken Yeo ("the Printout"). There were a number of bank receipts that showed certain cash withdrawals from Ken Yeo's and Lincoln College's account. The Judge also considered that the ledger provided by Ken Yeo was substantiated by a document produced by Supramaniam s/o Nasaiah ("Supramaniam"), who was the Appellant's own witness. We shall hereinafter refer to that document as "Supramaniam's Document".

27 While the Judge also referred to the Appellant's asserted entitlement to set off a series of unauthorised payments against Ken Yeo's counterclaim as well as the Appellant's argument that the 18 transactions in the Printout were just part of a larger scheme to defraud the Appellant, the Judge considered that the Appellant was *not* entitled to prove the alleged instances of misappropriation which necessarily pertained to the main claim.

28 The Judge also made a number of other findings as follows:

(a) The sums recorded as originating from Lincoln College were in fact advances by Ken Yeo, which were made by Lincoln College on Ken Yeo's behalf.

(b) The Appellant might have required advances to smoothen its cash flow, even if it had sufficient finances to support itself.

(c) The Printout could be admitted under s 32(1)(*b*) of the Evidence Act (Cap 97, 1997 Rev Ed) as a statement that was made in the course of trade, business, profession or other occupation. Furthermore, s 34 of the Evidence Act stated that entries in account books that are regularly

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kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire. The Judge also found that the Printout was not entirely unreliable.

(d) Ken Yeo had the authority to, and did, make the advances under the auspices of the licensing arrangements pursuant to which Lincoln College and SICC were required to manage the Appellant's business.

(e) An adverse inference was to be drawn against the Appellant for not disclosing bank statements on certain dates when the Appellant was able to do so for others.

29 The Judge then allowed the counterclaim in the sum of $218,000 after excluding four transactions in the Printout as they appeared to be entirely uncorroborated.

30 Finally, the Judge also ordered personal costs against KC and CM, to be borne by them jointly and severally together with the Appellant.

The issues

31 The Appellant appeals against the decision of the judge to allow the counterclaim and order personal costs against KC and CM. There is no appeal against the Judge's decision to dismiss the main claim for the Appellant's default in providing security for costs. The issues that arise are the following:

(a) With respect to the appeal in relation to the counterclaim, the first issue is whether the Judge was correct in determining the scope of the evidence to be considered; and if the Judge had erred in respect of

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the first issue, there is a second issue of whether this caused a substantial wrong, and if it did, what would be the appropriate remedy.

(b) In so far as the appeal against the order of costs is concerned, the issue is what the appropriate costs order should be in the circumstances, in particular, whether third party costs should have been ordered against KC and CM.

The parties' respective arguments

The Appellant's arguments

32 In the Appellant's submission, the Judge had erred in failing to consider facts in issue and evidence which are relevant to the defence to the counterclaim ("the Rejected Evidence"). The Appellant argues that there is a clear link between the defence to the counterclaim and the material facts in the main claim and that this is apparent when the pleadings are read in their totality and in the proper context, such that there is no question of a failure of pleading. It further submits that the Rejected Evidence would have made a difference to the outcome of the trial.

33 The Appellant also contends that Ken Yeo had failed to prove the existence of a "running account", which is clearly different from an argument that each individual advance was a debt in itself. The Judge had merely considered whether each advance was made, and not *why* the advance was made (if indeed they were). Even if there was a running account, it was still necessary for the Judge to consider the transactions in their *totality* and not merely those particular transactions which Ken Yeo had picked to reflect a balance that was positive to him.

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34 Finally, the Appellant argues that it was inappropriate for the Judge to order costs to be borne jointly and severally by KC and CM with the Appellant. KC and CM did not have the intention of ultimately deriving a benefit from the suit and they did not cause the incurring of costs. It was, therefore, unjust for the Judge to have so ordered.

The Respondents' arguments

35 The Respondents argue that, as the proper enquiry is whether the advances claimed were made or not, the Appellant has mischaracterised the true issue. Furthermore, even if the Judge had erred in excluding the Rejected Evidence, it would not justify setting aside the decision, as it has not resulted in any substantial wrong.

36 The Respondents also submitted that the Appellant has misunderstood what "running account" was meant by the Respondents – all they meant was an "ongoing account". The Respondents have not sought an account as a final relief; they are just seeking the repayment of an advance. Even if the relief sought is for an account, the evidence demonstrates that the liability is between Lincoln College and the Appellant and not between Ken Yeo and the Appellant. In any event, the evidence relied on by the Appellant to demonstrate sums owing to them were inadmissible and/or unreliable. The Judge was correct to allow the counterclaim as the evidence is sufficient to prove that the sum allowed was transferred.

37 Finally, the Judge was correct to order personal costs against KC and CM as KC and CM were the ones who funded the proceedings, were in control of the litigation and would derive the ultimate benefit from the litigation.

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Our decision

The counterclaim

The proper scope of the evidence

38 The Judge had summarised his understanding of the Appellant's pleaded defence to the counterclaim at [5] of the GD:

> The [Appellant's] pleaded defence to the counter-claim was that the [Appellant] had no need and/or reason to receive any cash advances from [Ken Yeo] as it had its own finances to support itself. It also asserted that [Ken Yeo] had never made any advances to the [Appellant] but instead, used the [Appellant's] accounting books to create fictitious entries.

39 According to the Judge, the Appellant could and should have done more for its pleaded case, for example, by producing bank documents which would demonstrate whether any of the advances had entered the Appellant's account (see the GD at [22]). The Judge also noted that because the Appellant's claim had been dismissed, alleged instances of misappropriation by the Respondent could not be proven as they pertained to the main claim (see the GD at [16]).

40 In our view, it is not, with respect, correct for the Judge to have denied the Appellant the opportunity to prove relevant facts in respect of the counterclaim simply because these facts would also prove the main claim, which had been stayed and subsequently dismissed. This is so for several reasons.

41 First, facts which are relevant to the main claim may similarly be facts which are relevant to the Appellant's defence to the counterclaim. As pointed out by the Appellant, s 3 of the Evidence Act defines a "fact in issue" as including "any fact from which either by itself or in connection with other facts

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the existence, non-existence, nature or extent of any right, liability or disability asserted or denied … necessarily follows". The starting point is that "every litigant has a general right to bring all evidence *relevant* to his or her case to the attention of the court", and that, while a litigant should not be allowed to abuse the processes of the court to further his ulterior or collateral motives, "it is usually both prudent and just to err in favour of admission rather than exclusion" (see the decision of this court in *Basil Anthony Herman v Premier Security Co-operative Ltd and others* [2010] 3 SLR 110 ("*Basil*") at [24]–[26] [emphasis in original]). The implication of the main claim being dismissed for the failure to provide security for costs is that, even if the plaintiff manages to establish for the purposes of his defence to the counterclaim the same facts in issue that would allow him to succeed on the main claim, he would still be unable to secure judgment on his claim: see the English High Court decision of *Dumrul v Standard Chartered Bank* [2010] 2 CLC 661 ("*Dumrul*") (at [18]). But there is *no rule* that facts which are relevant in establishing a defence to the counterclaim cannot be *proven* simply because these same facts would establish liability under the main claim as well.

42 Secondly, in our view, the various allegations of misappropriation of funds were sufficiently pleaded as part of the defence to the counterclaim. Much reliance was placed by the Respondent on the fact that the substantive defence to the counterclaim was encompassed within para 44 of the Reply and Defence to the Counterclaim (Amendment No 1) under the heading "DEFENCE TO COUNTERCLAIM", which we had set out above at [17]. We shall simply refer to that paragraph hereinafter as "Para 44".

43 The Judge had concluded that the pleading was that the entries were "fictitious" in the sense that monies never entered the Appellant's account and

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therefore the *only* issue in controversy was whether these monies had in fact entered the Appellant's account. In our view, even taken in isolation, the reference to "fictitious entries" in Para 44 could reasonably be interpreted to encompass the argument that the entries were inaccurately characterised as "advances", thereby rendering them a fiction. This could legitimately mean both that monies had never entered the Appellant's account or that the monies were never intended as advances, thereby amounting to spurious entries. This is *a fortiori* the case when the pleadings are viewed holistically and Para 44 is understood in its proper context, rather than in a vacuum. At the time the Reply and Defence to the Counterclaim (Amendment No 1) was filed, there was no indication that the main claim would not be proceeded with; there was no separate discovery exercise, there were no separate AEICs filed, and the Reply and Defence to Counterclaim was one composite whole embodied in a single document. In the paragraphs preceding Para 44, the Appellant had raised facts to allege that the Respondent had misappropriated funds from the Appellant. For example, at para 42, it was pleaded that: "the [Appellant] avers that the [Respondents] have no legitimate and/or valid defence whatsoever towards the unlawful withdrawal of $1.59mil". Although these facts did not fall under the heading "DEFENCE TO COUNTERCLAIM", and were pleaded for the purpose of establishing the main claim, they provide the context to what the Appellant meant when it stated in its defence that the entries were "fictitious".

44 As argued by the Appellant, "the point is that the 18 transactions formed part of a larger series of transactions". The Appellant also sought to establish this point during the first day of the trial, although this was met with resistance by counsel for the Respondents:

> Plaintiff: Your Honour, I---I'll be making submissions on that point. And I think I am entitled to it on---the

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> minimum is equitable grounds, and I will show to the Court the close connection. Because if one person has the power---the full power to give himself to his companies, wife and everybody else, and he's done that, and now he's claiming for amount all he has given, that's only part of a transaction. We need to consider, Your Honour, the full transaction, the full load, what he's actually done. We are not proceeding with the Court stay order on the claim. We are not claiming. We are defending, Your Honour. As defence, we are entitled to examine what was the intention, and we will. Because he gave up---wrote out the cheques, that means he had full control over the plaintiffs' bank accounts. *He wrote out in certain synchronised fashion to deplete fully the plaintiffs' bank account. Now he's coming to claim for monies that are part of the entire transaction. We need to be able to examine the whole transaction and the reason why we are claiming it is fictitious. We need to be able to demonstrate that these were fictitious part of a major scheme. That's our defence.* And to examine that defence, we will have to examine the agreement because he says, "We are entitled to it". If he says "Entitled to it" and takes off and he's put it in part of the claim that he's taken off money, then we are entitled to examine, Your Honour, I believe.
>
> [emphasis added]

45 In our view, the pleadings sufficiently encompass the averment that the monies that were credited into the Appellant's account (if any) were part of the Respondents' fraudulent scheme and under the guise of being "advances". The *purpose* of the transactions is being called into question, and it is *not* simply whether the monies did or did not *in fact* enter the Appellant's account. When viewed through this lens, the Respondents' misappropriation of funds and facts relating to this purported fraudulent scheme did form part of the Appellant's pleaded defence to the counterclaim.

46 Thirdly, it must be emphasised that procedure is the handmaiden of justice, not its master. In *V Nithia (co-administratrix of the estate of Ponnusamy*

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Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another [2015] 5 SLR 1422 ("*Nithia*"), this court embarked on a review of the law of pleadings and observed (at [2]) that the process of pleadings is to ensure, *inter alia*, that the plaintiff knows the nature and substance of the defence. A court should not adopt "an overly formalistic and inflexibly rule-bound approach" which might result in injustice (see *Nithia* at [39]). Ultimately, the underlying consideration of the law of pleadings is to prevent surprises arising at trial (see, for example, the Singapore High Court decision of *Lu Bang Song v Teambuild Construction Pte Ltd and Another and Another Appeal* [2009] SGHC 49 at [17]). In the present case, it can hardly be said that the Respondents had been taken by surprise. From the pleadings as well as the AEICs, the Respondents were clearly apprised of the line of argument which the Appellant was seeking to advance but attempted to limit the pleaded defence on the technical basis that there was no "pleading that incorporates the entire claim". However, it could not have escaped the Respondent's attention that the Appellant had never regarded the 18 transactions as legitimate "advances" and that this formed a basis of its defence as articulated in Para 44.

47 We therefore find that the Judge had wrongly determined the scope of the evidence and had erred in excluding the Rejected Evidence.

Whether the error led to substantial injustice

48 While we find that the Judge should have considered the Rejected Evidence it does not necessarily follow that his decision must be reversed or a new trial ordered, if it can be shown that the result was correct in any event. Order 57 r 14 of the Rules of Court states as follows:

> (1) On the hearing of any appeal the Court of Appeal may, if it thinks fit, make any such order as could be made in pursuance

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> of an application for a new trial or to set aside any finding or judgment of the Court below.
>
> (2) The Court of Appeal shall not be bound to order a new trial on the ground of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court of Appeal *some substantial wrong has been thereby occasioned*.
>
> [emphasis added]

49 In so far as the error relates to the improper rejection of evidence, s 169 of the Evidence Act states as follows:

> **No new trial for improper admission or rejection of evidence**
>
> 169. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, *or that, if the rejected evidence had been received, it ought not to have varied the decision.*
>
> [emphasis added]

50 Section 39(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") similarly provides as follows:

> (2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has been thereby occasioned.

51 The question therefore turns on whether any substantial wrong had been caused by the exclusion of the Rejected Evidence. The Respondents say that, even if the Rejected Evidence was considered, it would not have made any difference to the Judge's decision. However, before we proceed to answer this question, we note that the Appellant had pitched its case at an even higher level. It argues that, *on the evidence actually adduced*, the Respondents have not

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proven the counterclaim and therefore the Judge's decision must be reversed. We first address this argument advanced by the Appellant.

52 The Appellant contends that the *key* piece of evidence relied upon by the Judge was the Printout. The Printout had been extracted from the Appellant's system and provided by Koo, but Koo was not called to give evidence, and the admissibility of this piece of evidence was challenged on the basis of hearsay. While the Printout was *prima facie* admissible under s 32(1)(*b*) of the Evidence Act as a statement made in the course of trade, business, profession or other occupation, the court is nevertheless required to properly consider the discretion to exclude such evidence under s 32(3). This involves a balancing exercise involving weighing the significance of the evidence against its unreliability or other harm which might compromise fair adjudication (with the effect of being substantively unjust or procedurally oppressive): see the decision of this court in *Gimpex Ltd v Unity Holdings Business Ltd and others and another appeal* [2015] 2 SLR 686 at [105]–[109].

53 The Judge made two key findings with respect to the Printout. First, the Judge considered that Supramaniam's Document corroborated the Printout (at [13] of the GD). However, considering that this document and the Printout were all derived from the same source, *ie*, the Appellant's accounting software, we are unable to see why Supramaniam's Document is corroborative of the *facts* stated in the Printout, the same way a partial photocopy of a book does not corroborate the truth of the contents of the book.

54 Secondly, the Judge found that even though Ken Yeo was not the person who made the entries, he was the supplier of the information on the transactions, which were (partly) substantiated by bank statements (see the GD at [20]).

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However, the Printout was relied on to *corroborate* or *prove* Ken Yeo's assertions, which was that the moneys were transferred on a certain basis (which we will come to). One of the reasons why Koo should have been called in the first place is examine the veracity of *facts found within* the Printout. As the Judge had previously held in the Singapore High Court decision of *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795 at [19], it is highly prejudicial for a party to rely on evidence that the maker of the statement can testify to but chooses not to do so, as it may give rise to the possibility that the party was trying to prevent the maker from being cross-examined because the evidence might not withstand cross-examination.

55 While it was ultimately within the scope of the Judge's discretion to admit the evidence, the admission of the Printout was not in itself sufficient, without other evidence, to prove a *debt* because s 34 of the Evidence Act states that such statements "shall not alone be sufficient evidence to charge any person with liability". The obvious danger of relying on account book entries is even greater if the claimant or one of his affiliates was the one who was making the records. This danger remains even if accountants had given an unqualified opinion on the previous consolidated accounts that formed the basis for the first transaction on the ledger.

56 The Singapore High Court decision of *Re Ice-Mack Pte Ltd (in liquidation)* [1989] 2 SLR(R) 283 is illustrative. The issue in that case was whether the pages from the applicant's own ledger books were sufficient proof of debt against a company that was being wound up. The applicant and the company were associated companies as one Mr Valibhoy managed both companies. The applicant also adduced an audit confirmation of the sum owed. Yong Pung How CJ found that, in an arms-length situation, an audit

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confirmation would be strong evidence of the correctness of the credit or debit balance. However, because that confirmation was signed on behalf of the company by Mr Valibhoy, it could not be accepted as evidence of the debt unless it was corroborated by more independent evidence (at [11]). Further, at [20]−[21], Yong CJ stated:

> 20 Presented in a series of bits and pieces, the applicant's case depended almost entirely on the acceptance of the evidence of its accountants and its own audited accounts, which it allowed to surface at need. The audited accounts of the applicant, as averred by Mr Valibhoy in his fourth affidavit of 9 March 1989, were indeed prepared to "reflect the state of affairs of the applicant for the use of its shareholders", but auditors are dependent for their information regarding the affairs of a company on what is provided to them by the persons in control of the management of the company. In this connection, the relationship between these companies and the manner in which the persons who had exercised common control over them presented their claim merely depreciated the value which would normally be given to audited accounts.
>
> 21 It may well be that, in what might be called a straightforward case, documents such as those produced by the applicant might be accepted as sufficient evidence to prove a debt obligation. But, in this case, once the validity of the claim was challenged, it was incumbent on the applicant to go to the root of the matter and to produce proper evidence of the various "loans and payments for and on behalf of the company" which added up to the figure of $2,428,418.49 and which it claimed to have made. There should have been the proofs indicated by r 81, specifying the credit and debit notes, the vouchers and receipts, and other documentary evidence by which these loans and payments for and on behalf of the company could be substantiated. This evidence had been asked for repeatedly by the Official Receiver but had not been forthcoming, and throughout the exchange of affidavits before this court, the applicant appeared to have studiously avoided dealing with this real issue. In the result, no proper evidence was given of the various "loans and payments for and on behalf of the company".

57 While we have accepted in the foregoing analysis that there is some merit to the Appellant's arguments, taking the evidence that was considered by the Judge in *isolation*, we are unable to say that Ken Yeo has failed to discharge

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his burden of proof on the counterclaim. We therefore cannot allow the appeal simply on this basis alone.

58 We turn now to consider whether the exclusion of the Rejected Evidence caused a substantial wrong such that either a retrial ought to be ordered or this court should set aside the decision below based on its own evaluation of the Rejected Evidence. In our view, the factual matrix in the present case warrants a retrial.

59 In *Basil* (at [55]), this court noted that a new trial would ordinarily be ordered only where (a) the improperly rejected evidence would, if admitted, have a substantial and realistic prospect of making a meaningful difference to the outcome of the case, and (b) the appellate court is in no position to evaluate the improperly rejected evidence itself.

60 With respect to the first requirement, the Appellant contends that the Rejected Evidence consists of, *inter alia*, the following evidence:

(a) Ken Yeo and Koo's control over the Appellant and Ken Yeo and Koo's ability to implement and falsify transactions;

(b) Koo was part of Ken Yeo's fraudulent scheme to defraud the Appellant as Koo prepared the Printout, and nearly all of the vouchers and payments for the unauthorised transactions made from the Appellant's account were approved by Ken Yeo and verified by Koo;

(c) Ken Yeo's admission that he maintained the alleged "running account" between the Appellant and Lincoln College without informing other directors of the Appellant's board;

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(d) Ken Yeo's admission that, when he transferred $190,000 on 10 March 2011 to Lincoln College, he acted in contravention of the Board's resolution dated 8 March 2010 that he could not approve transfers of monies to Lincoln College;

(e) evidence exhibited in KC's AEIC of two cheques signed by Ken Yeo that were issued to Lincoln College that were part of five transactions in Ken Yeo's counterclaim (*ie*, the supposed repayments by the Appellant in the running account);

(f) 126 transactions between the Appellant, Ken Yeo and Lincoln College based on the Appellant's general ledger evidenced by a spreadsheet in Supramaniam's reply AEIC; and

(g) Ken Yeo's admissions that he had withdrawn monies from Lincoln College's bank account that had originally been transferred to Lincoln College from the Appellant.

61 In its written submissions, the Appellant raises more examples of evidence that if accepted might have played a role in the decision (which we consider to be part of the Rejected Evidence):

(a) the evidence that even if a running account existed, it was created by Ken Yeo or Koo to hide their transactions to make secret profits;

(b) the suspicious circumstances surrounding the entries created in the Appellants' books between 30 October 2009 and 21 October 2010;

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(c) the alleged fraudulent misappropriation of sums that were actually received from several students by altering the records to reflect discounts that were not in fact given; and

(d) five transactions in the counterclaim that were identical to five transactions that were part of the Appellant's main claim.

62 Having regard to the Rejected Evidence, the Appellant makes the argument that the Rejected Evidence is relevant to the following questions of fact:

(a) whether there was in fact a "running account" and whether there were fictitious entries created over the course of the alleged "running account";

(b) whether the alleged transactions were fictitious or were part of the alleged "running account";

(c) whether the alleged transactions formed part of a scheme to enrich Lincoln College at the Appellant's account; and

(d) whether there was a balance from the alleged "running account" and who that balance was in favour of.

63 The Respondents argue, on the other hand, that the exclusion of the Rejected Evidence had caused no substantial wrong as the evidence would not have made a difference to the result. Three points were emphasised by the Respondents in the hearing before us. First, they argue that the Rejected Evidence would at best go towards demonstrating a *modus operandi* and/or a propensity to create fictitious entries. If the specific entries were truly

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"fictitious", the Appellant could simply have produced the bank statements to prove that the alleged advances had not been made. The Appellant failed to do so in the trial below. Secondly, the Respondents argue that the concept of a "running account" had been misunderstood by the Appellant. The Respondent does not seek an "account" as a form of final relief but specifically seeks the precise sum of $244,844 owned. Such a "running account" is not amorphous inasmuch as it is without start or end, and the appropriate delineation of the running account is from the period of 1 April 2010 to 8 October 2010 (*ie*, the time period in which the 18 transactions were made). Thirdly, the Respondents contend that the counterclaim was brought by Ken Yeo against the Appellant and that the Rejected Evidence related only to alleged liabilities owing from Lincoln College to the Appellant. Therefore, it would not have been appropriate to consider the alleged liabilities of Lincoln College in the counterclaim.

64 In their first objection, the Respondents focus on the fact that the Appellant was unable to refute that the "advances" had actually entered the Appellant's account. However, as noted above at [43], this is not the only way in which the entries may be construed to be "fictitious". The fiction could conceivably lie in their characterisation as "advances". Bank statements produced by the Appellant would not aid it in advancing this point. Instead, it is necessary for a court to look at *the full context* of the transactional history between the parties in order to arrive at a fair decision as to whether the sums were transferred, whether the transfers were in the nature of an advance or something else, and whether in the overall scheme of things Ken Yeo was the creditor and not the debtor. These issues could not be divorced from the allegations raised in the main claim.

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65 In so far as the Respondents' second objection is concerned, it seems to us that the parties have been overly fixated on the phrase "running account", when the question should, instead, be whether the Rejected Evidence, if admitted, would go towards proving or disproving the *basis* for Ken Yeo's argument that he is entitled to be repaid. The fact that some monies were transferred (if that is indeed the case) is only one small element of the dispute. The legal nature and purpose of the transfer is, if anything, just as important in determining liability. Thus, one must still ask what the transfer was truly *for*. Were the "advances" in the nature of loans (for the purpose of supplementing cash flows), gifts, consideration under a contract, repayment of loans, transfers to replenish funds that were taken out (whether properly or improperly), or transfers used to cover up a fraudulent scheme to misappropriate funds? Even if they were loans, one might ask whether they were just part of a larger set of interdependent transactions which were always intended to be netted off. One could not come to a full and considered decision by looking at *a mere snapshot* of one part of the transactional history between the parties.

66 Finally, the Respondents' third objection may appear superficially attractive since liabilities owing from Lincoln College to the Appellant are technically separate and distinct from liabilities which the Appellant may owe to Ken Yeo, especially since the defence of set-off had not been pleaded by the Appellant. However, if it were indeed the case that Lincoln College had been siphoning off money from the Appellant without approval, and this was perpetrated by Ken Yeo, it could, in our view, shed light on the true nature of the transfer of monies from Ken Yeo to the Appellant. Again, the key question to be addressed is the *nature* of the transactions which form the basis of the counterclaim. Proof of a fraudulent scheme which was engendered as amongst the Respondents would be relevant to such an inquiry.

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67 We hasten to add, and this bears emphasis, that our rejection of the Respondents' objections above is not, in fairness to them, an indication that the Rejected Evidence *would definitely have* made a difference to the outcome of the case. It must be recalled that the threshold is that of "a substantial and realistic prospect of making a meaningful difference to the outcome of the case" and in our view, this threshold had been met. Indeed, the Judge's own recognition that "the [Appellant] was hamstrung to the extent that its case was that the 18 transactions in the ledger [were] just part of a larger scheme to defraud the plaintiff" (see the GD at [17], also reproduced above at [2]) buttresses our conclusion that the Rejected Evidence did have the requisite prospect of making a meaningful difference to the outcome of the case. For this reason, the decision below cannot be allowed to stand.

68 We must next consider whether this court is in a position to evaluate the Rejected Evidence and determine the appeal on its substantive merits (*ie*, the second requirement in *Basil*). The following observations of this court at [56] of *Basil* are instructive:

> In the present case, the evidence of the disallowed witnesses would certainly have a substantial and realistic prospect of making a meaningful difference to the outcome of the case. In fact, as we have said at various points, *the evidence of the disallowed witnesses might well be of decisive importance in confirming or refuting the factual positions taken by Basil and the respondents, as well as the credibility of each side's witnesses. At the same time, it is impossible to say precisely what the evidence of the disallowed witnesses might be, whose evidence would be confirmed, and whose would be refuted. This can only be done by subjecting both parties' witnesses to the crucible of cross-examination.* [emphasis added]

69 Similarly, it is impossible, in relation to the present case, to say precisely what would have transpired if the Appellant had not been wrongfully denied the opportunity to present its full case, and what the crucible of cross-examination

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might have elicited from the various witnesses. Attempting to predict such an outcome would be an exercise in speculation and we are not prepared to venture into such murky waters. The Federal Court decision of *Chia Bak Eng and another v Punggol Bus Service Co* [1965–1967] SLR(R) 270 is illustrative. In that case, the trial judge had erred in rejecting the evidence of one Lim Ah Huat ("Lim"), who was a bystander to an accident. The appellate court declined to simply reverse the conclusions of the learned judge and accept the evidence of Lim as true, primarily on the basis that this required a determination of Lim's credibility, who was the only witness called by the plaintiff, and it was difficult to estimate correctly the credibility of the witness from the printed evidence (at [21]).

70 Whilst the parties seek a final decision of this court on the merits, in preference to the trouble as well as concomitant costs of a retrial, especially given the Appellant's monetary woes, this court is in no position to determine whose version of the facts should be believed based merely on the AEICs filed and the transcript generated from the limited cross-examination on the background facts relating to both the counterclaim and main claim that was permitted below. We see no alternative but to order a retrial, notwithstanding that this was a remedy that has not been sought by either party (see O 57 r 13 of the Rules of Court; see also the Hong Kong Court of Appeal decision of *Ku Chiu Chung Woody v Tang Tin Sung* [2003] HKEC 727 at [22]−[28]).

71 However, as the Judge had only allowed the counterclaim in the sum of $218,000, which is less than the District Court limit of $250,000, we consider it appropriate that the trial of the counterclaim be held in the District Court, as we take the view that the Respondents, even if entirely successful, would not recover anything more than what the Judge had awarded. This was also the

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situation in *Basil* (at [81]) where this court exercised its powers under para 10 of the First Schedule to the SCJA and s 54C(2) of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) (now the State Courts Act (Cap 321, 2007 Rev Ed)), read with s 29A(3) of the SCJA, to send the case to the District Court to be heard. We so order.

72 Before we depart from the present analysis, although the Appellant has not appealed against the decisions to award security for costs or the subsequent stay and dismissal of the main claim for failure to furnish security, it would be appropriate for us to make a few observations as to the appropriateness of ordering such security in circumstances such as the present, where in dealing with the *substance* of the claim and the counterclaim, many of the same issues would arise.

Security for costs

73 The order for security for costs in this case was made under s 388 of the Companies Act (Cap 50, 2006 Rev Ed), which provides as follows:

> **Security for costs**
>
> 388.—(1) Where a corporation is plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

74 There is no question that the court has jurisdiction to award security for costs in the present case. Our concern is whether the discretion to do so should have been exercised by the court, *ie*, whether in all the circumstances it was just to order the Appellant to provide security for costs and the extent of such

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security (see the decision of this court in *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1999] 1 SLR(R) 112 at [13]).

75 The underlying rationale for ordering a plaintiff to give security for costs is to "protect a defendant (or a claimant placed in a similar position by a counterclaim) who is forced into litigation at the election of someone else against adverse costs consequences of that litigation" (see the English Court of Appeal decision of *Autoweld Systems Ltd* v *Kito Enterprises LLC* [2010] EWCA Civ 1469 ("*Autoweld*") at [59]). This is because "while it is up to a plaintiff to decide on whether to run the risk of suing a party who may not be good for costs, a defendant has no comparable choice" (*Singapore Civil Procedure Volume I* (GP Selvam gen ed) (Sweet & Maxwell, 2015) ("SCP") at para 23/0/2). More specifically, the point of security for costs under s 388 of the Companies Act is to protect the defendant from abusive suits by impecunious corporate bodies and it should not itself be wielded as an instrument of oppression: see SCP at para 23/3/19.

76 Like in most matters involving the exercise of discretion, the appropriate decision often rests on a nuanced appreciation of the factual matrix in the totality of the instant case. In the Singapore High Court decision of *L & M Concrete Specialists Pte Ltd v United Eng Contractors Pte Ltd* [2001] 3 SLR(R) 208, Judith Prakash J accepted the following non-exhaustive circumstances as being among those which the court might take into account in the following terms (at [10]):

> (a) whether the company's claim is *bona fide* and not a sham;
>
> (b) whether the company has a reasonably good prospect of success;
>
> (c) whether there is an admission by the defendants on the pleadings or elsewhere that money is due;

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> (d) whether the application for security was being used oppressively;
>
> (e) whether the company's want of means has been brought about by the defendants, such as delay in payments;
>
> (f) lateness in taking out the application.

77 In addition to the factors referred to in the preceding paragraph, there is another factor which plays an important role in the exercise of the court's discretion, namely, the fact that it is often inappropriate to award security for costs where the claim and counterclaim are co-extensive. This is a weighty factor, as the following cases will illustrate.

78 We begin with the decision of this court in *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR(R) 427 ("*Wishing Star*"). In *Wishing Star*, the dispute revolved around whether the contract between the parties was validly terminated. The appellant terminated the contract alleging that the respondent had made material misrepresentations in its tender submission for the contract. The respondent commenced legal proceedings against the appellant for wrongful termination. The appellant claimed that it had lawfully rescinded the contract and counterclaimed for damages suffered. The appellant subsequently applied for security for costs nearly four months after trial dates had been set down. The Court of Appeal agreed with the assistant registrar and the High Court judge that security should not be ordered in that case. The Court of Appeal identified two factors in *Wishing Star* as weighing heavily in the respondent's favour (at [16]−[21]):

> (a) The first was the delay in taking out the application. Numerous steps had been taken in the proceedings by the time it was filed, and substantial work had already been undertaken by the solicitors of both parties.

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(b) The other factor was the fact that, given the substantial overlap between the appellant's defence to the claim and the counterclaim, no significant additional costs would be incurred by the appellant whether or not the claim of the respondent was stayed. It was a significant consideration that granting security in such a situation could amount to indirectly aiding the appellant to pursue its counterclaim.

79 Before dealing with the second factor highlighted in the preceding paragraph, it would be useful to take a moment to discuss the effect of delay on an application for security for costs. The weight to be given to this factor may depend on the reasons for the delay, the length of the delay, and, crucially, the prejudice caused by the delay. A good explanation may be necessary in circumstances where the defendant was well aware from an early stage of the proceedings that the plaintiff company is impecunious but only applies for security for costs late in the day, after the financially straitened plaintiff has already expended much of its limited resources preparing for a trial which may now never come. As Newnes JA put it in the Court of Appeal of the Supreme Court of Western Australia decision of *Christou v Stanton Partners Australasia Pty Ltd* [2011] WASCA 176 (at [20]), a plaintiff "is entitled to know at the earliest opportunity, before it has committed substantial resources to pursuing the litigation, whether it will be required to provide security" and, importantly, "*[s]ecurity for costs is not a card that a defendant can keep up its sleeve and play at its convenience*" [emphasis added].

80 The delay in the present case was substantial. As noted above at [15], the Respondents had raised the issue of security for costs on 18 March 2013, and then failed to make an application by the deadline of 28 March 2013. Security was only sought on 10 July 2014, which was more than a year later. A

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plaintiff in such circumstances may well have incurred costs and adopted certain positions under the fair assumption that the defendant, who knows of the plaintiff's financial position, would not be seeking security.

81 Returning to the point on intersecting cross-claims, Prakash J, in the Singapore High Court decision of *Ong Jane Rebecca v Pricewaterhousecoopers and others* [2009] 2 SLR(R) 796 held (at [27]) that, even if there is some overlap between the defences and counterclaims, it does not mean that no security can be ordered, and the degree of overlap can be taken into account in considering both whether security should be ordered and the quantum of security to be ordered.

82 Whilst *Wishing Star* and *Ong Jane* referred to the overlap between the *defence* and the counterclaim, it is nevertheless well established that, for similar reasons, a close overlap between the *claim* and the counterclaim also militates against the granting of the security for costs. In this particular regard, the English Court of Appeal decision of *B J Crabtree (Insulation) Ltd v GPT Communication Systems Ltd* (1990) 59 BLR 43 ("*Crabtree*"), which was referred to in *Wishing Star* (at [20]), is instructive. As stated in an oft-cited passage by Bingham LJ (as he then was) in *Crabtree* (at 52–53):

> It is, however, necessary, as I think, to consider what the effect of an order for security in this case would be if security were not given. It would have the effect, as the defendants acknowledge, of preventing the plaintiffs pursuing their claim. It would, however, leave the defendants free to pursue their counterclaim. The plaintiffs could then defend themselves against the counterclaim although their own claim was stayed. *It seems quite clear and, indeed, was not I think in controversy – that in the course of defending the counterclaim all the same matters would be canvassed as would be canvassed if the plaintiffs were to pursue their claim, but on that basis they would defend the claim and advance their own in a somewhat hobbled manner, and would be conducting the litigation (to change the*

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> *metaphor) with one hand tied behind their back.* I have to say that that does not appeal to me on the facts of this case as a just or attractive way to oblige a party to conduct its litigation.
>
> Mr Phillips for the defendants submits there would really be no problem because, if the defendants failed in their counterclaim and the plaintiffs' case contrary to the counterclaim effectively succeeded, then the stay could be lifted and the plaintiffs could be given judgment. But on that assumption one is bound to ask what would be the point of making the order at all except to give the defendants a tactical advantage in the litigation.
>
> One comes back, I think, at the end of the day to the reflection that this is a rule intended to give a measure of protection to a defendant who is put to the cost of defending himself against a claim made by an impecunious corporate plaintiff. *It may in some cases be fair and just to make such an order even though the defendant is himself counterclaiming, but I am persuaded that it would be wrong to do so here because the costs that these defendants are incurring to defend themselves may equally, and perhaps preferably, be regarded as costs necessary to prosecute their counterclaim.* Of course, as Mr Phillips points out, they may decide later not to prosecute their counterclaim, but that would be a different situation from that which now presents itself before the court and upon the basis of which we have to rule. *The fact that the plaintiffs are plaintiffs and the defendants are counterclaiming defendants instead of the other way round appears on the facts here to be very largely a matter of chance.*
> …
>
> [emphasis added]

83 In other words, where the claim and counterclaim raise the same issues it will not *usually* be just to make an order for security for costs in favour of the defendant, although the court must always consider the particular circumstances of the case: see, for example, the English Court of Appeal decision of *Anglo Irish Asset Finance Plc v Flood and another* [2011] EWCA Civ 799 (at [20]). This is an important, but not *determinative*, factor – for example, the prejudice of the plaintiff being limited in the continuing litigation may be offset by the possibility that there may be no continuing litigation at all (see *Autoweld* at [58]–[60]).

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84 While the dismissal of a claim for want of security would not *ipso facto* prevent a plaintiff from raising overlapping evidence that is relevant to his defence to the counterclaim (as we have emphasised earlier in this judgment), an unfair result may still be occasioned if the plaintiff succeeds in his defence by relying on the same issues he raised in his main claim, and after having "incurred all the costs required to bring that claim to judgment in the prosecution of his defence of the… counterclaim", he would still be unable to secure judgment on his claim: see *Dumrul* at [18] (cited above at [41]). The effect would merely be "to prevent the claimant from obtaining compensation or other remedies in excess of the remedies, if any, to which the counterclaimant may be entitled": see *Civil Procedure Volume 1* (I R Scott and Steven D Whitaker gen eds) (Sweet & Maxwell, 2014) at para 25.13.1.1. We would note that, in *Crabtree*, Bingham LJ suggested (in the passage set out above at [82]) that if the claim was merely *stayed*, the stay could be lifted if the plaintiffs' case contrary to the counterclaim effectively succeeded, and judgment could be entered in favour of the plaintiffs' own claim. However, as he noted, one might then ask what the point of the stay would therefore be.

85 One might also consider what would have happened if the shoe was on the other foot, *ie*, that the Appellant had instead sought security for costs from the Respondents for the counterclaim. Even though security for costs may generally be ordered in respect of a counterclaim, a court will ordinarily not order security for costs in respect of a counterclaim that arises in respect of the same matter or transaction upon which the claim is founded if it is in substance the nature of a defence. We refer to Bingham LJ's pithy statement of principle in the English Court of Appeal decision of *Hutchison Telephone (UK) Ltd v Ultimate Response Ltd* [1993] BCLC 307 ("*Hutchison*") as follows (at 317):

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> … The trend of authority makes it plain that, even though a counterclaiming defendant *may* technically be ordered to give security for the costs of a plaintiff against whom he counterclaims, such an order should not ordinarily be made if all the defendant is doing, in substance, is to defend himself. Such an approach is consistent with the general rule that security may not be ordered against a defendant. So the question may arise, as a question of substance, not formality or pleading: ***is the defendant simply defending himself, or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own***? [emphasis in italics in original; emphasis added in bold italics]

86 In *Pannone v Aadvark Digital* [2013] 4 Costs LO 607, the English High Court considered *Crabtree* and *Hutchison* and concluded as follows (at [26]):

> However, in my judgment, as Bingham LJ stressed in both *Crabtree* and *Hutchison*, there is no rule of thumb which is to be applied in this case. … The justice of the case will be affected by the considerations referred to in the various cases, such as the degree of overlap of issues between the claim and the counterclaim, the amounts claimed and counterclaimed respectively and an assessment of the substance of the matter by asking whether a counterclaim is in substance a defence or in substance an independent claim. Because the court is concerned to assess the substance of the matter, it is less concerned with more technical matters as to whether a claim is, or can be, pleaded as a set off or can only be asserted as a cross claim. Further, the court is not influenced, or certainly not much influenced by, the fact as to who first sued whom.

87 In our view, the existence of the counterclaim which would require the raising of numerous issues that coincide with the claim is a factor which may well have influenced the various procedural decisions below, if only the argument had been clearly made. However, since there has been no appeal with respect to the decision to order security for costs and the corresponding decision to dismiss the main claim for failure to furnish such security, we will say no more on this matter.

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Costs

Whether third party costs should have been ordered in the circumstances

88 The Appellant also contests the Judge's decision to order the Appellant, KC and CM to pay the costs of the main claim and the counterclaim jointly and severally. This issue turns on the appropriateness of the award of third-party costs and we shall commence with the applicable general principles in that respect.

89 The leading Singapore authority on when non-party costs should be ordered is this court's decision in *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd and another appeal* [2010] 3 SLR 542 ("*DB Trustees*"), in which the following general principles were summarised as follows:

(a) A court is not precluded from awarding costs in favour of or against a third party (at [23]).

(b) Such costs orders are exceptional in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense – the ultimate question is whether in all the circumstances it is just to make the order (at [26]–[27], citing the Privy Council decision of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others (Associated Industrial Finance Pty Ltd, Third Party)* [2004] 1 WLR 2807 ("*Dymocks*") (at [25]).

(c) There are two factors, among the myriad of possibly relevant considerations, that ought to almost always be present to make it just to award costs against a non-party, even though they do not necessarily have to be present (see generally at [29]−[36]):

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(i) There must be a close connection between the non-party and the proceedings – it is sufficient that the non-party either funds or controls legal proceedings with the intention of ultimately deriving a benefit from them – and whether there is a close connection depends on the facts of the case (at [30] and [34]).

(ii) The non-party must have *caused* the incurring of the costs – it would not be fair to order costs against the non-party if the litigant would have incurred the costs regardless (at [35]).

90 Some clarification was provided by this court in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496 (at [66]) where it was stated that the two factors in *DB Trustees* are by no means conclusive and the award of costs is ultimately a matter of discretion.

91 The principles in *DB Trustees* (as well as *Dymocks*) have also been elaborated upon in two Singapore High Court decisions as follows:

(a) The fact that the non-parties are the only shareholders and directors of a company and would therefore be the real and only beneficiaries of any successful outcome in the litigation should not be the overriding factor in consideration for otherwise "any court which rules against any closely-held company would have to order costs against its shareholders and directors personally" and "drive a coach and horses through the doctrine of the separate liability of the company" (see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter and others (Tung Yu-Lien Margaret and others, third parties)* [2011] 1 SLR 582 at [26]).

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(b) Ordering costs against a non-party and shareholder of an impecunious litigant company is to pierce the corporate veil and it is *not* a principle of law that where a litigant company is unable to pay costs the successful party can look to the person with a close connection to that company for costs; the corporate veil is usually only lifted where there is fraud or highly unconscionable conduct: see *Nanyang Law LLC v Alphomega Research Group Ltd* [2012] 4 SLR 1153 (at [5]).

92 The decisions referred to in the preceding paragraph are consistent with the holdings in the well-known English Court of Appeal decision in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 ("*Metalloy*") where it was stated by Millett LJ (as he then was) at 1620:

> … It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are bought [*sic*] bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified.

93 Whilst impropriety or bad faith on the directors' or shareholders' part in causing the company to bring proceedings is an important factor in deciding whether they should be made personally liable for costs, we should emphasise that there is no *strict* requirement that such elements should be made out before an order can be made. Thus, where directors who were also guarantors of the debt of the company and who had conduct of the appeal pursued an appeal that the receiver of the company would not have taken to the bitter end and which was "was not an appeal which on any realistic objective assessment could be said to have good prospects of success", it was appropriate to exercise the power

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to make the non-parties pay costs (in this case, from the date they funded the litigation): see the English Court of Appeal decision of *Fulton Motors Limited v Toyota (GB) Limited* [2000] CP Rep 24. The lodestar is always whether it is just to do so in all the circumstances of the case concerned.

94 We now turn to the appropriateness of the decision below as to the costs of the main claim and the counterclaim. They raise slightly different issues and so, for clarity, we will deal with them separately.

Third party costs for the main claim

95 To begin, we accept that the basic factors laid out in *DB Trustees* (see above at [89(c)]) have been met. That, as we have explained, is not, however, the end of the story. The court must still be satisfied that it is *just* for costs to have been ordered against KC and CM for the main claim. We see no evidence that the main claim was not *bona fide,* or that the Appellant was not the proper plaintiff or that KC and CM had acted improperly, although the Respondents' counsel argues that KC had not handled himself well in the way he asked for the defence to be amended and trial dates to be vacated during the trial, and also alleges that the Appellant had deliberately supressed evidence. We do not think that this amounts to bad faith, especially considering that KC, whilst legally trained, is not a practising lawyer. Moreover, the Judge himself had found that "it could not be said that the plaintiff had conducted the litigation in an extravagant, disproportionate or oppressive manner" (see the GD at [30]).

96 It should be reiterated that the Appellant failed on the main claim because of the failure to provide security for costs, and not upon the merits of the case as such. Whilst we see no reason in principle to prevent non-party costs from being awarded in such a situation, it is a factor that this court should take

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into account when looking at the justice of the case. Further, a director/shareholder should not typically be discouraged from acting responsibly in assisting the company in getting compensation from those who may have wronged it and put it out of funds.

97 In *Metalloy*, the plaintiff company was in liquidation and it was unable to put up security for costs. The claim was thus dismissed and the liquidator was ordered to pay costs personally. This went to the English Court of Appeal which allowed the liquidator's appeal against the decision for him to pay costs personally. As Waller LJ put it (at 1619):

> … All that happened was that having successfully resisted an order for security for costs, on appeal the plaintiff company was ordered to provide security. That in fact forced the liquidator to discontinue. There was nothing exceptional in his conduct; there was nothing improper in his conduct; and no one in fact warned him that they were going to suggest otherwise. …

98 It was also held in *Metalloy* (at 1619) that there is nothing unreasonable or irresponsible about continuing an action just because the company has not the funds to fight a trial. As Millett LJ stated (at 1620), "[i]t is obviously risky for a plaintiff to begin proceedings which he cannot afford to finish, but it is not unreasonable, still less improper, for him to do so".

99 In the present case, costs were awarded against non-party shareholders or directors, even though they were funding a *bona fide* claim, which had been belatedly dismissed for failure to provide security for costs, in circumstances where the impecunious corporate plaintiff is clearly the proper claimant and there has been no finding of any impropriety or bad faith from the aforesaid shareholders. We fail to see anything extraordinary about the facts on the present case that should have merited such an order.

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100 Indeed, as mentioned earlier (above at [80]), the Respondents' application for security for costs came late in the day notwithstanding that they were aware of the Appellant's parlous financial position from an early stage. They may have had their own reasons for adopting such an approach – in their written submission for SUM 3367 it was explained that the Respondent's present solicitors only took over conduct of the matter on 4 June 2014 and there was an outstanding "unless order" application against the Respondents at the time – but the point is that the trial dates had already been fixed and, by the time the order was made, the AEICs had been exchanged. Much of the costs of getting up had already accrued. The result is that the Appellant, KC and CM found themselves in a position where, after expending much time and money to fund the litigation, they were deprived of the chance of having the main claim heard at the eleventh hour. To also order that KC and CM pay for the Respondents' costs out of their own pockets when it was entirely within the Respondents' right and power to have taken out a security for costs application at an early stage appears to us to be unfair, and militates against an award of non-party costs.

101 The Respondents submit that it is nevertheless fair for KC and CM to pay for the costs of the main claim since they had stated on affidavit that they have been funding the litigation and "[would] undertake any orders if any". However, this undertaking was made in the context of resisting an order for security for costs, which the Appellant was ultimately unsuccessful in. We read the undertaking as a conditional one, premised on the main claim being continued. This is not a scenario where the Respondents had withdrawn the application for security for costs in reliance on that promise, and we have not seen any evidence that the Respondents have been prejudiced by the statement in the affidavit. What CM said in her affidavit had clearly not influenced the

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Respondents in how they conducted the litigation, or the court below in its various procedural decisions.

102 In the result, it was not in the interests of justice for costs to have been ordered against KC and CM for the main claim.

Third party costs for the counterclaim below

103 To begin, and as counsel for the Respondents acknowledges, different considerations may apply where a company is forced to defend a claim as compared to a case where the company itself is the claimant (see, for example, the English Court of Appeal decision of *Goodwood Recoveries Ltd v Breen* [2006] 1 WLR 2723 at [48]).

104 When a claim or a counterclaim is brought against a company that is short of funds, the directors and shareholders (or the liquidator, if it is already insolvent) will frequently be the ones who are *both* in control of the proceedings and funding the company in the litigation, resulting in costs being incurred. To the extent that the value of their shareholding or any other interest that they may have in the company (if any) is enhanced by a positive result, they also stand to benefit by a successful defence. The factors in *Dymocks* and *DB Trustees* will therefore frequently be made out. But does that mean that it is automatically just for non-party costs to be awarded?

105 Guidance can be found in the following passage in the pre-*Dymocks* decision of *Taylor & Anor v Pace Developments Ltd* [1991] BCC 406, a decision of the English Court of Appeal (at 409):

> The controlling director of a one-man company is inevitably the person who causes the costs to be incurred, in one sense, by causing the company to defend the proceedings. But it could

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> not be right that in every such case he should be made personally liable for the costs, even if he knows that the company will not be able to meet the plaintiff's costs, should the company prove unsuccessful. That would be far too great an inroad on the principle of limited liability. I do not say that there may not be cases where a director may not [*sic*] properly be liable for costs. Thus he might be made liable if the company's defence is not bona fide, as, for example, where the company has been advised that there is no defence, and the proceedings are defended out of spite, or for the sole purpose of causing the plaintiffs to incur irrecoverable costs. No doubt there will be other cases. But such cases must necessarily be rare. In the great majority of cases the directors of an insolvent company which defends proceedings brought against it should not be at personal risk of costs.

106 Thus where the insolvent company's defence is *bona fide*, a court should lean against an award of such third party costs for the primary reason that it would not be in the public interest or, indeed, the interests of the other creditors, to deter the directors or shareholders from assisting it to pursue a legitimate defence even if it turns out, in the end, that the defence was not successful. But this is not a strict rule and the factual circumstances may vary widely from case to case. In the present case, we do not think it can be said that the defence to the counterclaim was not *bona fide* in that it was unsustainable or was for the sole purpose of causing the defendant to incur irrecoverable costs. We are satisfied that the Appellant was reasonable in defending the counterclaim, that it was in the interests of the Appellant and its creditors that this should be done, and the fact that it was seriously impeded from properly pursuing it below should not be held against it, or KC and CM.

The appropriate order of costs

107 We are satisfied that the decision to order non-party costs below was inappropriate, and we therefore set it aside. The question remains as to what the costs order ought to be, both here and below.

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108 In so far as the order for costs for the main claim was concerned, there is no appeal against the main claim or the order that the Appellant itself should pay $20,000 as costs. We see no reason to disturb the Judge's order in this respect, save for the part that KC and CM are to bear the costs of main claim jointly and severally with the Appellant.

109 We have allowed the appeal on the counterclaim and ordered a retrial in the District Court (see above at [70]–[71]). In *Basil* (at [83]–[86]), this court found itself in a similar position. In that case, it was found that the retrial had to be ordered in that case largely because of the conduct of the respondents *via* their "misguided procedural strategies"; however, the appellant's counsel did not assist the court in the way that someone of his experience would be expected to. In our judgment, the position appears to be similar here, but, in the interests of fairness, we will hear the parties on the issue of the costs below and on appeal with respect to the counterclaim at a date to be fixed.

Conclusion

110 For the reasons set out above, we allow the appeal and order a retrial for the counterclaim in the District Court. The Judge's decision to order non-party costs is set aside. The usual consequential orders will apply. For the avoidance of doubt, this does not affect the result in the main claim which has already been dismissed (and for which no appeal was taken to this court), except that the costs of the main claim (which was fixed at $20,000) shall be borne by the Appellant alone. Finally, we will hear the parties on the issue of the costs below and on appeal with respect to the counterclaim at a date to be fixed.

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Chao Hick Tin	Andrew Phang Boon Leong	Tay Yong Kwang
Judge of Appeal	Judge of Appeal	Judge

Prakash Pillai, Koh Junxiang and Clement Ong Yuan Kun (Clasis LLC) for the appellant;
Jordan Tan and Keith Han (Cavenagh Law LLP) for the respondents.

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