Chen Joon Onn
v
Kong Siew Kin

High Court, Kuantan – Civil Suit No 22-1-2004
Heliliah bt Mohd Yusof, J

May 13, 2005

Civil procedure – Appeal – Appeal against decision of deputy registrar allowing plaintiff's application to strike out writ and statement of claim in High Court – Failure to disclose which limb of Rules of the High Court Order 18 r 19 applies – Delay in filing application to strike out – Whether filing of writ and statement of claim in High Court whilst suit in Sessions Court was still pending constitutes a duplicity of actions – Attempt to delay proceedings in Sessions Court – Abuse of court process – Rules of the High Court 1980, Order 18 r 19(a), (b), (c)

Contract – Remedies – Claim for declaration and specific performance – Discretionary power – Parties not at consensus ad idem – Unfair advantage – Whether court can grant declaration and specific performance of unexecuted contract – Specific Relief Act 1950, ss 20(g), 21(1), (2)(a)

The defendant, landlady of the premises, had commenced an action for vacant possession of premises and damages against the plaintiff (tenant), in the Sessions Court. This trial in the Sessions Court, had been adjourned to a further date.

The plaintiff alleges that a compromise agreement was allegedly reached between the parties, somewhere in the vicinity of the court. This compromised arrangement had been incorporated in a draft and sent to the defendant and her solicitors by way of a letter. The plaintiff however received a reply whereby different terms were made. The plaintiff then applied for a stay of the action in the Sessions Court but this had been dismissed. In the meantime, the plaintiff filed a suit for a declaration and specific performance of the compromise agreement allegedly reached between the parties. The defendant filed a summons in chambers applying for the writ and statement of claim of the plaintiff to be struck off with costs. The matter was heard before the deputy registrar who allowed the application to strike out. This is an appeal against that order, allowing the defendant's application to strike out the writ and statement of claim pursuant to Order 18 r 19 of the Rules of the High Court 1980 (RHC).

Issues

1. Whether an application to strike out that was not specifically pleaded in the defence, ought to have been allowed.
2. Whether an application to strike out, made after the close of pleadings and after notice of pre-trial case management has been filed should be allowed.

3. Whether the filing of a writ and statement of claim in the High Court while there was still a pending suit in the Sessions Court could constitute a duplicity of actions.
4. Whether the claims for the declaration and specific performance can succeed.

Held, dismissing the appeal with costs

1. A failure to specifically plead in the defence that the claim was frivolous, vexatious and/or an abuse of the process of the court is not fatal in respect of an action under Order 18 r 19(1) of the RHC. In any case even if there was such a failure it was curable under Order 1A of the RHC. [*see p 439 lines 15-25*]

2. On the facts of the case, it was found that the filing of the application to strike out did not constitute an undue delay and was not inconsistent with the discretion vested in the court to consider such an application. [*see p 440 lines 2-8; p 441 lines 38-42*]

3. The institution of the processes in the High Court is definitely an attempt to delay or to circumvent the proceedings in the Sessions Court. In fact, it is tantamount to using the processes of the court, not for the purpose of resolving a dispute but to create another action running parallel to the case in the Sessions Court and hence creating duplicity and protracting litigation or stalling for time. [*see p 450 lines 3-20*]

4. (a) Claims for a declaration and specific performance require the court to exercise its discretionary power. Judicial discretion should be exercised with care and caution, with regard to all the circumstances of the case. [*see p 443 lines 3-9*]

   (b) The appellant is in fact urging the court to exercise its discretion when there is a pending litigation over the same premises and in respect of which there were contentious issues. [*see p 447 lines 25-28*]

Cases referred to by the court

Bandar Builder Sdn & Ors v United Malayan Banking Corporation Bhd [1993] 2 AMR 1969; [1993] 3 MLJ 36, SC *(ref)*

Board of Trustees of the Sabah Foundation v Datuk Syed Kechik b Syed Mohamed & Anor and another application [1997] 4 AMR 3422; [1997] 4 MLJ 553, HC *(ref)*

Foley v Classique Coaches Ltd [1934] 2 KB 1, CA *(ref)*

Gouriet v Union of Post Office Workers [1978] AC 435, HL *(ref)*

Jamir Hassan v Kang Min [1992] 2 MLJ 46, HC *(ref)*

Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd [1999] 4 AMR 4653; [1999] 4 MLJ 637, CA *(ref)*

Lai Kim Loi v Dato' Lai Fook Kim & Anor [1989] 2 MLJ 290, SC *(ref)*

Lie Kok Keong v Tang Container & Services Sdn Bhd [2003] 5 AMR 804; [2004] 1 MLJ 373, CA *(ref)*
Low Kum Yoon v Teh Kim Huah [1979] 1 MLJ 83, HC *(ref)*
Suppuletchimi a/p Karpaya v Palmco Bina Sdn Bhd [1994] 2 AMR 1191; [1994] 2 MLJ 368, HC *(ref)*
Syarikat Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 AMR 2947; [1997] 5 MLJ 705, HC *(ref)*
Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener) [1995] 2 AMR 1266; [1995] 2 MLJ 421, HC *(ref)*
Tengku Jaffar b Tengku Ahmad v Karpal Singh [1993] 2 AMR 2062; [1993] 3 MLJ 156, HC *(ref)*
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC *(ref)*

Legislation referred to by the court

Rules of the High Court 1980, Order 1A, Order 18 rr 19, 19(1), (1)(a), (b), (c), (d), 20(1)(a), Order 34 r 2
Specific Relief Act 1950, ss 20(g), 21(1), (2)(a)

R Sarengapani (Vendargon & Partners Kuantan) for appellant
Justin TY Voon (Sidek Teoh Wong & Dennis) for respondent

Judgment received: April 21, 2006

Heliliah bt Mohd Yusof, J

This was an appeal [encl 29] against the decision of the senior assistant registrar in respect of an application made by Kong Siew Kin (defendant/respondent) pursuant to Order 18 r 19 of the Rules of the High Court 1980 [encl 14] to strike out the writ and claim. On June 23, 2004 the senior assistant registrar granted the application and an appeal was filed by the plaintiff/appellant Chen Joon Onn against the order. In considering encl 29 the factual matrix leading to the application would be outlined.

In case MT(1)22-1-2004 (the High Court case) the appellant Chen Joon Onn had on December 31, 2003 instituted an action against the respondent Kong Siew Kin claiming the following:

(a) a declaration that an agreement had been concluded on June 5, 2003 between plaintiff and defendant for the rental of premises No 17, Level 2 and 3, Jalan Tanah Putih, 25100 Kuantan, Pahang Darul Makmur (or the premises);

(b) an order for specific performance of a compromise arrangement arrived at on the same date that is June 5, 2003.

The statement of claim also disclosed that the respondent at the material times was also the landlady of the premises and the appellant the tenant. Prior to the institution of the High Court case the respondent had earlier on filed an action against the appellant in the Session Court in case No 53-147-2002 [the Sessions Court case] claiming, inter alia, for vacant possession of the premises and damages. The trial in respect of the Sessions Court case had commenced on April 3, 2003 but was adjourned to June 5, 2003. According to the statement of claim, on June 5, 2003 there had been a discussion somewhere in the vicinity of the court that transpired amongst the defendant in the High Court case, the defendant's sister and counsel on the one part and the plaintiff (in the High Court case, a sibling and counsel on the second part). The statement of claim averred that arising out of the discussion a compromise had been attained on June 5, 2003 and it was deferred to August 7, 2003 to enable the parties to conclude a written agreement to record the following:

(a) a monthly rental of RM1,500 with effect from July 1, 2003 for a period of three years and renewal every three years with a rental increment of 100% over the old rate;

(b) a deposit of RM22,000 to be paid by the plaintiff (in the High Court case) to the defendant (in the High Court case) as a form of guarantee repayable upon expiration of tenancy;

(c) Both parties are not permitted to terminate the tenancy until the end of the year 2014.

The statement of claim further averred that the compromised arrangement had been incorporated in a draft and sent to counsel for the defendant/respondent vide letter dated July 17, 2003. Apparently despite two reminders, counsel for plaintiff/appellant received a letter dated August 4, 2003 from counsel of defendant whereby different terms were made.

The High Court case was filed on December 31, 2003. Apparently it was also borne out that an application for stay of the action in the Sessions Court case had been dismissed on July 21, 2004 in respect of which an appeal was still pending. On March 24, 2004 the defendant (High Court case) filed a summons in chambers dated March 24, 2004 applying, inter alia, for the writ and statement of claim of the plaintiff (High Court case) to be struck off with costs [encl 14]. The matter was heard before the deputy registrar who on June 23, 2004 allowed the application to strike out. The application [encl 14] made a reference to Order 18 r 19(1) of the Rules of the High Court 1980 (RHC 1980) and the grounds of the application were stated as follows in Bahasa Malaysia:

1. Writ saman dan pernyataan tuntutan plaintif bertarikh 31.12.2003 dibatalkan;

2. kos permohonan ini ditanggung oleh plaintif; dan

3. lain-lain perintah yang mahkamah yang Mulia ini fikirkan adil dan suai manfaat.

Alasan-alasan permohonan ini antara lain adalah:-

1. Tuntutan plaintif dalam pernyataan tuntutan bertarikh Disember 31, 2003 tersebut adalah bersifat skandal, remeh dan menyusahkan;

2. Tuntutan plaintif adalah memudaratkan defendant memalukan dan akan melambatkan perbicaraan yang adil bagi perkara ini;

3. Tuntutan plaintif adalah satu penyalahgunaan proses mahkamah yang mulia ini.

This was a point urged by the appellant/plaintiff in the High Court case that the application to strike off should not have been allowed since it was not pleaded in the defence that the action is frivolous, vexatious and/or an abuse of process and that the application did not state which limb of Order 18 r 19(1) of the RHC 1980 applies. It was found that this contention could be disposed of as a preliminary point which was not sustainable as it could not be said the paragraphs (1), (2) and (3) as reproduced above were not direct translation of the English text of the RHC 1980 which corresponded with the provisions r 19(1) paragraphs (b), (c) and (d) of that Order. In any case even if there was such a failure it was not one that was incurable according to the provisions of Order 1A as cited by counsel for the defendant/respondent.

The next issue was the alleged delay in filing the application to strike out in that the application was made after the close of pleadings and after which notice for pretrial case management had been filed and therefore the respondent should be barred from filing an application to strike out. In response to this contention counsel for respondent had chronicled the following i.e. the statement of reply to the defence was filed on March 4, 2004 [encl 9] and served on that date. According to Order 18 r 20(1)(a) pleadings are deemed to be closed at the expiration of 14 days after service of the reply and accordingly the date for close of pleadings would be March 18, 2004. The notice for case management was filed on March 5, 2004, that is only one day after filing of reply. This according to counsel for the respondent was a position where a notice for case management had been filed prematurely and in breach of the window period that was clearly permitted under Order 34 r 2 which would be between March 18, 2004 and April 1, 2004. The application to strike out was filed on March 24, 2004 namely six days after March 18, 2004. Hence it was contended that this was indeed a case where the filing of a case management notice was not only incorrect but also premature. It was also urged that the law did not provide that the application

to strike could not be made at the close of proceedings in consonance with a purposive approach in interpretation. Hence it was indeed correct that the notice for pretrial management had not only been filed prematurely but that the filing of an application to strike out on March 24, 2004 did not constitute undue delay and was not inconsistent with the discretion that was vested in the court to consider an application in accordance with r 19(1) which stipulates that the court "may at stage of the proceedings …" make an order for striking out. This issue had also been examined in several cases. However the general proposition that has gained ground is that the words should be given its ordinary meaning. In *Jamir Hassan v Kang Min* [1992] 2 MLJ 46 Haidar J (as he then was) applied the observation of Zakaria Yatim J (as he then was) as follows:

> Before proceeding to consider the merits of the defendant's application under Order 18 of the RHC it would not be inappropriate perhaps to consider first the issue of delay raised by Mr TO Thomas. It is not disputed that the defendant filed the application well after the defence and counterclaim was filed. While it may be true that in an Order 14 application, it must *normally* be filed before the defence is delivered, however, in an Order 18 application it would appear that there is no such constraint. Order 18 r 19 of the RHC specifically provides "The Court may *at any stage of the proceedings* order to be struck out or amended any pleading ..." (emphasis added). The issue of delay in an Order 18 application was considered by Zakaria Yatim J in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman and another action* 1 where at p 635 the learned judge said:
>
> > " The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow and application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice 1985*, vol 1, p 304."

I respectfully agree. In the circumstances of the present case the issue of delay raised by Mr TO Thomas is definitely without merit.

As this is an application by the defendant under Order 18 r 19 of the RHC, I need therefore to examine the statement of claim and the affidavits (where applicable) filed therein to see whether it discloses a reasonable cause of action or is scandalous, frivolous or vexatious (not "rexatious", apparently a typing error) and/or may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court.

In *Board of Trustees of the Sabah Foundation v Datuk Syed Kechik b Syed Mohamed & Anor and another application* [1997] 4 AMR 3422; [1997] 4 MLJ 553 Ian Chin J went even further and declined to follow the aforementioned cases. His reasoning was as stated at p 3440 (AMR); p 567 (MLJ) as follows:

> Mr Warren QC had argued that an application for striking out under Order 18 r 19 cannot be made once an action has been set down for trial and relied on *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1987] 1 CLJ 572 and *Jamir Hassan v Kang Min* [1992] 2 MLJ 46. I will first deal with *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* where Zakaria Yatim J (as he then was) spoke of Order 18 r 19 at p 575 in these terms:
>
> > "The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial (see 1 *Supreme Court Practice 1985* at p 304)."
>
> In *Jamir Hassan v Kang Min* [1992] 2 MLJ 46, Haidar J also decided, relying on *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman*, that an application to strike out must be refused after the action had been set down for trial. Mr Cherryman QC submitted that both cases are not good authorities because the practice has since the 1985 White Book been stated differently in the 1997 White Book at paragraph 18/19/4, viz.:
>
> > "The application may be made even after the pleadings are closed (per Brett MR in *Tucker v Collinson* (1886) 34 WR 354, or the trial set down (*Goymer v Central Wheelbase Ltd*, Times, 1 April 1993 (CA)) though it should not be heard at the opening of the trial, save in exceptional circumstances (*Halliday v Shoesmith* [1993] 1 WLR 1 (CA))."
>
> Learned counsel argued that the rule contains no limitation as to when an application can be made and the court should give the rule its plain and ordinary meaning (*Goymer v Central Wheelbase Ltd* at pp 16 and 18-19) and not read into it words limiting when an application can be made. Since the two Malaysian authorities are not binding on me, I respectfully refuse to follow them and accept the proposition of law that the application can be made at any time, even after the case has been set down for trial for the reasons stated by Mr Cherryman QC.

On the facts however in the present case before me the date of trial had not even been set down and the defendant/respondent had acted within the period before case management was even due. Again on this point it was found that the application was not fatal.

The third issue however was on the issue of duplicity of proceedings and it raised related questions on the proper application of Order 18 r 19(1) paragraph (b), (c) and (d). One could begin with certain observations of Haidar J in *Jamir Hassan*'s case, supra, in the context of the writ and statement of claim filed by the appellant (in the High Court case) against the respondent (in the same case) while there was still pending a suit against the appellant in the Sessions Court i.e. 53-147-2002. Haidar J had also stated at p 56, supra:

> Further, the court is entitled to look at the history of this case to determine whether the pleadings disclose a cause of action. This is what Lord Parker CJ said in *Re Vernazza* at p 202:
>
> "In considering whether any proceeding are vexatious one is entitled to and must look at the whole history of the matter and it is not determined by whether the pleading discloses a form of action. Indeed that is the principle applied under the rules of court when application is made to strike out a pleading. Though the pleading may be in order, the court in its inherent jurisdiction is entitled to look at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed."

The statement of claim and the statement of defence disclosed that the appellant is a tenant holding over and that at the time that the case No 53-141-2002 was instituted at the Sessions Court the rental agreement had already been terminated. The respondent not only denied but also refuted that a compromised arrangement had been attained on the date that the case was adjourned.

The appellant (in the High Court case) alleged that since the respondent (in the High Court case) had opposed stay of proceedings of the Sessions Court case, it was an indication that the Sessions Court case was indeed a different cause of action and hence was therefore precluded from asserting that the case instituted in the High Court could constitute a duplicity of action.

Reliance was placed on the case of *Lai Kim Loi v Dato' Lai Fook Kim & Anor* [1989] 2 MLJ 290. Gunn Chit Tuan SCJ (as he then was) in delivering the decision of the Supreme Court had then observed that the filing of a petition by a petitioner who had also filed a writ of summons and statement of claim amounted to multiplicity of actions. His Lordships observations (at p 295) were as follows:

> Although the issues raised and the relief sought are not totally similar yet we consider that the substantial supplication of issues and relief sought in both actions amounted to multiplicity of actions and in all the circumstances of this case, the petition presented is vexatious and is an abuse of the process of the court and ought to be struck out as the learned judge has done and not

stayed or the petition be allowed to be amended as suggested by counsel for the petitioner.

In the case before me what has been prayed for is not a mere declaration but also a claim for specific performance. Both claims for the declaration and specific performance had the object of invoking the court's discretionary power. It is to be noted however that the claim of the appellant is not the infringement of a public right but a legal right allegedly based on a contract. There were no instruments except for some payments alleged to be made. Judicial approach does lean in favour of courts granting a declaration. See *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, Intervener)* [1995] 2 AMR 1266; [1995] 2 MLJ 421. However it is also useful to note that though there may be unlimited power it still remains a discretionary power as expressed in the judgment of Arulanandom J (as he then was) in *Low Kum Yoon v Teh Kim Huah* [1979] 1 MLJ 83 at p 86 as follows:

> As for as declaratory judgments are concerned, it is established law that the power to make declaratory judgments is a discretionary one which should be exercised with care and caution and granted sparingly and judicially with regard to all the circumstances of the case. The court will also not make a declaratory judgment where the question raised is purely academic (see *Howard v Pickford Tool Co Ltd*) or where the purpose of seeking a declaration is to cause delay (*Vine v National Dock Labour Board*). Singleton LJ at p 8 says:–
>
> > "... The granting of a declaration is discretionary; the discretion is one to be exercised by the judge, and this court will seldom interfere with the exercise of a judge's discretion on such a matter. I feel, however, that the question of declaration was not fully developed before the learned judge, and had it been, I do not think that he would have granted a declaration. There is no reason, so far as I can see it, why damages should not be sufficient remedy for a plaintiff in a case such as this; he has been awarded damages; he desires to keep the declaration. For what purpose? So that he can go back and say to the defendants, "I am on the pool; now please employ me"? And if they say that they would prefer not to employ him, he may commence an action claiming damages again. He has had the advantage of legal aid in this case in order to bring his claim. It has been a great help to him, I have no doubt; but I do not think that it would be right in the circumstances of this case to prolong the issue between these parties or to give encouragement to fresh proceedings."

The above view does not appear to be at variance with the view expressed by Lord Diplock in *Gouriet v Union of Post Office Workers* 1978 AC 435 at p 501:

Authorities about the jurisdiction of the courts to grant declaratory relief are legion. The power to grant a declaration is discretionary; it is a useful power and over the course of the last hundred years it has become more and more extensively used often as an alternative to the procedure by way of certiorari in cases where it is claimed that a decision of an administrative authority which purports to affect rights available to the plaintiff in private law is ultra vires and void. Nothing that I have to say is intended to discourage the exercise of judicial discretion in favour of making declarations of right in cases where the jurisdiction to do so exists. But that there are limits to the jurisdiction is inherent in the nature of the relief: a declaration of rights.

The only kinds of rights with which courts of justice are concerned are legal rights; and a court of civil jurisdiction is concerned with legal rights only when the aid of the court is invoked by one party claiming a right against another party, to protect or enforce the right or to provide a remedy against the other party for infringement of it, or is invoked by either party to settle a dispute between them as to the existence or nature of the right claimed. So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.

The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that he need not. Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declaration of right can be most usefully invoked.

The affidavit of the respondent in support of the application to strike off averred, inter alia, that the proceedings in the Sessions Court had already commenced and that the institution of the proceedings in the High Court by the appellant (in the High Court case) was calculated to circumvent the proceedings in the Sessions Court and hence amount also to an abuse of process. The respondent in the High Court case also contended that it would also have an effect on the proceedings in the Sessions Court case to the extent that it would render the respondent's case in the Sessions Court almost nugatory. The affidavit of the appellant (in the High Court case) raised the issue that this was not a case where it was plain and obvious that the writ should be struck off. It was also submitted that when the Sessions Court case was deferred to June 5, 2003 there existed new facts giving rise to a settlement

that could only be determined by the High Court proceedings. The appellant (in the High Court) also denied that there had been a breach of the terms of the agreement which led to the institution of the proceedings in the Sessions Court case.

The affidavit in reply of the appellant in the High Court case had also incorporated verbatim the affidavit in reply of the respondent (plaintiff in the Sessions Court case). It was noted that the contents of the affidavit (encl 17 exh P2) did state, inter alia, that it was improbable (paragraph 10) that the very premises which constituted the subject of an action for vacant possession could become the subject of an agreement that would bind the parties until 2014. There was also a categorical denial that certain terms and conditions had been mutually agreed upon. The respondent (plaintiff in the Sessions Court case) in exh P1 to encl 17 also denied that any instruction had been given to their then solicitor to arrive at any particular arrangement. The alleged cheques which purportedly had been issued by the appellant (defendant in the Sessions Court case) had also been returned.

Exhibit P2 to encl 17 incorporated the verbatim statement of defence of the appellant (the defendant in the Sessions Court case) in the matter in the Sessions Court. The defence disclosed that there were indeed triable issues at the Sessions Court and that the subject matter was the premises in respect of which the respondent (plaintiff in the Sessions Court case) claimed possession.

Another contentious issue raised was in respect of a statement made by counsel for the appellant (defendant in Sessions Court case) appended as exh P3 to encl 17. P3 was a bare statement that the facts in the affidavit of the appellant in the High Court case (defendant in the Sessions Court case) were true. In responding to this counsel for the respondent (in the High Court case) referred to the following cases; *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 AMR 1191; [1994] 2 MLJ 368; *Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 AMR 2947; [1997] 5 MLJ 705. Case number (1) was invoked for purposes of elucidating the approach to be taken in considering an application to strike out and the relevant passages were at p 1205 (AMR); p 382 (MLJ):

> No party in a proceeding is entitled to require the court to accord them valuable time of several days open court viva voce trial only upon mere or bare assertions in their affidavits. Though, nevertheless, it is essential that affidavits in such applications filed should be confined to matters pleaded and not go beyond prima facie evidence of such matters pleaded.
>
> The crucial question the court would have to ask itself in applications under Order 14 or Order 18 r 19(1)(a)-(d) is first, whether the piece or pieces of evidence essential to make out a reasonable prima facie cause of action or a prima facie triable issue of fact are of the nature such that they are

adduceable by affidavit evidence; and secondly – if the answer to this question is in the positive – whether such essential prima facie evidence had been so adduced in the supporting affidavits. Such affidavits ought not to contain bare averments but must condescend or come definitely into particulars for serious argument such that they are sufficient to satisfy the court that there is a reasonable prima facie cause of action or a triable issue or issues of fact or law in the defence as the case may be.

…

Thus, Order 18 proceedings whether they be under r 19(1)(a), (b) or (c) – and for that matter also Order 14 proceedings as well – are not decided by weighing mere assertions in the affidavits of both the parties. It is trite that the mere assertion in an affidavit of a given situation which is to be the basis of a claim or a defence, does not ipso facto provide immunity against the claim or defence from being struck out under r 19(1)(a), (b) or (c), (or leave to defend refused in an Order 14 matter); the court must and ought to look at the whole situation and ask itself whether the plaintiff (in an application to strike off a claim) has satisfied the court that he has a bona fide or prima facie cause of action, and the defendants (in an application to strike off the defence) have not only raised an issue but also that the issue is, prima facie, triable. The defendants have to make out a good prima facie defence only if the plaintiff's case is also prima facie a good one. See *Saw v Hakim* 19.

Case number (2) was referred to for the purpose of disputing Mr Sarengapani's role both as solicitor and his purported attempt to furnish evidence as a witness as exhibited in P3 to encl 17. And to fortify the argument that Mr Sarengapani's evidence in P3 should also be discounted counsel for the respondent in the High Court case also cited *Lie Kok Keong v Tang Container & Services Sdn Bhd* [2003] 5 AMR 804; [2004] 1 MLJ 373.

The cases support the proposition that counsel for the appellant (defendant in the Sessions Court case) Encik R Sarengapani faced the possibility that he had conducted himself in a manner where there was a conflict of interest. The statement in P3 was also not a sworn statement but a bare statement that certain facts were true and constituted no more than a statement from the Bar.

Counsel for the appellant had not unexpectedly cited *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; *Tengku Jaffar b Tengku Ahmad v Karpal Singh* [1993] 2 AMR 2062; [1993] 3 MLJ 156 and *Bandar Builder Sdn & Ors v United Malayan Banking Corporation Bhd* [1993] 2 AMR 1969; [1993] 3 MLJ 36 both of which served as a reminder that the power of the court to dismiss an action summarily is a drastic one and that a court will only strike out a claim in plain and obvious cases where the claim is obviously unsustainable on the face of it.

It was further submitted that since specific performance was also being prayed for only the High Court could make such an order. But here was not a case where the court was being asked to exercise its discretion in respect of an executed agreement. There was a preceding declaratory judgment to be made in respect of an alleged contractual relationship.

Since the appellant is seeking a declaratory judgment it is still necessary to evaluate from the affidavits whether the parties were already on position to distill a form of agreement from the alleged negotiations. A compromise is merely a contract and hence the ordinary principles of contract law apply with the same force. As observed by Maugham LJ in *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 3:

> ... unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it.

The affidavits it is disclosed that the respondent/defendant in the High Court case had not only not accepted the terms that had been alleged but also the return of the cheques and the correspondence referred to in the affidavit indicated that there were various other changes to certain terms. There were therefore not only non-agreed facts but also disputed issues of law and it indicated that the court should refrain from the exercise of its discretion to grant a declaratory order *and* specific performance in the midst of a pending litigation over the very same premises that was still the subject matter of litigation in the Sessions Court. The surrounding circumstances strongly suggest that a form of agreement had not been distilled. The appellant is urging the court to exercise its discretion to grant a declaratory order and specific performance in the midst of a pending litigation over the very same premises in respect of which there were contentious issues relating to tenancy.

It was of course submitted that only a trial in the High Court could establish the alleged arrangement. But in the affidavits before the High Court there was no suggestion that there was already a contract. While it was alleged that there was not a plain and obvious case to be struck out it was also concomitant with a situation that there was not even a consensus ad idem. Indeed it was more consistent with an arrangement subject to contract which would render the claim to specific performance as a highly questionable position for the court to exercise its jurisdiction.

The affidavit and the history of the case showed that there was a dispute over an alleged contract. The statement of claim included a prayer that required the court to declare the existence of a contract whilst the terms of the contract itself are not clear. In addition there were submissions relating to the applicability of ss 20(g) and 21(1) and (2)(a) of the Specific Relief Act 1950.

One of the purported terms of the contract alleged by the appellant was that the contract was to extend over a longer period than three years in which the respondent had contended that it was not consistent with s 20(g). Counsel for the appellant had in turn counter argued that this was a situation where the tenancy was renewable after every three years and hence a lease could be created. It was therefore an indication that there were so many possibilities and alternatives that had not been resolved over the same premises which are still the subject matter of a cause of action in the Sessions Court.

Counsel for the respondent (in the High Court case) had also cited s 21(2)(a) of the Specific Relief Act 1950 where if the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, then a court may decline to exercise its discretion to grant a decree of specific performance. In the case before me, the statement of claim and the affidavits had only referred to supposedly established contractual relations which the court is firstly asked to declare and where the consensus ad idem had also not been established.

There are three other alternatives specified in Order 18 r 19 besides paragraph (a) to sub-rule (1). It was found that in this appeal the paragraph that is applicable is paragraph (d) that is there was here an abuse of process. In *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd* [1994] 4 AMR 4653; [1999] 4 MLJ 637 the Court of Appeal had opined that the circumstances in which the court's process may be abused are varied and not necessarily closed. The court possesses an inherent jurisdiction to prevent an abuse of its process. Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal addressed the issue in the following terms:

> It is trite that a person who has a legitimate grievance may invoke the court's process to obtain redress. But cases may arise where the true purpose for invoking the court's process is something other than to obtain a remedy provided by law. It may be to oppress a defendant. Or it may be to apply pressure upon him which the law regards as illegitimate. Or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion (see *Grovit & Ors v Doctor v Doctor & Ors* [1997] 2 All ER 417). Or the plaintiff having commenced an action may take steps to discontinue it after the defendant has become *dominis litis*, thereby preventing the defendant from obtaining vindication through a judgment of the court. In the last instance, the court will refuse to permit discontinuance, or if a notice of discontinuance has been filed, will set it aside and direct the action to proceed (see *Overseas Union Finance Ltd v Lim Foo Chong* [1971] 2 MLJ 124; *Castanho v Brown & Root (UK) Ltd & Anor* [1981] AC 557).
>
> A fairly recent decision on the point is that of the English Court of Appeal in *Gilham v Browning & Anor* [1998] 2 All ER 68. It was a case where the

defendant's discontinuance of his counterclaim before the county court was held to be an abuse of process, it was there held that whether in a particular case there was an abuse would be a question of fact and degree.

Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances. Where an action is found to be an abuse of the court's process, it may be struck out or stayed. If it is too late to do this, the party aggrieved may bring an action based upon the tort of abuse of process.

This court dealt with the point fairly recently in the context of the tort of abuse of process. It was in *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin b Ungku Mohamed* [1998] 2 AMR 1666; [1998] 2 MLJ 425. I there said (at p 1697 (AMR); p 434 (MLJ)):

> "Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
>
> The position has been neatly summed up by Lord Denning MR in his dissenting judgment in *Goldsmith v Sperrings Ltd & Ors* [1977] 1 WLR 478, where at p 489 he said:
>
> > ' In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.'
>
> Though a dissenting judgment, the principle enunciated by the Master of the Rolls has been accepted as authoritative of what constitutes an abuse of process.

Sometime abuse can be shown by the very steps being taken in the courts …"

In the case before me the subject matter of the alleged contract that is the premises were already the subject of litigation. Different terms were now being suggested but the institution of the processes in the High Court would definitely place a cog in the wheels for the matter to be litigated in the Sessions Court. It is found that there is definitely an attempt here either to delay or to circumvent the proceedings in the Sessions Court. That is tantamount to using the processes not for the purpose of resolving a dispute but to create another action running parallel to the case in the Sessions Court and hence create duplicity with all the possibilities that if matters were not resolved to the satisfaction of one party there is a strong likelihood of protracting litigation or stalling for time.

Underlining the action in the High Court is the inherent improbability that the respondent had agreed to the alleged terms whilst the matter in the Sessions Court was still active and disputed. Assuming that the parties had arrived at some consensus ad idem the parties are not prevented from recording a settlement before the Sessions Court. The institution of the proceedings in the High Court therefore constituted an abuse of the processes of the court. The appeal was therefore dismissed with costs.