Bachoo Mohan Singh *v* Public Prosecutor and another matter [2010] SGCA 25

Case Number	: Criminal Reference Nos 1 and 2 of 2010
Decision Date	: 15 July 2010
Tribunal/Court	: Court of Appeal
Coram	: Andrew Phang Boon Leong JA; V K Rajah JA; Choo Han Teck J
Counsel Name(s)	: Michael Hwang SC and Darius Chan (Chambers of Michael Hwang SC), Ang Cheng Hock SC (Allen & Gledhill LLP) and Eugene Thuraisingam and Vinesh Winodan (Stamford Law Corporation) for the applicant in Criminal Reference No 1 of 2010 and the respondent in Criminal Reference No 2 of 2010; Jennifer Marie SC, Aedit Abdullah, Kan Shuk Weng, Mohamad Faizal, Peggy Pao and Ang Feng Qian (Attorney-General's Chambers) for the respondent in Criminal Reference No 1 of 2010 and the applicant in Criminal Reference No 2 of 2010.
Parties	: Bachoo Mohan Singh — Public Prosecutor

Criminal Law

Civil Procedure

15 July 2010 Judgment reserved.

V K Rajah JA:

1 In these criminal references, this court has to consider questions of law of public interest relating to how s 209 of the Penal Code (Cap 224, 1985 Rev Ed) ("the PC") should be construed and the scope of lawyers' duties to verify their client's instructions. These criminal references arise from the conviction of Bachoo Mohan Singh ("BMS"), an advocate and solicitor of some 36 years' standing, in the Subordinate Courts by a district judge ("the District Judge") (see *Public Prosecutor v Bachoo Mohan Singh* [2008] SGDC 211 ("*BMS (No 1)*")). BMS had been convicted of abetting (by aiding) his client to dishonestly make a false claim in court, under s 209 (read with s 109) of the PC. Section 209 states:

> Whoever fraudulently, or dishonestly, or with intent to injure or annoy any person, makes before a court of justice any claim which he knows to be false, shall be punished with imprisonment for a term which may extend to 2 years, and shall also be liable to fine.

BMS's conviction was subsequently affirmed by a High Court judge ("the High Court Judge") (see *Bachoo Mohan Singh v Public Prosecutor* [2009] 3 SLR(R) 1037 ("*BMS (No 2)*")). In this judgment, the terms "advocate", "solicitor", "lawyer" and "counsel" (and their plural forms) are used interchangeably to refer to legal professionals qualified to practise in our courts, or, if the context so indicates, other courts.

2 According to BMS's counsel, this matter has the dubious distinction of being the first known case in the Commonwealth's legal annals where a lawyer has been convicted of abetting his client in the making of a false claim. This is also the first known case in Singapore involving a prosecution in relation to s 209 of the PC even though this provision has been in force in Singapore for well over a century. In India, no lawyer appears to have ever been prosecuted in connection with such an

offence under s 209 of the Penal Code 1860 (Act 45 of 1860) (India) ("the Indian Penal Code") (the progenitor to s 209 of the PC (see [54] below)) since the Indian Penal Code was first enacted. Nevertheless, despite the extraordinary nature of this matter, there was initially animated and protracted wrangling about the propriety of this court entertaining these references. I am therefore glad to note that both parties now accept that there are important questions of law of public interest. However, before considering the problematic questions of law raised by these references, I should first state the facts.

Background facts and the underlying proceedings

Background facts

3 The facts have been reprised in detail in my judgment in *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 ("*BMS (No 3)*") (at [5]–[14]), in which this court (by a majority) granted an extension of time for both BMS and the Prosecution to apply to the High Court Judge for leave to raise, to this court, questions, pursuant to s 60(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"). Therefore, I will only repeat what I consider to be the essential facts, although a more granular approach has been adopted on some aspects.

4 BMS's offence has its roots in the seemingly innocuous sale and purchase of a flat located in Redhill ("the Flat"), by Koh Sia Kang ("Koh") and his wife, Kang Siew Guek ("Kang"), to Hong Swee Kim ("Hong") and his wife, Elizabeth Bong ("Bong"). For ease of reference, Koh and Kang will be referred to collectively as "the Sellers" and Hong and Bong will be referred to collectively as "the Buyers". The agents who represented the parties in this transaction were Tony Ho ("Ho") and Teo Pei Pei ("Teo"), who worked for a real estate agency known as PropNex Realty Pte Ltd ("PropNex") For ease of reference, Ho and Teo will be referred to collectively as "the Agents". Ho was Teo's supervisor. The law firm that originally acted for the parties in respect of the sale and purchase of the Flat was M/s Rayney Wong and Eric Ng ("M/s Rayney Wong"). However, the Sellers later sought legal advice from BMS, who was then employed as a consultant at M/s K K Yap & Partners ("M/s K K Yap").

5 Prior to purchasing the Flat, the Buyers had sold their flat in Jurong and asked Teo to find a flat whose owners were prepared to enter into a cash-back arrangement. At or around the same time, Koh asked Ho to act for him in the sale of the Flat. Ho, in turn, arranged for Teo to be appointed as agent for the sale of the Flat. Soon after Ho's appointment, Koh approached Ho on a number of occasions for loans, which Ho then arranged through a moneylender. It was envisaged that these loans would eventually be repaid from the sale proceeds of the Flat. Teo brought the Buyers to view the Flat on 30 September 2003. The Buyers were keen to purchase the Flat as the existing tenants would provide them with some income. There is no dispute that on the evening of 30 September 2003:

(a) the Agents told the Sellers that the Buyers were willing to purchase the Flat at $390,000;

(b) the Sellers told the Agents that they agreed to sell the Flat at $390,000; and

(c) the Sellers signed an option to purchase ("the OTP") with the purchase price left blank.

There is, however, a fierce controversy as to whether the Sellers had agreed to a cash-back arrangement. The Buyers' and Agents' evidence is that the Sellers were, at this point of time, agreeable to a cash-back arrangement, with the quantum to be determined after they obtained a valuation report for the Flat. [note: 1] Koh has adamantly denied having ever agreed to the purported cash-back arrangement.

6 Eventually, the Flat was valued at $490,000 by CKS Property Consultants Pte Ltd. [note: 2] Teo then proceeded to insert the figure of $490,000 into the OTP as the purchase price. As an aside, it is interesting to note that there was a previous valuation report from APC Property Consultants Pte Ltd that valued the Flat at $442,000 as of 18 September 2003. [note: 3] However, it appears that the Agents only received this valuation report after 30 September 2003. The Agents, it bears mention, never disclosed this report to the Sellers. [note: 4]

7 The first appointment with the Housing and Development Board ("the HDB") was scheduled for 2 December 2003. Just before the appointment, while waiting at the HDB office, Teo informed the Sellers that they had to declare to the HDB that the sale price of the Flat was $490,000. [note: 5] It is not disputed that Koh only came to know about the purchase price indicated on the OTP just before the first appointment. [note: 6] Koh, though unhappy with the inflated price, nevertheless proceeded to declare to the HDB officer that the $490,000 sale price stated in the OTP was the actual price. The Buyers also affirmed this as the correct price. After the first appointment, Teo brought the Sellers to M/s Rayney Wong's premises to execute various documents, which (*inter alia*) authorised the law firm to distribute $100,000 of the sale proceeds to Kang. [note: 7] The Agents' evidence was that Kang was chosen to be the go-between as she appeared more reliable. Kang, the Agents alleged, was supposed to withdraw the money and pass it to Teo, who would then hand the money over to the Buyers.

8 Koh testified that immediately after the first appointment at the HDB, he became deeply unhappy and perturbed about the regularity of the transaction. He felt that the Agents had cheated him by inducing him and his wife to sell the Flat below market value, and had taken advantage of his dire financial situation. He eventually approached BMS for legal help. On BMS's advice, the Sellers made separate statutory declarations setting out the various alleged breaches of duties by the Agents, the law firm and the moneylenders involved in the cash-back arrangement. BMS testified that Koh's instructions to him were as set out in the statutory declaration that Koh had made. Koh confirmed this. Based on these statutory declarations, complaints were lodged by Koh with the police, the Corrupt Practices Investigation Bureau ("the CPIB"), the HDB, the Inland Revenue Authority of Singapore ("the IRAS"), the Law Society of Singapore ("the Law Society"), and the Registrar of Moneylenders. [note: 8]

9 Teo's subsequent efforts to persuade the Sellers to continue with the transaction were unsuccessful. On 15 January 2004, a meeting was arranged by the Buyers (and their solicitors) at the premises of M/s K K Yap ("the K K Yap Meeting"). [note: 9] The meeting was attended by BMS, the Sellers, the Buyers and Ong Bee Lay ("Ong"), a solicitor from M/s PKWA Law Practice LLC, who attended at the Buyers' request. The Agents were not invited. During this meeting, Hong informed BMS about the cash-back arrangement. In response, BMS tersely stated that "he did not want to know about [the] arrangements" from Hong and would sue on the price stated in the OTP. [note: 10] No settlement was reached. After the meeting, Ong advised the Buyers that the transaction was illegal (she had not been informed by Hong of these details prior to the meeting) and that she would not act for them in the transaction. The Buyers accepted her advice and called off the purchase.

10 On 28 January 2004 and 30 January 2004, BMS wrote letters to the Buyers' solicitors, notifying them that the Sellers had decided to rescind the contract and would resell the Flat, and that if the Flat was to be sold for less than $490,000, the Sellers would make a claim for the damages suffered. [note: 11] There was no response to these letters. Subsequently, the Sellers sold the Flat for $380,000. [note: 12] On 2 April 2004, BMS sent a letter of demand to the Buyers, demanding payment

of $120,000, comprising $110,000 (this being the difference between the inflated sale price of $490,000 and the price at which the Flat was eventually sold at) and $10,000 (for expenses). [note: 13] Once again, no response was given. [note: 14]

11 On 10 April 2004, *The Straits Times* published an article (Tanya Fong, "Flat seller claims he was asked to inflate its price", *The Straits Times* (10 April 2004) at p 3). In this article, Koh was quoted as stating that he was "asked to inflate the selling price of his flat [*ie*, the Flat] by $100,000". [note: 15] This article caught the attention of PropNex's management. They promptly arranged for a meeting at a hotel – the Marina Mandarin Singapore – on the evening of the same day ("the Marina Mandarin Meeting"). The Marina Mandarin Meeting was attended by BMS and Yap Kok Kiong from M/s K K Yap, Koh, the Agents, and Mohd Ismail, the chief executive officer of PropNex. During this meeting, Ho offered to pay the Sellers $20,000 to settle all the claims made by the Sellers, but his offer was roundly rejected by BMS.

12 Two days after the Marina Mandarin Meeting, a writ of summons ("the Writ") endorsed with a statement of claim ("the SOC") [note: 16] was filed by M/s K K Yap on behalf of the Sellers in the Subordinate Courts, with the Buyers named as the defendants. The SOC read:

1. The [Sellers] are the lessees of [the Flat] (hereinafter referred to as the "Premises").

2. On the 30th. September 2003, the [Sellers] granted the [Buyers] an [o]ption to [p]urchase [*ie*, the OTP] the said [*sic*] at a price of $490,000.

3. On the same day, the [Buyers] duly exercised the said Option [*ie*, the OTP].

4. The consent/approval of the [HDB] for the sale and purchase was duly obtained. The sale and purchase was fixed for completion on 5th. January 2004.

5. The [Buyers] failed, refused and/or neglected to complete the sale and purchase on 5th January 2004 or thereafter despite a Notice to Complete issued pursuant to Clause 29 of the Singapore Law Society's Conditions of Sale 1999 being served on their Solicitors.

6. The [Sellers] thereafter put the said Premises up for sale. In or about late March 2004, the [Sellers] received an offer of $380,000 for the said premises. The said offer was the highest that was received. The [Sellers] thereafter, granted an [o]ption [to purchase] to the offerors to sell the said premises to them at the price of $380,000.

7. By reason of the aforesaid, the [Buyers] have been in breach of agreement and the [Sellers] have suffered loss and damage.

And the [Sellers] claim against the [Buyers], jointly and severally for :-

i. damages and loss;

ii. interest; [and]

iii. cost.

13 Soon after the SOC was filed, the Sellers received an offer to resolve the matter from the

Buyers' solicitors. Eventually, an agreement was reached to settle the matter with the Buyers and Agents for $70,000. [note: 17] The Agents and the Buyers assert that they settled the claim as they did not want to be prosecuted for their involvement in the cash-back arrangement. [note: 18] Of this $70,000 settlement sum, the Agents paid $55,000 while the Buyers contributed $15,000. [note: 19] The suit was later discontinued on 30 April 2004 before any further pleading was filed. [note: 20] Subsequently, BMS was prosecuted in the Subordinate Courts for abetting Koh to dishonestly make a false claim in court, pursuant to s 209 (read with s 109) of the PC.

The District Judge's decision

14 The District Judge found that there was "overwhelming evidence" to prove every element of the charge and convicted BMS (see *BMS (No 1)* at [258]). He sentenced BMS to three months' imprisonment (see *BMS (No 1)* at [271]). I will now summarise, in brief, his main findings on the law and on the facts.

Main findings on sections 109 and 209 of the Penal Code

15 In the District Judge's view, there were just three constitutive elements evident in s 209 of the PC (see *BMS (No 1)* at [145]):

(a) First, there must be a "claim" that is "made" in a "court of justice". The District Judge held that a "claim" would include "all manner of claims before the court including both originating summons[es] as well as writs of summons" (see *BMS (No 1)* at [146]). In addition, following Indian treatises on this point, he held that the claim is "made" once a writ of summons is filed (see *BMS (No 1)* at [150]–[151]). For "court of justice", the District Judge relied on the definition provided in s 20 of the PC (see [104] below). On the facts of the case, he observed that there was no dispute that the claim by the Sellers had been made in a court of justice (see *BMS (No 1)* at [228]).

(b) Second, the claim must be made "dishonestly". For the meaning of "dishonestly", the District Judge cited the definition provided in ss 23 and 24 of the PC (see [32] below) (see *BMS (No 1)* at [147]–[148]).

(c) Third, the person who made the claim must have knowledge that the claim is false. In this regard, the District Judge stated (see *BMS (No 1)* at [149]):

> As regards the issue of whether the person who made the claim knew the claim to be false, all that is required … is for the [P]rosecution to show that the claim was false in that it was untrue in the sense the person making the claim knew that he was claiming for more than what was due.

In the District Judge's view, it was not appropriate to draw an analogy between s 209 of the PC and s 191 of the PC because the latter provision dealt with the giving of false evidence by persons legally bound to state the truth, and involved entirely different elements from the former (see *BMS (No 1)* at [231]–[232]). He further added that to establish falsity, it was not necessary to prove that the claim was entirely made up; it was only necessary to show that the claim was false "in the sense as explained in the case of [*Queen-Empress v Bulaki Ram* (1889) 10 AWN 1 ("*Bulaki Ram*")]" (see *BMS (No 1)* at [236]). He also cited (see *BMS (No 1)* at [237]) the decision of *Koh Pee Huat v Public Prosecutor* [1996] 2 SLR(R) 816. In that case, Yong Pung How CJ adopted (at [64]), in the context of s 192 of the PC (the offence of fabricating false evidence),

the following *dicta* from *Jatindra Nath Sahu v Emperor* AIR 1937 Cal 42 at 44:

> An entry would be a false entry or a statement in a record or document would be a false entry if it does either by reason of some false additions or of some material omissions misrepresents the truth. The omission may be illegal or may not be illegal. The thing to consider is what is the effect of the omission on the entry as made or on the statement as occurring in a document.

16 The District Judge also rejected the argument of BMS's counsel that where a claim depends on a question of law or upon the validity of a custom having the force of law, and not a question of fact, it would not be possible to establish the charge. This was because, in his view, liability under s 209 of the PC depended upon knowledge that the claim was false and the presence of intention (see *BMS (No 1)* at [240]).

17 After considering the wording of ss 107 and 109 of the PC, the District Judge held that to establish the charge of abetment by aiding, BMS must be shown to have had knowledge of the circumstances constituting the crime (see *BMS (No 1)* at [157]). It had to be proven that the aid was intentionally given, in the sense that BMS intended to aid the commission of the offence (see *BMS (No 1)* at [160]).

Main factual findings

18 The District Judge held that the claim was false. He stated that it was "obvious" that the sale price of the Flat was $390,000 (see *BMS (No 1)* at [238]). The $490,000 price indicated on the OTP was to facilitate the illegal cash-back arrangement, and there was nothing to show that the claim could be made in law or custom (see *BMS (No 1)* at [238]–[241]). He also held that the OTP was a sham agreement, since the parties never intended it to bind their relationship (see *BMS (No 1)* at [252] and [254]). Instead, their relationship was governed by their oral agreement in so far the price of the Flat was concerned (see *BMS (No 1)* at [252]). The OTP was entered into simply to satisfy the formalities required to sell and purchase the Flat (see *BMS (No 1)* at [253]). Even if the agreement to return $100,000 to the Buyers was a collateral agreement, both the OTP and the collateral contract would be tainted by the same illegality (*viz*, the cash-back arrangement) (see *BMS (No 1)* at [255]). A contract that was, *ex facie*, illegal would not be enforced by the court, and, in any case, where the plaintiff was involved in reprehensible conduct, the doctrine of illegality would not apply to aid him (see *BMS (No 1)* at [256]–[257]).

19 The District Judge also held that Koh knew that the claim was false. He accepted the Agents' evidence that the Sellers knew and agreed to the cash-back arrangement at the time of signing the OTP and rejected Koh's evidence that he was not involved in any such agreement (see *BMS (No 1)* at [74] and [103] (on Teo), [79]–[80] and [110] (on Ho), and [93] and [129] (on Koh)). Crucially, the District Judge held that BMS knew that Koh had originally agreed to participate in the cash-back arrangement for the following reasons:

(a) Koh always intended to sell the Flat at $390,000 and admitted to having told BMS that the price of $490,000 was false (see *BMS (No 1)* at [166] and [224]).

(b) In the letters to the HDB and the IRAS, there were clear and unambiguous references to $100,000 being returned to the Buyers (see *BMS (No 1)* at [171]). The fact that $100,000 had to be returned to the Buyers was also made known at the K K Yap Meeting by Hong and, furthermore, Ho had told BMS about the cash-back arrangement at the Marina Mandarin Meeting (see *BMS (No 1)* at [167]–[171], [185], [206], and [219]).

(c) BMS had access to objective evidence that would have indicated to him the truth of Koh's instructions (see *BMS (No 1)* at [178]). For example, the service commission form prepared by Teo showed a commission amount based on a sale price of $390,000, which indicated that Koh had only intended to sell the Flat at that price. BMS himself accepted that this was something he should have probed (see *BMS (No 1)* at [178]–[179]).

(d) BMS never made any attempts to ask the Agents to clarify the sum of $100,000 (see *BMS (No 1)* at [181]).

20 In the District Judge's view, BMS used the filing of the Writ as a tool to induce the Agents and Buyers to settle the claim and never intended the matter to go to trial (see *BMS (No 1)* at [226]).

The High Court Judge's decision

21 On appeal, the High Court Judge upheld the conviction. However, he allowed BMS's appeal on sentence in part and reduced it to one month's imprisonment and a fine of $10,000 (see *BMS (No 2)* at [75]). His main findings will now be set out in brief.

22 The High Court Judge, like the District Judge, found that there was no dispute that Koh had made a claim in a court of justice (see *BMS (No 2)* at [35]). In his view, the only issues were whether (see *BMS (No 2)* at [36]):

(a) the claim was a false one;

(b) the Sellers agreed to participate in the cash-back arrangement; and

(c) BMS knew that the Sellers had agreed to participate in the cash-back arrangement.

23 The High Court Judge held that the claim was "false" for the following reasons:

(a) The parties agreed to a sale price of $390,000 for the Flat. The true amount of damages would be, at most, $10,000 (being the difference between the actual agreed price and the eventual sale price of $380,000) (see *BMS (No 2)* at [45]). The OTP reflected a price of $490,000 due to the illegal cash-back scheme (see *BMS (No 2)* at [47]). To determine the falsity of a claim, a contextual interpretation of the claim should be adopted, and one could not simply plead the price indicated on the OTP without mentioning the actual sale price (see *BMS (No 2)* at [47]). The claim was simply "Koh's … blatant attempt to enforce the [OTP] without the [cash-back arrangement] by way of court proceedings" (see *BMS (No 2)* at [47]).

(b) The Sellers would have to rely on the illegality itself to substantiate their claim against the Buyers and the claim was therefore bound to fail, especially since the OTP was entered into to deceive third parties (see *BMS (No 2)* at [48]).

(c) Whether or not it was the Buyers' duty to plead the collateral contract in their defence (or for the Sellers to raise it in the SOC) was irrelevant in determining whether the claim was genuine (see *BMS (No 2)* at [49]). In any case, in light of *Bulaki Ram*, BMS could not argue that the Sellers had no duty to raise a potential defence for the Buyers and that it was for the Buyers to raise it in their defence. The claim was false because the Sellers were claiming for more than their due, under the agreement. The issue was not whether the claim presented in the SOC was one that was properly pleaded or an illegal claim, but whether BMS, with knowledge of the cash-back arrangement, abetted the commission of the offence (see *BMS (No 2)* at [49] and [52]).

(d) Considering the circumstances leading up to the filing of the SOC, it was clear that the claim was for the difference between the false price of $490,000 and the eventual sale price of $380,000, and that was a "patently false claim in law" (see *BMS (No 2)* at [51]). This was supported by the fact that the SOC was filed in the District Court, which suggested that the unliquidated claim was for more than $60,000 (the jurisdictional limit of civil claims that can be made in the Magistrates' Courts under s 52(1) (read with s 2) of the Subordinate Courts Act (Cap 321, 2007 Rev Ed)) (see *BMS (No 2)* at [51]).

(e) Section 209 of the PC would not apply only to cases where the whole claim was false; it would apply where a claim was false in a material particular, whether by way of an outright lie, deliberate omission or suppression of material facts (see *BMS (No 2)* at [53]). Here, the amount of damages was the essence of the claim filed in court, and it was computed on the falsely pleaded basis that the actual price was $490,000 (see *BMS (No 2)* at [53]).

(f) The offence was complete once the claim was filed in court (if the other elements of s 209 were satisfied) (see *BMS (No 2)* at [55]). It did not matter if the claim was verified or if evidence on the claim was adduced (see *BMS (No 2)* at [55]). The falsehood here was carried to the point of no return when the settlement was effected (see *BMS (No 2)* at [55]).

24 The High Court Judge agreed with the District Judge's finding that the Sellers had agreed to participate in the cash-back arrangement from the beginning. In the High Court Judge's views, the findings were "amply supported" by the Agents' evidence and were not perverse in any way (see *BMS (No 2)* at [64]).

25 Most significantly, the High Court Judge also upheld the District Judge's finding that BMS knew that the Sellers had agreed to participate in the cash-back arrangement. In this regard, he stated (*BMS (No 2)* at [66]):

> In my view, the events that transpired in both the [K K] Yap [M]eeting and the Marina Mandarin [M]eeting constituted clear evidence that [BMS] had actual knowledge or, at the very least, constructive knowledge that there was a cash back scheme between the [Sellers] and the [Buyers] and that the true transaction price for the flat was $390,000.

26 I pause here to make two observations. First, the High Court Judge did not clearly explain why and how the K K Yap Meeting and the Marina Mandarin Meeting gave rise to such knowledge on BMS's part. The High Court Judge had earlier observed that the Prosecution's case was that during the K K Yap Meeting, Hong had told BMS that $100,000 was to be returned to the Buyers (see *BMS (No 2)* at [15]). In addition, the High Court Judge also pointed out that the Prosecution's case was that at the Marina Mandarin Meeting, BMS had rejected an offer to settle at $20,000, remarking that PropNex's name was definitely worth more than $120,000 (see *BMS (No 2)* at [21]). However, there was no explanation why and how these two meetings resulted in BMS gaining knowledge of the cash-back scheme. Second, the High Court Judge's finding, not unlike the District Judge's, was simply that BMS knew (or ought to have known) that there was a cash-back arrangement between the Buyers and the Sellers. It was similarly entirely silent on whether BMS knew that Koh was a party to the cash-back arrangement *from the outset*. There was remarkably *no finding of fact that BMS did not believe Koh's instructions to him*.

27 In addition, the High Court Judge also considered: (a) the letters sent to the HDB and the IRAS, which contained clear references to $100,000 being returned to the Buyers and the true purchase price of $390,000; and (b) Koh's statements to the CPIB, in which Koh stated that the $490,000 price was false, and that he was told by BMS that he could sue the Buyers for breaching the contract of

$490,000. In light of the above evidence, the High Court Judge found that BMS knew, or deliberately shut his eyes from knowing, that Koh had agreed to inflate the transaction price of the Flat to $490,000 (see *BMS (No 2)* at [67]–[71]).

Proceedings leading up to the present references

28 BMS applied to reserve certain questions of law of public interest to this court, pursuant to s 60(1) of the SCJA. His application was, however, dismissed by the High Court Judge, who provided his reasons for doing so in *BMS (No 2)*. Essentially, the High Court Judge accepted the Prosecution's submission that there were no difficult points of construction in respect of the elements of s 209 of the PC (see *BMS (No 2)* at [79]). However, in BMS's subsequent application to this court, he (as well as the Prosecution) was granted an extension of time to apply to the High Court Judge for leave to raise questions of law of public interest to this court (see *BMS (No 3)* at [87] and [108]). In the hearing that followed, the High Court Judge granted both BMS and the Prosecution leave to raise questions of law of public interest to this court as set out at [29] and [30] below (see *Bachoo Mohan Singh v Public Prosecutor and another matter* [2010] SGHC 26), culminating in the present proceedings.

The questions of law of public interest

29 The five questions of law of public interest raised by BMS will, for convenience, be referred to, respectively, as "BMS's Question 1", "BMS's Question 2", "BMS's Question 3", "BMS's Question 4", and "BMS's Question 5". They are as follows:

> (*a*) Section 209 of the [PC] makes it an offence for a person to (i) **dishonestly** (ii) **make** (iii) **before a court of justice** (iv) a **claim** which he (v) **knows** to be (vi) **false**. *What is the meaning of each these words and the cumulative purport of this provision in the Singapore context?* [*ie*, BMS's Question 1]
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> (*b*) In what circumstances would a solicitor be held to have acted dishonestly (causing wrongful gain or wrongful loss, as defined in s 24 of the [PC] since if he obtains judgment for a client in an action for payment of a debt or for damages, it is bound to cause a loss to the defendant. When is the gain or loss wrongful or unlawful for this purpose? [*ie*, BMS's Question 2]
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> (*c*) In what circumstances is the offence committed: at the point of the filing of the statement of claim or defence in court? [*ie*, BMS's Question 3]
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> (*d*) Can a claim before a court ever be held as false if the defendant settles the claim in whole or in part before the claim is tried in court, or if the defendant submits to judgment to the whole or part of the claim? [*ie*, BMS's Question 4]
>
> (*e*) In what circumstances ought a solicitor decline to accept and/or doubt his client's instructions before filing pleadings considering that a solicitor has no general duty imposed on him to verify his client's instructions? [*ie*, BMS's Question 5]
>
> [bold and italics in original]

30 The Prosecution's questions of law of public interest are as follows:

> Question 1

> If an advocate and solicitor files a statement of claim in court on behalf of his client with the knowledge that the claim is based on facts which are false; and that his client was dishonest in making the false claim, does he commit an offence under section 209 read with section 109 of the [PC]?
>
> Question 2
>
> If the answer to question 1 is in the affirmative, would he still have committed an offence if he was only acting on his client's instructions?
>
> [underlining in original]

The main submissions of the parties before this court

BMS's submissions

31 BMS's counsel submitted that two fundamental points were central to this case, *viz* the meaning of the term "dishonestly" and the meaning of the term "false" (as these terms are used in s 209), although it was also recognised that the other elements of s 209 of the PC should not be overlooked.

32 In relation to the meaning of "dishonestly" – one of the *mens rea* elements of the offence set out in s 209 – BMS's counsel relied on ss 23 and 24 of the PC as defining "dishonestly". Those sections, respectively, read:

> **23**. "Wrongful gain" is gain by unlawful means of property to which the person gaining it is not legally entitled.
>
> "Wrongful loss" is loss by unlawful means of property to which the person losing it is legally entitled.
>
> *Explanation*.—A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.
>
> **24**. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.
>
> [bold and italics in original]

33 It was submitted that if material facts have not been suppressed during the process of making a claim, there could not have been an intention to cause "wrongful gain" or "wrongful loss" and the claim therefore could not have been made "dishonestly" for the purposes of s 209 of the PC. BMS's counsel argued that since the material facts had been actively publicised via Koh's press interview with *The Straits Times* (see [11] above) and the letters sent by BMS to various government agencies, there had been no attempt or intention to suppress any facts, notwithstanding that the SOC did not, on its face, refer to the oral agreement for $390,000. It was further contended that the element of dishonesty could only be ascertained *after* the process of making a claim had been completed, for if the claim had been adjudicated, regardless of whether the trial judge decided that $390,000 or $490,000 represented the true sale price of the Flat, there would have been no wrongful

gain or wrongful loss. The Prosecution, it was suggested, had therefore acted prematurely in prosecuting BMS under s 209 of the PC on the basis of what was stated (or not stated) in the SOC; it was, at that point in time, impossible to prove or infer that a litigant intended to suppress any material facts and thereby intended to cause wrongful gain or wrongful loss.

34 These arguments were also canvassed in relation to the issue of when a litigant "makes" a claim for the purposes of s 209 of the PC. Here, BMS's counsel argued that, taking a purposive interpretation, the making of a claim for the purposes of s 209 of the PC should be seen as a "process" which only terminates at the scintilla of time, just prior to the court's adjudication on the merits. Until that point, it was submitted, a litigant could always seek to amend, settle or withdraw his claim. Using this scintilla of time as the point of reference to determine whether a litigant "makes" a claim, and whether that claim is "false" for the purposes of s 209 of the PC was preferable, it was argued, for it would give full effect to the doctrine of *locus poenitentiae* as well as the power of a litigant to amend his claim at any stage of proceedings under the Rules of Court (Cap 322, R 5, 2006 Rev Ed). BMS's counsel contended that, on the facts, as the Sellers' suit was settled shortly after the SOC was filed, it could not be said that an offence under s 209 (read with s 109) of the PC had been committed by BMS.

35 Finally, in relation to the meaning of the term "false" in s 209 of the PC, BMS's counsel submitted that a claim is only false if it is impossible for the claim to be true or if the claim is without factual basis. In this regard, BMS's counsel raised the following points:

(a) It was never the Prosecution's case that Koh was wrong in, or disentitled from, even commencing an action; rather, the complaint was *how* BMS (on behalf of the Sellers) had conducted the claim – if so, the focus was not on the falsity of the claim but on the manner of its pleading.

(b) While the information provided by BMS in the SOC may arguably have been incomplete, there was no evidence led by the Prosecution to suggest that that information would have been suppressed at trial. This also reinforced the point made in relation to the issue of dishonesty and making a claim – that the prosecution was premature and that the proper time for judging a claim's falsity is the scintilla of time prior to the adjudication of claim, at which point it can be said that a litigant "makes" a claim for the purposes of s 209 of the PC.

(c) As a matter of principle and policy, it is no function of a statement of claim to anticipate matters or facts which may be included in a defence, and any reasonable solicitor would have drafted the SOC in a similar manner.

(d) It was *possible* for the stated price of $490,000 to be the true legal price, and if so, the claim had a factual basis and was not false.

The Prosecution's submissions

36 The Prosecution submitted that s 209 of the PC was part of a scheme of offences that was intended to safeguard the whole judicial process. Given the origins of the PC, Indian authorities applying s 209 of the Indian Penal Code were highly persuasive. Differences in civil procedure regimes between Singapore and India were of little relevance for the purposes of interpreting s 209.

37 In support of these contentions, the Prosecution argued that Parliament must be presumed to know the law. Therefore, it must be presumed that Parliament was aware of certain differences in civil procedure between India and Singapore when it enacted s 209 of the PC. Given that s 209 was

enacted despite knowledge of these differences, the Prosecution submitted, it followed that such differences were irrelevant to the interpretation and operation of s 209 of the PC.

38 The Prosecution also contended that statutory interpretation should give effect to a legislative provision, rather than render it nugatory.

39 Following these prefatory submissions, the Prosecution focused on three main issues, *viz*, whether the claim was made before a court of justice, whether the claim was false, and the requisite *mens rea* for the offence of abetment by intentionally aiding. The following was submitted:

(a) Having regard to Indian authorities as well as the Rules of Court, it was submitted that a claim is made for the purposes of s 209 as soon as it is filed, and therefore, a claim in the present case had been made when the SOC was filed in the Subordinate Courts, regardless of whether the action was eventually settled.

(b) A "false claim" should be defined as a "claim by one of more, than his due, and amercement and punishment therefore" or the "[u]ndue assertion of a right to something" (having regard to *P Ramanatha Aiyar's The Law Lexicon* (Justice Y V Chandrachud & V R Manohar gen eds) (Wadhwa and Company, 2nd Ed, 1997) ("*The Law Lexicon*") at p 705).

(c) The OTP, it was submitted, was a sham as both the Buyers and the Sellers never intended it to bind their relationship, and prepared it solely for the purpose of misleading third parties.

(d) It would not be necessary for the entire claim to be false in order for s 209 of the PC to be engaged. It would be sufficient if, by presenting a half-truth or suppressing certain information, a misleading impression is created.

(e) The *mens rea* element for the offence of abetment by intentional aiding is satisfied if it is established that the abettor must have known the circumstances constituting the principal crime when he voluntarily rendered an act of positive assistance, and this had indeed been established here.

Overview of the issues

40 I have already set out the questions of law of public interest raised to this court above (at [29]–[30]) and will not repeat them here. It is immediately apparent that BMS's Question 1 (see [29] above) straddles four issues concerning how s 209 should be construed. The issues are as follows:

(a) the meaning of "claim";

(b) the meaning of "makes" a claim;

(c) the meaning of making a claim that one "knows to be false"; and

(d) the meaning of "court of justice".

BMS's Question 3 and BMS's Question 4 will be discussed under (a) and (c) respectively. BMS's Question 2 and BMS's Question 5, in my view, can be discussed together; they relate to one overarching issue, viz, a solicitor's liability for abetting the making of a false claim. I should add that my observations on, and answers to, the questions are made for the purpose of clarifying the ambit of s 209 of the PC, and they should therefore be read in that context.

41 Before I delve further into this matter, I should state that in an ordinary application to this court under s 60 of the SCJA, this court would generally be averse to making observations about findings of fact made below. This court's task is simply to resolve the issues of law of public interest that have arisen in the proceedings below. Where however, as here, the findings of fact are inextricably intertwined with the questions of law of public interest that have been raised, this court is, in my opinion, duty-bound, in ruling on the questions of law, to also address the related findings of fact made by the court(s) below. A court of justice cannot simply gloss over the presence of incorrect and/or unsupportable findings of fact, particularly, if they spring from a fundamental misapprehension of legal principles and have caused a miscarriage of justice. In this regard it would be apposite to restate the current approach towards serious judicial errors that was emphatically declared by Chan Sek Keong CJ recently in *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR(R) 192 at [15]:

> [T]he finality principle should not be applied strictly in criminal cases where the life or liberty of the accused is at stake as it would subvert the true value of the judicial process, which is to ensure, as far as possible, that the guilty are convicted and the innocent are acquitted. The floodgates argument should not be allowed to wash away both the guilty and the innocent. Suppose, in a case where the appellate court dismisses an appeal against conviction and the next day the appellant manages to discover some evidence or *a line of authorities that show that he has been wrongly convicted, is the court to say that it is* functus *and, therefore, the appellant should look to the Executive for a pardon or a clemency*? In circumstances where there is sufficient material on which the court can say that there has been a miscarriage of justice, this court should be able to correct such mistakes. [emphasis added]

Preliminary observations

42 Before dealing with the substantive issues, however, a number of preliminary observations ought to be made.

43 A crucial concern arising from the decision of the District Judge, which caused widespread consternation within the legal profession – even prompting the intervention of the Law Society in the previous hearing before this court (see *BMS (No 3)* at [83]) – is that if it is accepted (as the Prosecution *now* does) that the Sellers had a viable cause of action on the facts, how should BMS have pleaded the Sellers' case in order not to commit an offence under s 209 of the PC? The present matter concerns, in this light, a profound, and seemingly irreconcilable, difference of views as to how a "claim", such as the one the Sellers attempted to make in the Subordinate Courts, ought to be properly pleaded.

44 The Prosecution, in its reply submissions, insisted that BMS, in filing the SOC on behalf of the Sellers, "could have been candid and disclosed the *whole facts* in the pleadings" [emphasis added]. The Prosecution further contended that: [note: 21]

> While this departs from the usual position that a statement of claim need not preempt [*sic*] the defence, the present situation is out of the ordinary, and it is necessary to sterilise the claim.

45 The contrary position is represented by the actions of BMS himself, as well as the views expressed over the course of these proceedings by BMS's counsel, who are eminent members of the Bar. They have stated emphatically that they would have pleaded the Sellers' case in exactly or substantially the same way. Unfortunately, attempts by BMS's counsel to introduce expert evidence on how the matter ought to have been pleaded were strenuously resisted by the Prosecution before the District Judge, who upheld the Prosecution's objections. This turn of events is regrettable because the Prosecution itself led no evidence on this point but curiously maintained, before this court, that an entirely different approach to pleadings had to be taken here by BMS as "the present situation is out of the ordinary, and it is necessary to sterilise the claim" (see [44] above). The Prosecution could not, however, refer us to any authority supporting this novel argument. I will revisit this issue later (at [73]–[74] below).

46 This apparently unbridgeable difference of views as to how the Sellers' case ought to have been pleaded also found its way into the parties' submissions on the proper time to assess whether the constituent elements of s 209 of the PC had been made out. BMS's counsel suggested that it should be just before the claim is adjudicated, but the Prosecution insisted that it should be at the moment the claim is filed.

47 That s 209 of the PC, which on its face appears to be a beguilingly simple provision, gives rise to such stark and persistent differences of opinion is an indication of the interpretive difficulties faced by the courts below in attempting to give the provision its proper construction.

48 It is trite law that in interpreting a statutory provision, such as s 209 of the PC, a court is bound by s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) and must prefer an interpretation that advances the legislative intention or purpose over one that does not (see *L & W Holdings Pte Ltd v Management Corporation Strata Title Plan No 1601* [1997] 3 SLR(R) 30 and *Planmarine AG v Maritime and Port Authority of Singapore* [1999] 1 SLR(R) 669). It is also clear that a court may refer to extrinsic material or take into account the context surrounding the legislative provision in an exercise of statutory interpretation, even if the provision is clear on its face (see *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183).

49 The context surrounding s 209 of the PC, and its drafting history, is particularly important in this case, given the different practices in civil procedure in India and Singapore. This was referred to in *BMS (No 3)* at [79]) as follows:

> [T]here appear[s] to be a number of differences in the civil procedure regimes in Singapore today and India then. This may have a bearing on how s 209 of the PC should be interpreted in Singapore. These include: (a) radical differences between the civil pleading systems in India when s 209 of the PC came into force and the framework currently prescribed by the Rules of Court … in Singapore; (b) different verification procedures for civil claims (in India, pleadings had to be verified on oath when s 209 was passed, but not so in Singapore); and (c) the fact that there did not appear to be any provision in India, when s 209 of the Indian Penal Code came into force, requiring or allowing a claimant to file a reply, whereas in Singapore, a claimant need not invariably anticipate the contents of a defence and may opt to reserve appropriate material facts or even legal points, for inclusion in a reply.

Section 209 should not be interpreted in a manner that might criminalise what may be said, in the final analysis, to be legitimately different pleading practices in Singapore. That cannot have been the object of s 209 of the PC when the Legislative Council of the Straits Settlements ("the Legislative Council") introduced the PC (as the Penal Ordinance (Ordinance 4 of 1871)) into the Straits Settlements in 1872. The reply was, after all, already part of the existing pleading scheme here, even

then, in contrast to India.

The purpose of s 209 of the Penal Code

50 Naturally, in order to properly interpret s 209 of the PC, it is first necessary to ascertain the objective undergirding the provision. To divine this, it is useful to understand the original impetus for introducing s 209 of the Indian Penal Code in India, in order to see if this sheds any light.

51 The motivation for the provision which was ultimately enacted as s 209 of the Indian Penal Code was clearly articulated by the Indian Law Commissioners in "Note G" of *A Penal Code* (Pelham Richardson, Cornhill, 1838) ("the Law Commission Report") (a reprint was published by The Lawbook Exchange Ltd in 2002). There it was stated (at pp 98–99):

> We think this is the proper place to notice an offence which bears a close affinity to that of giving false evidence, and which we leave, for the present, unpunished, only on account of the defective state of the existing law of procedure. We mean the crime of deliberately and knowingly asserting falsehoods in pleading. Our opinions on this subject may startle persons accustomed to that boundless licence which the English law allows to mendacity in suitors. On what principle that licence is allowed, we must confess ourselves unable to discover. …
>
> It appears to us that all the marks which indicate that an act is a proper subject for legal punishment meet in the act of false pleading. That false pleading always does some harm is plain. Even when it is not followed up by false evidence it always delays justice. That false pleading produces any compensating good to atone for this harm has never, as far as we know, been even alleged. That false pleading will be more common if it is unpunished than if it is punished appears as certain as that rape, theft, embezzlement, would, if unpunished, be more common than they now are. …
>
> We have as yet spoken only of the direct injury produced to honest litigants by false pleading. But this injury appears to us to be only a part, and perhaps not the greatest part, of the evil engendered by the practice. If there be any place where truth ought to be held in peculiar honour, from which falsehood ought to be driven with peculiar severity, in which exaggerations, which elsewhere would be applauded as the innocent sport of the fancy, or pardoned as the natural effect of excited passion, ought to be discouraged, that place is a Court of Justice. … [T]hat a person should come before a Court, should tell that Court premeditated and circumstantial lies for the purpose of preventing or postponing the settlement of a just demand, and that by so doing he should incur no punishment whatever, seems to us to be a state of things to which nothing but habit could reconcile wise and honest men. Public opinion is vitiated by the vicious state of the law. Men who, in any other circumstances, would shrink from falsehood, have no scruple about setting up false pleas against just demands. There is one place, and only one, where deliberate untruths, told with the intent to injure, are not considered as discreditable; and that place is a Court of Justice. Thus the authority of the tribunals operates to lower the standard of morality, and to diminish the esteem in which veracity is held; and the very place which ought to be kept sacred from misrepresentations such as would elsewhere be venial, becomes the only place where it is considered as idle scrupulosity to shrink from deliberate falsehood.
>
> We consider a law for punishing false pleading as indispensably necessary to the expeditious and satisfactory administration of justice, and we trust that the passing of such a law will speedily follow the appearance of the Code of procedure. We do not, as we have stated, at present propose such a law, because, while the system of pleading remains unaltered in the Courts of this

country, and particularly in the Courts established by royal charter, it will be difficult, or to speak more properly, impossible to enforce such a law. We have, therefore, gone no further than to provide a punishment for the frivolous and vexatious instituting of civil suits, a practice which, even while the existing systems of procedure remain unaltered, may, without any inconvenience, be made an offence. …

[emphasis added]

52 As pointed out in *BMS (No 3)* at [77], the Indian Law Commissioners, in proposing the progenitor to s 209 of the Indian Penal Code, acknowledged that they were creating a new offence that had no English precedent, and that furthermore, they were intentionally departing from the English position of affording considerable latitude to litigants in presenting their claims in court. This is a point of considerable importance as Singapore's civil procedure rules (unlike India) have historically, until recently, closely paralleled the concurrent English prototypes.

53 In addition, it is noteworthy that the Indian Law Commissioners were motivated to criminalise false claims on the grounds that it tended to delay justice and compromise the sanctity of a court of justice as an incorruptible administrator of truth and a bastion of rectitude. The primary objective of the provision appears to have been to deter the filing of such claims by the native population, whose morality was perceived by the English colonialists as being flawed (see also [81] below).

54 It is also pertinent that notwithstanding that criminal sanctions for false pleadings were regarded as unenforceable on account of the then defective state of Indian civil procedure laws, the Indian Law Commissioners felt able to recommend, in the draft Indian Penal Code, section 196 ("the Draft Provision"), which provided for a punishment for the "frivolous and vexatious instituting of civil suits" as follows (the Law Commission Report at p 27):

Whoever, fraudulently, or for the purpose of annoyance, *institutes any civil suit* knowing that he has *no just ground* to institute such suit, shall be punished with imprisonment of either description for a term which may extend to one year, or fine, or both. [emphasis added]

After the Indian civil procedure rules were revamped, the Draft Provision was, eventually, modified and enacted as s 209 of the Indian Penal Code, which is in *pari materia* with s 209 of the PC.

55 It follows that s 209 of the PC was clearly intended to deter the *abuse of court process* by all litigants who make false claims fraudulently, dishonestly, or with intent to injure or annoy. The essence of this provision is entirely consistent with the desire of the Indian Law Commissioners to preserve the special standing of a court of justice and safeguard the due administration of law by deterring the deliberate making of false claims in formal court documents. I should perhaps round up this discussion on the objectives of s 209 of the PC by pointing out that in India it is the court and not the Public Prosecutor who initiates prosecutions under the equivalent provision. At the end of the day, it can be said with some force that it is the court that is best positioned to assess when its processes have been misused or abused. The court is also well-equipped to deal with litigants and/or solicitors who abuse its processes through a variety of well established judicial remedies including adverse personal costs orders and/or contempt proceedings. In the case of advocates and solicitors, disciplinary proceedings will swiftly follow serious infractions of professional responsibilities. This may explain why other common law jurisdictions have not seen a compelling need to criminalise abuses of the pleading process.

56 I summarise. It is imperative to firmly bear in mind the objectives for which the Legislative Council enacted s 209 of the PC. It was clearly not the intention of the Legislative Council or the

object of s 209 of the PC to alter or even criminalise, by a side wind, well-established civil pleading practices – this much is obvious from the fact that Singapore has, unlike India, all along incorporated and preserved the architecture of contemporary English civil procedure rules.

57 Therefore, in purposively construing the constituent elements of s 209 of the PC (in particular the terms "claim", "makes … any claim", and "knows to be false"), consideration should be given to the Legislative Council's (and now Parliament's) intention *to prevent the abuse of court process by the making of false claims in the context of the applicable civil procedure rules in Singapore and not India*.

Construing section 209 of the Penal Code

The meaning of a "claim"

58 The term "claim", while appearing in a number of provisions in the PC, is not defined in the PC, and it therefore falls to this court to determine what should be regarded as a "claim" for the purposes of s 209 of the PC.

59 In *The Law Lexicon*, it is noted that the word "claim" is "of very extensive signification, embracing every species of legal demand" and "is one of the largest words of law" (at p 329). The protean nature of the word "claim" is illustrated by the fact that various legal dictionaries provide multiple definitions. Among some of the more relevant definitions of the word "claim" for present purposes listed by *The Law Lexicon* are (at p 330):

(a) a "demand made of a right or supposed right" or a "calling of another to pay something due or supposed to be due";

(b) a demand for something as due, or an assertion of a right to something;

(c) "relief and also any grounds of obtaining the relief"; and

(d) the assertion of a cause of action.

60 Similarly, *Black's Law Dictionary* (Bryan A Garner chief ed) (West 9th Ed, 2009) provides various definitions of the word "claim" (at pp 281–282):

> … **1.** The aggregate of operative facts giving rise to a right enforceable by a court … Also termed *claim for relief* …. **2.** The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional …. **3**. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for. …
>
> …
>
> **4.** An interest or remedy recognized at law; the means by which a person can obtain a privilege, possession or enjoyment of a right of thing; CAUSE OF ACTION [*sic*] ...
>
> [bold and italics in original]

61 In my view, the word "claim" is an etymological chameleon that takes its colour and definition from the context in which it is used: a "claim" for the purposes of s 209 of the PC does not necessarily mean the same thing as a "claim" for the purposes of, for example, insurance law or

patent law or even other provisions of the PC.

62 In the context of s 209 of the PC, the most helpful definitions of the word "claim" are definitions (c) and (d) as set out at [59] above. Drawing on these definitions, a litigant makes a "claim" before a court of justice for the purposes of s 209 when he seeks certain relief or remedies from the court, and a "claim" for relief necessarily encompasses the grounds for obtaining that relief. A "claim" for these purposes may, for convenience, also be said to be a "cause of action", and, indeed, *The Law Lexicon* notes (at p 330):

> In practice, "the word 'claim', and the phrase 'cause of action' relate to the same thing and have one meaning. The plaintiff before suit may have 'a claim' for damages; and this, when stated in a complaint, is technically, a 'cause of action'."

63 The term "cause of action" here does not refer to *forms* of suing, in the sense of a litigant having a cause of action in contract and a cause of action in tort, or a cause of action in the tort of negligence and a cause of action in the tort of nuisance. Instead, it refers more broadly to the *substance or foundation* of the action – to the fact or combination of facts that forms the very essence of a litigant's right to seek redress from a court (see John Burke, *Jowitt's Dictionary of English Law* vol 1 (Sweet & Maxwell, 2nd Ed, 1977) at p 297; *Black's Law Dictionary* at p 251; Daniel Greenberg, *Stroud's Judicial Dictionary of Words and Phrases* vol 1 (Sweet & Maxwell, 7th Ed, 2009) at p 387; and *The Law Lexicon* at pp 288–289). A litigant, therefore, makes only *one* claim even though he sues alternatively in contract and tort, and even though he seeks more than one type of relief (*eg*, damages and an injunction), as long as the claim arises out of the same set of facts and is against the same defendant.

64 I pause to note that while the word "claim" is ordinarily taken to refer to the relief prayed for by a claimant, s 209 ought not to be restrictively confined to just a plaintiff's claim. It is noteworthy that when the Indian Law Commissioners first contemplated criminalising false pleadings, they plainly regarded false defences as being equally objectionable as false claims. One of the examples given of a false claim in the Law Commission Report (at p 98) (see also [87] below) would be as follows:

> Z brings an action against A for a debt which is really due. A's plea is a positive averment that he owes Z nothing. The case comes to trial; and it is proved by overwhelming evidence that the debt is a just debt. A does not even attempt a defence. Ought A in this case to enjoy impunity?

65 The reason for criminalising false defences as well as false claims is obvious when the purpose of s 209 of the PC is recalled: the court process can just as easily be abused by defendants as by plaintiffs in perpetrating deliberate falsehoods, thereby perverting the course of justice and undermining the authority of the law. Further, I note that s 209 when finally enacted in India used the broader term "claim" in place of the narrower term "civil suit" as the Indian Law Commissioners originally suggested in the Draft Provision (see [54] above). I am therefore of the view that the word "claim", for the purposes of s 209 of the PC, ought to also refer to defences adopted by a defendant. Pertinently, this is one of a small handful of points that both parties could agree on.

The meaning of "makes" a claim

66 The word "makes" is also not defined anywhere in the PC, and there were vigorous exchanges between BMS's counsel and the Prosecution about what it means. BMS's counsel argued that a claim is not made until just before a judge adjudicates on it, while the Prosecution submitted that a litigant "makes" a claim is as soon as the claim is filed.

67 In my view, neither of these conflicting stances is correct. The difficulty with the construction pressed upon this court by BMS's counsel is that it is entirely uncertain – the time just before the claim is adjudicated is an indeterminate one, given that a judge may be adjudicating the claim continuously throughout the trial, or may reserve judgment to a later date. It would be impossible, on this view, to pinpoint a specific moment in time at which a litigant "makes" a claim for the purposes of s 209 of the PC. This would effectively emasculate the provision. On the other hand, the Prosecution's argument, relying mainly on Indian authorities, that one "makes" a claim within the meaning of s 209 of the PC the moment a statement of claim is filed, is also not correct, as it does not acknowledge the stark differences between the past and present civil procedure regimes in India and Singapore. It also fails to appreciate that claims can be initiated through different processes (see [82] below).

68 In Indian civil procedure, even today, there appears to be no provision permitting or requiring the plaintiff to file a reply to a defence (see *BMS (No 3)* at [79]). Without the right to file a reply, a plaintiff in India would apparently be obliged to plead all material facts in his statement of claim, and cannot, on pain of prosecution under s 209 of the Indian Penal Code, omit any facts if to do so may render his pleadings false. In Singapore, however, a plaintiff may legitimately opt to reserve appropriate material facts or even legal points for inclusion in a reply.

69 In my view, it would be wrong to say that a litigant "makes" a claim within the scope of s 209, as soon as he serves his statement of claim. A statement of claim, on its own, unaccompanied by a reply, contains only *part of* the plaintiff's claim, as it does not contain all the material facts which may form the basis of the plaintiff's right to seek redress from the court (unless no reply is filed, or the reply does not contain any material facts). It is the statement of claim and the reply, *read in totality*, which constitute the plaintiff's plea for judicial assistance and the basis on which he seeks relief from the court. It would be premature (and incorrect) to say that a plaintiff "makes" a claim within the meaning of s 209 as soon as he serves his statement of claim; it would also not be possible to say that the claim is "false" when the claim is still inchoate.

70 In oral arguments before this court, the Prosecution contended that an offence under s 209 of the PC could be made out at the statement of claim stage *and/or* the reply stage. Therefore, the Prosecution argued, it would not be premature to commence a prosecution under s 209 of the PC based solely on what a plaintiff had alleged in the statement of claim, if the other elements of s 209 would be made out, because once a false statement of claim has been filed, a plaintiff "makes" a claim for the purposes of s 209 of the PC.

71 Quite apart from the fact that it is doubtful whether what is stated in a statement of claim can ever be conclusively said to be "false" without reference to what is contained in the reply, this argument fails to appreciate the indivisible nature of a "claim". It is not correct to assert that a statement of claim and a reply each contain a "claim" – rather, they must be read together in order that a plaintiff's entire case may be revealed. As such, a plaintiff cannot be said to "make" a claim until *both* the statement of claim and reply (if any) are read together, and this obviously cannot be done at the precise moment a statement of claim is filed.

72 There is yet another intractable difficulty in the way of acceptance of the Prosecution's submissions: it contradicts settled pleading practices. It has long been settled that it is not the function of the statement of claim to anticipate a defence. As was explained in a seminal English case on pleading procedure, *Hall v Eve* (1876) 4 Ch D 341, by James LJ (at 345–346):

> The Plaintiff is left as much at liberty in his reply as in his statement of claim. … *It is no part of the statement of claim to anticipate the defence, and to state what the Plaintiff would have to*

> *say in answer to it*. That would be a return to the old inconvenient system of pleading in Chancery, which ought certainly not to be encouraged, when the Plaintiff used to allege in his bill imaginary defences of the Defendant, and make charges in reply to them. … *[T]he reply is the proper place for meeting the defence by confession and avoidance* …. [emphasis added]

In the same case, Bramwell JA also mused (at 348):

> I cannot help thinking it would be *a mischievous thing to anticipate a defence that may never be made. If the Plaintiff were to do this, he might also anticipate every form of defence, and that would lead to great length of pleading*. [emphasis added]

73 If the Prosecution is correct and a plaintiff "makes" a claim for the purposes of s 209 of the PC as soon as he files his statement of claim, that would undoubtedly require a plaintiff, in order not to fall foul of s 209, to anticipate all defences by including in the statement of claim facts he might otherwise have reserved for inclusion in the reply. Perhaps because it recognised this logical conundrum, the Prosecution also argued that BMS, in drafting the SOC, should have been candid and disclosed the "whole facts" (see [44] above). BMS, it suggested, should have pleaded the claim in this fashion because: [note: 22]

> *While this departs from the usual position that a statement of claim need not preempt [*sic*] the defence*, *the present situation is out of the ordinary*, and it is necessary to sterilise the claim. [emphasis added]

74 It was, however, never persuasively explained by the Prosecution what made the facts of this case so exceptional as to necessitate a departure from the "usual position". Cases involving the alleged illegality of a transaction are not an uncommon occurrence in our courts, and, as far as I am aware, all the leading treatises on pleadings do not suggest that that they merit different or special treatment. When queried, the Prosecution acknowledged that it knew of no authority that would support its submissions on this issue. The Prosecution was also unable to satisfactorily show this court how BMS ought to have pleaded the Sellers' case in the SOC, apart from suggesting that all material facts ought to have been disclosed from the outset. However, this suggestion, as pointed out above, does not take into account the current pleading practices.

75 In my view, the submissions of both parties on this particular issue must be rejected, and a third alternative sought to cut this Gordian knot – one which adequately balances the flexibility to be given to litigants and their solicitors in pleading strategy (such as the right to reserve facts to be included in the reply) against the State's interest in deterring the making of false claims.

76 It seems to me on the basis of the prevailing civil procedure rules in Singapore that the only appropriate point in time when it can be said that a litigant "makes" a claim for the purposes of s 209 of the PC is one that takes into account the present notional deadline for the filing of pleadings, *viz*, the close of pleadings. This is the crucial point of time when the parties' respective cases have crystallised. At the close of pleadings, the issues of fact and law between the parties "should be revealed precisely" (see Sir Jack Jacob & Iain S Goldrein, *Pleadings: Principles and Practice* (Sweet & Maxwell, 1990) at p 4). Thereafter, the parties cannot amend their pleadings without the court's intervention.

77 As this court observed in *Obegi Melissa and others v Vestwin Trading Pte Ltd and another* [2008] 2 SLR(R) 540 (at [13]):

> The close of pleadings is an important juncture in a writ action. It indicates that the issues in

dispute have been sufficiently crystallised by the process of allegation, denial, admission and deemed denial in that order. There is thus at the close of pleadings an implied joinder of issue on the pleading last served (see O 18 r 14(2)(*a*) of the Rules [*ie*, the Rules of Court]). *The close of pleadings also serves as the cut-off point for one-time amendments to the writ or other pleadings made without the leave of the court under O 20 r 1 and O 20 r 3 respectively of the Rules. Further, it signifies the commencement of the timeline under O 25 r 1 of the Rules for taking out a summons for directions as well as triggers in appropriate cases the operation of the automatic directions under O 25 r 8 of the Rules*. [emphasis added]

78 Deeming the close of pleadings as the point in time a litigant "makes" a claim for the purposes of s 209 of the PC avoids most of the pitfalls inherent in both parties' extreme positions. It is a definitive and determinate point in the litigation process (see *Singapore Court Practice 2009* (Jeffrey Pinsler SC gen ed) (LexisNexis, 2009) at paras 18/20/2 and 18/20/3), and it gives full effect to the significance of a plaintiff's ability, as provided for in the Rules of Court, to file a reply. At the same time, making the close of pleadings the decisive point in time also covers the situation where no reply is made by the plaintiff. In that situation, it would not be premature to prosecute an offence under s 209 based solely on what is included in a plaintiff's statement of claim. It is important to appreciate, however, that it is *only* at the close of pleadings that it becomes possible to say whether the plaintiff's "claim" consists of either the statement of claim and reply or only the statement of claim, for it is only at that stage that the parties are deemed, in law, to have finalised their pleadings.

79 This construction of s 209 of the PC also promotes the purpose of the provision, *viz*, to prevent litigants from corrupting the administration of justice and abusing the court process by filing false claims (see [57] above). It is only after the close of pleadings that the court's machinery is ordinarily engaged, in the sense that the close of pleadings "signifies the commencement of the timeline under O 25 r 1 of the Rules [of Court] for taking out a summons for directions as well as triggers in appropriate cases the operation of the automatic directions under O 25 r 8" (see the passage quoted at [77] above). Beyond that point, parties may only make amendments to their pleadings with leave of court. Determining that a plaintiff only "makes" a claim for the purposes of s 209 of the PC at the close of pleadings, therefore, ensures that the conduct Parliament intended to prevent is criminalised neither too early nor too late, but at the precise point of time at which it would ordinarily cause mischief – that is to say when the interactive curial processes would usually commence.

80 It might plausibly be said that determining the close of pleadings as the point at which a plaintiff "makes" a claim within the meaning of s 209 of the PC fails to take into account certain situations where the court process is abused prior to the close of pleadings, *eg*, falsely obtaining summary or default judgment. The short answer to this is that there are other provisions in the PC to deal with these situations, such as ss 191, 193 and 210. To view s 209 of the PC as the panacea to all pleading misdeeds would be to force it into a Procrustean bed. This is something this court cannot condone.

81 At the end of the day, s 209 of the PC should be interpreted in an ordinary commonsense way (that takes into account the broad canvas of existing pleading rules and practices) and it must be accepted that there may well be instances of mischief which may not be captured. This, I acknowledge, is an imperfect application of what can also be said to be an imperfect provision. I cannot, however, under the guise of interpretation adopt an elastic interpretation that attempts to embrace all manner of contingencies when the letter of the provision does not permit this. I should also point out that there have been no known previous prosecutions under s 209 of the PC in Singapore and it is, therefore, improbable that such a sensibly restrained interpretation will suddenly open the proverbial floodgates and wash away the legal profession's existing inhibitions in relation to pleading practices. Here, I would also reiterate that s 209 was introduced in India by the British

colonialists for reasons which could today be considered anachronistic and, I dare say, entirely unacceptable because of the patronising assumptions made about Asian morality. This has been mentioned in my judgment in *BMS (No 3)* at [78] and I can do no better than to repeat my earlier observations here:

> I should also note, from the [Law Commission Report], ***that there were very peculiar reasons for the English colonialists to have created this peculiar offence. A fundamental reason was the perceived lack of morality in the local population resulting in claims or defences with entirely no factual foundations being maintained in court. One may rightly ask how relevant some of these considerations should be in interpreting s 209 of the PC in Singapore today*** . In addition, some of the illustrations given there are highly instructive in indicating the mischief the provision was intended to address. I think it will be helpful to reproduce some of the relevant passages here (at p 41):
>
> > *In countries in which the standard of morality is high, direct evidence is generally considered as the best evidence*. In England assuredly it is so considered, and its value as compared with the value of circumstantial evidence is perhaps overrated by the great majority of the population. *But in India we have reason to believe that the case is different. A Judge, after he has heard a transaction related in the same manner by several persons who declare themselves to be eye-witnesses of it, and of whom he knows no harm, often feels a considerable doubt whether the whole from beginning to end be not a fiction, and is glad to meet with some circumstance, however slight, which supports the story, and which is not likely to have been devised for the purpose of supporting the story. ...*
>
> [emphasis in original in italics; emphasis added in bold italics]

82 I have earlier considered what a "claim" refers to in the context of an action commenced by writ. Significantly, there is a further consideration that counsel did not address. Section 209 of the PC ought to apply with equal force to actions commenced by other originating processes such as originating summonses. Order 7 r 3 of the Rules of Court states:

> Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

The above rule indicates that there is no absolute requirement for the plaintiff in an originating summons to plead material facts in support of his claim. It would make no sense to adopt the Prosecution's approach in respect of originating summonses (*ie*, deeming the claim to be made as soon as an originating process is filed in court), as the court would not be aware of the facts supporting the claim made by looking at the originating summons filed. In my view, when one considers that s 209 of the PC must apply equally to all originating processes, it becomes even clearer that the claim is made only after the parties have finalised the case(s) they intend to pursue in court. For this reason, I take the view that for originating summonses, a litigant "makes" a claim (within the meaning of s 209 of the PC) only when his affidavit evidence, as directed, is filed in court.

83 Returning to the facts of this case, it will readily be seen that, where an action commenced by writ, engrossed with a statement of claim, is resolved before the close of pleadings, it will not be possible to say that a litigant "makes" a claim for the purposes of s 209 of the PC. Indeed, here a settlement was reached shortly after BMS filed the SOC and the action was discontinued even before

any defence or reply was filed. Plainly, it is not possible to say that a "claim" had been "made" for the purposes of s 209 of the PC. I would therefore disagree with the lower courts' determination that the offence (under s 209 of the PC) was complete once the claim was filed in court, and that the falsehood was carried to the point of no return when the settlement was effected (see [23(f)] above). On this point alone BMS's conviction has to be set aside. Given the stark differences between pleading practices in India and Singapore, particularly in relation to the entitlement of a plaintiff to file a reply, the views expressed in dated Indian decisions (and the treatises that rely on them) should have been more cautiously assessed.

The meaning of making a claim which one "knows to be false"

84 The word "false" is similarly not defined in the PC, though it appears in quite a number of other provisions in relation to different subject matters (*eg*, false claims (s 209), false evidence (s 191), false information (s 177), false statement (s 181), and false instrument (s 264), etc). What is considered "false" would depend, largely, on the intent and purport of each particular provision. As for the meaning of the word "false" under s 209 of the PC, three points are noteworthy.

85 First, given that these are criminal proceedings, the Prosecution bears the burden of proving the falsity *beyond a reasonable doubt*. The Prosecution cannot simply assert that the claim would have failed, on a balance of probabilities at the civil trial, or establish that it was probable, possible or could be inferred that the claim was false, as may ordinarily be sufficient in a civil case (see *Hiralal Sarda and others v Emperor* (1932) 33 Cri LJ 860 at 861). The following observations by Bucknill J in *Lalmoni Nonia and another v Emperor* (1922) 24 Cri LJ 321 at 325, though made within the context of s 193 of the Indian Penal Code, apply with equal force to s 209 of the PC:

> [W]hat I do ascertain from the papers which have been placed before me is that there have been inferences drawn as to probabilities which may be deduced from facts and from circumstances which formed the environments of this somewhat peculiar affair; and, *where one has to make up one's mind as to inferences and the correctness of those inferences and as to what is probable and what is reasonable and what is possible, there is often introduced … an element of doubt as should properly cause a Court to give accused persons … the benefit of whatever doubt there is*. Here, I think there is a loophole in this case; although a suspicious and sinister affair, I cannot think that the charge has been fully maintained against these two men by the prosecution. [emphasis added]

86 Second, where questions of law are involved, it cannot be plausibly said that the claim made in court by the plaintiff (or defendant, as the case may be) is false. In *Baisakhi v The Empress* (1888) 7 PR No 38 ("*Baisakhi*"), the court opined (at 100):

> When the correctness of the claim depends upon the existence and validity of a custom having the force of law or upon a question of law and not upon a question of fact, *it will generally be found impossible to establish the charge*. [emphasis added]

I accept *Baisakhi* as correctly stating the position under s 209 of the PC. It is a legal fiction to say that the courts simply expound the law as it has always been. Existing statements or declarations of legal principle ought not to be considered as being invariably set in stone. Precedents are the servants and not the masters of the judicial process. In ascertaining and applying the law, a court is, of course, bound by the decisions of higher courts. But absent the shackles of *stare decisis*, a court may undertake its own enquiry into the state of the law and depart from earlier decisions. It is then for the court to make a final determination on any question of law. If it were otherwise, the law would never be able to progressively adapt and advance. The contrary position would also have an

immediate chilling effect on counsel's ability to uninhibitedly prosecute a client's case comprehensively. Given the above, it is my view that the Prosecution will ordinarily not be able to establish that a claim resting on a question of law is false for the purposes of s 209 of the PC, even if the court eventually rules against the litigant making the claim on that question of law. I would, therefore, emphatically reject the District Judge's suggestion that claims concerning issues of law can also be considered to be false (see [16] above; see also *BMS (No 1)* at [239] and [240]).

87 Third, I will now turn to consider the position in respect of issues of fact. The Indian Law Commissioners gave the following illuminating examples of what they regarded to be "false" claims (the Law Commission Report at p 98):

> A lends Z money. Z repays it. A brings an action against Z for the money, and affirms in his declaration that he lent the money, and has never been repaid. On the trial A's receipt is produced. It is not doubted, A himself cannot deny, that he asserted a falsehood in his declaration. Ought A to enjoy impunity? Again: Z brings an action against A for a debt which is really due. A's plea is a positive averment that he owes Z nothing. The case comes to trial; and it is proved by overwhelming evidence that the debt is a just debt. A does not even attempt a defence. Ought A in this case to enjoy impunity? If, in either of the cases which we have stated, A were to suborn witnesses to support the lie which he has put on the pleadings, every one of these witnesses, as well as A himself, would be liable to severe punishment. But false evidence in the vast majority of cases springs out of false pleading, and would be almost entirely banished from the Courts if false pleading could be prevented.

In both examples, it is obvious that the claims made by A were entirely without factual foundation. In the first example, there was no factual basis for A to claim for the money, as it had already been repaid. In the second example, there was absolutely no factual basis raised by A to support his positive averment that he owed Z nothing. It is clear, from these examples cited by the Indian Law Commissioners, that the mischief that the drafters intended to address under s 209 of the Indian Penal Code was that of making claims *without factual foundation*.

88 The case of *Bulaki Ram*, which the High Court Judge and the District Judge (hereafter referred to collectively as "the Judges below") heavily relied on, involved facts that were actually rather strikingly similar to the first example given by the Indian Law Commissioners (see [87] above). The plaintiff in *Bulaki Ram* brought a claim for Rs 88-11. In the course of proceedings, the defendant produced a receipt from the plaintiff for Rs 71-3-3. Before the courts, the plaintiff's claim to that extent (*ie*, Rs 71-3-3) was dismissed but he obtained a judgment for the balance. The plaintiff was subsequently charged with making a false claim.

89 On the facts of the case, Straight J held that there was *prima facie* evidence for the Prosecution to proceed against the plaintiff. He did not decide that the plaintiff was guilty of making a false claim on the facts of the case. On the contrary, he was careful to emphasise, twice in his judgment, that he was not trying the case before him or expressing any opinion on the plaintiff's guilt. However, the Judges below relied on *Bulaki Ram* as excerpted in Justice C K Thakker & M C Thakker, *Ratanlal & Dhirajlal's Law of Crimes* vol 1 (Bharat Law House, 26th Ed, 2007) (*Ratanlal & Dhirajlal's Law of Crimes*), which reads as follows (at p 989):

> This section is not limited to cases where the whole claim made by the defendant is false. The accused brought a suit against a person to recover Rs. 88-11-0 alleging that the whole of the amount was due from the defendant. The defendant produced a receipt for a sum of Rs. 71-3-3, and this amount was proved to have been paid to the accused. *The accused was thereupon prosecuted and* ***convicted*** *under this section*. It was contended on his behalf that because a

part of the accused's claim was held to be well-founded and due and owing, *he could not be* ***convicted*** *under this section*. ***It was held that the conviction was right*** . Straight J., said: … "if that view were adopted, a man having a just claim against another for Rs. 5, may make claim for Rs. 1,000, the Rs. 995 being absolutely false, and he may escape punishment under this section." [emphasis added in italics and bold italics]

90 It is clear that the learned authors of this treatise had mistakenly elevated the importance of *Bulaki Ram* by treating it as a case involving a *conviction* under s 209 of the Indian Penal Code when it was, in fact, merely a case involving the issue of whether there was *prima facie* evidence to *support the prosecution*. The Judges below, by relying solely on the case *as excerpted*, would not have been aware of this important distinction, though in fairness, it was through no fault of theirs as the case report for *Bulaki Ram* was not made available to them by counsel. Again, I would reiterate my observations in *BMS (No 3)* at [81]:

> Neither counsel nor a court should rely on judicial *dicta* without perusing and considering the context in which such judicial views have been made. This is especially so if it involves a point that takes centre stage in the proceedings. One can never be sure whether there may have been peculiar considerations, legal or otherwise, that influenced the *dicta*, or whether those observations were made purely in the context of the peculiar issue or type of facts before that court. Alternatively, the weight placed on that authority may turn out to be misplaced if the court has merely made those remarks *casually or* without proper deliberation or reference to authority. [emphasis in original]

91 Next, I would point out that Straight J's observations in *Bulaki Ram* were made in a very narrow context and was, as noted earlier (at [88]), very similar to the straightforward examples given by the Indian Law Commissioners. In particular, Straight J took the view that the claim was *prima facie* false, stating (*Bulaki Ram* at 2):

> [I]f that view [*ie*, the plaintiff's arguments] were adopted, a man having a just claim against another for Rs. 5, may make claim for Rs. 1,000, the Rs. 995 being absolutely false, and he may escape punishment under this section. The law never intended anything so absurd. These provisions were made by those who framed this most admirable Code, which I wish we had in England, with full knowledge that this was a class of offences very common in this country. *We who sit in this Bench and try civil cases know that this is so, and that* ***most dishonest claims*** *are made by persons who thinking to place a judgment-debtor in difficulty*, ***repeat claims*** *against him* ***which are satisfied*** . I am, however, not trying this case or expressing any opinion as to the petitioner's guilt. [emphasis added in italics and bold italics]

92 In the examples provided by the Indian Law Commissioners and *Bulaki Ram*, the claims, as made, were *prima facie* without any factual foundation. The plaintiff in *Bulaki Ram* apparently did not question the veracity of the receipt for Rs 71-3-3 and therefore did not have any factual or legal basis for claiming for Rs 88-11 in its entirety. In short, there was not even a colourable claim for the amount claimed as allegedly due. There was a claim, if at all, only for a very small fraction of what was alleged to be due. Similarly, in the first example provided by the Indian Law Commissioners, the receipt produced was not doubted. In their second example, A did not even attempt, at trial, a defence despite his positive averment that he owed Z nothing. In both examples, there were no facts whatsoever to support the plaintiff's (or defendant's) claim. In my view, it was on this very narrow and facile basis that these claims were considered by both Straight J and the Indian Law Commissioners to be false. Pertinently, in none of these cases or illustrations was there any complex interplay of issues of fact and law. They simply involved either unambiguous repeat claims or unarguably sham defences. It ought to be also pointed out that all the Indian cases involving s 209

drawn to our attention appear to be instances where the courts initiated proceedings (against the litigants who had made false claims) only after all the pertinent facts had been established at the conclusion of trial proceedings.

93 I would further observe that the Judges below were content to rely on *Bulaki Ram* (as excerpted (see [89]–[90] above)) to suggest that the test for falsity was applied by considering the pleading on its face (see *BMS (No 1)* at [234]–[236] and *BMS (No 2)* at [52]). However, I do not think that *Bulaki Ram* stands for the proposition that the litmus test of falsity is to be assessed solely by reference to the pleadings alone, or that every statement of claim which does not, on its face, contain all the material facts is a false claim. Neither does *Bulaki Ram* stand for the proposition that every exaggerated or overstated claim is false. On the contrary *Bulaki Ram* suggests that the wider factual context has to be taken into account as its primary consideration was whether, on the facts of the case, the petitioner there had a claim for Rs 88-11 in light of the receipt. But in assessing whether s 209 of the PC is contravened, it is plainly not enough to merely scrutinise the pleadings of a party.

94 It is vital to appreciate that whether the litigant's "claim" or cause of action, properly understood, is false is not considered merely from whatever he pleads (or omits to plead): that would be to elevate form over substance. To make out the offence, the court does not merely inspect *how* a litigant's pleadings have been drafted or the case has been presented. The real issue is whether, all said and done, the litigant's action has a proper foundation which entitles him to seek judicial relief. Indeed, a similar approach was taken by Costello J in relation to false statements under s 193 of the Indian Penal Code in *Rash Behary Ray and others v Emperor* AIR 1930 Cal 639, and I see no reason why the same ought not apply in relation to s 209 of the PC. When examining the origins of s 209 of the PC, it is also most pertinent that, in the Draft Provision, the Indian Law Commissioners used the term "*no just ground*" [emphasis added] in characterising a false claim (see [54] above). It must, therefore, follow that the *substance* of a party's claim is crucial. The critical question, accordingly, is whether *there are any grounds, whether in law or in fact, to make a claim even if they are not revealed in the pleadings itself*. I do not think that s 209 of the PC was ever intended to operate as a trap for solicitors or litigants who may inadequately or incorrectly plead their case.

95 I should also mention that a distinction must be drawn between claims that may be regarded as being legally hopeless and claims that are false. For example, one may characterise a claim that is based entirely on love and affection as consideration as being hopeless in the light of the current state of contract law, but one certainly cannot say that such a claim is false because only the courts can determine what constitutes good and valuable consideration (or, more fundamentally, whether consideration is necessary under contract law). This category of claims, like many types of claims involving elements of illegality, often involve closely intertwined, and often inseparable, issues of fact and law. Given this almost indivisible interrelationship between fact and law, such matters raise many thorny legal issues. A court should be slow to label these problematic cases as false even if they are ultimately found to be hopeless. There are already a number of effective sanctions that a court can visit upon litigants and/or counsel who present hopeless claims in court (see [55] above).

96 As for the requirement that the primary offender and the abettor each knew that the claim was false (see [111] below), this is, in my view, always a question of fact and degree. It may be said that the definition of "false" above may render clients and their solicitors, who may mistakenly add (or omit) a digit to the amount claimed in the statement of claim and/or reply, at risk of offending s 209 inadvertently. I think that such concerns are overstated, as these clients and solicitors would not, in such circumstances, have the requisite knowledge that the claim made was false.

97 Turning now to the facts of the present case, it is plain that the Judges below were content to

conclude that BMS had abetted the Sellers in making a false claim because the "true" sale price on the face of the SOC alone was overstated. The High Court Judge also held that the claim was false because the Sellers had agreed to sell at $390,000, and the $490,000 price was inserted in the OTP for the purpose of facilitating the illegal cash-back transaction only (see [23(a)] above). He concluded that BMS had decided to conceal the existence of the oral contract from the court. With respect, such an interpretation of the claim was not supported by the facts as properly understood, for the following reasons.

98 First, it should always be borne in mind that the multi-faceted relationship between the tools of procedure and the machinery of justice is, in the celebrated words of Sir Richard Collins MR, "intended to be that of handmaid rather than mistress" (see *In re Coles and Ravenshear* [1907] 1 KB 1 at 4). Before this court, the Prosecution contended that the SOC filed by the Sellers was false because it omitted the fact that the actual sale price was $390,000. It is implicit from this submission that the Sellers had, in substance, a viable claim against the Buyers and that the Sellers' (and/or BMS's) only "mistake" was that they had pleaded their case "wrongly". I do not see how or why such conduct can or ought to be criminalised under s 209. This provision is plainly targeted at the filing of *false* claims and not defective pleadings. Therefore, the focus of the court's enquiry ought always to be on the wider factual matrix (*eg*, whether A *in fact* owes B $100, and whether A had made part or full payment of the debt) rather than just the material facts which are stated on the face of the pleadings. The Indian Law Commissioners did not intend for s 209 of the PC to penalise a litigant who has a good claim but inadvertently omits facts in his pleadings. This position ought to be no different in cases where for legitimate tactical reasons, prior to the filing of a reply, a plaintiff keeps his powder keg partially dry in an attempt to commit his adversary to a particular legal position or course of action. There is, as explained above, absolutely no obligation on a plaintiff to anticipate how a defendant might refute a particular claim. Form or procedure should not, in the context of s 209 of the PC, take precedence over the substance of a claim.

99 Indeed, as pointed out earlier (see [82] above), when one considers the applicability of s 209 of the PC to originating summonses, it becomes even clearer that the court ought not to limit itself to considering only the content of the originating summons alone, as it would be entirely silent on the material facts and/or the grounds for relief. Instead, the grounds for relief and facts giving rise to the dispute are put forth by the parties through their respective affidavits, and the making of a false statement in an affidavit would be an offence caught under s 193 read with s 191 of the PC. In the present case, given the Prosecution's significant concession that the Sellers had a viable claim in law but ought to have pleaded their case differently (see [44]–[45] and [73]–[74] above), it is impossible to see how it can be said that BMS filed a false claim.

100 Second, the Sellers here plainly had, at the very least, an indisputable claim in respect of the repudiated oral contract for the sale of the Flat at $390,000. BMS was attempting, in light of the Sellers' instructions that the Flat had been sold at a substantial undervalue by the Agents to the advantage of the Buyers, to enforce the OTP for $490,000. Was such a course of action so far beyond the pale that it offended s 209 of the PC? I do not think so. Whether a claim for $490,000 could succeed was an issue of mixed fact and law. It would depend on, *inter alia*, whether the OTP was illegal and, even if so, whether the Sellers were, nevertheless, entitled to enforce it despite the illegality because, for example, they were not a party to the illegality from the outset. Complex questions relating to the doctrine of *locus poenitentiae* may also arise if Koh's version of events is believed (as BMS did). The court would have to decide, based on its interpretation of the law and its finding of facts, whether the Sellers were entitled to claim based on a selling price of either $490,000 or $390,000. As the Sellers had an OTP which *ex facie* stated that the purchase price was $490,000, the Sellers' claim could not be said to be devoid of any factual foundation. All that can be said is that their claim *may* not have been enforceable because of the earlier oral agreement between the parties

and/or because of illegality, but that would involve a question of law. Whether the OTP (and hence the claim) was enforceable was therefore an issue of law which (only) the courts could ultimately decide on after being seised of all the material facts, and the claim could not be said to be false on that ground alone.

101 Neither do I see how it can be said that BMS knew that the claim was false. The lower courts have, in my view, lost sight of the fact that the Sellers had very publicly stated, prior to the filing of the SOC, that they had been *unwittingly* dragged into a cash-back arrangement. BMS accepted the Sellers' version of events that the Agents had been manipulative in pressing for the Flat to be sold at a substantial undervalue and, most importantly, that they had not participated in the cash-back arrangement from the outset. It could be neither obviously nor objectively concluded by a reasonable solicitor that their instructions were false. Given their numerous earlier and emphatic references to the cash-back arrangement in the Sellers' complaints to the authorities and the press just before the filing of the SOC, could it be reasonably concluded that there ever was an intention to falsely conceal this alleged arrangement and thereby abuse the court process? I do not think so.

102 All in all, I do not see how the claim filed by BMS on the Sellers' behalf can be considered to be false, or that BMS could be said to know that the claim was false, in the then prevailing circumstances. Quite plainly, the Judges below, by relying on the supposed illegality of the OTP to hold that a false claim was filed by BMS in court, had decidedly misdirected themselves as to the legal meaning of the word "false". On this basis, I again do not think that BMS's conviction was safe.

The meaning of a "court of justice"

103 In the courts below, BMS did not deny that the Sellers had made a claim before a "court of justice" (see *BMS (No 1)* at [228] and *BMS (No 2)* at [35]). Neither was this questioned by the parties in their respective submissions.

104 Section 20 of the PC provides a definition of "court of justice" in the following terms:

> The words "court of justice" denote a judge who is empowered by law to act judicially alone, or a body of judges which is empowered by law to act judicially as a body, when such judge or body of judges is acting judicially.

105 The term "judge" is defined in s 19 of the PC as follows:

> The word "judge" denotes not only every person who is officially designated as a judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

106 At first glance, the definition of "court of justice" suggests that a "court of justice" is the person(s) who meet(s) the definition of "judge" in s 19 of the PC, rather than the judicial institution called a "court". *Ratanlal & Dhirajlal's Law of Crimes* also suggests (at p 63) that the term "does not mean … the place or building where justice is administered, but the Judge or Judges who conduct judicial proceedings in the due administration of justice". This implies, therefore, that until the first day of trial (or the hearing of an interlocutory application, if any) before a judge, it cannot be said that the plaintiff makes a claim "before a court of justice".

107 This, however, is a strained construction that defers the point at which an offence under s 209

of the PC may be committed, when the decisive moment is really the close of pleadings (in the context of actions commenced by writ (see [76]–[83] above)). Adopting such a construction would be contrary to the intent and purport of s 209 of the PC, which, as can be seen from Note G (at [51] above), envisioned a "court of justice" as an institution rather than as a person or body of persons.

108 Further, the term "court of justice", as it is used in the PC, does not consistently refer to a judge or body of judges. It is also used to refer to the court as an *institution*. For instance, s 51 of the PC provides:

> The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorised by law to be made before a public servant, or to be used for the purpose of proof, whether *in a court of justice* or not. [emphasis added]

Here, it is clear that "court of justice" cannot literally refer to a "judge" or "body of judges", but must mean, instead, the court as a legal or judicial institution. In addition, Illustration (b) to s 76 of the PC provides:

> *A*, ***an officer of a court of justice*** , being ordered by that court to arrest *Y*, and, after due enquiry, believing *Z* to be *Y*, arrest *Z*. *A* has committed no offence. [italics in original; emphasis added in bold italics]

Whereas a bailiff or sheriff would clearly be "an officer of a court of justice" within the meaning of Illustration (b) to s 76, such an individual would not normally be regarded as an officer of a "judge" or "body of judges".

109 As such, on a true construction of s 209 of the PC, the term "court of justice" must mean more than simply a judge or body of judges acting judicially: it must mean, not so much the physical edifice of the courthouse building, but the entire legal institution or body where disputes are adjudicated. On the facts of this case, the "court of justice" in question would refer to the Subordinate Courts, where the SOC was initially filed.

A solicitor's liability for abetting the making of a false claim

110 As mentioned earlier, BMS was charged with abetment by intentionally aiding the making of a false claim. Section 107(*c*) of the PC sets out the law on abetment by aiding as follows:

> **107**. A person abets the doing of a thing who —
>
> …
>
> (c) intentionally aids, by any act or illegal omission, the doing of that thing.
>
> …
>
> *Explanation 2*.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.
>
> [bold and italics in original]

111 In order to establish that abetment has taken place, the Prosecution must show that: (a) the accused did something which facilitated the commission of offence (see Explanation 2 to s 107 (at

[110] above)); and (b) the accused had knowledge of the circumstances of the offence (see *Daw Aye Aye Mu v Public Prosecutor* [1998] 1 SLR(R) 175 at [41] and *Pritam Singh s/o Gurmukh Singh v Public Prosecutor* [2003] SGHC 160 at [33]). Nelsonian knowledge or wilful blindness may also suffice for the purposes of establishing abetment liability (see *Bala Murugan a/l Krishnan and another v Public Prosecutor* [2002] 2 SLR(R) 420 at [31]). In *Chiaw Wai Oon v Public Prosecutor* [1997] 2 SLR(R) 233, Yong CJ explained the difference between Nelsonian knowledge and lower standards of imputed knowledge in the following manner (at [45]):

> [M]erely being put on inquiry or a mere suspicion is not to be equated automatically with knowledge. However, where the facts obviously point to one result, and the accused must have appreciated it but shuts his eyes to the truth, then together with the other evidence adduced, this can form a very compelling part of the evidence to infer the requisite guilty knowledge.

112 Here, there is no dispute that BMS filed the SOC on the Sellers' behalf at the Subordinate Courts; the *actus reus* element is therefore notionally satisfied. The key issue, accordingly, is whether BMS knew of the circumstances of Koh's alleged primary offence at the time of filing the SOC at the Subordinate Courts. As will become evident, this issue straddles important issues of ethical responsibilities relating to a solicitor's duty to verify a client's instructions. Therefore, it would be apposite for me to make a few observations about this *duty to verify* first. The broad questions to be answered are (see *BMS (No 3)* at [75]):

> (a) *When there is a factual controversy, can a solicitor rely exclusively on his client's version of events in prosecuting a claim or defence*?; *and*
>
> (b) *What is the extent of a solicitor's duty of verification, if any, in the absence of incontrovertible evidence that entirely undermines his client's instructions?*
>
> [emphasis in original]

The duty not to mislead and the duty of verification

113 It is trite that a solicitor, being an officer of the court, owes a paramount duty to the court, which overrides his duties to the client (see Pt IV of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed) ("the Professional Conduct Rules"); see also *Public Trustee and another v By Products Traders Pte Ltd and others* [2005] 3 SLR(R) 449 at [35], *Rondel v Worsley* [1969] 1 AC 191 at 227, *Saif Ali and another v Sydney Mitchell & Co (a firm) and others* [1980] AC 198 at 219, and *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615 at 680). This paramountcy is justified by reason of "the court" being the embodiment of the public interest in the administration of justice. No instructions from a client, tactical considerations or sympathy for a client's interests can ever take precedence over this duty.

114 A crucial aspect of this multi-faceted responsibility is the duty not to mislead the court, also known as the duty of candour (see, in particular, rr 56, 59(*a*) and 60(*f*) of the Professional Conduct Rules, as well as Principle 21.01 of *The Guide to the Professional Conduct of Solicitors* (Nicola Taylor gen ed) (The Law Society, 8th Ed, 1999) ("*The Guide*")). Indeed, this duty is a touchstone of our adversarial system which is based upon the faithful discharge by an advocate and solicitor of this duty to the court. The duty applies when performing *any* act in the course of practice. Litigants and/or their solicitors must neither deceive nor knowingly or recklessly mislead the court. Untrue facts cannot be knowingly stated, true facts cannot be misleadingly presented, material facts cannot be concealed and a client or witness must not be allowed to mislead the court. Unquestionably, the tension between the duty to the court and to the client can only be reconciled by the solicitor

maintaining his poise by dint of steering a cautious middle course. As Lord Templeman perceptively noted in an article titled "*The Advocate and the Judge*" (1999) 2 Legal Ethics 11 (at 11):

> The litigant aims to obtain a favourable result. The advocate aims to persuade the judge to reach a result favourable to his client by fair means. The advocate, not the litigant, must decide which means are fair in the light of the advocate's training and experience in the law.

Simultaneously, a solicitor must have his eye on his client's success as well as live up to his non-derogable responsibilities to ensure the administration of justice. I should explain that I have briefly touched on all these wide-ranging duties and solemn responsibilities so as to illustrate the point that it is sometimes no easy task, especially in problematic cases, for a solicitor to balance competing and sometimes conflicting considerations in the faithful discharge of a client's instructions.

115 The duty of candour has both a prescriptive and a proscriptive dimension in civil proceedings. On the one hand, the solicitor must, for example, ensure that all discoverable documents are produced and he must disclose to the court even adverse legal authorities; on the other hand, he must refrain from misleading the court as to the law or the facts. He has a duty to place before the court his client's version of facts but must not massage or tamper with the facts or invent a defence. The solicitor cannot knowingly place a false story before the court. So long as he is not misleading the court, he is not otherwise constrained from presenting his client's case, and is in fact afforded considerable latitude in how he chooses to do so. As Denning LJ explained in *Tombling v Universal Bulb Company, Limited* [1951] 2 Times LR 289 (at 297):

> The duty of counsel to his client in a civil case … is to make every honest endeavour to succeed. *He must not, of course, knowingly mislead the Court, either on the facts or on the law, but, short of that, he may put such matters in evidence or omit such others as in his discretion he thinks will be most to the advantage of his client*. … The reason is because he is not the judge of the credibility of the witnesses or of the validity of the arguments. He is only the advocate employed by the client to speak for him and present his case, and he must do it to the best of his ability, without making himself the judge of its correctness, but only of its honesty. [emphasis added]

116 The solicitor's duty, in this respect, is to present his client's case in the most favourable light and not prejudge the outcome. Ultimately, it is for the court to decide that outcome. In the famous exchange between the irrepressible James Boswell and that personification of common sense Samuel Johnson (as quoted in John V Barry, "The Ethics of Advocacy" (1941) 15 ALJ 166), Boswell reportedly asked (at 169): "But what do you think of supporting a cause which you know to be bad?" Dr Johnson replied:

> Sir, you do not know it to be good or bad till the Judge determines it. ... It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client and then hear the Judge's opinion.

Notably, Dr Johnson also penetratingly pointed out (at 169) that a solicitor has no charter to mislead and elaborated on why he should not act as an appraiser of his client's veracity:

> [A] lawyer has no business with the justice or injustice of the cause which he undertakes …. [It] is to be decided by the judge. … A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to usurp the province of ... the judge and determine what shall be the effect of the evidence,—what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of

> the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on one side or other; and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.

117 The solicitor is also entitled to use all available legal procedures to the best advantage of the client but cannot manipulate or misuse the machinery by, for example, employing delaying tactics or engaging in a battle of attrition. In advancing his client's cause, the employment of legal tactics or strategies by a solicitor in order to pin an opposing party or to extract concessions is not improper if carried out in accordance with the intent and purport of the Rules of Court. Truth in pleadings is, however, an extremely difficult area to police and circumscribe with bright lines. For instance, a litigant and his solicitor ought not to put the opposing side to proof of a fact that is known by them to exist. Such a denial, particularly if done for an ulterior purpose, is certainly ethically improper but ought not to be a crime. However, if one was to take the determinations of the lower courts to their logical end (as this denial is also a false pleading by their capacious definition), large swathes of pleadings would end up being criminalised.

118 The broad issue raised in this case is whether *the duty of candour to the court* requires the solicitor concerned to verify the truthfulness or factual accuracy of his client's instructions and if so the extent of this duty. This point was addressed in *Wee Soon Kim Anthony v Law Society of Singapore* [2002] 1 SLR(R) 954 ("*Anthony Wee (No 2)*"), where this court explained (at [23]):

> *There is no general duty on the part of a solicitor that he must verify the instructions of his client*. This was laid down in *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 and *Tang Liang Hong v Lee Kuan Yew* [[1997] 3 SLR(R) 576]. *It would be different if there were compelling reasons or circumstances which required the solicitor to verify what the client had instructed*. [emphasis added]

More than a decade earlier, Chan Sek Keong JC, in another decision, *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 ("*Anthony Wee (No 1)*"), involving the same litigant solicitor, unequivocally declared with his customary acuity and clarity (at [21]):

> It is not for an advocate and solicitor, whether in his capacity as counsel or as solicitor, to believe or disbelieve his client's instructions, *unless he has himself has personal knowledge of the matter or unless his client's statements are inherently incredible or logically impossible. His duty to his client does not go beyond advising him of the folly of making incredible or illogical statements*. [emphasis added]

Of course, a solicitor cannot simply take whatever the client states at face value. The solicitor has a *duty to the client* to assess the instructions holistically and explain to the client what may support or contradict the claim. He has to ensure that his client understands the duty to be truthful and the consequences of being found to be untruthful.

119 This is also the current position in England. *The Guide* confirms (see Principle 21.21, paras 4–5) that there is, in general, no duty upon a solicitor to enquire in every case whether his client is telling the truth, and the mere fact that a client makes inconsistent statements to his solicitor is no reason for the solicitor to verify those statements; it is only where it is *clear* that the client is attempting to

put forward false evidence to the court that the solicitor should do so, or cease to act. Evidently, therefore, *the duty to verify arises only in the presence of compelling reasons or circumstances*, and *is not triggered simply because the client gives conflicting instructions*. Where, however, the client's instructions are consistent and unwavering, the answer must surely be that there is no peculiar requirement to take extraordinary steps to assess the veracity of the client's story. I observed in *BMS (No 3)* at [75] that:

> *Solicitors frequently find themselves in a position where they are confronted with opposing versions of events, but should be allowed to act on their client's instructions even in the face of conflicting evidence, unless the instructions received fly in the face of incontrovertible evidence or documents*. As Lord Halsbury sagely observed more than a hundred years ago, "Very little experience of courts of justice would convince any one that improbable stories are very often true notwithstanding their improbability." (see Showell Rogers, "The Ethics of Advocacy" (1889) 15 LQR 259 at 265). The solicitor should not create or act as a pre-trial sieve that a client's instructions must pass through as he or she is not a fact-finder. [emphasis added]

The findings by the courts below

120 It is now necessary for me to consider the findings made by the courts below to ascertain if it is implicit from these findings that a more searching duty to verify a client's instructions has been indirectly imposed on the legal profession through an incorrect application of s 209 of the PC to this matter.

121 The District Judge essentially found that BMS knew about the circumstances of the offence from a number of sources (see [19] above). Crucially, after considering the service commission form signed by the Sellers and the exchange of correspondence between BMS and M/s Rayney Wong regarding the name of a payee, the District Judge cryptically noted that (*BMS (No 1)* at [181]):

> The totality of the evidence shows that [BMS] was fully aware that [Koh] had participated in the cash back transaction and he abetted him by presenting a false claim to abuse the legal process. *[BMS] never made any attempt to ask the [A]gents to clarify the sum of $100,000*. [emphasis added]

I am puzzled why the District Judge thought BMS should have made an attempt to seek clarification from the Agents. Unfortunately, this was not the only serious error he made. After finding that BMS had known about the cash-back arrangement from the Marina Mandarin Meeting, the District Judge curiously observed that (*BMS (No 1)* at [219]):

> The net effect of the above [evidence] is that [Ho] had obviously told [BMS] of the cash back arrangement in the transaction and he had knowledge of the same. This is further borne out by [BMS's] undisputed conduct at and after the meeting. *If anything, [BMS] deliberately refrained from making enquiries that would shed more light on the transaction. For example, he claimed that he could not recall whether he had asked anyone at the Marina Mandarin [M]eeting if the transaction was a cash back transaction. He also stated that in all his dealings with Mr Mohd Ismail, he did not ever ask him. This reticence appears completely uncharacteristic of [BMS] when compared to what is reflected in his dogged pursuit on all the other issues in the various letters*. [emphasis added]

122 This again reveals that the District Judge did not appreciate the basic scope of a solicitor's duty to verify his client's instructions. This is not all. The District Judge also mistakenly found that BMS was "clearly aware of the true circumstances" (*BMS (No 1)* at [185]) of the offence. Before that,

the District Judge had stated (*BMS (No 1)* at [184]):

> As *an experienced lawyer it cannot be too much to expect [BMS] to have taken additional steps to ensure that he was not involved in an abuse of judicial process, even if his client has sworn a statutory declaration*. This point was alluded to by the learned author of ***The Law of Advocates and Solicitors in Singapore and Malaysia*** … that:
>
> > "The fact that a client swears in a statutory declaration that he is the victim of a fraud may be an appropriate consideration in precluding any suit by the client against the solicitor. However, it ought not be sufficient. The solicitor is expected, as the cases elsewhere show, to investigate for himself to see if a case of fraud is reasonably made out and, if it is not, to advise his client not to press the allegation."
>
> [bold italics in original; emphasis added]

123 Before the High Court Judge, BMS argued that he knew that the original selling price was $390,000, but was instructed by Koh that the price stated in the OTP was $490,000, with the result that there were two prices for the Flat (*BMS (No 2)* at [65]). The High Court Judge dismissed BMS's argument, finding that BMS knew or was wilfully blind to the fact that Koh had agreed to participate in the cash-back scheme, on the basis of the following:

(a) the events at the K K Yap Meeting and the Marina Mandarin Meeting indicated that BMS knew (or had constructive knowledge) that the true transaction price was $390,000 (*BMS (No 2)* at [66]);

(b) the letters to the HDB and the IRAS contained clear references to the amount of $100,000 being returned to the Buyers, and to the transaction price for the Flat being $390,000 (*BMS (No 2)* at [67]); and

(c) Koh's statements to the CPIB indicated that BMS knew that the $490,000 price indicated on the OTP was false (*BMS (No 2)* at [68]).

124 By highlighting that BMS had never made any attempt to clarify with the Agents the sum of $100,000 (see [121] above), it was contended by BMS's counsel that the District Judge had mistakenly placed on BMS the burden to verify his clients' instructions. On this issue, the High Court Judge observed that (*BMS (No 2)* at [81]):

> The decision in this case does not impose on a lawyer the duty to verify facts stated by his client and it certainly does not hold that a lawyer must do so even when such facts are contained in a statutory declaration. *It concerns a lawyer's duty to act honestly when he knows about or is imbued with knowledge of some wrongful act*. [emphasis added]

125 In essence, both the Judges below relied on, largely, the same set of facts to reach similar (but differently nuanced) conclusions. The District Judge concluded that BMS had (at the very least) Nelsonian knowledge about the cash-back arrangement, as he was under a duty to verify Koh's instructions to him. The High Court Judge, however, while quite correctly holding that no duty was imposed on BMS to verify his clients instructions, nevertheless felt that, BMS had (at the least) Nelsonian knowledge about the cash-back arrangement because of the circumstances. The facts and evidence which both the Judges below relied on were as follows:

(a) Koh admitted, in the CPIB statements, that he had agreed to sell the Flat at $390,000 and

that the $490,000 sale price was "false";

(b) the letters sent by BMS to the HDB and the IRAS (see [8] above);

(c) the events at the K K Yap Meeting and the Marina Mandarin Meeting; and

(d) the service commission form signed by Koh.

126 I disagree with the District Judge's finding that the facts here required BMS to take special steps to verify his clients' instructions. In my view, the District Judge had entirely misconceived the scope of the duty imposed on a solicitor to verify his clients' instructions. First, as a matter of law, the District Judge had relied on the treatise of Prof Tan Yock Lin ("Prof Tan") (*viz*, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Malayan Law Journal Pte Ltd, 1991) ("*The Law of Advocates and Solicitors*")) to support his determination that BMS had to make "additional" independent enquiries to assess the veracity of Koh's version of events (see [122] above). However, Prof Tan did not suggest that there was a *general* duty on solicitors to verify their client's instructions. Instead, he was simply making observations on a Malaysian case (*viz*, *Abdul Malik bin Abdul Majid v Asnah bte Hamid & Anor* [1985] 2 MLJ 459) which suggested that solicitors who received instructions from a client to allege fraud against another party in legal proceedings ought to protect themselves by requesting their clients to confirm their instructions in a statutory declaration. Otherwise, a solicitor who alleges fraud in pleadings despite being aware that it is groundless may be personally liable for costs.

127 In Prof Tan's view, the fact that a statutory declaration was made may not always be sufficient, and a solicitor may also have to investigate and ascertain if an allegation of fraud is made on reasonable grounds (see *The Law of Advocates and Solicitors* at p 310). I think it is important that these observations by Prof Tan are read in their proper context. All he intended to say was that a solicitor ought not to allege fraud without reasonable grounds. He owes a duty of care before making allegations of misconduct against another. Quite plainly, the situation here is altogether different. Prof Tan was certainly not discussing the potential liability of a solicitor as regards an offence under s 209 of the PC. Furthermore, Prof Tan's observations were made before *Anthony Wee (No 2)* was decided. In the light of this court's observations in *Anthony Wee (No 2)*, Prof Tan's observations (which I doubt were intended to be a statement of general principle) cannot be said to correctly delineate the general scope of a solicitor's duty to verify a client's instructions.

128 On the facts, it is clear that no compelling circumstances to verify Koh's instructions with any other party had arisen. In any event, *there was simply no objective or neutral party with whom BMS could verify his instructions* (see also [130] below). Turning first to consider Koh's instructions, two points are noteworthy. First, the Sellers were upfront in informing BMS that the actual sale price of the Flat was $390,000. They did not conceal this fact. Next, although Koh did describe the $490,000 claim in the OTP as false in his CPIB statements, it should also be remembered that Koh had *consistently maintained in those statements that he was not a party to the cash-back arrangement* and that he only learnt about the arrangement when he attended at the HDB's offices on 2 December 2007 (see [7] above). It bears emphasis that Koh's testimony in court was, to that extent, entirely consistent with what he had stated to the CPIB investigators when he was closely questioned. This was the same version of events he had given to BMS. If the CPIB questioning failed to draw out a different version of events from Koh, how could BMS (*qua* reasonable solicitor) be faulted for believing Koh's instructions?

129 Next, as for the letters sent to the IRAS and the HDB, it would be useful to first set out the salient portions of those letters (which are similar): [note: 23]

> Dear Sir
>
> **COMPLAINT AGAINST HOUSING AGENT – [HO] AND [TEO] …**
>
> **FOR "CASH BACK", ILLEGAL MONEYLENDING AND FALSE DECLARATIONS**
>
> We act for [the Sellers].
>
> …
>
> Our clients are concerned that Ho and Teo [*ie*, the Agents] have induced our clients to unknowingly make false statements to [the] HDB, *assist the purchasers [*ie*, the Buyers] in cheating the bank and CPF [*ie*, Central Provident Fund] Board in obtaining a larger loan and larger amounts of withdrawals respectively* and Teo in making a false Statutory Declaration to [the] HDB.
>
> [bold and underlining in original; emphasis added]

Again, in both letters, there was no mention that Koh had, himself, *agreed* to the cash-back arrangement from the beginning. I would further observe that if indeed Koh told BMS that he was a party to the cash-back arrangement from the outset, it would make no sense whatsoever for BMS to advise Koh to send out such letters as Koh would be eventually implicated.

130 As for the events that transpired during the K K Yap Meeting and the Marina Mandarin Meeting, the findings made by the Judges below were based on assertions made to BMS by Ho and Hong (see [19(b)] and [25] above). However, Ho and Hong were parties with interests diametrically opposed to that of Koh. Here, the role and responsibilities of a solicitor in relation to advancing his client's interests had again not been properly appreciated. It is not uncommon for solicitors to receive conflicting information from an adversarial party, and I do not see why BMS was required to verify Koh's instructions just because Ho and Hong had given another version of events. Significantly, Ho and Hong provided no objective evidence to back their claims. In the prevailing circumstances, I reiterate: with which reliable or objective source could BMS verify Koh's assertions that he was not involved in the scam? Put in another way, how should or could BMS have satisfactorily verified the information Koh had given him? Neither the Judges below nor the Prosecution ever satisfactorily answered these rather basic but essential questions.

131 As regards the service commission form signed by Koh, I accept that it indicated that the commission paid was based on a selling price of $390,000. However, that was exactly what Koh had told BMS – that he had originally agreed to sell at $390,000, and did not know why the price on the OTP was now $490,000. This fact is neither here nor there.

132 After assessing the evidence relied on by the Judges below, I am of the view that there were in fact no compelling reasons that required BMS to verify the Sellers' instructions to him. Indeed, Koh's instructions to BMS were consistent – he had agreed to sell the Flat at $390,000, but, for reasons unknown to him, the price on the OTP was stated as $490,000. There was nothing contradictory about Koh's instructions to BMS (see [128] above). There was simply no evidence that Koh had told BMS that he had agreed to the cash-back arrangement from the beginning. Tellingly, Koh also maintained this version of events in court despite the intense cross-examination he was subjected to.

133 Given the above circumstances, I do not think that it can fairly be said that BMS knew or was

wilfully blind to the circumstances constituting the offence. The Prosecution had not established, beyond a reasonable doubt, that BMS *knew* that Koh had *agreed* to the cash-back arrangement from the beginning. Simply because BMS had been confronted with a contrary version of events, based on the fact that Ho and Hong had told him about the cash-back arrangement was not determinative as he was entitled to rely on Koh's instructions that he (*ie*, Koh) did not know about the cash-back arrangement. In this regard, I would also observe that the District Judge's findings (that BMS knew about the cash-back arrangement) were made without reference to the alleged source of this information. There is a fundamental difference between knowing that there were allegations that a client was involved in a cash-back arrangement, and knowing that the client had indeed *agreed* to the cash-back arrangement from the outset. On this basis, it would not be safe for BMS's conviction to stand, given that the Judges below had misdirected themselves as to the scope of a solicitors' duty to verify a client's instructions.

134 While the High Court Judge's determination of BMS's guilt was at the end of the day more indirect in that he held that "[o]n the *totality of the evidence*, it could and should be *inferred* that [BMS] had the requisite guilty knowledge at least from the fact that *he deliberately shut his eyes to the obvious*" [emphasis added] (see *BMS (No 2)* at [71]), this finding too is questionable. As I have pointed out earlier, none of the facts relied on by either of the Judges below *ineluctably* implicated Koh in the scam from the outset. A court should be slow in attributing a solicitor with blind-eye knowledge of his client's dishonesty. As Chan JC noted in *Anthony Wee (No 1)* (at [21]):

> It is not for an advocate and solicitor, whether in his capacity as counsel or as solicitor, *to believe or disbelieve his client's instructions, unless he has himself has personal knowledge of the matter or unless his client's statements are inherently incredible or logically impossible*. [emphasis added]

The present case was clearly not such a case. First, there was no reason for BMS to have accepted the version of events proffered by the Agents and/or the Sellers. BMS therefore had no personal knowledge of the "falsity" of Koh's instructions. Second, the available documentation was of little assistance and offered no conclusive pointers. Koh's instructions were neither inherently incredible nor logically impossible.

135 As the findings of dishonesty and impropriety against BMS *directly flowed from the issue of his supposed duty to verify instructions and/or his knowledge of the assertions made against Koh*, I also find them entirely unsupportable, as they rest on incorrect inferences and questionable legal suppositions. I should add for the avoidance of doubt, even assuming *arguendo* that Koh committed offences in connection with the sale transaction, this is, at the end of the day, legally irrelevant *apropos* BMS. He did not breach any of his legal responsibilities *qua* solicitor either to the Sellers or to the court when he caused the SOC to be filed. He certainly owed no duties on the established facts to the Buyers and/or the Agents and did no wrong by relying on instructions the Sellers had given him.

136 I should also point out that before the District Judge, the "[P]rosecution's case [was] that [Koh] has committed an offence under section 209 of the Penal Code and that the accused has abetted him" (see *BMS (No 1)* at [6]). Only in the course of oral arguments was this court informed (in response to our query) that the Prosecution had subsequently proceeded against Koh for some other offences in relation to the transaction and not for offending s 209 of the PC. Interestingly, when asked, the Prosecution also revealed that while the Agents had been convicted on related charges, the Buyers, who stood to gain the most from the transaction in relation to the Flat, if it went through, were not prosecuted.

Conclusion

Conclusion

137 I would answer the questions of law of public interest posed by BMS (see [29] above) as follows:

(a) BMS's Question 1:

(i) A "claim" for the purposes of s 209 refers to the relief or remedy sought from the court, as well as the grounds for obtaining that relief or remedy. A "claim" may also be said to be a cause of action.

(ii) In writ actions, a litigant "makes" a claim at the point in time when pleadings have closed, after the statement of claim and reply (if any) (for the plaintiff) and the defence (for the defendant) is filed. For originating summons actions, a litigant "makes" a claim when his affidavit evidence is filed in court as directed.

(iii) To succeed under s 209 of the PC, the Prosecution must establish that the claim was "false" beyond a reasonable doubt and that the accused knew that it was false. A claim is "false" if it is made without factual foundation. A claim is not "false" if it involves a question of law. The test for falsity is not considered by reference to the pleadings in isolation, but must take into account the wider factual context; this necessarily includes facts not revealed in the pleading itself.

(iv) A "court of justice" for the purposes of s 209 of the PC refers to the legal institution or body where disputes are adjudicated.

(b) BMS's Question 2: This question does not directly affect the outcome of the proceedings below. In my view, a solicitor acts dishonestly if, having actual knowledge about the falsity of a client's claim (or after he subsequently acquires that knowledge), he proceeds to make that claim in court and thereby allows the client to gain something that he is not legally entitled to, or causes the adversary to lose something which he is legally entitled to.

(c) BMS's Question 3: In writ actions, a litigant "makes" a claim at the point in time when pleadings have closed, after the statement of claim and reply (if any) (for the plaintiff) and the defence (for the defendant) is filed. For originating summons actions, a litigant "makes" a claim when his affidavit evidence is filed in court as directed.

(d) BMS's Question 4: If an action is settled before the close of pleadings (for actions commenced by writs) or before affidavits are filed as directed (for actions commenced by originating summonses), no "claim" is "made" for the purposes of s 209 of the PC. Where only part of the action is settled or the defendant submits only to part of the action, a claim would be "made" at or after the close of pleadings stage or the filing of affidavits, as the case may be. Whether that claim is "false" will depend on the facts of the case. Here, it must be borne in mind that not all overstated or exaggerated claims are false.

(e) BMS's Question 5: A solicitor should decline to accept instructions and/or doubt his client's instructions if they plainly appear to be without foundation (*eg*, lacking in logical and/or legal coherence). A solicitor is not obliged to verify his client's instructions with other sources unless there is compelling evidence to indicate that it is dubious. The fact that the opposing parties (or parties allied to them) dispute the veracity of his client's instructions is not a reason for a solicitor to disbelieve or refuse to act on those instructions, and a solicitor should not be faulted if there are no reasonable means of objectively assessing the veracity of those instructions.

138 Finally, I answer the questions posed by the Prosecution (see [30] above), although they are now moot in the light of the responses above. The two questions the Prosecution posed were not neutrally drafted and did not greatly assist in the elucidation of the myriad legal difficulties that arose in this matter. Indeed, I am constrained to observe that these questions were quite plainly drafted to allow for only an affirmative answer. My short responses are, therefore, of course, "yes" for both questions.

139 For all the above reasons, I have no hesitation in concluding that BMS's conviction was wrong in law. Further, the questionable factual findings of dishonesty made against him have been irremediably undermined by the mistaken legal analysis that informed the reasoning of the courts below. BMS's conviction must be set aside forthwith pursuant to s 60(4) of the SCJA.

Coda

140 After reading the dissenting judgment of Choo Han Teck J, I consider it appropriate to make some comments. I preface my comments by observing that Choo J maintains that no issues of law of public interest have arisen in these proceedings. This, in essence, reiterates the position he took in *BMS (No 3)* at [94]. A similar position has not been adopted by the Prosecution in the present proceedings.

141 That said, I now turn to Choo J's main observations on the meaning of a "claim" and/or "makes" a claim, which would be as follows (see [149] and [153] below):

> 149 ... I am of the view that "whoever makes a claim he knows to be false" should not be interpreted to mean "whoever makes a claim at the close of pleadings or after a reply has been filed". *That implies that a false claim cannot be made before or after the close of pleadings or after a reply, or that it cannot be made in other forms of original action, or before this court, or that a claim cannot be false if it were made orally*. There is nothing in s 209 to suggest that Parliament had intended such a narrow scope for this offence. The mischief to be averted by s 209 is the making of a false claim, however made, before any court of justice. ... A claim *is any prayer* a litigant (not necessarily a plaintiff) makes before a court in expectation of a ruling in his favour and thus sanctioning his claim. A defendant can also make a claim, and so can third parties. ...
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> ...
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> 153 ... *[A] claim in a court of justice should be understood as any demand or assertion of right made before any court and requiring the sanction of that court*. ...
>
> [emphasis added]

142 I surmise from these various statements that Choo J is of the view that a claim can be made at any time before any court, including an appellate court, and that it can be made orally. With respect, this viewpoint would appear to draw no support from any decided Indian cases or treatises written over the last 150 years. This view also fails to take into account the genesis of s 209 as well as the architecture of the scheme in Ch XI of the PC relating to false evidence and offences against public justice. There are, in fact, specific provisions that govern the giving of false oral assertions (s 191), the fabrication of false evidence (s 192), the giving of false statements (s 199), the making of false claims (s 209) and the fraudulent procuring of decrees or orders of court (s 210).

143 Quite apart from the absence of any principle or authority supporting such a construction of s 209, it appears to me that Choo J's approach fails to appreciate the rather limited objectives that the Indian Law Commissioners had in mind when they proposed the Draft Provision (which was later amended and enacted as s 209 of the Indian Penal Code (the progenitor of s 209 of the PC)) (see [54] above). After dealing with the desirability of punishing the giving of false evidence, the Indian Law Commissioners turned specifically to the issue of false pleadings, and stated (see [51] above):

> We think this is the proper place to notice an offence which bears a close affinity to that of giving false evidence, and which we leave, for the present, unpunished, only on account of the defective state of the existing law of procedure. We mean the crime of deliberately and knowingly asserting falsehoods in pleading. ...
>
> ...
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> ... We have, therefore, gone no further than to provide a punishment for the frivolous and vexatious instituting of civil suits, a practice which, even while the existing systems of procedure remain unaltered, may, without any inconvenience, be made an offence. ...
>
> [emphasis added]

144 Choo J also suggests that the Rules of Court "cannot ... be the basis for defining or altering what Parliament had intended in s 209" (see [149] below). With respect, Choo J has failed to appreciate the intertwined relationship between s 209 and the rules of civil procedure. Initially, the Indian Law Commissioners had recommended that the Draft Provision (see [54] above), which refers to the institution of civil suits without just grounds, be enacted. The Draft Provision was then modified and enacted as s 209 of the Indian Penal Code, but this only took place after the Indian rules of civil procedure were reformed. Plainly, there is an inextricable relationship between s 209 of the PC and the rules of civil procedure, and it would therefore be strange if s 209 was to punish a person for making a claim when his conduct would not amount to making a claim under the Rules of Court. In my view, this is clearly an area where the legislatures, in both India and Singapore, would have no quarrel with the rules of procedure providing the point of reference as to when a claim is made. After all, it is for the courts to decide when their processes have been abused.

145 Choo J further states (at [150] below) that as this is not a civil matter, he will "not dwell on the nature and function of pleadings". With respect, one key issue in the entire matter has been the nature and functions of pleadings in civil proceedings. The crux of the charge against BMS is that he has criminally abused the existing system of pleadings and abetted Koh in mounting a false claim. I would certainly agree with Choo J that advocates are always expected to be forthright. There is no suggestion whatsoever in my judgment that anything less than candour and probity is expected from all solicitors at all times. Solicitors, it goes without saying, are officers of the court owing heavy and uncompromising responsibilities towards the court. However, it must be emphasised that a solicitor who adopts legitimate pleading strategies *does not* "operate on the sly" (see [150] below). I would add that Choo J has not addressed the points raised at [69] and [71] above about the composite and indivisible nature of the statement of claim and reply in relation to defining the essence of a plaintiff's claim.

146 Next, Choo J refers (at [151] below) to the principle of *locus poenitentiae* and suggests that the interpretation of s 209 that I prefer allows a plaintiff an unjustifiable opportunity to evade criminal responsibility for an offence. He may have misunderstood the thrust of my argument. I am not suggesting in my judgment that the reply gives the plaintiff an opportunity to change his mind and claim immunity on the basis of the principle of *locus poenitentiae*. This is an entirely irrelevant point in

the context of assessing when a claim might be made. Rather, what I determined was that the plaintiff's claim has to be assessed with reference to both the statement of claim and reply, and that it would not be improper for the plaintiff to reserve the right to respond in a substantive way in his reply, after the defendant raises the issue of illegality in his defence. Choo J also maintains (at [154] below) that the Judges below had not "misapprehended the law". With respect, I do not see how this viewpoint is justifiable (see [121]–[136] above for example).

147 I need only conclude by observing that the courts should be slow to accord an expansive interpretation to criminal provisions, unless it is supported by the relevant legislative material. With respect, it seems to me that Choo J's approach in construing s 209 cannot be so supported.

Choo Han Teck J:

148 I have no disagreement with the narrative as set out in the majority judgment save for my opinion below. In an earlier decision, *Bachoo Mohan Singh v Public Prosecutor and other applications* [2010] 1 SLR 966 ("*BMS (No 3)*"), this court granted (by a majority) Bachoo Mohan Singh ("BMS") and the Prosecution an extension of time to file applications to the High Court under s 60 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA") for leave to reserve questions of law of public interest to this court. Having now heard the submissions on the questions referred by BMS and the Prosecution, I am fortified in my views expressed in my previous judgment in *BMS (No 3)* that there was no question of law of public interest to be referred to this court. Section 60 of the SCJA provides that a point of law of public interest might be referred for determination by this court, but it does not envisage that every question of law qualifies for a reference, and when a question of law does qualify, the applicant is obliged to pose the question clearly and precisely. This case seems to be extraordinary in having a number of questions being referred. I am confining my present opinion to what I think was the only point of law although I am of the view that it was not one of public interest for reasons I shall elaborate. The arguments by counsel and the majority judgment ultimately collapsed into the central question of whether *Queen-Empress v Bulaki Ram* (1889) 10 AWN 1 ("*Bulaki Ram*") was correctly applied. *Bulaki Ram* itself was not wrong because the Indian court did not have to consider the relevance of the reply. Is the reply at all relevant in our courts for the purposes of s 209 of the Penal Code (Cap 224, 1985 Rev Ed) ("the PC")?

149 The central question concerns the point when an offence under s 209 of the PC is committed. The *actus reus* of the offence under this section, is committed when the accused "makes before a court of justice any claim". The *mens rea* of the crime consists of the knowledge of the falsity of the claim and the intention thereby to injure another by the making of that claim. I am of the view that "whoever makes a claim he knows to be false" should not be interpreted to mean "whoever makes a claim at the close of pleadings or after a reply has been filed". That implies that a false claim cannot be made before or after the close of pleadings or after a reply, or that it cannot be made in other forms of original action, or before this court, or that a claim cannot be false if it were made orally. There is nothing in s 209 to suggest that Parliament had intended such a narrow scope for this offence. The mischief to be averted by s 209 is the making of a false claim, however made, before any court of justice. When a person does an act he must know at the point he performed that act whether he would be committing an offence or not. Whether a person's conduct amounts to a criminal act cannot be contingent upon a subsequent event even if that event was a procedural step in the civil process. In this case, the claim was made when BMS filed the statement of claim in court. The claim was not made in his reply, and neither can his reply exonerate his crime. Furthermore, the reply arises from an internal set of rules, namely, the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules"). As part of the court's civil procedure, the Rules can be changed or removed without reference to Parliament. It cannot therefore be the basis for defining or altering what Parliament had intended in s 209. Should the Rules be changed by removing the need for a reply, does that mean

that s 209 will have to be interpreted in the same way as the Indian court in *Bulaki Ram* did? I do not think so. An act (conduct) such as that contemplated in s 209 is deemed criminal when it is completed with the requisite *mens rea*. The provision in s 209 is simple, straightforward and clear. A claim is any prayer a litigant (not necessarily a plaintiff) makes before a court in expectation of a ruling in his favour and thus sanctioning his claim. A defendant can also make a claim, and so can third parties. The reply is thus a false clue to a puzzle that does not exist.

150 I also feel obliged to differ from the majority's view that the plaintiff has a strategic right to "reserve facts to be included in the reply". This is not a civil matter and I shall not dwell on the nature and function of pleadings except to express my view that it is the time-honoured rule of pleading that a plaintiff has to plead all material facts in his statement of claim and not reserve parts for later. Lawyers ought to be encouraged to be forthright and open and not operate on the sly. The reply is meant only to address fresh issues raised in the defence which requires a rebuttal. In any event, nothing in the reply generally, or in this case, would have any bearing on a claim which was false in a statement of claim; the falsehood cannot be sanctified afterwards. A lawyer must surely know that fraud can still be perpetuated even if all the steps in civil procedure have been complied with. It is those kinds of cases, *ie*, cases in which a litigant uses the court as a means of cheating another, that s 209 seeks to prevent. Such schemes are more likely to fail when the procedures are not complied with. To hold that the crime manifests only after the reply has been filed serves only to test the ingenuity of the criminal mind.

151 In the majority view, the reply is significant in the operation of s 209 because it provides the plaintiff the opportunity of changing his mind and thus claiming immunity on the criminal law principle of *locus poenitentiae*. I do not agree with the application of *locus poenitentiae* in this way. That principle allows a criminal mind to recant at the last moment before the crime is committed. A man may buy poison with the criminal intent to kill his wife, lace her soup with it, but change his mind as he approaches her with the poisoned dish and pours it out of the window. Applying that principle here, BMS had ample opportunity to change his mind during any of his consultations with his clients, and even after the draft statement of claim had been settled, or even in the morning as the clerk was about to file the claim. But once the claim is made before the court, the act is done. He can withdraw it, but that only goes to mitigation, the false claim having already been made.

152 The main reason the majority of this court in *BMS (No 3)* allowed parties an extension of time to file applications for questions to be determined by this court was the concern that this case might pave the way for widespread prosecution of lawyers. I am of the view that this arose from the misapprehension that the longstanding acceptance that lawyers are not obliged to verify the claims of their clients might be withdrawn and thus impose an unbearable onus on the lawyers. This is a misapprehension because s 209 does not impose any greater obligation on a lawyer than what they now have. There is an important difference between verifying the truth of a client's claim or instructions and filing a claim for the client knowing that the claim was false. I do not think that the Law Society of Singapore or any of its members wishes to protect a lawyer who knowingly files a claim that was false, and with the dishonest intent to injure (in the words of s 209) anyone. The protection is meant for those who might be so injured. That is the purpose of s 209.

153 Thus, a claim in a court of justice should be understood as any demand or assertion of right made before any court and requiring the sanction of that court. When an accused stands trial for an s 209 offence, all that the trial judge in that trial (and not the court in the civil claim) needs to do is to determine whether the claim was true or false and whether it was made with a dishonest intention to injure another. These are matters of fact and have nothing to do with law. It would be remarkable if a trial judge does not know how to distinguish between what is true and what is false. Whether he made the right decision in the end is a finding of fact, that is to say that even though a judge may

know what is true and what is false, he might still erroneously conclude that the issue in question was true when in truth it was false. This court is not concerned in this instance with whether or not this was the case here, and the High Court below had found that there were no such errors. The court trying the accused in an s 209 offence need not have to depend on the progress or the outcome of the civil claim in which the alleged false claim was made. Whether it was a case of "defective pleading" as the majority thought so, or a case of making a false claim is precisely the fact that the trial judge has to find. The trial judge did so in this case.

154 For the reasons above, I am of the view that no one – either in the trial at first instance or the High Court on appeal – misapprehended the law. The trial judge was required to determine whether the claim filed by BMS on behalf of his client for $490,000 was a false claim and whether both BMS and his client, knowing that the claim was false, dishonestly intended to cause a wrongful loss to the defendant there or a wrongful gain to BMS's client. If the trial judge had erred in finding that the claim was a false claim made with dishonest intention, it was an error of fact. It seems to me that the trial judge had taken all the evidence into consideration and his findings were upheld by the High Court on appeal. I therefore, respectfully, dissent from the majority view.

Andrew Phang Boon Leong JA:

Introduction

155 I have read the judgments of both my brother judges closely. They have come to diametrically opposed conclusions – particularly in relation to when it can be said that a person "makes" a "claim" for the purposes of s 209 of the Penal Code (Cap 224, 1985 Rev Ed) ("the PC"). I should observe that, despite ostensibly disagreeing in relation to only one substantive point, the dissenting judgment by Choo Han Teck J is, in substance, a disagreement with all the answers furnished to the questions posed in the present proceedings, in so far as he is of the view that none of the questions is of public interest to begin with.

156 Having reflected at some length on both judgments, I agree with the answers to the questions raised by Bachoo Mohan Singh ("BMS") and the Prosecution that have been provided in the judgment of V K Rajah JA (and the reasons stated therein). However, because of the sharp difference expressed in the judgments of Rajah JA and Choo J, as well as the importance of the issues raised in the broader – indeed, fundamental – context of legal practice, I am of the view that it would be appropriate to add a few observations of my own.

Preliminary observations

157 Rajah JA commenced his judgment with the following pertinent remarks (at [2] above):

> According to BMS's counsel, this matter has the dubious distinction of being the first known case in the Commonwealth's legal annals where a lawyer has been convicted of abetting his client in the making of a false claim. This is also the first known case in Singapore involving a prosecution in relation to s 209 of the PC even though this provision has been in force in Singapore for well over a century. In India, no lawyer appears to have ever been prosecuted in connection with such an offence under s 209 of the Penal Code 1860 (Act 45 of 1860) (India) ...

158 Although there is, of course, a first time for everything, the extraordinary length of time that has elapsed prior to the institution of the present proceedings gives us an incipient clue as to the nature and purpose of – as well as the interpretation that ought to be accorded to – s 209 of the PC, especially when this provision is viewed in its historical context. I hasten to add, however, that every

statutory provision ought – especially one with such a long history as the present – to be accorded (as far as is possible) an updating approach which takes into account the impact for both the present as well as the future. However, as I shall elaborate upon below, such an approach merely serves to buttress the interpretation which Rajah JA has given to s 209. Before proceeding to consider how s 209 should be construed, it would be appropriate to commence with a brief consideration of the historical context.

The historical context

159 Turning, then, to the historical context, it is, in my view, important to point out, at the outset (albeit, at this initial stage at least, at a more general level), that the PC was (whatever the actual position in fact was) intended for what was perceived to be a less than developed legal system, whose courts were not necessarily always presided over by professional judges as such (see, generally, Andrew Phang Boon Leong, "Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore" (1989) 31 Mal LR 46 at 54–57). More importantly, perhaps (and viewed from the specific perspective of potential accused), s 209 had less than enlightened objectives. I can do no better than reproduce what Rajah JA stated in his judgment (at [81] above), as follows:

> Here, I would also reiterate that s 209 was introduced in India by the British colonialists for reasons which could today be considered anachronistic and, I dare say, entirely unacceptable because of the patronising assumptions made about Asian morality. This has been mentioned in my judgment in *BMS (No 3)* at [78] and I can do no better than to repeat my earlier observations here:
>
> > I should also note, from [*A Penal Code* (Pelham Richardson, Cornhill, 1838), prepared by the Indian Law Commissioners], ***that there were very peculiar reasons for the English colonialists to have created this peculiar offence. A fundamental reason was the perceived lack of morality in the local population resulting in claims or defences with entirely no factual foundations being maintained in court. One may rightly ask how relevant some of these considerations should be in interpreting s 209 of the PC in Singapore today*** . In addition, some of the illustrations given there are highly instructive in indicating the mischief the provision was intended to address. I think it will be helpful to reproduce some of the relevant passages here (at p 41):
> >
> > > *In countries in which the standard of morality is high, direct evidence is generally considered as the best evidence*. In England assuredly it is so considered, and its value as compared with the value of circumstantial evidence is perhaps overrated by the great majority of the population. *But in India we have reason to believe that the case is different. A Judge, after he has heard a transaction related in the same manner by several persons who declare themselves to be eye-witnesses of it, and of whom he knows no harm, often feels a considerable doubt whether the whole from beginning to end be not a fiction, and is glad to meet with some circumstance, however slight, which supports the story, and which is not likely to have been devised for the purpose of supporting the story. ...*
>
> [emphasis in italics and bold italics in original]

The passage just quoted – together with the likely dearth of trained lawyers – suggests, therefore, that there were *specific historical* reasons that underlay the enactment of s 209. *Significantly*, and needless to say, *these reasons (or, rather, deficiencies) no longer obtain in the Singapore context*.

160 However, even leaving aside the pejorative (historical) origins of s 209 for time being, it is clear that that provision was – and is – intended to deter the abuse of the court process. As Rajah JA put it (at [55] above):

> The essence of this provision is entirely consistent with the desire of the Indian Law Commissioners to preserve the special standing of a court of justice and safeguard the due administration of law by deterring the deliberate making of false claims in formal court documents.

We find, at this juncture, the confluence of both the particular (history) and the universal (the broader purpose and ideals). However, it was never, in my view, the intention of the Indian Law Commissioners to change (or even modify) the procedure in the civil sphere. Indeed, it is clear that, at the time s 209 was first introduced, the existing law of civil procedure was by no means settled and was (on the contrary) defective (see [54] above). Not surprisingly, perhaps, there was even more of a need for a provision such as s 209. That having been said, s 209 must be interpreted and applied *consistently* with the *prevailing* system of civil procedure. As I explain later (at [164] below), such a system is, in fact, a pre-requisite to the attainment of substantive justice in the case at hand and its operation ought therefore not to be impaired in any way. This leads me to a consideration of how s 209 should be construed – to which my attention must now turn.

Section 209 of the Penal Code

161 As Rajah JA pointed out (at [40] above), four issues concerning how s 209 should be construed are apparent. The issues are as follows:

(a) the meaning of "claim";

(b) the meaning of "makes" a claim;

(c) the meaning of making a claim that one "knows to be false"; and

(d) the meaning of "court of justice".

I gratefully adopt the views of Rajah JA as to what constitutes a "court of justice" within the meaning of s 209. I will, however, proffer a few observations on the other three issues. For reasons which I will elaborate upon in a moment, the first two (of these three) issues, *viz*, the meaning of "claim" and the meaning of when one "makes" such a claim, are closely related and will therefore be dealt with together in the next section of this judgment.

162 There is, in fact, a fifth issue which is not directly related to the interpretation of s 209 as such but is no less important in relation to the present proceedings. This has also been dealt with by Rajah JA and relates to the scope of a lawyer's duty to verify what is told to him or her by a client – particularly (as is the case here) in relation to the offence of abetment (here, in the context of s 107(*c*) of the PC). I will also proffer some observations on this particular issue, not least because it impacts directly on the guilt (or otherwise) of BMS in the present proceedings.

The meaning of "claim" and when one "makes" such a claim

163 As alluded to above, the meaning of a "*claim*" and when an accused person "*makes*" such a claim pursuant to s 209 are closely related. The former is, as Rajah JA's judgment makes clear, a broader – umbrella – definition (which pertains to both plaintiffs as well as defendants), whereas the latter *particularises* the former, inasmuch as ascertaining the *time* at which the accused "*makes*" a "*claim*", *sets the parameters as to what a "claim" precisely is in the context of that provision itself*. At this juncture, I beg to differ from Choo J's approach, especially in so far as the latter issue is concerned. In particular, the learned judge appears to be of the view that a "claim" under s 209 can be made at *anytime*. Choo J is of the view (see [149] above) that:

> An act (conduct) such as that contemplated in s 209 is deemed criminal when it is completed with the requisite *mens rea*. The provision in s 209 is simple, straightforward and clear. A claim is any prayer a litigant (not necessarily a plaintiff) makes before a court in expectation of a ruling in his favour and thus sanctioning his claim.

164 As Rajah JA has also observed (at [75] above), a balance must be struck between the flexibility and latitude to be given to litigants and their lawyers with respect to their pleading strategy on the one hand and the State's interest in the deterring of false claims on the other. Both these aforementioned interests simultaneously reflect the balance that must be struck between the civil and criminal spheres. In so far as the former is concerned, there is a clear *procedural framework* (embodied principally within the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) which cannot be ignored, simply because it conduces towards the procedural justice that is an integral and necessary pre-requisite for substantive justice to be achieved in the case at hand (see the Singapore High Court decision of *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [4]–[9]).

165 With respect, Choo J's approach does not address the *relevant process as a whole* (which, as just seen, contributes towards the attainment of both procedural and (ultimately) substantive justice) by focusing (in a piecemeal and isolated fashion) on the act or conduct, thereby generating the very uncertainty that will, *inter alia*, have a potentially chilling effect on litigation (a point to which I will return later). The approach itself is apparently self-referential (*ie*, a *legal* "claim" crystallises within the meaning of s 209 when the *literal* act or conduct is complete). It bears repeating that, although the words "claim" and "makes" in s 209 can be conferred the literal meaning which Choo J appears to be in favour of, such an approach does not, with respect, take into account the *context* in which the provision ought to be read (and which has already been elaborated upon above), *viz*, its *relationship* (here, in the *criminal* sphere) to the rules and principles of procedure in the *civil* sphere.

166 For the purpose of the present proceedings, Choo J has – in accordance with his suggested approach – adopted the same position as the Prosecution. Put simply, since the act or conduct relates to a statement of claim, a "claim" has crystallised once the statement of claim has (as in the present proceedings) been filed. Indeed, a consideration of this particular (and concrete) situation in the context of the present appeal will, with respect, illustrate not only the weakness of this approach in relation to the *particular* facts of these proceedings but also its weakness as a *universal* norm because (in so far as this last-mentioned point is concerned) there is the very real danger that the difficulties which arise might be replicated on the broader practical canvass of litigation practice in other situations as well.

167 If such a strict – indeed, in my view, overly stringent – interpretation is to be adopted with regard to s 209, the question which arises is this: what (especially practical) implications follow with respect to legal practice in general and legal advocacy in particular? The common law system of litigation is premised on the adversary system. Hence, so long as the lawyer concerned does not knowingly mislead the court, he or she is free to proffer to the court whatever arguments are felt to

best advance his or her client's case as long as there is some rational basis to do so. Whether those arguments are persuasive is a task left to the court. Indeed, the theory (and, indeed, practice) is that the truth (as found by the court) will emerge from the clash of arguments and views proffered by the lawyers for each party. No system is, of course, perfect, but that is a truism which applies to any system of law adopted (whether common law or civil law). However, as this court observed, in *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 (at [154]):

> In point of fact, the adversary system is not a perfect one (see, for example, Sir Richard Eggleston, "What is Wrong with the Adversary System?" (1975) 49 ALJ 428). However, no system is perfect. The adversary system has served us well. And it will continue to serve us well only if its fundamental concepts as well as workings are not undermined. In this respect, undue judicial interference will, in fact, result in such undermining. Hence, it must be assiduously avoided. In this regard, it is significant, in our view, that even those who are (even vigorously) of the view that the operation of the adversary system often impedes what it is intended to achieve, *viz*, the attainment of the truth (but *cf* writers, such as Prof Freedman, who also point (in the US context) to the aim of realising the dignity of the individual (see, for example, Monroe H Freedman, "Judge Frankel's Search for Truth" (1975) 123 U Pa L Rev 1060, especially at 1063 (which is a response to Judge Frankel's article cited next); see also generally Monroe H Freedman & Abbe Smith, *Understanding Lawyers' Ethics* (LexisNexis, 3rd Ed, 2004) at ch 2), do *not* advocate judicial intervention as a solution. For example, Judge Marvin E Frankel observed thus (see "The Search for Truth: An Umpireal View" (1975) 123 U Pa L Rev 1031 at 1042 (see also generally, *id* at 1041-1045)):
>
> > The fact is that our system does not allow much room for effective or just intervention by the trial judge in the adversary fight about the facts. The judge views the case from a peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. He risks at a minimum the supplying of more confusion than guidance by his sporadic intrusions.
>
> The learned author later proceeds to observe thus (at 1045):
>
> > [T]he trial judge as a participant is likely to impair the adversary process as frequently as he improves it. What is more vital to my thesis is that the critical flaw of the system, the low place it assigns to truth-telling and truth-finding, is not cured to any perceptible degree by such participation.
>
> [emphasis in original]

168 In my view, if the approach advocated by the Prosecution (and endorsed by Choo J) with regard to s 209 is accepted, the effectiveness of the adversary system (already by no means a perfect one) might be further undermined. If lawyers are to plead (and subsequently argue) their respective clients' cases with a constant concern (as well as duty) to ensure that everything that is communicated by their clients is completely verified before a statement of claim is filed (including any actions thereafter, up to the point at which pleadings are closed (as to which see the next paragraph)), this would have a chilling effect on litigation generally. This is *not*, of course, to state that lawyers are permitted (whether through direct and/or indirect means) to canvass – on behalf of their clients – arguments of law and/or fact *which they actually (or constructively) know to be untrue (still less, actively canvass arguments which are clearly illegal)*. Such conduct would, indeed, render the lawyer concerned liable to prosecution under s 209 (as well as other sanctions, including

disciplinary proceedings, which are also mentioned briefly in the next paragraph); even here, however, s 209 might not be the appropriate provision under which a charge should be preferred against the lawyer if the act or acts concerned were committed by the lawyer prior to the appropriate cut-off point for s 209 itself (*viz*, the close of pleadings (see the next paragraph)). But this does *not* mean that *other* provisions of the PC might not apply to the lawyer concerned (see the various provisions in Ch XI of the PC). Much would, of course, depend on the precise facts concerned.

169 Absent, however, the circumstances just mentioned in the preceding paragraph, there is no reason, in principle, why lawyers ought to be constrained in the manner argued for by the Prosecution. Indeed, they are *not* – and ought *not* to be – the judges of their respective clients' cases: *the court* is. Even if the strongest case a lawyer proffers on behalf of his or her client turns out to be a weak – or, indeed, hopeless – one, the due process of law permits such a right to be vindicated in a court of law. Where frivolous or vexatious claims are maintained in the civil sphere, there already exist legal mechanisms for dealing with them (for example, by way of striking out (under O 18 r 19 of the Rules of Court) and/or an appropriate costs order). Where the lawyer concerned might have not only sailed too close to the wind but might have in fact crossed the appropriate boundaries, sanctions exist both in the civil sphere as well as pursuant to the disciplinary process set out under Pt VII of the Legal Profession Act (Cap 161, 2009 Rev Ed). Is there, then, a need to adopt an interpretation of s 209 which will sap the adversary system of its vitality and, indeed, strike at its very *raison d'être* (which centres on lawyers proffering the strongest possible legal cases on behalf of their respective clients)?

170 However, *in order to prevent abuse*, there must be *a cut-off point, beyond which the conduct in question would be considered to be an abuse of such flexibility*. In this regard, the meaning of "makes" a claim should be given the broadest possible reading consistent with balancing the purpose of s 209 on the one hand with the need to confer the broadest latitude to lawyers to conduct their respective clients' cases on the other. Looked at in this light, I agree with Rajah JA that a claim is only made at the close of pleadings for actions commenced by way of writs and when affidavit evidence is filed in court as directed for actions commenced by way of originating summonses. Once the points just mentioned have been reached (and, *a fortiori*, if they have been passed), it will lie ill in the mouth of the litigant concerned (and/or his or her lawyer) to argue that a claim has not yet been made within the meaning of s 209 of the PC.

171 Thus, even on an updating construction of s 209, it is, *a fortiori*, the case that that provision ought to be interpreted in the manner stated by Rajah JA in his judgment.

The meaning of making a claim which one "knows to be false"

172 I agree with Rajah JA that where questions of *law* are involved, it *cannot* plausibly be said that the claim made by either the plaintiff or the defendant (as the case may be) is "false", still less that the plaintiff or the defendant concerned "knows" that the claim is "false". One ought never to assume that the law can never change. This is especially the case when a rule or principle of law which has held sway for a very long time is suddenly discovered to be logically defective and/or no longer in sync with local needs and circumstances (assuming, for the moment, that this is a rule or principle of domestic law). Indeed, major developments in the common law would not have been possible if there had been a strict (as well as dogmatic and mechanistic) adherence to the status quo. Put simply, therefore, it is always open to a litigant to make arguments of *law*. There ought not – and cannot – be a chilling effect on this freedom. If such freedom is abused, there are (as already mentioned at [169] above) sanctions that can be administered in an appropriate fashion in such cases. Indeed, a good illustration occurs in the context of the present proceedings. In particular, the area of law potentially applicable to the facts in the present proceedings centres on the doctrine of illegality. This

is one of the most confused – and confusing – areas in the common law of contract. Many aspects of the doctrine continue – even today – to be in a state of flux. Although the issues are, of course, now moot, it is not beyond the boundaries of comprehension that a lawyer in the position of BMS would have considered that the case of his client was not (in these circumstances) wholly beyond the legal pale.

173 I also agree with Rajah JA that, in so far as arguments of *fact* are concerned, a claim is "false" within the meaning of s 209 *only if it is without factual foundation*. Such an interpretation may appear to favour an accused but, even if this is so, it is only appropriate, in my view. This is because to adopt a contrary approach would be to perpetrate a chilling effect on the freedom of the litigant concerned to argue his or her case – in this instance, from a *factual* perspective. If, again, such freedom is abused, there are, as has just been mentioned (in the preceding paragraph and at [169] above), appropriate sanctions that can be administered.

174 There may, of course, be arguments of *mixed* law and fact. In such situations, the flexibility already mentioned would continue to apply.

The scope of a lawyer's duty of verification

175 It is important to note that BMS was not convicted based on a direct application of s 209 itself. He was convicted of having *abetted* Koh, the latter of whom was assumed to have committed an offence under s 209. The salient provision (relating to abetment) was s 107(*c*) of the PC (which was reproduced at [110] above). A key element in this last-mentioned provision is that BMS "intentionally aids" the commission of the offence by Koh under s 209. This, presumably, requires (in turn) proof that BMS *knew* that Koh had been involved in the cash-back arrangement *from the outset*. Such knowledge could take the form of *actual* knowledge. It could, in my view, also take the form of *wilful blindness* (which is the legal equivalent of actual knowledge (see also the decision of this court in *Tan Kiam Peng v Public Prosecutor* [2008] 1 SLR(R) 1 at [106]–[128])). The former type of knowledge does not pose significant difficulties. However, the latter might simply because, absent actual knowledge, it must be ascertained what the scope of duty of verification is on the part of the lawyer in so far as what is told to him or her by the client is concerned. Put another way, if the lawyer concerned does *not* fulfil that duty, then he or she *would* be guilty of *wilful blindness* with the result that the requisite element of *knowledge* would be established.

176 Consistent with the analysis set out above (at [167]–[168]) with regard to the adversary system, the scope of the lawyer's duty of verification of what is told to him or her by the client should be a *balanced* one. As Rajah JA has pertinently pointed out, the lawyer owes a paramount duty to the court. This (in turn) entails, as the learned judge has also pointed out, a duty of candour. In Rajah JA's apt words (see [115] above):

> The duty of candour has both a prescriptive and a proscriptive dimension in civil proceedings. On the one hand, the solicitor must, for example, ensure that all discoverable documents are produced and he must disclose to the court even adverse legal authorities; on the other hand, he must refrain from misleading the court as to the law or the facts. He has a duty to place before the court his client's version of facts but must not massage or tamper with the facts or invent a defence. The solicitor cannot knowingly place a false story before the court. So long as he is not misleading the court, he is not otherwise constrained from presenting his client's case, and is in fact afforded considerable latitude in how he chooses to do so.

177 Indeed, as I have emphasised earlier (at [169] above), the very nature of the adversary system means that the lawyer concerned is *not* the judge of his or her client's case. Rather, this is

the function of *the judge*. As Rajah JA put it (at [118] above):

> The broad issue raised in this case is whether *the duty of candour to the court* requires the solicitor concerned to verify the truthfulness or factual accuracy of his client's instructions and if so the extent of this duty. This point was addressed in *Wee Soon Kim Anthony v Law Society of Singapore* [2002] 1 SLR(R) 954 ..., where this court explained (at [23]):
>
> > *There is no general duty on the part of a solicitor that he must verify the instructions of his client*. This was laid down in *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 and *Tang Liang Hong v Lee Kuan Yew* [[1997] 3 SLR(R) 576]. *It would be different if there were compelling reasons or circumstances which required the solicitor to verify what the client had instructed*. [emphasis added]
>
> More than a decade earlier, Chan Sek Keong JC, in another decision, *Wee Soon Kim Anthony v Law Society of Singapore* [1988] 1 SLR(R) 455 ..., involving the same litigant solicitor, unequivocally declared with his customary acuity and clarity (at [21]):
>
> > It is not for an advocate and solicitor, whether in his capacity as counsel or as solicitor, to believe or disbelieve his client's instructions, *unless he has himself has personal knowledge of the matter or unless his client's statements are inherently incredible or logically impossible. His duty to his client does not go beyond advising him of the folly of making incredible or illogical statements*. [emphasis added]
>
> Of course, a solicitor cannot simply take whatever the client states at face value. The solicitor has a *duty to the client* to assess the instructions holistically and explain to the client what may support or contradict the claim. He has to ensure that his client understands the duty to be truthful and the consequences of being found to be untruthful.
>
> [emphasis in original]

178 Everything would depend, in the final analysis, on the actual factual matrix concerned and it would therefore be invidious to attempt to envisage (let alone furnish precise answers to) the myriad permutations and possibilities that may come before the court. However, the *general legal principles* that ought to guide the court (as set out above) are, in my view, very clear. Indeed, these principles strike an ideal balance between the lawyer's duty to his or her client on one hand and his or her (paramount) duty to the court on the other.

179 Applying the above principles to the facts of the present proceedings, it is clear, in my view, that there was no objective evidence to demonstrate that BMS had actual knowledge that Koh had been involved in the cash-back arrangement from the outset. Was there, then, objective evidence to demonstrate that BMS ought to have questioned Koh further but had, instead, turned a blind eye to Koh's alleged conduct (or, rather, misconduct)? Looking at the objective facts before the courts below, whilst it is clear that BMS did have knowledge of the existence of the cash-back arrangement, there were no facts (let alone compelling circumstances) which ought to have prompted BMS to investigate further in order to ascertain *whether Koh was involved in the cash-back arrangement from the outset* (see also [128] above, *per* Rajah JA). Indeed, as Rajah JA also pointed out (at [128] and [130] above), there was no reliable or objective source BMS could have turned to in order to verify Koh's assertions that he had not been involved in the cash-back arrangement right from the outset.

180 I agree with Choo J (see [151] above) that once BMS has committed an offence under s 209,

there is no opportunity for him to recant. However, this does not really address the issue as to whether or not an offence was committed in the first instance. In order for an offence to be established under s 209, all the elements stated therein must be proved by the Prosecution beyond a reasonable doubt. As we have seen, however, the interpretation of a few of these elements in the courts below was, with the greatest of respect, in error. On a related note, where the principle of *locus poenitentiae* is mentioned by Rajah JA in his judgment (see [100] above), this is (as I understand it) a reference to possible arguments relating to that particular aspect of the doctrine of illegality in the *civil* sphere.

Concluding observation

181 In my view, it is clear – beyond any doubt – that the questions raised in the context of the present proceedings are, indeed, of significant public interest. Indeed, many of them go to the heart of the nature and functions of the adversary system in general and the lawyer's specific duties in particular. These would, in turn, impact the interests of litigants generally. One would be hard put to imagine a much stronger instance of questions of law of public interest.

The conviction in the present proceedings

182 The present proceedings concern a reference pursuant to s 60 of the Supreme Court of Judicature Act (Cap 322, 2006 Rev Ed) ("the SCJA"). Strictly speaking, they are not an appeal as such. However, whilst *purely factual* findings that might impact on the guilt (or otherwise) of the individual accused will not therefore be dealt with by this court, where the court's findings on the question or questions of *law* pursuant to s 60 of the SCJA do impact on guilt (or otherwise) of the individual accused, I see no reason why, if the court or courts below have misdirected themselves as to the *law* (which misdirections have not only been corrected by this court but have *also* played a role in the *conviction* of the accused), this court cannot, in principle, *set aside* the conviction.

183 In the circumstances, and having regard to the fact that there have been misdirections on the *law* in relation to s 209, I agree with Rajah JA, for the reasons given therein, as well as for the reasons set out in the present judgment, that BMS's conviction should be set aside.

[note: 1] Notes of Evidence ("NE") at pp 12–14, 74–75, 139, 166–167, 269–270, 274–277, and 286.

[note: 2] Exhibit ("Exh") P7.

[note: 3] Exh P2.

[note: 4] NE at pp 70 and 78–80.

[note: 5] NE at pp 27, 288–289 and 533.

[note: 6] NE at pp 497–503 and 533–541.

[note: 7] Exh P10 and Exh P11.

[note: 8] Exh P13, Exh P16, Exh P17, Exh D27, Exh D29, and Exh D31.

[note: 9] NE at pp 42–43, 330, and 2511–2512; Exh D63.

[note: 10] NE at pp 1784 and 1909.

[note: 11] Exh P14 and Exh P15.

[note: 12] Exh P33.

[note: 13] Exh P19.

[note: 14] NE at pp 53, 216 and 347.

[note: 15] Exh P20.

[note: 16] Exh P21.

[note: 17] Exh P22, Exh P24 and Exh P26.

[note: 18] NE at pp 71–72, 197, 380, 464–466, and 1805.

[note: 19] NE at pp 71, 379, 462, and 1809.

[note: 20] Exh P28.

[note: 21] Prosecution’s reply submissions at para 41.

[note: 22] Prosecution’s reply submissions at para 41.

[note: 23] Exh P16 and Exh P17.

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