Suhaidah bte Mohd Noor and another (trustees and executors of the estate of Haji Hassan bin Haji Ismail, deceased) *v* Syed Ahmad Jamal Alsagoff
[2014] SGHC 116

Case Number : Originating Summons No 1079 of 2013

Decision Date : 25 June 2014

Tribunal/Court : High Court

Coram : George Wei JC

Counsel Name(s) : Alfred Dodwell (Dodwell & Co LLC) for plaintiffs; Nur Rafizah bte Mohamed Abdul Gaffoor (Selvam LLC) for defendant.

Parties : Suhaidah bte Mohd Noor and another (trustees and executors of the estate of Haji Hassan bin Haji Ismail, deceased) — Syed Ahmad Jamal Alsagoff

Civil Procedure – Originating Processes

Civil Procedure – Rules of Court – Non-compliance

Trusts – Trustees – Rights

Trusts – Trustees – Duties

25 June 2014 Judgment reserved.

George Wei JC:

Introduction

1 The Plaintiffs, Suhaidah bte Mohd Noor ("the First Plaintiff") and Sheik Nawaz bin Mohd Fadel ("the Second Plaintiff"), are the trustees of two settlement trusts created by the late Haji Hassan Bin Haji Ismail ("Haji Hassan"). They are also the executors of Haji Hassan's estate. In Originating Summons No 1079 of 2013 ("OS 1079/2013"), the plaintiffs are seeking a court order for the defendant, Syed Ahmad Jamal Alsagoff ("the Defendant"), a former trustee, to hand over all documents relating to the two settlement trusts.

2 The Plaintiffs' claim is based on two separate grounds. The first is in relation to a settlement agreement ("the Settlement Agreement") that was entered into by Haji Hassan and the Defendant, which included a duty to hand over the trust documents after the Defendant's resignation as trustee. The second is based on the Plaintiffs' right as the incoming trustees of the two settlement trusts to have access to the trust documents.

3 The core of the defence is that the Defendant has already complied with the duty to hand over all documents in relation to the two settlement trusts. To this end, the Defendant states that he no longer has possession, custody or control over any other trust documents. Apart from that, the Defendant also argues that OS 1079/2013 has been wrongly commenced as the proper cause of action ought to be, in any event, a breach of the settlement agreement.

4 After hearing the parties and reviewing the evidence placed before me, I am dismissing the Plaintiffs' application in OS 1079/2013. I now give the reasons for my decision. Whilst the legal issues

are relatively straightforward, the background facts to this application are rather complex and bears setting out in some detail.

The facts

The background

5 The late Haji Hassan was the owner of certain properties in Singapore situated at Lorong K, Telok Kurau. On 10 June 1992, Haji Hassan created two settlement trusts: [note: 1]

(a) The first settlement ("the First Settlement Trust") was in respect of properties identified as 62A, 64B, 66A, 68B, Lorong K, Telok Kurau, Singapore 425672. This was created as an irrevocable settlement.

(b) The second settlement ("the Second Settlement Trust") was in respect of a property identified as 66, Lorong K, Telok Kurau, Singapore 425672. This was created as a revocable settlement.

6 The beneficiaries of the two settlement trusts included, amongst others, Haji Hassan, and upon his demise, his wife, the late Inche Pungot bte Alamas ("Inche Pungot"). On 29 December 1999, Haji Hassan and Inche Pungot executed a deed to vary the Second Settlement Trust, so as to make provision for Hai'zah bte Mohammad Shafi ("Hai'zah"), a niece of Haji Hassan. [note: 2] In this respect, the Defendant described Hai'zah as possessing a contingent interest. The Second Settlement Trust was also converted into an irrevocable settlement.

7 The original trustees of the two settlement trusts are as follows: [note: 3]

(a) Haji Hassan;

(b) Inche Pungot;

(c) the Defendant's father, Syed Ali Redha Alsagoff ("Syed Ali"); and

(d) the Defendant.

8 It bears noting that there was no express provision in both trust deeds to reserve the power to change the trustees of the two settlement trusts. Whilst four trustees were appointed at the point in time when the two settlement trusts were created, it is the Plaintiffs' case that the management of the trust properties was left in the hands of Syed Ali. The Plaintiffs further assert that after Syed Ali's demise in 1998, the control and management of the trust properties were left to the Defendant, who was described as a "professional trustee". [note: 4]

9 Inche Pungot subsequently passed away on 21 August 2011. [note: 5] After her demise, Haji Hassan executed his last will and testament ("the Will") on 29 September 2011. [note: 6] The Plaintiffs were appointed as executors under the Will. Haji Hassan passed away on 7 April 2012 and probate was granted on 27 May 2013. [note: 7]

Suit No 300 of 2011

10 Prior to that, on 15 October 2010, Haji Hassan and Inche Pungot had commenced proceedings

by way of Originating Summons No 1064 of 2011 ("OS 1064/2011") against the Defendant. In that action, Haji Hassan and Inche Pungot sought, amongst others, an order for the removal of the Defendant as trustee of the two settlement trusts, as well as an order for the Defendant to render an account of monies he had received as a trustee.

11 On 4 March 2011, OS 1064/2011 was heard by Steven Chong J, who granted an order appointing the First Plaintiff as a new trustee for the two settlement trusts. Apart from that, Chong J adjourned the rest of the application with a direction that the learned Assistant Registrar was to decide at the pre-trial conference whether it would be more expedient, given the allegations of breach of trust made against the Defendant, for the matter to proceed by way of a writ action. [note: 8] Subsequently, on 26 April 2011, the learned Assistant Registrar granted the order for OS 1064/2011 to be converted into a writ action. As a result, OS 1064/2011 became Suit No 300 of 2011 ("S 300/2011").

12 After the conversion, the statement of claim was filed and in it, a few assertions were made, summarised briefly as follows: [note: 9]

(a) In 1992, Syed Ali proposed to Haji Hassan and Inche Pungot that he would fund the cost of building 12 apartments on Haji Hassan's property at 66 Lorong K, Telok Kurau. Haji Hassan would then retain ownership of six apartments whilst the remaining six apartments would be owned by Syed Ali.

(b) The six apartments retained by Haji Hassan were the subject matter of the two settlement trusts created on 10 June 1992.

(c) Syed Ali, the Defendant, Haji Hassan and Inche Pungot were named as the original trustees of the two settlement trusts.

(d) The deeds for the two settlement trusts were prepared by Syed Ali and/or the Defendant.

(e) Haji Hassan and Inche Pungot did not receive independent legal advice and were not informed of their duties as co-trustees of the two settlement trusts. They were also mistaken as to the nature of the transactions.

(f) Upon execution of the settlement deeds, Haji Hassan and Inche Pungot left the management of the properties to Syed Ali. Upon Syed Ali's demise, his role was taken over by the Defendant.

(g) Syed Ali and the Defendant committed various breaches of duties as trustees, both in law and in equity.

(h) Twenty particulars of the alleged breaches were set out, which included, amongst others:

(i) Failure to provide proper or adequate documentation of the development, the submissions to the relevant authorities, and the accounts regarding the development and the construction costs.

(ii) Failure to provide bank statements and accounts of monies received from the tenants and/or the sale of Haji Hassan's apartment units.

(iii) Failure to provide documentary evidence of the appointment of real estate agents

and other related matters.

(iv) Failure to provide copies of the tenancy agreements and evidence of the rental deposits received.

(v) Failure to provide copies of invoices and receipts in respect of the repair works that were undertaken.

(vi) Failure to provide copies of the insurance policies.

(vii) Failure to provide information about a potential *en bloc* sale.

(viii) Failure to provide all relevant documents regarding the management of Haji Hassan's and Inche Pungot's properties.

(ix) Failure to hand over rental deposits and to provide an account of all rents, profits, dividends, interest and income received as managing agent and/or trustee.

13 It is noted that in S 300/2011, Haji Hassan and Inche Pungot alleged that the Defendant had committed serious breaches of trust with regard to the management of the two settlement trusts. A variety of orders was sought in S 300/2011, which included, amongst others, the handover of all trust documents and the provision of accounts in relation to the properties belonging to the settlement trusts. [note: 10]

The settlement

14 The Defendant denied the allegations made by Haji Hassan and Inche Pungot in S 300/2011. It was submitted that both Haji Hassan and Inche Pungot had enjoyed the benefits of the two settlement trusts throughout the 18-year period up to 2009, and that they had not made their objections known then. Apart from that, the Defendant also argued that he was not the only trustee of the two settlement trusts, and that he was only acting in the capacity of a managing agent in respect of some of the properties held under the settlement trusts.

15 In any event, S 300/2011 did not proceed to trial as all parties managed to arrive at a settlement where the Defendant was to resign as a trustee for both settlement trusts. Pursuant to the Settlement Agreement, the Defendant resigned on 27 September 2011.

16 As already mentioned at [11] above, the First Plaintiff was appointed as an additional trustee on 4 March 2011, pursuant to the order of court made by Chong J. After her appointment, it is apparent that the First Plaintiff made various requests to the Defendant for the latter to hand over all documents relating to the two settlement trusts. Whilst it is also apparent that the Defendant did provide some documents, it is asserted by the First Plaintiff that instead of handing over all the relevant documents, the Defendant had rebuffed her request by asking her to approach Haji Hassan or Inche Pungot for the documents instead. In this respect, the First Plaintiff refers to the difficulties she encountered when tenants of the properties held under the settlement trusts sought clarification on certain matters relating to the properties in question. It bears noting that whilst S 300/2011 was still ongoing, the First Plaintiff was already requesting the handover of the trust documents from the Defendant in order to enable her to discharge her duties as a newly appointed trustee of the settlement trusts.

17 At the same time, it is apparent that Haji Hassan and Inche Pungot also made requests for the

trust documents in the Defendant's possession, custody or control in S 300/2011. Numerous correspondences were exchanged between the parties from 11 August 2011 to 17 September 2011 concerning the trust documents. A formal application was also made on 9 September 2011 for the Defendant to disclose certain documents or classes of documents. [note: 11] This did not happen as, it will be recalled, S 300/2011 was subsequently settled on or about 27 September 2011.

18 The Settlement Agreement was embodied in an exchange of letters between the respective solicitors of each party. The letters span the period between 5 September 2011 and 27 September 2011. Of particular importance is the letter sent by the Defendant's solicitors dated 25 September 2011, in which the terms of the settlement offer were expressed as follows: [note: 12]

(a) The allegations made by the plaintiffs in S 300/2011 (*ie*, Haji Hassan and Inche Pungot) are to be withdrawn and expunged from the court records.

(b) The Defendant will resign as trustee of the two settlement trusts by way of writing (unless a formal application is required to effect the resignation). To this end, the resignation will be tendered upon confirmation of the settlement.

(c) The Defendant will hand over the documents in relation to the two settlement trusts to the person nominated by the Plaintiffs in S 300/2011 at a convenient date and time.

(d) The parties to S 300/2011 will file an application to have the court determine all issues relating to costs (*ie*, liability and quantum). Parties will make their respective submissions and the terms of the settlement will not feature in the submissions, save that costs are to be determined by the court.

(e) Upon confirmation of the terms of the settlement, parties will inform the court that the matter has been settled and request all hearing dates to be vacated. If necessary, parties will inform the court of the terms of the settlement.

(f) The notice of discontinuance will be filed upon completion of all the above-mentioned matters.

(g) All matters are to be kept confidential, save that if for any reason any article appears in the media, there will be a right to respond to the same.

19 Subsequently, by way of a letter dated 27 September 2011, the solicitors for Haji Hassan confirmed acceptance of the proposed terms of settlement, including the expunging and sealing of the court records. [note: 13] In a reply that was dated on the same day, the Defendant confirmed receipt of the acceptance letter and added that reasonable time must be allowed for the documents to be collated and handed over to the nominated person. [note: 14] This request was accepted by the solicitors acting for Haji Hassan. [note: 15] As a result, the Defendant resigned as a trustee of the two settlement trusts on 27 September 2011. [note: 16] It bears noting at this juncture that Inche Pungot was not a party to the Settlement Agreement as she had passed away on 21 August 2011, shortly before the Settlement Agreement was concluded.

The dispute in relation to the handover of the documents

20 On 12 October 2011, the Defendant's former solicitors wrote to Haji Hassan's solicitors to inform them that the trust documents would be ready for collection on the afternoon of 14 October 2011.

[note: 17] Thereafter, there was an exchange of correspondence between the respective solicitors for each party, concerning a request for a list of documents to be handed over, payment of photocopying charges and a request for the original trust documents as opposed to copies. On 9 November 2011, the Defendant provided a list of documents amounting to 59 pages. The documents handed over were contained in five arch files. The plaintiffs in S 300/2011 complained that upon inspection, it was realised that the documents handed over by the Defendant were incomplete and that a majority of the documents were not the originals. The photocopying charge amounting to $352.94 was also disputed by the plaintiffs in S 300/2011.

The present application

21 As a result of the dispute regarding the handover of the documents, the Plaintiffs commenced OS 1079/2013 against the Defendant. As in the case of OS 1064/2010 which was subsequently converted into S 300/2011, the action is brought against the Defendant in respect of the same settlement trusts. Although the Defendant is no longer a trustee, the present application relates to documents concerning the same trust properties which the Defendant had administered prior to resigning as a trustee as part of the Settlement Agreement.

22 In brief, both the First Plaintiff and the Second Plaintiff (who were not parties to the Settlement Agreement) assert that they require the trust documents in full so as to carry out their duties as executors of Haji Hassan's estate and to administer the properties held under the two settlement trusts. In this regard, the Plaintiffs assert that the documents handed over by the Defendant in the five arch files were reviewed by an accounting firm, which arrived at the conclusion that there were periods unaccounted for.

23 Apart from the two settlement trusts, the Plaintiffs have also relied on the fact that as executors of Haji Hassan's estate, they are bound to carry out the terms and instructions set out in the Will. In this regard, it is of significance that there exists in the Will a direction to commence legal proceedings against the Defendant, his companies and/or his agents in respect of any breaches of duties and to make the necessary claims.

24 Therefore, it seems probable that in the event the Plaintiffs uncover some evidence of breach of trust or fiduciary duty by the Defendant whilst he was still a trustee, they intend to commence legal proceedings in respect of those breaches. In this regard, it appears that the request for the trust documents to be handed over is not driven solely by the need to administer the trust properties, such as to answer queries from the tenants of the properties, but also to discover if there is any documentary evidence to support an action against the Defendant.

25 In any event, the Plaintiffs are essentially seeking an order for the Defendant to hand over the documents relating to the trust properties under 49 different headings. It appears that these are the same classes of documents requested by Haji Hassan and Inche Pungot pursuant to the discovery application in S 300/2011.

26 The Defendant's position is extremely clear – he asserts that he has already provided *all* trust documents that were in his possession. In fact, the Defendant has offered to execute a statutory declaration to that effect. Apart from that, the Defendant also highlighted the fact that the action in S 300/2011 was settled on the basis of his resignation as a trustee of the two settlement trusts pursuant to the Settlement Agreement. In return, the Plaintiffs' allegations that were made in S 300/2011 will have to be withdrawn and expunged from the court records. To this end, the Defendant has expressed concern that the real purpose of the present application is to obtain the very same documents that were sought in the discovery application in S 300/2011 and to commence fresh legal

proceedings for breach of trust against the Defendant. The Defendant suggests that at least in some respects, this appears to be the underlying motive behind the present application.

The issues

27 Based on the facts above, there are essentially two issues which arise in the present application:

(a) Whether the Defendant has handed over all trust documents in discharge of both his duty as a former trustee of the two settlement trusts and his contractual obligation pursuant to the Settlement Agreement ("Issue 1").

(b) Whether the proper originating procedure was utilised in the present application ("Issue 2").

Issue 1: Whether the Defendant has handed over all trust documents in discharge of his duties and obligations

28 At the outset, it must be noted that the applicable legal principles in the present application are relatively straightforward and not heavily disputed by the parties.

29 There is no doubt that incoming trustees are entitled to all documents relating to the trust. In the Court of Appeal decision of *Regenthill Properties Pte Ltd v Management Corporation Strata Title Plan No 2192* [2002] 2 SLR(R) 359 ("*Regenthill Properties*"), it was regarded as settled law that outgoing trustees are required to deliver up to the new trustee all records, books and other papers belonging to the trust. One reason, as appears from the decision of *Wentworth v De Montfort* (1988-1989) 15 NSWLR 348, which was cited by the Court of Appeal in *Regenthill Properties* at [48], is that the documents and financial records relating to the trust are part and parcel of the trust properties. Another reason is based on the fact that the new trustee is under a duty to look into the trust documents to determine whether there are any encumbrances or matters which affect the trust properties. In Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th Ed, 2012), the learned author explains at p 399 that a retiring trustee is expected to answer his successor's requests for information regarding the trust and its affairs and is expected to exercise due care in doing so. In fact, it is stated in Charles Mitchell, *Hayton and Mitchell: Commentary and Cases on the Law of Trusts and Equitable Remedies* (Sweet & Maxwell, 13th Ed, 2010) at para 9–10 that a person who is appointed as a new trustee of an existing trust must investigate any suspicious circumstances which suggest that a breach of trust may have occurred prior to his appointment. This is such that legal proceedings can be commenced, if necessary, to recover the trust fund. In order for the new trustee to be able to discharge this aspect of his duty, it follows that he will need to have access to the documents relating to the trust.

30 Nevertheless, disputes may arise as a result of differing views on what constitutes a trust document and whether each and every document relating to the trust must be handed over. In this respect, the Plaintiffs have submitted that the new trustees are entitled to *all* documents relating to the trust. In support of this proposition, they have cited the following passage from *Underhill and Hayton: Law Relating to Trusts and Trustees* (David Hayton gen ed) (LexisNexis, 18th Ed, 2010) at para 42.23:

> So that the new trustees may carry out these duties, they are entitled to require the old trustees to produce all trust documents, papers and memoranda relating to the administration of the trust (including any letter of wishes necessary to be considered before exercising any flexible

> discretionary functions), and where there was previously a corporate trustee, the documents to be produced may include internal correspondence and memoranda. But what should be produced, and whether it should be only produced or actually handed over depends upon the circumstances of each case and the nature and contents of the document. Everything relating to the management and administration of the trust property should be produced, at the least, but so far as concerns documents relating to discretionary distributive functions it would seem that only those of them that should be take [*sic*] into account when considering fuure [*sic*] exercise of such functions need to be produced. It would seem that a former trustee should be obliged to supply information to the new trustee on matters not clear from the trust papers, just as he would be so obliged to a beneficiary of full age and capacity, the new trustee being no worse off than the beneficiaries to whom he owes a duty to collect in and safeguard all the property for which the former trustee should account.

It thus follows that disputes may arise as to whether it is merely sufficient to *produce* the documents in question or whether they have to be *handed over.* Apart from that, parties may also disagree on the issue of whether it is sufficient to hand over a *copy*, as opposed to the *original* document.

31 In the English decision of *Tiger v Barclay Banks Ltd* [1952] 1 All ER 85 ("*Tiger*"), the Court of Appeal had to deal with the issue of whether a bank, which was acting as a corporate trustee, had the right to withhold documents relating to the estate from the successors in office. In that case, an action had been commenced to revoke the grant of probate. A compromise was reached on the basis that the defendant would renounce probate. Subsequently, the plaintiffs, who were both residuary legatees, proceeded to apply for letters of administration with the will annexed. Legal proceedings were then commenced by the plaintiffs against the defendant on the basis that the defendants were under an obligation to hand over all documents connected with the administration of the estate, either as an implied term of the compromise agreement or on the ground that, having renounced probate, they had no right to retain possession of the documents as against the successors in office. On appeal, the main issue was whether the order granted at first instance should be varied so as to exclude any books or documents kept or brought into being by the defendants as bankers of the estate, and any books kept by the defendants as administrators but which also contained entries regarding other trusts. Another question also arose in that case as to whether the order should exclude inter-office correspondence, memoranda or other documents brought into existence by the defendants in the ordinary course of the defendant's business as a trust corporation, the production of which would not assist the plaintiffs in the discharge of their duties as administrators.

32 The appeal was dismissed. It is pertinent to note that the defendants had also sought to exclude all documents relating to the administration of the estate which they were not, as a matter of law, liable to deliver up. The problem in that case, however, was that the question was never pleaded or argued, and no evidence was adduced to show its bearing on the documents which actually existed in that case. On that basis, the Court of Appeal commented that it was impossible to consider the issue *in vacuo* without any evidence regarding the particular documents in question. I agree with that general observation. Where the outgoing or former trustee objects to the handing over of a document relating to the trust on the basis of some other principle of law such as privilege, it is incumbent on him to define clearly what those documents are and the nature of the privilege or other right on which he relies on to resist production of the documents. In this regard, the Court of Appeal in *Tiger* was ready to accept (at 88) that a distinction may be drawn between mere banking books or documents on the one hand, and trust books or documents on the other.

33 Apart from that, it is also significant to note that the Court of Appeal in *Tiger* did not go as far as to lay down an unyielding rule that the *original* trust documents must be handed over in all cases. Jenkins LJ, in delivering the judgment of the court, made the following observations at 86–87:

> The practical difficulty with regard to documents common to this and other matters (*i.e.*, *books containing information relating to other trusts besides the testator's estate*) was met by counsel for the plaintiffs conceding (*as was obviously right*) that under the order as it stood he *could not claim more than a right to inspection and taking copies of the relevant parts of the documents of this description*.
>
> [emphasis added]

I agree with this approach. Whilst it is accepted that incoming trustees will ordinarily have the right to the production of the *original* documents, there may be cases where it will be sufficient for the outgoing or former trustee to provide the new trustee with sight of the original document and to allow a *copy* to be taken. The circumstances in which it may be sufficient to provide a clear copy of the trust documents cannot be articulated with any degree of precision. This is a question of fact which will vary depending on the actual factual matrix in each individual case. Apart from the example given in *Tiger*, another case where a relevant trust document may be retained by the outgoing trustee would be in situations where the document has to be used for tax or reporting purposes. To that end, if the outgoing trustee is concerned that he may be in a difficult position in the future should there be, for example, litigation, the trustee may create a list of what was handed over, to whom it was handed over and, where necessary, to retain a copy of the document. Returning to the facts in the present case, whilst the Plaintiffs have complained that many of the trust documents handed over by the Defendant were *copies*, as opposed to the *originals*, it is difficult to make any sensible determination *in vacuo* (that is, without full argument and examination) as to whether the provision of a copy was justified in the circumstances.

34 Turning to the question of whether any other restriction ought to be imposed on the range of documents to be delivered up, the primary argument raised in *Tiger* was that a distinction ought to be drawn between the duty to hand over trust documents imposed on a *natural* trustee and that imposed on a *corporate* trustee. It was argued by the defendant in *Tiger* that a corporate trustee, unlike a natural person, carries out its deliberations through internal correspondences and memoranda. These were akin to the private thoughts of a natural trustee which can never be "handed over" as they are not reduced to writing or any other material form. On this basis, the defendant in *Tiger* argued that the internal memoranda and correspondence of a corporate trustee should be exempt from production. This argument was soundly rejected by the Court of Appeal and the following observations were made at 87:

> ... If a natural executor or trustee does, in fact, reduce his deliberations to writing, as, for instance, by recording them in a diary relating to the administration of the estate or trust, we see no reason in principle why he should not be required to produce it to his successor in office. Another example may be found in the case of two or more natural trustees who record their deliberations in minutes of trustees' meetings. Here, again, we see no reason in principle why the advantage of production and perusal of such minutes should be withheld from their successors in office. Unless it can be shown that records such as these, if kept by natural trustees, would necessarily be exempt from production – and as at present advised we see no sufficient ground for this view – we find it impossible to accept the general proposition that the internal correspondence and memoranda of a corporate trustee must as such necessarily be so exempt. ...

Therefore, it follows that in the present case, the fact that the Defendant was described by the Plaintiffs as a "professional trustee" or a "managing agent" of some of the trust properties is neither here nor there in so far as it does not place him in a special position with regard to the duty to hand over the trust documents.

35 A slightly more contentious question is whether the outgoing trustee retains any residual discretion to refuse to hand over documents relating to the trust properties or the administration of the trust on the basis that the documents are obsolete or of marginal relevance and utility for the future administration of the trust. In this respect, when a trust has been administered over a long period of time and involves a number of properties held under the trust, such as in the present case, it goes without saying that the total collection of trust documents is likely to be voluminous. I am of the view that allowing the outgoing trustee to sieve out documents which, in his view, are of marginal utility or relevance is clearly a risky proposition. This is bearing in mind the incoming trustee's duty to peruse the trust documents in order to satisfy himself that no breaches of trust or other duties were committed prior to his appointment. To that end, it would be in the outgoing trustee's interests to conceal and retain incriminating documents that may give rise to a case for breach of trust or other duties.

36 In any event, the English Court of Appeal in *Tiger* also made it very clear that the incoming trustees would be the "best judges" of whether the document was relevant to the administration of the trust. It was observed at 88 that:

> ... If such a document relates to the administration of the testator's estate and no more than that is known about it, then, at all events, it is potentially a document which would or might assist the plaintiffs in the administration of the estate. Whether it would in fact do so or not must depend on its actual contents, and of that question, *prima facie*, the plaintiffs [*ie*, the incoming executor or trustee], whose duty it is to carry on the administration, would be the best judges, and obviously they could only form an opinion by looking at the document itself. ...

37 Returning to the facts in the present case, there is no doubt that quite apart from the terms of the Settlement Agreement, the Defendant is under an obligation to hand over the documents relating to the two settlement trusts to the Plaintiffs. Given that the two settlement trusts were created more than 18 years ago and that the background factual matrix is relatively complex, I have no doubt that the documentation involved is likely to be voluminous and would require some time to collate and compile. That said, it is clear that the Defendant does not, in any event, deny that he is under an obligation to deliver up the trust documents. In fact, the Defendant sought for and was given reasonable time to compile the trust documents which were eventually handed over to the Plaintiffs in five arch files. Whilst the Plaintiffs have complained that the documents handed over by the Defendant were incomplete and have also alluded to the fact that the accounting records for some time periods were missing, I am bound to comment that there is no particularisation at all as to what is missing. Furthermore, as already explained at [33] above, whilst the Plaintiffs have also complained that many of the documents handed over by the Defendant were *copies* as opposed to the *originals*, it bears noting that no detailed information or particulars have been provided in respect of any specific document. Therefore, in the absence of such material information, I find it impossible to arrive at a specific decision as to whether there has been a failure to comply with the duty to hand over the trust documents on the part of the Defendant simply because a *copy* was provided as opposed to the *original*.

38 Apart from that, the Plaintiffs have also complained about the trust documents being handed over by the Defendant in a haphazard manner. It was asserted that the Defendant is under a duty to hand over the documents in an orderly manner and that the documents should have been organised in appropriate files (or sub-files) with proper chronological tables and guides. Whilst I have some sympathy for the Plaintiffs on this score, especially after taking into account the fact that the documents even as disclosed appear to be voluminous, I find myself unable to arrive at a specific conclusion on whether the five arch files were so poorly organised so as to make the contents (*ie*, the trust documents) unintelligible or difficult to contextualise and use for the purposes of

administering the trust.

39 In fact, the Defendant's response to all the complaints raised by the Plaintiffs is simple – that he has already handed over all documents pursuant to the Settlement Agreement and that he no longer has any trust documents in his possession. The fact that the Defendant also offered to provide a statutory declaration to that effect has also been alluded to above. In relation to the Plaintiffs' complaint that the Defendant has retained the *originals* and provided only the *copies* in many instances, the response is simply that the Plaintiffs have not identified which documents they are referring to with sufficient clarity.

40 With regard to the Plaintiffs' complaint that an incomplete account has been provided of the monies that are due to the late Haji Hassan, the Defendant's response is that he has already supplied the relevant accounts. To this end, it was asserted that should the Plaintiffs have any queries regarding the accounts, these should be set out with sufficient particularity rather than by means of "wild and overarching allegations".

41 Finally, the Defendant has asserted that after the originating summons for OS 1079/2013 was served on him, a further check was conducted to verify that all trust documents have been handed over. It is stated that apart from a few documents relating to the proposed collective sale of Sapphire Court and Telok Kurau View, no other documents were found. [note: 18] In his affidavit, the Defendant further stated that he was collating the relevant correspondence on the matter and that these would be tendered to the Plaintiffs' solicitors in due course.

42 In summary, based on the affidavits and the documentary evidence that have been placed before me, I am unable to arrive at a specific conclusion as to whether the Defendant has failed to comply with his duty to hand over all trust documents to the Plaintiffs.

43 For completeness, it is noted that the Plaintiffs have also relied on the Settlement Agreement entered into between the late Haji Hassan and the Defendant. Under the Settlement Agreement, the Defendant agreed to hand over all documents in his possession, custody and power, including monies, if any, concerning the two settlement trusts and any related tenancies.

44 The position taken by the parties in respect of the contractual duty to hand over the trust documents pursuant to the Settlement Agreement is broadly similar to that taken in respect of the duty under general law. That said, I note that with reference to the Settlement Agreement, the duty imposed on the Defendant was in respect of all documents in his *possession, power or control*. Whilst the Defendant has made it clear that he no longer has possession of any trust documents, it may be argued that this does not deal with the documents which he had or should have had, and which he no longer has possession of. These documents may have been within the Defendant's power or control. If so, it is understood that the Plaintiffs' complaint is that an explanation should have been provided as to what has happened to these documents. In this respect, the Defendant takes the position that the Plaintiffs should identify these documents with sufficient particularity in order to enable him to make a proper response.

45 In my view, the Plaintiffs' arguments in respect of both the general duty to hand over the trust documents and the contractual duty pursuant to the Settlement Agreement suffer from the same fundamental flaw. Given that the originating procedure utilised in the present action was the originating summons, the scope of evidence placed before me included only affidavit evidence and documentary evidence. Both parties have not made any application to cross-examine any witness throughout the course of these proceedings. To that end, I am unable to arrive at a specific conclusion on whether the Defendant has failed to discharge his duty, contractual or otherwise, to

hand over the trust documents to the Plaintiffs.

Issue 2: Whether the proper originating procedure was utilised in the present application

46 Having arrived at the conclusion that I am unable to make any specific finding in relation to the substantive merits of the Plaintiffs' application, I turn now to consider the issue of whether the proper originating procedure has been utilised in the present application.

47 At the outset, O 5 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) provides for two modes for commencing civil proceedings: by writ or by originating summons. In cases where the proceedings are by way of an application to the court under any written law, O 5 r 3 provides that the application *must* be by way of originating summons. On the facts of the present case, O 5 r 3 is inapplicable. The proceedings are commenced pursuant to the Plaintiffs' right as the incoming trustees to the trust documents as well as the Settlement Agreement. To this end, the proceedings are not by way of application under any written law.

48 On the other hand, O 5 r 2 states that "[p]roceedings in which a substantial dispute of fact is likely to arise shall be begun by writ". It bears noting that in cases where there are substantial disputes of fact, the litigant has no choice and the action has to be commenced by way of writ. The rationale behind this rule is straightforward and succinctly explained by the learned author in Jeffrey Pinsler, *Principles of Civil Procedure* (Academy Publishing, 2011) ("*Principles of Civil Procedure*") at para 03.001:

> ... The differences between the writ of summons and the originating summons reflect the nature of the legal proceedings. The writ of summons caters to primarily factual disputes and triggers the necessary procedures for the purpose of identifying the issues of dispute (primarily through the process of pleadings), the disclosure of relevant evidence (via the appropriate discovery mechanisms), interlocutory relief and other steps leading to eventual settlement or adjudication at trial. The originating summons, which is primarily concerned with issues of law such as the construction of legislation or legal instrument or an application pursuant to statute, normally involves a simpler and less drawn out procedure involving the presentation of affidavits which are ultimately considered in the less formal setting of the court's chambers.

As a corollary to O 5 r 2, it is stated in O 5 r 4(2) that where there is unlikely to be any substantial dispute of fact, the proceedings are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under O 14 or for any other reason considers the proceedings more appropriate to be begun by writ.

49 In the present case, as already mentioned above, the applicable legal principles are relatively straightforward. In fact, the Defendant does *not* deny that he is under a duty to hand over the trust documents to the Plaintiffs. Whilst there may be some disputes concerning the scope of the obligation to hand over the trust documents, such as whether the delivery up of *copies* as opposed to *originals* would suffice, that does not detract from the fact that a substantial part of the dispute between the parties concerns questions of *fact*. To this end, the Plaintiffs' position is that the Defendant has failed to hand over all the trust documents whilst the Defendant's position is that he has already handed over all documents and no longer has any other trust documents in his possession. This is undoubtedly a substantial dispute of *fact*. Therefore, in accordance to O 5 r 2 of the RC, the action should have been commenced by way of writ, as opposed to by originating summons.

50 In arriving at this conclusion, I find it useful to refer to the English Court of Appeal decision of *Jones v The Monte Video Gas Company* (1880) 5 QBD 556 ("*Jones*"). In that case, the plaintiff had

obtained an order for the defendant to file an affidavit of documents to be discovered. After the defendant had filed its affidavit, the plaintiff filed an affidavit complaining that certain specified documents had been omitted from the defendant's affidavit of documents. The defendant then proceeded to file a further affidavit stating that the documents were not material or relevant to the action. The question that arose in that case was whether further affidavits should be ordered. To put it another way, the English Court of Appeal had to confront the issue of whether a dispute concerning the relevance or materiality of documents was appropriate for resolution by way of further affidavits.

51 In this respect, Brett LJ observed that (at 558):

> ... either party to an action has a right to take out a summons that the opposite party shall make an affidavit of documents: when the affidavit has been sworn, if from the affidavit itself; or from the documents therein referred to, or from an admission in the pleadings of the party from whom discovery is sought, the master or judge is of opinion that the affidavit is insufficient, he ought to make an order for a further affidavit; but except in cases of this description no right to a further affidavit exists in favour of the party seeking production.

Brett LJ further acknowledged that it cannot be shown by a contentious affidavit that the affidavit of documents was insufficient. More significantly, it was observed that the affidavit of documents must be accepted as conclusive and that there was no right to further affidavits in the circumstances. Brett LJ went on to note that a more appropriate procedure for resolving such disputes would be the administration of interrogatories. It was recognised at 558–559 that:

> ... interrogatories properly framed may force a person to disclose what documents he has in his possession, and the party requiring the production will thereby avoid committing any breach of the practice as to affidavits of documents. ...

To this end, both Cotton and Thesiger LJJ were also in agreement that the more appropriate procedure to resolve the dispute would be through the administration of interrogatories. In fact, Cotton LJ observed that the main objective was to avoid a conflict of affidavits as to whether the affidavit of documents was sufficient.

52 Whilst it is acknowledged that the decision of *Jones* is not strictly relevant as it does not address the issue of when proceedings should be commenced by writ as opposed to by originating summons, the general takeaway is that disputes of fact are not easily resolved by way of a battle of affidavits. In the context of *Jones*, it was observed that the administration of interrogatories would be far more effective as appropriate questions could be framed and directed specifically at the defendant. In the present case, it is, therefore, unlikely that the dispute as to whether there are any further documents relating to the two settlement trusts in the possession, custody or control of the Defendant can be properly resolved by way of an exchange of affidavits. In fact, it bears repeating that the Defendant has gone as far as to offer to execute a statutory declaration to the effect that he no longer has any of the trust documents in his possession.

53 In summary, I am of the view that the proceedings ought to have been commenced by way of writ, as opposed to by way of originating summons. As mentioned above, the applicable legal principles are relatively straightforward and it is clear that the parties' dispute is primarily one of *fact*. Therefore, pursuant to O 5 r 2 of the Rules of Court, in the light of the substantial dispute of fact between the parties, the proceedings should have been begun by writ. In the usual course of proceedings commenced by writ, after pleadings have been filed by the parties, the normal process of discovery will follow. At this stage, the administration of interrogatories may be appropriate, depending on the outcome of the discovery process. The case will then proceed to trial for the

factual disputes to be properly resolved.

54 In the light of the above, the only question that remains is whether the Plaintiffs' failure to adopt the proper originating procedure is fatal to their application in this case. In this regard, it is established law that the mere use of an improper originating process does not necessarily mean that the proceedings must be terminated. The learned author in *Principles of Civil Procedure* rightly points out at para 03.004 that the court retains a discretion to allow the action to continue subject to the appropriate amendments. In this regard, it is undisputed that an action commenced by way of an originating summons can be converted into a writ action pursuant to O 28 r 8(1) of the Rules of Court, which states that:

> Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it *may order the proceedings to continue as if the cause or matter had been so begun* and may, in particular, order that pleadings shall be delivered or that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.
>
> [emphasis added]

55 In the present case, it must be noted that the Plaintiffs have not made any application to convert the current proceedings into a writ action. In fact, the written submissions tendered by the Plaintiffs do not address the question of whether the appropriate originating process has been utilised in the present application. Neither was this point raised in any of the affidavits filed by the Plaintiffs. On the other hand, the Defendant has, in his written submissions, argued that the action was misconceived on the basis that it was commenced by way of an originating summons, and thus should be struck out. This point was also raised by counsel acting for the Defendant during the hearing itself.

56 The question is, therefore, whether the court should exercise its discretion to allow the current proceedings to proceed as if it had been commenced by writ. In the decision of *In re 462 Green Lane, Ilford; Gooding v Borland* [1971] 1 WLR 138 ("*Re 462*"), the plaintiff had commenced an action concerning a land dispute which involved allegations of fraud. The court declined to allow the proceedings to continue as if it had been commenced by writ on the basis that the action should not have been commenced by originating summons right from the start. It must, however, be noted that the decision of *Re 462* was doubted in the subsequent decision of *In re Deadman, deceased; Smith v Garland and others* [1971] 1 WLR 426, where Stamp J made the following observations at 429:

> I have been a little troubled by the judgment delivered in *In re 462 Green Lane, Ilford* ... The judge on the procedural point held that the action ought to be brought by writ, that the matter was not a technicality, and he appears to have stayed the proceedings. Unfortunately it does not appear to have been brought to the judge's attention that Ord. 2, r. 1(3), provides:
>
> > "The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed."

In this regard, it bears noting that the rule cited by Stamp J is the English equivalent of O 2 r 1(3) of the Rules of Court. A plain reading of O 2 r 1(3) suggests that the court should *not* wholly set aside any proceedings solely on the basis that the wrong originating process has been utilised.

57 Nevertheless, I am of the view that the court retains the discretion to disallow the action to

proceed as though it had been commenced by way of writ pursuant to O 28 r 8 of the Rules of Court. In this regard, I find it useful to refer to the observations made by the learned author in *Principles of Civil Procedure* at para 03.050:

> ... This view [referring to the decision of *Re 462*] has been criticised on the basis that the court has a discretion to permit the continuation of the proceedings pursuant to Order 2 rule 1(3) ... The better view is that the court's discretion to make whatever order it regards as just *should not be restricted given the variety of circumstances which may arise in a case*. This is the underlying philosophy of Order 2.
>
> [emphasis added]

58 Furthermore, apart from the English decision of *Re 462*, I find it useful to also refer to the local Court of Appeal decision of *Haco Far East Pte Ltd v Ong Heh Lai Francis* [1999] 3 SLR(R) 959 ("*Haco Far East*"). In that case, the judge at first instance was of the view that the plaintiff had utilised the wrong originating process as the action should have been commenced by way of a writ. It was noted by the learned judge that the hearing of the originating summons had been adjourned previously in order for the plaintiff to consider whether the correct originating process had been utilised but the plaintiff failed to make the necessary changes. On this basis, the originating summons was dismissed.

59 On appeal, Chao Hick Tin JA, in delivering the grounds of decision of the court, agreed with the judge at first instance that the action should have been commenced as a writ action given the presence of contested issues of fact which required proof by way of oral evidence. Whilst it was acknowledged that under O 28 r 8 of the Rules of Court, the court could ordinarily give directions for the action to be continued as if it had been commenced by writ, the plaintiff had failed to take up the suggestion when given the opportunity to do so and instead held firm to its position that it had utilised the appropriate originating process. Chao JA observed that in the circumstances, the court below "was entitled to have refused to exercise its discretion under O 28 r 8" (at [17]). Given that there was no basis for the Court of Appeal to disturb the exercise of discretion by the judge at first instance, the appeal was dismissed. Therefore, the decision of *Haco Far East* lends support to the view that the court is entitled to refuse to exercise its discretion under O 28 r 8 of the Rules of Court and to dismiss the originating summons on the basis that it was not the appropriate originating process on the facts of the case.

60 Nevertheless, it must be acknowledged that decision of *Haco Far East* is often rationalised on the basis that the plaintiff had failed to take the opportunity granted by the court to remedy the error of utilising the incorrect originating process (see *eg*, *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) at para 28/8/5). In this regard, I am of the view that the court is entitled to also take into account other relevant factors, such as the conduct of the plaintiff, in deciding whether to exercise its discretion under O 28 r 8. To this end, I agree with Prof Pinsler's observations that "the court's discretion to make whatever order it regards as just should not be restricted given the variety of circumstances which may arise in a case".

61 Returning to the facts in the present case, I am of the view that the present application ought to be dismissed, as opposed to being allowed to continue as if it had been commenced by writ, for the following reasons. First, given that the Defendant has never denied the obligation to hand over the trust documents and instead contended that he has already done so, it would have been apparent to the Plaintiffs right from the beginning that the action would likely involve substantial disputes of fact. Second, although the Defendant has raised the issue of the incorrect originating process being utilised in the present application the Plaintiffs have to date not made any formal application to convert the original summons into an action commenced by way of writ. Third, the

Plaintiffs did not accept the Defendant's offer to provide a statutory declaration to the effect that all trust documents have already been handed over and that there are no other trust documents in his possession, custody or control. Fourth, it will be recalled that the Plaintiffs, as executors of Haji Hassan's estate, have also claimed to possess the right to enforce the terms of the Settlement Agreement against the Defendant. In this respect, that claim is likely to be based on a breach of contract. It is apparent that the Defendant would likely deny that there was a breach of the Settlement Agreement. On this basis, the proceedings should have been commenced by way of a writ action right from the beginning.

62 Furthermore, during the course of the hearing, it became apparent that the Plaintiffs have adopted the position that a "formal" court order dictating the handover of the trust documents was preferable, if not necessary. In other words, the Plaintiffs were of the view that in spite of the Defendant's acceptance that he was bound by both the Settlement Agreement and the duties arising out of general law to hand over the trust documents, it was preferable that there should be a court order reinforcing the duty to hand over the documents. In the event that the order was granted by the court, it was suggested that the Plaintiffs may then proceed to "test" the Defendant as to whether full disclosure and the proper handover of all trust documents had been made. If it became apparent that there was no full disclosure or proper hand over of the trust documents, a claim would then be considered for breach of the Settlement Agreement and also for breach of the duty to hand over the trust documents imposed on an outgoing trustee.

63 In my view, the Plaintiffs are applying for a court order to dictate the handing over of the trust documents because they do not trust the Defendant and to that end, they intend to rely on the coercive power of a court order to compel the Defendant to properly comply with his obligations and duties, contractual or otherwise. In fact, it must not be overlooked that the Settlement Agreement was *not* recorded as a consent order and the Defendant had adopted the position that the Settlement Agreement had to be enforced by way of an action for breach of contract. In that regard, I am of the view that the Plaintiffs are effectively trying to convert the Settlement Agreement into a consent order at this juncture when the Settlement Agreement, as negotiated between the parties to S 300/2011 at that point in time, was *not* recorded as a consent order by the court. In my view, given the nature of the Settlement Agreement and the allegations made by the Plaintiffs in the present application, the proper cause of action would most likely be a breach of the Settlement Agreement. If the Plaintiffs intend to rely on general law for the imposition of a duty on the Defendant to hand over the trust documents, the cause of action would likely be one for a breach of trust, in so far as the Plaintiffs maintain the view that the Defendant has failed to hand over all the trust documents. Both causes of action would likely involve substantial disputes of fact.

64 For the reasons above, I decline to make an order under O 28 r 8 of the Rules of Court for the proceedings to be continued as if it had been commenced by writ. Instead, I am dismissing the Plaintiffs' application in OS 1079/2013. At this juncture, it bears noting that whilst the Court of Appeal in *Haco Far East* declined to make an order under O 28 r 8 of the Rules of Court, the plaintiff was given liberty to file a fresh writ on the claim if it so wished. Similarly, in the present application, I hereby grant the Plaintiffs liberty to file a fresh writ on the claim if they so wish.

The further affidavit

65 For completeness, I now turn to deal with the dispute that had arisen regarding the affidavits filed in respect of OS 1079/2013.

66 The Plaintiffs filed a total of three affidavits, set out as follows:

(a) the first affidavit, filed by the First Plaintiff on 8 November 2013;

(b) the second affidavit, filed by the Second Plaintiff on 13 November 2013; and

(c) the third affidavit, filed jointly by the Plaintiffs on 28 February 2014.

The Defendant filed a single affidavit dated 14 December 2013.

67 The dispute between the parties concerns the third affidavit that was filed by the Plaintiffs on 28 February 2014. This affidavit runs into some 19 pages (excluding the exhibits) and was by way of a response to the points raised in the Defendant's affidavit. The exhibits included a CD-ROM setting out scanned copies of the documents that had been handed over by the Defendant. The contents of the CD-ROM were said to support the Plaintiffs' allegation that the documents handed over by the Defendant were incomplete and randomly arranged. In fact, the Plaintiffs made the assertion in their joint affidavit that the Defendant had deliberately arranged the documents in a manner so as to cause maximum disruption and problems. Nevertheless, given the lack of any detailed elaboration or particularisation of this issue, I find myself unable to arrive at a firm determination on whether the Defendant had wilfully handed over the trust documents in a haphazard and confusing manner.

68 The Defendant objected on the basis that the third affidavit was filed without leave of the court, and thus should either be disregarded completely or struck out. To this end, the Defendant has referred to O 28 r 3 of the RC, which states that:

> (1) Unless otherwise provided in any written law, where the plaintiff intends to adduce evidence in support of an originating summons, he must do so by affidavit and must file the affidavit or affidavits and serve a copy thereof on every defendant *not later than 7 days after the service of the originating summons*.
>
> ...
>
> (4) *No further affidavit shall be received in evidence without leave of the Court*.
>
> [emphasis added]

The Plaintiffs, on the other hand, submitted that Senior Assistant Registrar Yeong Zee Kin had, at a pre-trial conference on 26 November 2013, granted them leave to file the reply affidavit.

69 At the conclusion of the hearing on 24 March 2014, I directed the parties to submit a letter to court setting out what exactly transpired at the pre-trial conference on 26 November 2013 and more specifically, whether the Plaintiffs had been granted leave to file the reply affidavit.

70 Subsequently, in a letter dated 27 March 2014, the Defendant's solicitors confirmed that SAR Yeong had, in fact, given directions for the Plaintiffs to file the reply affidavit by 17 January 2014. In that letter, the Defendant also requested leave to file a further reply affidavit to address the matters raised in the Plaintiffs' joint affidavit, as well as some points or arguments that came up in the course of the hearing on 24 March 2014. This included, amongst others, the issue of whether a settlement agreement entered into by a former trustee would bind incoming successors to that office. To this end, the Defendant referred to the Court of Appeal decision of *Abdul Jalil bin Ahmad bin Talib and others v A Formation Construction Pte Ltd* [2007] 3 SLR(R) 592 in support of the proposition that the waiver agreement entered into by a former trustee would bind the current trustees in office. I note that a formal application by way of a summons for leave to file a further affidavit was subsequently

taken out by the Defendant on 23 April 2014.

71 In a letter dated 2 April 2014, the Plaintiffs' solicitors acknowledged the Defendant's acceptance that leave was, in fact, granted for the Plaintiffs to file their reply affidavit. It was also highlighted that the Defendant had not applied for leave to file a further reply affidavit during the pre-trial conference. That being so, the Plaintiffs objected to the Defendant's request for leave to file a further reply affidavit at this juncture.

72 I agree with the Plaintiffs that it is far too late for the Defendant to now apply for leave to file a further reply affidavit in response to the joint affidavit of the Plaintiffs, especially when oral arguments have already been concluded. Such a request should have been made prior to the commencement of the hearing on 20 March 2014 and the need for some degree of finality with regard to the admission of evidence, whether in the form of further affidavits or otherwise, should not be overlooked. In any event, I am also mindful of the fact that it is generally undesirable for parties to engage in a battle of evidence through multiple exchanges of affidavits in relation to proceedings begun by originating summons. This also reinforces the conclusion set out at [53] above that the proceedings should have been commenced by writ.

73 For the avoidance of doubt, it must be acknowledged that at the conclusion of the hearing on 20 March 2014, the matter was stood down subject *only* to the parties' clarification that SAR Yeong had granted leave for the Plaintiffs to file their joint affidavit. Furthermore, it is observed that the joint affidavit filed by the Plaintiffs was not dealt with substantively during the hearing itself, and that many of the points raised in the affidavit were merely amplification of matters already referred to earlier. In any event, I am of the view that it would not be appropriate for the Defendant to make further legal submissions on the binding effect of the Settlement Agreement by way of a further reply affidavit.

74 For the reasons above, and taking into account the conclusion that I have arrived at with regard to the issue of whether the action should have been commenced by writ, I am not minded to grant leave for the Defendant to file a further reply affidavit.

Conclusion

75 For the reasons set out above, the Plaintiffs' application in OS 1079/2013 is dismissed. For the avoidance of doubt, the Plaintiffs are given liberty to file a fresh writ on the claim if they so wish.

76 In the circumstances, costs are to be awarded in favour of the Defendant. Whilst the Defendant has included in his written submissions a claim for costs to be awarded on an indemnity basis, that matter was not addressed during the course of the oral submissions. In any event, I am of the view that the facts in the present application do not warrant a departure from the general principle that costs should be awarded on a standard basis. Therefore, costs are to be awarded in favour of the Defendant on a standard basis. Costs are to be agreed or taxed.

[note: 1] Plaintiffs' Bundle of Documents at pp 32–43.

[note: 2] Plaintiffs' Bundle of Documents at pp 44–48.

[note: 3] Plaintiffs' Bundle of Documents at pp 32, 39.

[note: 4] Plaintiff's Written Submissions dated 19 March 2014 at p 4, para 3.

[note: 5] Plaintiffs' Bundle of Documents at p 50.

[note: 6] Plaintiffs' Bundle of Documents at p 11, para 11.

[note: 7] Plaintiffs' Bundle of Documents at p 11, para 11.

[note: 8] Plaintiffs' Bundle of Documents at pp 52–53.

[note: 9] Plaintiff's Written Submissions dated 19 March 2014 at Annex 2.

[note: 10] Plaintiff's Written Submissions dated 19 March 2014 at Annex 2, pp 16–19.

[note: 11] Plaintiffs' Bundle of D ocuments at pp 224–232.

[note: 12] Plaintiffs' Bundle of Documents at pp 264–265.

[note: 13] Plaintiffs' Bundle of Documents at pp 266–267.

[note: 14] Plaintiffs' Bundle of Documents at pp 268–269.

[note: 15] Plaintiffs' Bundle of Documents at p 270.

[note: 16] Plaintiffs' Bundle of Documents at pp 136–137.

[note: 17] Plaintiffs' Bundle of Documents at p 139.

[note: 18] Defendant's Affidavit dated 14 December 2013 at pp 5–6, para 20.

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