

LXGA 6180 RESEARCH PROJECT

**RETHINKING OF SUMMARY JUDGMENT:
REVAMP REQUIRED?**

**BY:
MAK MUN LUAN**

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ABSTRACT

Summary judgment has been touted as an effective tool for disposing of litigations in timely and cost effective manners, as disputes between litigants may be resolved without the need of full trials and the usual pre-trial processes associated with civil litigation. However, the tension between the potential for this procedure to produce a final judgment versus the litigants' entitlements to full trials, illustrates how reform in this procedure may be crucial. This paper sought to outline the current laws with regards to summary judgment in Malaysia and explore ways in which it may be revamped. For comparison, summary judgment procedures in the United Kingdom and Australia will also be examined.

ABSTRAK

Penghakiman ringkas sering dihargai ke atas keupayaannya demi pelupusan litigasi secara jimat masa dan kos, sebab pertikaian di antara litigan-litigan dapat diselesaikan tanpa keperluan perbicaraan penuh dan menggunakan proses pra-bicara dalam guaman sivil. Walaupun sedemikian, tegangan di antara potensi prosedur ini demi menghasilkan penghakiman muktamat dan hak-hak litigan ke atas perbicaraan penuh, menggambarkan kepentingan reformasi prosedur ke atas prosedur ini. Perbincangan ini akan mengemukakan pelan rangka undang-undang perbicaraan ringkas di Malaysia dan menjelajahi cara-cara di mana prosedur penghakiman ringkas boleh diubah. Untuk tujuan perbandingan, undang-undang penghakiman ringkas di United Kingdom dan Australia akan dibincangkan.

ABSTRACT

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RETHINKING OF SUMMARY JUDGMENT: REVAMP REQUIRED?

1. INTRODUCTION

Summary judgment is a peculiar procedure, in which a party can obtain judgment without the necessity of a full trial. As Nasser Hamid¹ has rightly pointed out, trial as a rule must precede judgment. However, summary judgment is a procedure whereby, instead of trial first and then judgment, there is judgment at once and never a trial².

Summary judgment procedure is the remedy of inherent delay in trial procedure in adjudicating and determining disputes between litigants. The principles that govern summary judgment were set out by Abdul Malik Ishak J in *Kiwi Brands (Malaysia) Sdn Bhd v Multiview Enterprises Sdn Bhd*³ following a line of authorities starting with the dictum of Raja Azlan Shah in *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia (FC)*⁴:

“Summary judgment is only given in plain and obvious case. An Order 14 in the view we have always taken of it is a very stringent procedure because it shuts the door of the court of the defendant. The jurisdiction ought only to be exercised in proper cases”.

¹ See Summary Judgment by Nasser Hamid, Sweet & Maxwell Asia 1999, p3
² *Symon & Co v Palmer Stores* [1912] 1 KB 259 per Buckley LJ at p266
³ [1998] 3 AMR 2791
⁴ [1981] 2 MLJ 196

Summary judgment is said to be effective tool for disposing of litigation in a timely cost effective manner. In particular, summary judgment offers a mechanism, whereby disputes between litigants may be resolved without the need of a full hearing and without the need of the usual pre-trial processes associated with civil litigations.

As summary judgment avoids the time and expense of trial, it also appeals to commentators who prize efficiency⁵. Aimed this movement toward an increasingly central role of summary judgment, there have been a few cautionary voices. To grant summary judgment against a defendant without permitting him to advance his case is a serious matter, which is akin to denying a right to trial. It therefore raises concerns, such as whether summary judgment is a fair practice? Should summary judgment continue to exist or should it be abolished?

Commentators have also raised a number of questions. For instance, as propounded by John Bronsteen⁶, does the bar for summary judgment go beyond what is necessary for a fair and just resolution? Does the current rule for summary judgment favour an over caution concern, thus limiting the application for summary judgment? Have the circumstances that existed in 1885 when summary judgment was introduced changed, such that the current rule should also be changed? It was also questioned by Derek O'Brien⁷ that will lowering the bar or changing the means to achieve summary disposition improve access to justice and increase the efficiency of the court system? The courts have always

⁵ See Edward J. Brunet, Martin H. Redish & Michael A. Reiter, Summary Judgment: Federal Law and Practice 1 (West Group 2nd Ed, 2000)

⁶ See John Bronsteen, Against Summary Judgment (2007) George Washington Law Review Vol 75 p522

⁷ See Derek O'Brien, The New Summary Judgment: Raising the Threshold of Admission (1999) 18 CL132

been conscious of the risks associated with summary or preliminary determination of issues.

And recently, a few scholars have begun to voice concerns that summary judgment revolution might have gone too far. For instance, Milton I. Shadur in *An Old Judge's Thoughts*⁸ expressed that: "... from my perspective that trend has gone much too far, to the benefit of on one involved in the justice system..." Patricia M Wald in *Summary Judgment at Sixty* stated that "... summary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy tree as it goes"⁹.

In the United States of America, in contemporary American Federal practice¹⁰, summary judgment is employed more frequently to identify claimants who lack evidence sufficient to reach the jury and who will therefore probably suffer a directed verdict or its equivalent at trial. That said, summary judgment has been challenged in the USA. In particular the article titled 'Why Summary Judgment is Unconstitutional'¹¹, by Suja Thomas (and was featured on Howard Bashman's leading weblog 'How Appealing'¹²) contends that summary judgment violates the Seventh Amendment to the U.S. Constitution, which guarantees the right to a jury trial in civil cases.

⁸ 18 CBA REC 27 (2004)

⁹ 76 TEX.L.REV. 1897, 1941 (1998)

¹⁰ Rule 55(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered when the papers offered in support of and in opposition to the motion "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

¹¹ 93, VA.L.REV. 2007 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886363#PaperDownload

¹² <http://howappealing.law.com/022206.html>

In the United Kingdom, English law protects the right to fair trial by a variety of means, including statute, rules of court and common law principles that uphold fundamental constitutional rights. The right to fair trial as Laws J stated in *R v Lord Chancellor, ex p Witham*¹³ is as near to an absolute right as any which I can envisage". Whether there is the right to an impartial tribunal, the right to be heard, or indeed the elementary right of access to court. The statutory and common law safeguards of procedural fairness are now overlaid with the right to fair trial established by Art 6 of the European Convention of Human Rights ("ECHR").

Similar vein was expressed in the case of *Osman v UK*¹⁴, where the court recalls at the outset that Art 6(1) secures everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.

It was further observed in *Neumeister v Austria*¹⁵ and *McMichael v UK*¹⁶ that litigants have a right to equality before law, which demands that all parties before the court should be given the same procedural facilities for advancing their case. They must be afforded equality of arms, in the terminology of the jurisprudence of ECHR, Art 6. Both parties must be afforded an equal and reasonable opportunity to present their own case and to learn their opponent's case and respond to it, under conditions which do not substantially advantage or disadvantage either side¹⁷.

¹³ [1998] QB 575

¹⁴ [1999] 1 FLR 193

¹⁵ (1968) EHRR 91

¹⁶ (1995) 20 EHRR 205

¹⁷ *Dombo Beheer BV v Netherlands* A/274 (1993) (ECtHR); J Mashaw 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 BUL Rev 885; WB Rubenstein 'The Concept of Equality in Civil Procedure' (2002) 23 Cardozo L Rev 1865

In *O'Reilly v Mackman*¹⁸, Lord Diplock had the following to say:

“... the requirement that a person ... should be given a fair opportunity of hearing what is alleged against him and of presenting his own case, is so fundamental to any civilised legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement”.

To set the agenda of the relevant discussion, the purpose of this paper is to outline the current law with regards to summary judgment in Malaysia and explore the ways in which summary judgment may be reformed to improve the speed and cost efficiency of the civil justice system without sacrificing the need for fairness and just results. The procedures will be scrutinised by analysing the existing procedures and proposing ways in which those procedures may be reformed. For the purpose of comparison, this paper will also briefly examine the law of summary judgment in the United Kingdom and Australia.

2. HISTORY OF SUMMARY JUDGMENT

This section will attempt to outline the historical development of summary judgment for a better understanding on how summary judgment procedure came into existence and through evolvement of time, how the system has developed and been adopted into the civil justice system in various jurisdictions. According

¹⁸ [1983] 2 AC 237

to Odger's Principles of Pleadings and Practice¹⁹, summary judgment antecedents have been traced back to the thirteenth century and summary judgment finds its modern origins in the nineteenth century English practice. The Summary Procedure on Bills of Exchange Act of 1885 (commonly called "**Keating's Act**") was adopted to assist merchants to promptly collect on bills of exchange and promissory notes and to dispense with sham defences. The emphasis was on liquidated claims. This procedure was designed to assist the plaintiffs and expedite litigation which had been slowed down by England's pleading requirements and discovery practices. By the Judicature Act 1873 and later the Rules of the Supreme Court 1883, the procedure was extended to cover cases where the plaintiff sought to recover a debt or liquidated demand in money and actions for recovery of land. In 1937 the procedure became additionally applicable, so far as the Queen's Bench Division only is concerned, to all actions except libel, slander, malicious prosecution, false imprisonment and actions in which fraud is alleged by the plaintiff. Since January 1964, the procedure has been available with the same exceptions in all actions commenced by writ in the Queen's Bench or Chancery Division and is available not only to a plaintiff but also to a counterclaiming defendant. It was then also extended so as to enable application to be made for judgment on part only for a claim or counterclaim.

Summary judgment is quite usually found in the British Colonial practice system. While the Australian summary judgment procedure is modelled on the English rule, the South African practice shows many local characteristics²⁰. Summary

¹⁹ See Odger's Principles of Pleadings and Practice, 21st Edition p61
²⁰ 9 Comm. L Rep 366 (Australia 1909), decided under Rules of Supreme Court 1906 Order XIV; Buckle And Jones, The Civil Practice of the Magistrates' Courts in South Africa 294.

judgment seems to have found its way into the various corners of the British Empire shortly after the adoption by the home country of the Rules of 1873.

As we will see at the later part of this paper, summary judgment procedure in Malaysia also closely resembles the English procedures. In Malaysia, the procedure of summary judgment is a creature of statute and it is contained in Orders 14, 43, 81 and Order 89 of the Rules of High Court 1980 ("**RHC**") and Order 26A of the Subordinate Courts Rules 1980 ("**SCR**").

3. TEST FOR GRANTING SUMMARY JUDGEMENT

Order 14 of RHC ("**O14**") proceedings are meant for cases which are virtually uncontested. O14 provides that:

- (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

Generally, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he

has a bona fide defence, he ought to have leave to defend. The jurisdiction should only be exercised in very clear cases²¹.

The words used in the present O4 r3(1) of the RHC in turn provide that the defendant should have leave to defend if he satisfies the Court 'that there ought for some other reason to be a trial'. The provision in O14r3(1) is wider in its scope than the former O14r1. O14(3) of RHC reads as follows:

- (1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

Sometimes the defendant may not be able to pinpoint any precise issue or question in dispute which ought to be tried nevertheless, it is apparent that for some other reason there ought to be a trial²². However, this cannot be achieved by raising facts which do not constitute a defence to the claim²³ or by a mere general denial of indebtedness²⁴.

²¹ *Malayan Insurance (M) Sdn. Bhd. v Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183; and *Gunung Bayu Sdn. Bhd. v Syarikat Pembinaan Perlis Sdn. Bhd.* [1987] 2 MLJ 332

²² *Jallcon (M) Sdn. Bhd. v Nikken Metal (M) Sdn. Bhd. (No.2)* [2001] 5 MLJ 716; and *Tac Construction & Trading v Bennes Engineering Bhd.* [1999] 2 CLJ 117

²³ *Hookham v Mayle* (1906) 22 TLR 241

²⁴ *Huo Heng Oil Co. (E.M.) Sdn. Bhd. v Tang Tiew Yong* [1987] 1 MLJ 139

SCOPE AND OBJECTIVE OF SUMMARY JUDGMENT

Avoidance of Delay

We now turn to the scope and objective of summary judgment. In this section, discussion will be centred around the basis of summary judgment, preliminary requirements for the application of summary judgment and the applicability of summary judgment to civil actions. The object of summary judgment under Order 14 was illustrated by Lord Halsbury in *Jacobs v Booths Distillery Co*²⁵:

“People do not seem to understand that the effect of O14 is that, upon that allegation of the one side or the other, a man is not to be permitted to defend himself in a court that his rights are not to be litigated at all. There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, O14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who are endeavouring to enforce their rights.”

A similar view was expressed by Vaughan Williams LJ in *Symon & Co. v Palmer's Stores Ltd*²⁶, stating that O14 is a “salutary provision for the purpose of

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preventing a defendant, who knows perfectly well that he owes the sum claimed, from postponing the time of payment and putting the plaintiff to further expense in a litigation which ought never to have been taken place.” If the plaintiff is precluded from the application for summary judgment, it would only mean unnecessary prolongation of the case, resulting in a waste of time and added expense for the defendant company²⁷.

As Professor Dr. Choong Yeow Choy had succinctly pointed out in the article, “**Delay in Seeking Quick Justice**”²⁸, summary judgment espouses the maxims “to none shall we deny or delay justice” and “justice delayed is justice denied”. Summary judgment by its very nature provides a means of preventing a defendant from taking advantage of the delay inherent in the procedure before a case comes to trial. Hence, if a plaintiff makes out a prima facie case and his proceedings are in order, the onus shifts to defendant to show cause, why judgment should not be entered against him²⁹.

O14 was intended as a mean by which the plaintiff could obtain speedy judgment when a defendant had no defence, or nothing that looked like a defence. In *British and Commonwealth Holdings plc v Quadrex Holdings Inc*³⁰, Browne Wilkinson VC said that “Order 14 procedure is for clear cases and not for complicated cases which absorb many days to unravel.” An application under Order 14 should be resorted to by a plaintiff where there are no substantial issue of fact or of law involved.

²⁷ See also *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York* [1997] 3 MLJ 818.

²⁸ [1991] 1 MLJ xliii

²⁹ Ibid

³⁰ [1989] 3 All ER 492

4.2 Preliminary Requirements-Summary Judgment Where No Triable Issues

An application for summary judgment is largely decided on affidavit evidence. In *Citibank NA v Ooi Boon Leong & Ors*³¹, the Federal Court made the following observation:

“We have often said in this court many a time that, where all the issues are clear and the matter of substance can be decided once and for all without going to trial, there is no reason why the Assistant Registrar or the Judge in chambers, or, for that matter this court, shall not deal with the whole matter under the O14 procedure.”

It is important to bear in mind that O14 is a summary judgment procedure and not a summary trial procedure³². Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by the plaintiff without trial when there are no triable issues³³, namely when there is no dispute as to fact or law³⁴.

The purpose of O14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his case clearly³⁵. The stress is on the word ‘clearly’ indicating that there are no triable issues which should go to trial³⁶.

³¹ [1981] 1 MLJ 282

³² See *Ng Hee Thoong & Y Anor v Public Bank Bhd* [1995] 1 MLJ 281 and *Niaga Tani Sdn Bhd v Samarez Holdings Berhad* [2005] 1 MLJ 239

³³ See *Crown Alliance Marketing (Pte) Ltd v ABV Builders Sdn Bhd* [2001] 2 MLJ 16

³⁴ See *Ho Lai Ying (trading as KH Trading) v ABV Builders Sdn Bhd* [2004] 2 MLJ 197

³⁵ See *Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd* [2004] 4 MLJ 453

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Summary Procedure Not To Deprive Defendant An Opportunity to Give

Evidence

As Meggery J pointed out in *Miles v Bull*³⁷, Order 14 is for the plain and straight forward, not for the devious and crafty. Further, as aptly stated by Scott LJ in *Dott v Brown*³⁸, summary judgment should not be indiscriminately employed for tactical purposes. The jurisdiction ought only to be exercised in proper cases³⁹.

O14 is not a short cut for a plaintiff to force the defendant to settle his claim without having to go through the process of an ordinary trial by the evidence of witnesses in open court before a judge⁴⁰. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment⁴¹. O14 was not intended to shut out a defendant who could show that there was a triable issue application to the claim as a whole from laying his defence before the court, or to make him liable in such a case to be put on terms of paying into courts as a condition of leave to defend⁴².

³⁶ See *General Trading Corporation (M) Sdn Bhd v Overseas Lumber Bhd* [1977] 1 MLJ 108; see note to O14 under the heading 'Judgment for Plaintiff' on p243 of the Annual Practice 1958

³⁷ [1969] 1 QB 258

³⁸ [1936] 1 All ER 545

³⁹ See *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183, referred to in *Danaharta Managers Sdn Bhd v Huang Ee Hoe & Ors* [2002] 2 MLJ 424; *Perwira Affin Merchant Bank Bhd v Dato' Soh Chee Wen* [2000] 3 MLJ 555; *Sediperak Sdn Bhd v Baboo Chowdhury* [1999] 5 MLJ 229.

⁴⁰ See *Lim Goh Huat v Saw Keng See* [1998] 6 MLJ 600

⁴¹ See *Bank Industri Malaysia Bhd v Huston Electronics Co. (M) Sdn. Bhd. & Ors* [1997] 1 MLJ 818;

⁴² See *Rashid Hussain Securities Sdn Bhd v Che Teng Song & Ors* [2001] 6 MLJ 468

See *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsai* [1978] 2 MLJ 267

4.4 O14 Applies to Admiralty Action

O14 does not expressly exclude admiralty actions from the purview of summary procedure unlike Order 14 of the Rules of the Supreme Court of England which does so by O14r1(2)(c). In *Emmanuel E Okwuoso & 25 Ors v Pemunya Kapal dan Orang-Orang lain yang mempunyai kepentingan dalam Kapal MV 'Brihope' (Hong Leong Leasing Sdn Bhd as Interveners)*⁴³, the plaintiff applied for summary judgment under O14 and for an order for sale of the defendant's vessel under O29. Vincent Ng J in delivering the judgment of the court had this to say:

“...my view is that the procedure adopted by the plaintiffs here does not run foul of the RHC. Here, admiralty cases occur can rarely and far between, and we do not have, nor is it justified for us to have an Admiralty Court, governed by specific procedures and rules for admiralty proceedings. Indeed, in England they have an autonomous body headed by an Admiralty Marshall, who has his own funds to administer the mechanics of a sale under the Admiralty Division. I am given to understand that Admiralty Division cases there are disposed of so speedily that, parties need not have recourse to Order 14 procedure. As such, it is impractical and unrealistic for Malaysian courts to be too strict on the procedures employed by the parties in admiralty cases. Such procedures should be dictated according to the justice of the situation prevailing in our country.”

⁴³ [1995] 1 AMR 594

4.5 Actions Excluded By O14

Under O14r(1)(2)(a) of RHC, a summary judgment is not available if an action contains a claim by a plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise of marriage⁴⁴. In addition, O14 is also not available in an action which includes a claim by the plaintiff based on an allegation of fraud⁴⁵. It has been held in *Tan See Yin Vincent v Noone & Co & Anor*⁴⁶ that in terms of O14r(2)(b) of RHC to operate as a bar to summary judgment, the plaintiff's claim must be based on an allegation of fraud, which means fraud in the technical sense as used in *Derry v Peek*⁴⁷ that is false misrepresentation. O14(1)(3) of RHC further states that O14 shall not apply to an action to which O81 applies⁴⁸.

O14 thus deals with not only liquidated, but also unliquidated claims. However, in the latter case assessment of damages must follow. The case of *Dummer v Brown And Another*⁴⁹ is authority for the proposition that summary judgment procedure is available to claims in negligence arising out of accidents causing death or personal injuries. However, Lord Jenkins LJ had observed that the procedure under Order 14 applicable to claims in negligence arising out of accidents causing death or personal injuries, though the proportion of such cases which would be suitable subjects for summary procedure must be very small.

⁴⁴ See the corresponding O26A r1(2)(a) of the SCR 1980

⁴⁵ See the corresponding O26A r1(2)(b) of the SCR 1980

⁴⁶ [1995] 1 MLJ 705

⁴⁷ (1889) 14 App Cas 337

⁴⁸ Order 81r(1) provides in any action begun by writ indorsed with a claim (a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages; or (b) for rescission of such an agreement; or (c) for the forfeiture or return of any deposit made under such an agreement, the plaintiff may, on the ground that the defendant has no defense to the action, apply to the Court for judgment.

⁴⁹ [1953] 1 QB 710

But, so far as the rules are concerned, there is no procedural reason why that course should not be adopted in a proper case of this class. The plaintiff's husband, who was killed in the accident, was being conveyed with other passengers in a motor-coach belonging to the first defendant and driven by the second defendant. The coach got out of control and ran into a telegraph post and, as a result, the plaintiff's husband was thrown from the coach and suffered fatal injuries. It is well known that if a triable issue is raised in affidavits then the court will not in Order 14 proceedings adjudicate upon those issues, but will say that they must be determined in the usual way at a trial. Neither defendant had anything that he desired to raise. That being the case, the second defendant had made an admission which was an admission of liability. The evidence given was clearly admissible against the second defendant and proved liability as against him. Once liability against him was established then the admission that he was acting in the course of his employment was enough to warrant giving judgment against both defendants.

By way of contrast, in *Khairi bin Mohamed & Anor v Sanip Bin Salleh & Anor*⁵⁰, Low Hop Bing J was of the view that the plaintiff's mode of action by way of summary judgment in a cause of action based on negligence arising out of a motor vehicles accident is wrong and wholly inappropriate. It is clear that in order for the plaintiff's claim to succeed there must be proof of the defendant's negligence, and this proof can only come about by way of testimony of witnesses and not by way of summary judgment.

⁵⁰ [1996] 3 CLJ 119

From the case of *Drummer v Brown And Another*, it would seem that it is possible to apply for summary judgment against the defendant in a fatal accident action in England. Pertinently where Singleton LJ held that the provisions of Order 14 are wide enough to cover fatal accident cases. Nonetheless, His Lordship cautioned that it is only in the clearest case where there is no defence that judgment ought to be given against a defendant under the provisions of Order 14 r1. On evidential principles that once a defendant raises contributory negligence as a defence, the matter will usually be ordered to trial.

Even the restriction on cases falling under Order 14 r1(2) is an anomaly because these are cases in which, under the English legal system, there is a right to trial by jury, in Malaysia such a right does not exist.

4.6 Injunction

In a case where the plaintiff is able to surmount both the procedural and meritorial hurdles placed upon him, and the defendant was unable to show a defence or that for any other reason the case ought to be tried, can the plaintiff in a proper case use the summary judgment procedure to apply for an injunction restraining the defendant from carrying out an activity detrimental to the plaintiff's interest? This is the type of question that the English Court of Appeal was asked to consider in 1971 in *Shell-Mex and BP Ltd. v Manchester Garages Ltd.*⁵¹ In this case, the plaintiffs gave notice to the defendants to vacate their petrol station at the end of the expiry date of the licence. However, the defendants did not comply with the notice, and continued to use the filling station. The plaintiffs then issued

⁵¹ [1971] 1 All ER 841

a writ claiming damages and an injunction to restrain the defendants from entering on the premises and trespassing thereon. They took out a summons under Order 14 and asked for an injunction restraining the defendants from entering on the premises. Lord Denning MR said:

“I see no reason whatever why a plaintiff cannot go straight to the judge and ask for summary judgment under RSC O14 for an injunction... The plaintiffs were quite entitled to go under RSC O14 to the judge for an injunction”.

Sixteen years later a similar issue was brought before Dr. Zakaria Yatim J in the case of *Fabrique Ebel Societe Anonyme v Syarikat Perniagaan Tukang Jam City Port & Ors*⁵², the plaintiff in this case applied for a final judgment under O14 RHC for an injunction to restrain the defendants from infringing the plaintiff's trade mark. The application for an injunction under O14 procedure was something novel then as far as the Malaysian Court was concerned. There were no local reported authorities on the point up to then. Therefore, essentially what the plaintiff was asking the learned Judge to do was to extend the scope of O14 summary procedure to injunctions. In response, Dr. Zakaria Yatim J explained:

“It is clear that the court has jurisdiction to enter summary judgment under O14 of the RHC for an injunction”.

⁵² [1988] 1 MLJ 188

It was remarked by Mohd Akram b. Shair Mohamad⁵³ that the Ebel case marks another major step in the development of procedural law relating to the obtaining of summary relief under O14. There should be no reason why in a proper case as decided in the instance one an injunction cannot be obtained under O14 procedure.

The court has a discretion to grant or to refuse the relief of injunction depending on the facts of the case and the triable issues, which the defendant may raise, necessitating a trial. For instance, in *Kiwi Brands (M) Sdn Bhd v Multiview Enterprises Sdn. Bhd.*⁵⁴, Abdul Malik Ishak J declined to grant the relief for injunction in an application for summary judgment, since the plaintiff had not made out a clear cut case and the facts of the case were such that the issues involve could be decided only in a full blown trial.

7 Claims Against the Government

The next issue then arises is whether an application for summary judgment can be made against the Government. It is clear from the wording of O73r5 of RHC that no application against the government shall be made under O14r1, or O81r1 in any proceedings against the government. The same Order also further provides that no application shall be made under O14 r5, namely a claim for summary judgment on a counterclaim, in any proceedings against the government.

⁵³ See Mohd. Akram b. Shair Mohamad, Obtaining An Injunction Order 14 Summary Procedure [1988] 1 CLJ 109

⁵⁴ [1998] 6 MLJ 38

O73r3 is substantially the same as Order 77r7 of the English Rules of the Supreme Court 1965 ("**RSC 1965**"). Order 77r7 of RSC 1965 continues to apply despite the coming into effect of the UK Civil Procedure Rules 1998 ("**CPR**")⁵⁵.

4.8 Claim for an Account

A claim for an account is an equitable remedy which only the High Court has jurisdiction to grant. O43r1(1) of RHC provides that:

Where a writ is indorsed with a claim for an account or a claim which necessarily involves taking an account, the plaintiff may, at any time after the defendant has entered an appearance or after the time limited for appearing, apply for an order under this rule.

Hence, unlike O14 which is of general application, O43 only applies to two very specific claims, namely to applications made for a summary order for accounts or inquiries. O43 r1 of RHC is in pari material with Order 43 r1 of RSC 1965. Under the CPR, all such claims can now be made under Part 24 by any party to the proceeding. Hence, Order 43 r1 of the RSC 1965 has now been superseded by Part 24.

5. THE INITIAL APPROACH

Summary judgment procedure has undergone a significant transformation in recent years. Historically, summary judgment was a rarely used procedural

⁵⁵ See Part 50 and Sch 1 of the CPR

device, designed to preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands. Since 1855, procedures for obtaining summary judgment have broadened gradually, though summary judgment varies from jurisdiction to jurisdiction. In some provinces it is available only to a plaintiff, but in others such as British Columbia, New Brunswick, Nova Scotia, and Ontario, it is also available to a defendant. The details of the procedure vary, but the essential element is the same in all jurisdictions, an application for an final judgment in which the party attempting to establish that there is no 'triable issue' or no 'genuine issue of fact requiring a trial' and that he or she is entitled to judgment as a matter of law. In theory, the courts still adhere to the view that summary judgment should be granted with caution. In practice, summary judgment has been recast as a primary mechanism for disposing of litigation.

THE NEW APPROACH

Position in the United Kingdom

To facilitate the comparison with the position in Malaysia, the position of summary judgment procedure in the United Kingdom will be discussed as follows.

Before 26 April 1999, the plaintiff had the power to apply for summary judgment against only a defendant on the ground that the defendant had no defence⁵⁶. Provided that the plaintiff's application was not inappropriate or procedurally

⁵⁶ O14r1 RSC 1981

device, designed to preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands. Since 1855, procedures for obtaining summary judgment have broadened gradually, though summary judgment varies from jurisdiction to jurisdiction. In some provinces it is available only to a plaintiff, but in others such as British Columbia, New Brunswick, Nova Scotia, and Ontario, it is also available to a defendant. The details of the procedure vary, but the essential element is the same in all jurisdictions, an application for an final judgment in which the party attempting to establish that there is no 'triable issue' or no 'genuine issue of fact requiring a trial' and that he or she is entitled to judgment as a matter of law. In theory, the courts still adhere to the view that summary judgment should be granted with caution. In practice, summary judgment has been recast as a primary mechanism for disposing of litigation.

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premature⁵⁷ and that there was affidavit evidence confirming the lack of defence⁵⁸, the burden of proof was on the defendant to show that his or her case was good enough to merit leave to defend.

A key objective identified by Lord Woolf in his 'Access to Justice' reports was 'stopping weak cases from dragging on'. One way the Civil Procedure Rules ("CPR") sought to achieve this was by the new summary judgment regime under Part 24.

Accordingly, from 26 April 1999, summary judgment may be made on the whole of the claim or on a particular issue against a claimant who has "no real prospect of succeeding" on the claim or issue or against a defendant who has no real prospect of successfully defending the claim or issue provided in either case that there is no other reason why the case or issue should be disposed of at a trial⁵⁹.

Part 24 (1) defines summary judgment as "a procedure by which the court may decide a claim or a particular issue without a trial". It thus covers both points of

⁵⁷ i.e. provided the action was not one of the limited kinds of cases excluded from summary judgment (such as defamation claims), and provided that the statement of claim had been served and an acknowledgement of service filed: O14r1(1) of the RSC 1981

⁵⁸ O14 r2(1) RSC 1981

⁵⁹ CPR r24.2(1). It is pointed out in Blackstone's Guide to Civil Procedure Rules (1990, Blackstone, London) that the wording of CPR Part 24 can be traced back to comments in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* [1986] 2 Lloyd's Rep 221 to the effect that the test for setting aside a default judgment was higher than the mere arguable case which would defeat a summary judgment application under RSC O14 since it required a real prospect of success. Note, however, the decision in *Day v Royal Automobile Club Motoring Services Ltd* [1999] 1 W.L.R. 2150 CA heard prior to the implementation of the CPR and discussed further in Browne, 'A Matter of Semantics' (1999) Litigation 18(4) 18. Put simply the rationale for the difference between the criteria for setting aside a default judgment and those for the grant of summary judgment was that the defendant in a judgment case did not merit the benefit of any judicial doubt; he or she was already in breach of the rules of court. It is however worthy of note that CPR Part 13 governing the setting aside of default judgments against defendants now allows for the judgment to be set aside if the defendant has a real prospect of successfully defending the claim. The use of virtually identical wording albeit that Part 13 is expressed as a positive (the defendant having to prove a real prospect) and Part 24 is expressed as negative (the identity of the party bearing the burden of proof) disposes at a stroke of the rationale for any distinction between the two procedures.

fact and points of law such as might previously have been dealt with under Order 14A of RSC 1981. Summary judgment against a claimant is available in any type of proceedings, see CPR 24.3(1). Summary judgment may be given in defamation proceedings tried by jury on question of law. But the availability of summary judgment against defendants is somewhat more limited, CPR 24.3(2). It is not available in certain residential possession proceedings; it may not be given against defendants in proceedings for possession of residential premises brought against mortgagors; against tenants or persons holding over who are protected by the Rent Act 1977 or Section 34 of the Housing Act 1988. No summary judgment is available in admiralty proceedings in rem, against the Crown, CPR Sch1. However, the possibility of striking out the defendant's statement of case as disclosing no reasonable grounds of defence, under CRP 3.4(2)(a), is not excluded in such cases. Accordingly, if the defendant's defence is patently groundless, it may be struck out notwithstanding that summary judgment is unavailable.

Accordingly, the court may decide to grant summary judgment on liability alone, and defer the issue of quantum to trial, or it may confine summary judgment to the issue of causation if this is likely to assist the disposal of the case. However, the fact that the summary judgment will not dispose of the whole of the case, may in certain situations lead the court to conclude that it would be better for the whole matter to go forward to trial⁶⁰. The appropriateness of summary judgment will depend in such situations on the extent to which it is likely to contribute to settlement of the remaining issues or to their expedition and economical disposal.

⁶⁰ See *Green v Hancocks* (2000) Lloyd's Rep PN813, Times 15, August

A summary judgment process may be initiated by the parties or by the court (the court has a general power to make orders of its own initiative, CPR 3.3). It is part of the court's active case management duties to ensure that disputes that do not require full procedural attention should be disposed of summarily, CPR 1.4(2)(c). The court may therefore order summary judgment wherever it appears to it that the dispute can be justly resolved by these means. Where the court has dismissed an application for summary judgment it may proceed to give summary judgment against the applicant. In *James v Evans*⁶¹, the trial judge held on the first day of a planned three-day trial that in light of the statement of case, the witness statements and other documentation, there was no real prospect of the defence succeeding, and gave summary judgment for possession under CRP 24.2(a)(ii). However, the court would be justified in proceeding to summary judgment of its own initiative only if all the necessary materials are before the court and the parties have had adequate notice of what how the court proposes to proceed⁶². An appeal against a refusal to strike out under CPR 3.4(2) may be treated as if it were an application for summary judgement so that the case may be summarily disposed of even if the striking out order is set aside⁶³.

In *Swain v Hillman*⁶⁴, Lord Woolf MR said that the words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of

⁶¹ (2000) 3 EGLR 1
⁶² See *Oxford v Rasmi Electronics Ltd* (2002) EWCA Civ 1672
⁶³ See *Taylor v Midland Bank Trust Co Ltd*. [1999] All ER (D) 831 (CA)
⁶⁴ [2001] 1 All ER 91 (CA)

success. However, even this elaboration hardly conveys a clear measure of what has to be established in order to obtain summary judgment and different judges may well have different conceptions of what counts as a “real” and what counts as “fanciful”. It is of course not possible to obtain precision in a test of this kind, but reasonably consistency can be achieved if the test is more fully articulated so that judges can apply it in the context of a shared understanding of its nature and purpose.

To appreciate the full meaning of this test, it is submitted that one first has to understand the purpose behind it. Under the old rules, summary judgment was available only to claimants who could show that the defendant had “no defence” to the claim, under Order 14r1(1) of RSC 1981. This test was interpreted as requiring claimants to produce a case strong enough to leave the court with no reasonable doubt that a plaintiff is entitled to judgment⁶⁵. It was not enough for the court to merely conclude that the defendant was unlikely to succeed in his defence. Since the absence of a defence had to be established beyond reasonable doubt, leave to defend had to be given even where the defence was very weak, or “shadowy”⁶⁶ and the court was bound to give leave to defend in defence that appeared to be doubtful or lacking in substance⁶⁷.

In the Access to Justice Report, Lord Woolf found the old rules unsatisfactory because they allowed unmeritorious claims to go to trial when they should have been disposed of summarily. Lord Woolf viewed that the court should exercise its

⁶⁵ See *Home and Overseas Insurance Co v Mentor Insurance Co (UK) Ltd (In liquidation)* [1989] 3 All ER 74

⁶⁶ See *Van Lynn Developments Ltd v Pelias Construction C* [1969] 1 QB 607

⁶⁷ See *MV Yorke Motors Ltd v Edwards* [1982] 1 All ER 1024

powers of summary disposal on a wider basis than at present. The test of “a real prospect of succeeding” must therefore be understood in the context of the above Report’s policy to promote proportionate use of resources. The purpose of the new test is to avoid the use of the normal pre-trial and trial procedures for resolving disputes that cannot benefit from use of these procedures. It follows that summary judgment should be given where the normal processes are not likely to make a difference to the outcome⁶⁸. The crucial factor is whether the full process could turn up something that would make a difference. Whether a party has a real prospect of success depends therefore on an assessment of two distinct matters: first, on whether the party has a real prospect of success on the basis of the facts that are known at the time, and second, on whether there is a real prospect that some additional support for the party’s case would emerge if the case followed the normal procedural route. It is only when the court is convinced that the party has no real prospect in this second sense that it may be truly said that the use of the normal process would be wasteful.

Support for this interpretation of the test is found in *S v Gloucestershire County Council*⁶⁹, where the Court of Appeal explained that before giving summary judgment the court must be satisfied of the following matters:

- (a) that it had before it all substantial relevant facts that were reasonably capable of being before it;
- (b) that those facts were undisputed or there was not real prospect of successfully disputing them; and

⁶⁸ See *Royal Brompton Hospital Health Service Trust v Hammond* [2001] All ER(D) 130
⁶⁹ [2000] 3 All ER 346 (CA)

- (c) that there was no real prospect of oral evidence affecting the court's assessment of the facts.

The Court of Appeal added that even where there were gaps in the evidence, the court could proceed to summary judgment if there was no real prospect that the gaps would be filled. It follows that the test is not merely a matter of the probability of the respondent's success but also involves an assessment of the need for further investigation and the possibility that such investigation will add to what is already known. If the legal issues are simple and have a straightforward answer, a trial process would be redundant. For example, a case that gives rise to a point of law may be decided by summary judgment if it does not depend upon the resolution of questions of fact and if its postponement to trial would waste time and add to the expense of the proceedings⁷⁰. However, where issues involve difficult points of law and there was much to be considered in light of the relevant authorities, the full process should be employed⁷¹.

There would be cases where, although the respondent's case appears weak, the facts could be so complex that the prospects of success cannot be assessed without further investigation. Such cases must go to trial. The House of Lords decision in *Three Rivers District Council v Governors and Company of the Bank of England (No 3)*⁷² illustrates this point. Depositors who had lost money as a result of the collapse of the Bank of Credit and Commerce International ("BCCI") brought proceedings for misfeasance in public office against the Bank of England

⁷⁰ See *Hallissey v Petmoor Developments Ltd* [2000] All ER(D) 1632

⁷¹ See *MT Realisations Ltd v Digital Equipment Co Ltd* [2002] EWHC 1628; and *Barrett v Universal Island Records Ltd* (2003) EWHC 625

⁷² [2001] 2 All ER 513

on the grounds that the Bank of England should have warned of BCCI's impending failure. The Bank of England made an application, supported by a 737 page written case, to have the claim struck out or dismissed by summary judgment on the grounds that it had no real prospect of succeeding. Lord Hope explained that justice required that the claimants should be given the opportunity to present their case at a trial so that its merits could be assessed, noting that:

"A trial in this case will be lengthy and it will be expensive. There is only so much that astute case management can do to reduce the burdens on the parties and on the court. Nevertheless, it would only be right for the claim to be struck out if it has no real prospect of succeeding at trial. I do not think that one should be influenced in the application of this test by the length or expense of the litigation that is in prospect. Justice should be even handed whether the case be simple or whether it be complex."

The court will not give summary judgment if there are compelling reasons why the case or issue should be disposed of at trial, CPR 24.2(b), notwithstanding that the respondent has no real prospect of succeeding at the trial. Since it would normally be wasteful to employ the pre-trial and trial processes where the respondent has no real prospect of succeeding, there is a question mark over what kind of compelling reasons would require allowing such a case to go to trial. The pre-CPR case law is of little help here since most of the decisions involved case where the facts called for further investigation and could not therefore be disposed of summarily under the "real prospect" test as defined above, see *Miles*

*v Bull*⁷³, the claimant's case appeared to be "devious and crafty" and not "plain and straightforward". Under CPR, however, it has been held that it would be unfair to enter summary judgment against a party who claims that it is duty-bound to refrain from disclosing information pertinent to its defence⁷⁴. It has also been held that summary judgment should not be given where it would effectively deprive a party of the right to trial by jury⁷⁵. The court may decline to give summary judgment if it considers that there is a public interest that the case should be determined in the full public glare of a trial⁷⁶. Given the importance attached to the proper use of court resources, it would be only in exceptional case that the court would refuse to give summary judgment after the applicant has shown that the respondent has no real prospect of success.

7. THE POSITION IN AUSTRALIA

We turn now to discuss the position in Australia. The Uniform Civil Procedure Rules 1999 came into force on 1.7.1999. They introduced a uniform set of procedures to replace the Rules of the Supreme Court, which commenced on 1.1.1901, the District Court Rules 1968 and the Magistrates Court Rules 1960. Like the rules in England, the Uniform Civil Procedure Rules aim to promote justice and efficiency and to contain costs and delay⁷⁷. In the same vein, the court may give summary judgment on either the plaintiff's or the defendant's motion if a defence or claim has no real prospect of success.

⁷³ [1969] 1 QB 258

⁷⁴ See *Bank of Scotland v A Ltd* [2001] 3 All ER 58

⁷⁵ See *Safeway Stores plc v Tate* [2001] QB 1120 CA

⁷⁶ See *Bank für Gemeinwirtschaft Aktiengesellschaft v City of London Garages* [1971] 1 All ER 541

⁷⁷ See A Review of Some Innovations in Queensland Civil Procedure, Australia Bar Review Vol 26, May 2005 p13

Wilson J noted in *Foodco Management Pty Ltd v Go My Travel Pty Ltd*⁷⁸ that the grounds for summary judgment in the Uniform Civil Procedure Rules reflect the grounds for summary judgment in Part 24 of CPR in England.

In *Gray v Morris*⁷⁹, the Queensland Court of Appeal was concerned to define the limits of summary judgment. There are two parts of the summary judgment test:

- (a) whether the claim or defence has a real prospect of success; and
- (b) whether there is a need for a trial.

On 1 December 2005, Section 31A of the Federal Court of Australia 1976⁸⁰ was introduced to extend “the power of the court to deal with unmeritorious matters by broadening the grounds on which federal courts can summarily dispose of unsustainable cases”: see *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd*⁸¹. The section empowers the Court to give summary judgement in favour of an applicant if it is satisfied that the respondent “has no reasonable prospect of successfully defending the proceeding or a part of the proceeding”: see Section 31A(1)(b). A defence may have no reasonable prospect of success notwithstanding that it is not “hopeless” and not “bound to fail”, see Section 31A(3).

⁷⁸ [2002] 2 Qd R249

⁷⁹ [2004] 2 Qd R118

⁸⁰ Section 31A of the Federal Court of Australia 1976 provides as follows: (1) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if: (a) the first party is prosecuting the proceeding or that part of the proceeding; and (b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding. (2) The Court may give judgment for one party against another in relation to the whole or any part of a proceeding if: (a) the first party is defending the proceeding or that part of the proceeding; and (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

⁸¹ (2008) FCAFC 60 at 406 (per Gordon J) (quoting from the Second Reading Speech of the Minister on the Migration Litigation Reform Bill 2005 (Cth)).

The test which was applied generally on an application for summary judgment prior to the insertion of Section 31A was that referred to in *General Steel Industries Inc v Commissioner for Railways (NSW)*⁸² and others. Barwick CJ determined the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument; so to speak apparent at a glance.

Plainly, Section 31A was, as Lindgren J held in *White Industries Aust Ltd v Commissioner of Taxation*⁸³ designed "to lower the bar for obtaining summary judgment" from the level that had been fixed by the High Court in *Dey v Victorian Railways Commissioners*⁸⁴ and *General Steel Industries Inc v Commissioner for Railways (NSW)*⁸⁵. Although the standard which must be met by an applicant who seeks summary judgment under the Federal Court Act has been expressed in a variety of different ways, where, as here, an application is made under Section 31A, the Court is required to give close attention to the statutory language and to apply that test to the exclusion of all others. As Kenny J said in *PZ Cussons (International) Ltd v Rosa Dora Imports Pty Ltd*⁸⁶:

"The key is to address the statutory question. That is, under Section 31A, in order to grant summary judgment, I must be satisfied that the respondents have no reasonable prospects of success in defending the

⁸² [1964] 112 CLR 125

⁸³ (2007) FCA 511

⁸⁴ (1949) 78 CLR 62

⁸⁵ Ibid

⁸⁶ (2007) FCA 1642

infringement claim. As s 31A(3) makes clear, this does not mean that I must be satisfied that their defence is hopeless or bound to fail.”

In *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited*⁸⁷, the court observed that it is by no means easy to work out what Parliament had in mind by providing for summary judgment, where a claim or defense has no "reasonable prospect" of success. For one thing, it is difficult to see how one can assess prospects of success without some attempt at predicting the outcome of the dispute. If the dispute is about factual issues, the task of prediction is fraught with all kinds of difficulties. First of all, in many cases the court will not have before it all the material evidence. Second, if credit is involved it may be impossible to predict how that issue will be resolved. Many of the problems involved in predicting the outcome of an action were referred to by the High Court in *Agar v Hyde*⁸⁸. Even if the dispute only concerns a question of law, that issue may be difficult to resolve, or to predict its resolution in the absence of detailed argument only occurs at a trial.

In *Boston Commercial Services Pty Ltd v GE Capital Finance Australasia Pty Ltd*⁸⁹, Rares J attempted to describe the requisite standard under Section 31A. After reviewing many cases, most from different and not necessarily analogous areas, he came down to the view that if there was "a real issue of fact to be decided" or "possibly, where there is a real issue of law" to be resolved the matter should go to trial. With respect, this does not seem to be very far removed from the old Order 14 test. So the standard must be found elsewhere.

⁸⁷ supra at 30
⁸⁸ (2000) 201 CLR 552
⁸⁹ (2006) FCA 1352

Perhaps one should look further at what Australia Parliament intended to achieve. In Order 14 cases, to show cause against an application for summary judgment, a defendant is required to go into some detail and state clearly and concisely the facts to be relied upon⁹⁰. This requires only the material facts to be stated as distinct from the evidence that would establish those facts⁹¹. If the test under Section 31A raises the hurdle for the opposing party, it may be necessary for that party at a minimum to provide an outline of the evidence that will be relied upon. The outline must be sufficient to show that there is a genuine dispute about facts that are material to the outcome of the case. That will enable the judge to make some assessment of the merits. It would not in most cases to require the party to do more than provide an outline, because that would turn the summary judgment application into a trial.

In other words, the section requires a judge to conduct what might loosely be described as a preliminary trial and look more closely than he would under an Order 14 application to a party's assertion that there is a real question of law or fact to be decided. Such an assertion is to be examined with a critical eye. The judge is to decide whether the opposing party has evidence of sufficient quality and weight to be able to succeed at trial. There will be cases where the asserted facts appear to be so improbable that there is no point in allowing them to go to trial. There will be others where the opposing party has not been able to show that the asserted facts are likely to be established at a trial. On questions of law, the judge should conduct an inquiry into their merit, not for the purpose of resolving them (though this can be done)⁹² and also not simply to determine

⁹⁰ See *Country Estates Pty Ltd v Leighton Contractors Pty Ltd* (1975) 49 ALJR 173

⁹¹ See *Ritter v North Side Enterprises Pty Ltd* [1975] 132 CLR 301

⁹² See *Rosser v Austral Wine and Spirit Co Pty Ltd* [1980] VR 313

whether the argument is hopeless, but in order to decide whether it is sufficiently strong to warrant a trial. If the judge is satisfied that he or she is able to resolve any contested legal issue at a summary hearing and without undue delay, it may be better all around if that be done. If not, then at least the merits must be tested. That will then give Section 31A a substantial operation, which is what, it seems was intended.

8. THE FUTURE OF SUMMARY JUDGMENT PROCEDURE

Despite the general probability that the court will in future be more willing to grant summary judgment, trigger-happy and over-enthusiastic applications are, if anything, likely to be even more dangerous than previously. First, given the new system of verifying statements of case, any application under Part 24 CPR after defence will effectively have to challenge the defendant's statement of truth. Secondly, an unduly aggressive claimant may not only fail to obtain summary judgment or the imposition of a conditional order, but given the possibility of "reverse Order 14" may even end up having to pay money into court as a condition of continuing with his own claim. Even where a claimant is successful, the recoverable costs are fixed and extremely low.

8.1 The "Other Reason" Question

The wording of the proviso "there is no other reason why the case or issue should be disposed of at a trial" in CPR 24.2(a) is of very similar to the wording of the previous RSC 1981 Order 14 proviso "that there ought for some other reason

to be a trial". The words "an RSC 1981 Order 14 other reason" will be used to refer to a reason other than one relating to the court's assessment of the merits of the case which would have displaced the possibility of summary judgment under the old rules. The words "a Woolf other reason" will be used to refer to a reason which could displace summary judgment according to the particular use of the proviso in CPR 24.2(b) envisaged by Lord Woolf, namely recognition of the existence of a public interest in the case proceeding to trial; and the words "a CPR24.2(b) other reason" will be used to refer to a reason unrelated to the court's assessment of the merits of the case which will displace the possibility of summary judgment according to the proviso in CPR24.2(b) but other than on the public interest grounds envisaged by Lord Woolf⁹³. It is perhaps unfortunate that, in taking control of the Part 24 mechanism in *Swain v Hillman*⁹⁴, where Lord Woolf himself recognised that certain issues were only suitable for trial that he did not also provide guidance on the application of the proviso in CPR24.2(b) "other reason".

3.2 The Burden of Proof And The Complication Of Practice Directions

Prior to 26 April 1999, the burden of proof on the plaintiff in relation to an application for summary judgment was very limited. The main burden was placed by the RSC 1981 on the defendant, who could nevertheless discharge it completely even if all that he or she could show was a defence that was less than

⁹³ See Jane Ching, Civil Procedure: Part 24-How Real Is A Real Prospect Of Success? (1999) 8 Nott LJ 28
⁹⁴ [2001] 1 All ER 91 (CA)

probable⁹⁵. Unlike RSC 1981, the CPR originally contained no explicit provision on the allocation of the burden of proof. Until 13 September 1999, a practice direction supplementing Part 24 did contain the following:

“4.1 Where a claimant applies for judgment on his claim, the court will give that judgment if:

- (1) the claimant has shown a case which, if unanswered, would entitle him to that judgment, and
- (2) the defendant has not shown any reason why the claim should be dealt with at trial.

4.2 Where a defendant applies for judgment in his favour on the claimant's claim, the court will give that judgment if either:

- (1) the claimant has failed to show a case which, if unanswered, would entitle him to judgment; or
- (2) the defendant has shown that the claim would be bound to be dismissed at trial.

4.3 Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order.”

⁹⁵ See *Radafin Bank v Agom Universal Sugar Trading Co*, The Times 23.12.1986 C.A.

Paragraph 4.1 caused potential difficulty where a defendant could raise a real prospect of a defence on the merits, whilst paragraph 4.2 cause difficulty where the claimant could raise some other reason why the claim should be dealt with at trial and where the claimant's case, though weak, was not bound to be dismissed. Further uncertainty lay in defining what exactly would constitute a reason why the claim should be dealt with at trial within CPR24.2(b). From 13 September 1999, the first two sub-paragraphs of paragraph 4 of the practice direction were deleted. In the absence of these sub-paragraphs with their well-meaning attempt to allocate and define the burdens of proof however, it seeks from the courts not only guidance on the standard of proof involved in the application but also the allocation of the burden of proof.

The significance of the allocation of the burden of proof in the application produces two concerns. First, there is Ward LJ's concern expressed in *Day v Royal Automobile Club Motoring Services Ltd*⁶⁶ to the effect that it is possible on a summary basis to establish a negative (that the respondent has no real prospect of success namely to identify a hopeless, or all but hopeless case) but that trying to establish the positive merits of a case (that the respondent has a real prospect of success) involves considerations unsuitable for summary process and suitable only for trial. Secondly, there is Derek O'Brien's concern that the placing of the burden of proof could itself demand a mini-trial and produce inequality by requiring the claimant in all cases to prove his or her positive case.

⁶⁶ [1999] 1 W.L.R. 2150 CA

In addition, whatever the position in relation to the substantive merits of the case, one cannot ignore the CPR24.2(b) proviso: is it for the respondent to prove that there is an other reason or for the applicant to prove that there is not? Whether Ward LJ's reservations about the proving of positive allegations on a summary basis would also be significant on this point will depend, of course, on the nature of an acceptable "other reason".

9. DISPOSITION WITHOUT TRIAL

The pinnacle of the litigation process is a judgment given after a trial of the substantive issues in dispute between the parties. To reach it the parties are required, first, to fulfil the pre-trial preparatory requirements for the purpose of ensuring that the issues had been adequately defined, that necessary evidence has been obtained and exchanged and that all problems concerning these and other pre-trial processes have been resolved. Secondly, the parties must undergo a searching trial process at which they present their evidence and arguments and probe each other's positions. This elaborate procedure provides the optimal means for securing a judgment on the merits that correctly determines the facts and applies the law. Needless to say, this intensive process requires the investment of considerable party and court resources. It is, however, equally clear that not every dispute justifies the use of the full procedural panoply. Many may be just as satisfactorily decided by a simpler process. For instance, where the claim of defence has no real prospect of success and may therefore be summarily dismissed without further ado.

There will be situations where although the statement of case cannot be so easily brushed aside, the issues that they present can be easily decided without need for the normal pre-trial and trial processes. To insist that such disputes should nevertheless follow the full procedural course would waste valuable resources and, worse still, would enable unscrupulous litigants to harass their opponents by putting them to unnecessary trouble and expense and by keeping them out of their entitlements pending resolution of the case. As noted, the right to an adjudication within a reasonable time may well entitle a litigant with an unanswerable claim to insist that its resolution should not be delayed by unnecessary protracted process. Accordingly, English law has evolved a summary judgment procedure for enabling litigants with a clear and unanswerable case to obtain judgment without having to negotiate the normal procedural hurdles⁹⁷. The employment of the normal process may be side stepped where it could make no useful contribution to a just determination of the dispute, over and above what could be achieved by a simple early hearing. Summary judgment may therefore be seen as an early example of proportionality, in that the full procedure could be avoided because its use in a particular dispute would be disproportionate to what it could achieve.

10. PROCEDURES GOVERNING SUMMARY JUDGMENT IN MALAYSIA

Having explored the positions in other jurisdictions, focus now will be turned on the procedures governing summary judgment in Malaysia.

⁹⁷ See C Clark and C Samenow 'The Summary Judgment' (1928) 38 Yale LJ 423; A Bauman 'The Evolution of the Summary Judgment Procedure' (1956) 31 Ind LJ 329

10.1 Preliminary Requirements

It can be said that the Rules pertaining to summary judgment are exclusionary in nature. A plaintiff wishes to proceed for summary judgment against a defendant must satisfy statutory requirements as imposed by O14r1(1) of RHC⁹⁸. The preliminary requirements are that (a) the statement of claim must have been served on the defendant⁹⁹, (b) the defendant must have entered an appearance, see O14r1(1) of RHC; (c) the affidavit in support of the application must comply with the requirements of O14r2.

10.2 Application for Summary Judgment Be Filed Immediately After Defendants Enter Appearance

O14 r1(1) of RHC and O26A r1(1) of SCR clearly state that an application for summary judgment under the respective provisions may be filed after the defendant has entered appearance following the service of the writ or summons on him. There are no specific words to the effect that an application should be made before the defendant files his defence.

As was pointed out in *Loo Sze Kin v Cheong Choy Teik*¹⁰⁰ that O14r1 and 2 of RHC do not spell out the time in which the application for summary judgment must be made. These rules only point out that immediately after the defendant

⁹⁸ *National Company for Foreign Trade v Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300
⁹⁹ *United Malaya Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn. Bhd.* [1983] 1 MLJ 206;
and *UMW Sarawak Sdn. Bhd. v Kim Leong Timber Sdn. Bhd. & Ors* [1989] 3 MLJ 177
¹⁰⁰ [1997] 4 MLJ 537

had entered an appearance, the plaintiff is entitled to apply for summary judgment.

10.3 Application Can Be Filed Even After Defence Filed

A plaintiff is not precluded from filing his application for summary judgment even after the defendant has filed their defence, provided the plaintiff accounted for such delay¹⁰¹.

It is not imperative that an O14 application must always be made before the defence is filed¹⁰². Possibly, it may even be advantageous to wait for the defence to see if it was a good defence before the O14 application was filed¹⁰³. But the delay should not be inordinate¹⁰⁴. The onus of explaining the delay thereafter will be on the plaintiff¹⁰⁵.

10.4 Premature Application For Summary Judgment

It would seem clear that a plaintiff may not apply for O14 judgment before the defendant enters an appearance. However, in *Sungei Way Leasing Sdn. Bhd. v Sena Land Development Sdn. Bhd.*¹⁰⁶, it was contended that the application for summary judgment was premature in that at the date of its issue no appearance had as yet been entered, contrary to O14r1(1). Rejecting the contention, Edgar

¹⁰¹ *Lim Tiong Huai v Wang Swee Teck (trading as Wang Plumbing & Electric Co)* [2004] 1 MLJ 638; *Majlis Islam Negeri Johor v United Merchant Finance Bhd (MUI Continental Insurance Sdn. Bhd., Third Party)* [1995] 4 MLJ 482

¹⁰² *Malayan Finance Corp Bhd v NKM Credit Sdn. Bhd. & Ors* [1986] 1 CLJ 89

¹⁰³ *Malaysia Building Society Bhd v Ghazi Bin Hasbollah* [1994] 2 MLJ 11

¹⁰⁴ *Lim Goh Huat v Saw Keng See* [1998] 6 MLJ 600

¹⁰⁵ *Lim Tiong Huai v Wang Swee Teck (trading as Wang Plumbing & Electric Co.)* [2004] 1 MLJ 638

¹⁰⁶ [1989] 3 MLJ 37

Joseph J held that the irregularity regarding the commencement of O14 proceedings for want of appearance had been waived by the defendant by taking a step in the proceedings, to wit, by filing a defence and moreover, at an earlier hearing, counsel for the defendant had appeared and argued the application on its merits. The more important point that was emphasized by the learned judge is that in any event, the court had a discretion to condone the irregularity under O2 r2. The court would invoke O2 r2 because a dismissal would merely have served to delay the proceedings and add to the costs. What mattered were the merits of the application.

10.5 Objection For Summary Judgment Where Application Preferred After Defence Filed

In Malaysia, the basis for raising the question of delay in a plaintiff applying for summary judgment appears to have stemmed from the judgment of the English Divisional Court in *McLardy v Slateum*¹⁰⁷. In this case, the action was for the recovery of a sum of £129 for principal and interest. The writ was specially endorsed, and the defendant in the ordinary course delivered a defence. About a month after the defence was delivered the plaintiff applied for judgment under O14, and a master made an order giving the defendant leave to defend upon paying the whole amount into court. Pollock B delivering the judgment held:

“... the intention of O14 was that the plaintiff must take his application before delivery of a statement of defence; but that in peculiar circumstances it may be made after, as where the defendant has

¹⁰⁷ [1890] 24 QBD 504

delivered his defence before the expiration of the usual time, for the very purpose of defeating such an application. The view taken by other judges, and by the masters, is that the intention of O14 r1 was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O14 right and proper. We think that this is the proper construction of the rule. Although the preliminary intention of the rule may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not all cases compulsory".

The case of *McLardy v Slateum* was followed in the cases of *Comptroller-General Inland Revenue*, *Malaysia v Weng Lok Mining Co. Ltd*¹⁰⁸; *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongs*¹⁰⁹; *Perkapalan Shamelin Jaya Sdn Bhd & Anor v Alpine Bulk Transport New York*¹¹⁰; *Malaysia Building Society Bhd v Ghazi Bin Hasbollah*¹¹¹.

In *Krishnamurthy & Anor v Malayan Finance Corporation Bhd.*¹¹², the respondents sued for the recovery of a sum of RM66,303.89 which arose in connection with a business deal in which the respondents agreed to finance the sale of motor vehicles by the first defendant to members of the public under hire purchase agreements. The first defendant did not enter an appearance and so a judgment was entered against him. The other defendants had all entered their

¹⁰⁸ supra at 11

¹⁰⁹ supra at 13

¹¹⁰ supra at 11

¹¹¹ supra at 41

¹¹² [1986] 2 MLJ 134

appearances on diverse dates. The respondents took out a summons in chambers under O14 against the four defendants to sign a final judgment. An objection was raised on behalf of the appellants claiming that the respondents were not entitled to the summary judgment because of delay in applying for it. Salleh Abas LP held that:

“.... the law as to the time when an application for an O14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence PROVIDED THAT, where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court, no O14 judgment could be signed”.

This is the ratio decidendi in *McLardy v Slateum*. This case was followed by Raja Azlan Shah J in *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co. Ltd.*¹¹³ and Abdoolcader J in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi*¹¹⁴.

The decisions in *McLardy* and of the Supreme Court in *Krishnamurthy* have been followed with or without reservation in a number of cases¹¹⁵. Any explanation

¹¹³ supra at 11

¹¹⁴ supra at 13

¹¹⁵ *Malaysian International Merchant Bankers Bhd. v Richard Lee Chiong Woo* [2002] 5 MLJ 215; *Pengurusan Danaharta Nasional Bhd. v Miri Salamjaya Sdn. Bhd. & Ors* [2004] 4 MLJ 327; *Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn. Bhd. & Ors* [1999] 6 MLJ 153; *Loo Sze Kin v Cheong Choy Teik* supra at 41; *Perkapalan Shamelin Jaya Sdn. Bhd. & Anor v Alpine Bulk Transport New York* supra at 11; *Standard Chartered Bank Malaysia Bhd v Eng Song Huat* [1996] 1 MLJ 446; *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn. Bhd. & Ors* [1994] 2 MLJ 180; *British American Life &*

offered by the plaintiff for the delay also was being considered on merits in those cases.

In *Loo Sze Kin v Cheong Choy Teik*¹¹⁶, Ian Chin J commenting on *McLardy* in the present day context, said:

“The Rules of the High Court have undergone a lot of changes since the decision of *McLardy v Slateum*, the most important of which is to do away with the rules which made non-compliance fatal. Surely, the Rules of the High Court 1980 must be construed in the circumstances existing in 1980 and must take into account that non-compliance of the rules does not render proceedings a nullity, which was not so in 1890 when *McLardy v Slateum* was decided. I am respectfully of the view, and for the reasons I have earlier stated, that *McLardy v Slateum* cannot be a sound decision for our courts to follow.”

Similarly in *Lee Wah Bank Ltd v Chee Kong Electrical Engineering Sdn. Bhd. & Ors*¹¹⁷, Abdul Aziz J said:

“I therefore agree that the statement of the Supreme Court about the necessity for an explanation where the application for summary judgment is made after the delivery of defence is not the ratio decidendi of the case but was merely a dictum following *MrLarcy*.”

General Insurance Bhd. v Pembinaan Fal Bhd & Ors [1994] 3 MLJ 267; *UMW (Sarawak) Sdn. Bhd. v Kim Leong Timber Sdn. Bhd. & Ors* supra at 40

¹¹⁶ Ibid

¹¹⁷ Ibid

10.6 Consequences of rulings in McLardy and Krisnmanurthy

The pertinent issues that arise after taking into account of the discussions in the preceding paragraphs and one of the consequences of following the rulings in the cases of McLardy and Krishnamurthy have been discussed by Ian Chin J in *Loo Sze Kin v Cheong Choy Teik*¹¹⁸, where his Lordship said:

“If unexplained delay defeats an otherwise meritorious O14 application which *McLardy v Slateum* and all those cases that relied on it so decided, it would mean that (i) the courts will have to try cases which are absolutely indefensible....an explanation why the application was not made before the defence was delivered when such extension of the said rules defeats the objective of the said rules of preventing delay and which has the result of rewarding the delinquent and punishing the innocent. Unfortunately, the Supreme Court in *Krishnamurthy & Anor v Malayan Finance Corp Bhd* clearly stated that the plaintiff must explain the delay in applying for judgment after a defence has been delivered, which decision seems to imply that an application made one day after the filing of the defence would still be considered a delayed application requiring an explanation resulting in precious time being wasted in arguments as to whether the one day delay is acceptable or not while forsaking the primary and in fact the only consideration, whether there is any defence or not.”

¹¹⁸ supra at 41

In *Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn. Bhd. & Ors*¹¹⁹ again on the question of delay affecting the rights of the plaintiff for a summary judgment under O14 of RHC, Abdul Aziz Abdul Rahim JC observed:

"I am also of the view that the principle that a plaintiff is entitled to an O14 judgment if the defendant cannot show a triable issue is a time tested principle and makes good sense. It is a principle that goes to the merits of the plaintiff's claim; compare this to the principle of delay as decided in *Krishnamurthy*, it is only a technical defence, not on the merits. In my view, the judicial trend now is give consideration to substantial justice-real justice-rather than to defeat a meritorious claim merely on the grounds of technicality. It is for the reason also that the Rules of the High Court 1980 were amended in 1993 to minimize objections on technicality which do not affect the substantive rights of the defendant or one that causes injustice to either party."

Taken literally, its corollary is that if there are bona fide triable issues, delay can provide an answer to an application for summary judgment. Since, however, the existence of a triable issue is the true answer to such an application, if a triable issue can be shown to exist, the application simply cannot succeed, and delay need not come into the balance at all. So what the statement amounts to is that delay is not relevant in an application for summary judgment. Irrespective of delay, if there is no triable issue or no reason otherwise for going to trial, the application must succeed, but if there is a triable issue, the application must fail. This can be seen in the cases of *Lee Wah Bank Ltd v Chee Kong Electrical*

¹¹⁹ supra at 45

*Engineering Sdn. Bhd. & Ors*¹²⁰ and *Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn. Bhd. & Ors*¹²¹.

The delay in recourse to a summary judgment is not per se fatal¹²². The law on this point is that delay per se is only one of the factors to be considered in an application under O14 but delay on its own can never form the basis of a dismissal of such an application¹²³. If the defence is sterile and a bare denial, an O14 application will not be struck out¹²⁴.

O14 is silent as to the consequences of delay in filing the summary judgment and the failure to explain the delay will not be construed unfavourably against the plaintiff can be seen in the case of *Majlis Islam Negeri Johor v United Merchant Finance Bhd (MUJ Continental Insurance Sdn Bhd., Third Party)*¹²⁵.

However, in *British American Life & General Insurance Bhd. v Pembinaan Fal Bhd & Ors*¹²⁶, Richard Tallala J has stressed the need for the plaintiff to act with alacrity in filing the application for summary judgment saying:

“The court having made available a quick remedy to a plaintiff, it is not unreasonable to require that party to seek the remedy with alacrity. A prudent plaintiff represented by a competent solicitor, seeking to take advantage of the O14 procedure will be ready to file the summons hot on

¹²⁰ supra at 45

¹²¹ supra at 41

¹²² *Gilbert Engineering Co., Inc v Zainuddin bin Ahmad & Ors* [2003] 6 MLJ 103; and *British American Life & General Insurance Bhd. v Pembinaan Fal Bhd. & Ors* supra at 45

¹²³ *Government of Malaysia v Dato' Mahindar Singh* [1996] 5 MLJ 626

¹²⁴ *Malaysia Building Society Bhd v Ghazi Bin Hasbollah* supra at 41

¹²⁵ supra at 41

¹²⁶ supra at 45

the heels of the defendant entering appearance and certainly within the period prescribed for service of the defence, at least so as to avoid the embarrassment of having to explain delay... It is a question of acting within a few weeks if not days and not months on end as the plaintiff in this case did."

Having commenced a suit against the defendant, the plaintiff should have prepared all the documents for the expeditious conduct of the case. This is of material consideration in the light of the present day litigation culture which enjoins speedy disposal of cases. As such, in *Lim Goh Huat v Saw Keng See*¹²⁷, the court took into consideration the sophisticated technology of today in the field of communication, the excuse given by the respondent for the delay was the problem of communicating with her solicitors was unacceptable.

10.7 Length of Delay Not Uniform

The question of inordinate delay for an O14 application lies at the discretion of the trial judge having considered the explanation given by the plaintiff for the lapse of time taken after the writ or the statement of defence was filed¹²⁸.

In *Lim Nyang Tak Michael v ACE Technologies Sdn. Bhd.*¹²⁹, Abdul Kadir Sulaiman J on the question of delay held:

¹²⁷ supra at 41

¹²⁸ *MBf Finance Bhd v Hasmat Properties Sdn. Bhd. & Ors* [1990] 1 MLJ 180

¹²⁹ [1995] 4 MLJ 616

"O14 r1(1) of RHC gives the power to the plaintiff to apply to the court for summary judgment against the defendant in an action to which the rule applies, when his statement of claim has been served on the defendant and that defendant has entered an appearance in the action. This is the starting point for making the application. The Order does not prescribe the limit beyond which such application may not be made. However, in instances where the application is made after the defence is filed the plaintiff must explain the delay in doing so. If on the circumstances, the delay is not inordinate, the court in the exercise of its discretion may not refuse the application merely on the ground that it was made after the defence has been filed. What is inordinate delay would depend on the circumstances of each case".

In *UMW (Sarawak) Sdn. Bhd. v Kim Leong Timber Sdn. Bhd. & Ors*¹³⁰, it was held that an unexplained delay of 10 months could be termed as inordinate disentitling the plaintiff to a summary judgment. In *Public Bank Bhd v Malamaju Enterprise Sdn. Bhd. & Ors*¹³¹, it was held that filing the application for summary judgment 16 months after the defence was filed was not an inordinate delay in the light of the absence of any merits in the statement of defence. In *Tractors Malaysia Bhd v Joseph Thambirajah & Anor*¹³², the application for summary judgment had been filed nearly two years after the filing of the writ and almost one year after the defence of the first defendant had been filed. It was held that the court had the power to enter summary judgment against the first defendant,

¹³⁰ supra at 40
¹³¹ [1989] 2 MLJ 112
¹³² [1986] 2 CLJ 72

even though a defence had been filed and the plaintiff took some time to file the O14 application.

Same is also the case under Order 26A of SCR. To say that an application should be filed before the pleadings are deemed to be closed will be too rigid a view. In *Huo Heng Oil Co. (E.M.) Sdn. Bhd. v Tang Tiew Yong*¹³³, Chong Siew Fai J has pointed out that there is no express provision in the rule restricting time within which an application for summary judgment must be made except that it can only be made after a statement of claim has been served on the defendant and that the action must be one to which O26Ar1 applies. In summary, the delivery of a defence does not, in a proper case, preclude a plaintiff from applying for summary judgment.

11. DEFENDANT TO SHOW CAUSE AGAINST APPLICATION FOR SUMMARY JUDGMENT

In this section, issues relating to defendant's show cause against the application for summary judgment will be addressed, in particular the determination of triable issues, which is important vis-à-vis the defendants' rights to trial.

¹³³ supra at 9

11.1 Defence and Leave to Defend

If the court is satisfied the basic requirement for invoking O14 has been complied with, the burden shifts to the defendant to show that there are triable issues¹³⁴ or question or that there ought to be a trial¹³⁵.

O14r4(1) of RHC enables a defendant to show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the court¹³⁶.

Under O14r3 of RHC, the defendant need not show a good defence but need only show an arguable defence or some other reason why there ought to be a trial. See also Supreme Court Practice 1985¹³⁷.

In *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd*¹³⁸, the Court of Appeal said:

"When an application is made for summary judgment under O14 supported by an affidavit which goes to show that there is no defence, the defendants must show cause why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence which is fit to be tried."

¹³⁴ *Pengurusan Danaharta Nasional Bhd v Miri Salamjaya Sdn. Bhd. & Ors* supra at 45; and *Daito Kogyo (Sarawak) Sdn. Bhd. v Port Dickson Land Development Sdn. Bhd.* [2001] 2 MLJ 531
¹³⁵ *Perkapalan Shamelin Jaya Sdn. Bhd. & Anor v Alpine Bulk Transport New York* supra at 11
¹³⁶ O26A r4(1) SCR also provides that a defendant may, not less than four clear days before the date of hearing, show cause against an application for summary judgment by affidavit or otherwise to the satisfaction of the court.
¹³⁷ Volume 1 page 137 para 14/3
¹³⁸ [1995] 2 MLJ 363

In exercise of its powers under O14r4(3), the court may grant leave to the defendant with respect to the claim or part thereof either unconditionally or on such terms as to the giving of security or mode of trial or otherwise as it thinks fit¹³⁹.

In the Supreme Court decision in *Bank Negara Malaysia v Mohd Ismail & Ors*¹⁴⁰, Gunn Chit Tuan SCJ said:

“Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.”

This was referred to in *Tuncom Sdn Bhd lwn Syarikat Kar King Sdn Bhd*¹⁴¹; *Niaga Tani Sdn Bhd v Samarez Holdings Berhad*¹⁴².

It is trite law that leave to defend must be given unless it is clear that there is no real substantial question to be tried or unless there is no dispute as to facts or law which raises a reasonable doubt that plaintiff is entitled to judgment¹⁴³. Further discussion with regards to the determination of triable issues will be carried out below.

¹³⁹ Corresponding to this, the subordinate court has similar powers under O26A r4(3) of SCR 1980

¹⁴⁰ [1992] 1 MLJ 400

¹⁴¹ [1996] 4 MLJ 365

¹⁴² supra at 12

¹⁴³ *Gunung Bayu Sdn. Bhd. v Syarikat Pembinaan Perlis Sdn. Bhd.* supra at 9

11.2 Unconditional Leave

In *Jacobs v Booths Distillery Co*¹⁴⁴, the House of Lords coined the phrase “a triable issue” as entitling a defendant to defend. So, where the defendant has successfully raised a triable issue, normally the court will be inclined to grant an unconditional leave to the defendant as in *UMW (Sarawak) Sdn Bhd v Kim Leong Timber Sdn Bhd & Ors*¹⁴⁵. Where there is a bona fide triable issue, the defendant is entitled to leave to defend without being put upon terms to pay money into court, even though it may appear that the defendant is not likely to succeed and a defence on merits includes any legal defence.

11.3 Conditional Leave

Where the defence to a claim does not appear to the court to be made bona fide, leave to defend can be given on condition that the defendant pays into court the disputed amount¹⁴⁶. In *Ionian Bank Ltd v Couvreur*¹⁴⁷, the Court of Appeal of England being satisfied that the defence raised by the defendant was not a sham, nevertheless took the view that it had little or no substance and the case was almost one in which summary judgment could be ordered and was described as so shadowy that the judge was right in giving leave to defend only on condition that the full amount should be brought into court. By imposing conditional leave to defend in the form of payment into court, whilst not denying the defendants' right to trial, the defendants will have to reassess if their

¹⁴⁴ supra at 10

¹⁴⁵ supra at 40

¹⁴⁶ *Cho Chin Huat v Lee Boo Hock* supra at 29

¹⁴⁷ [1969] 1 WLR 781

defences will be able to withstand trial or risk further penalty on costs of proceedings.

11.4 Determination of Triable Issues

An application for a summary judgment is not a trial¹⁴⁸. So, one of the basic question which a court can ask itself in determining if there are triable issues in a case is to ask itself what can be achieved if the matter is ordered to go for trial¹⁴⁹. In respect of an application for summary judgment, the court is merely concerned, in an appropriate case, to see if there is any need to obviate the necessity of a trial and hence not delay judgment for the plaintiff. In such an application, the plaintiff has to clearly show that there is no defence to the case at all¹⁵⁰.

Essentially, in order to decide if a trial could be obviated, the court has to find out whether the defendant has succeeded in raising a good defence, or whether there are issues which could be decided only after a regular trial. For granting a summary judgment, the court must be satisfied on the affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable¹⁵¹. What are triable issues would vary from case to case and would be dependent

¹⁴⁸ *Sharikat Bakti Ltd v Gurbachan Singh* (1966) 2 MLJ 269
¹⁴⁹ *Chong Hin Trading Co. Sdn. Bhd. & Ors v Malayan Banking Bhd.* supra at 12; and *OCBC Bank (M) Bhd & Anor v Sin Lee Meng Farm Sdn. Bhd.* [2002] 6 MLJ 257
¹⁵⁰ *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85; and *Trans Resources Corp Sdn. Bhd. v Sanwell Corp. v Anor* [1999] 5 MLJ 537
¹⁵¹ *Kapital Raya Sdn. Bhd. lwn. Bloomville Corp. Sdn. Bhd.* [1996] 3 MLJ 522; *Philips (M) Sdn. Bhd. v Ghazali bin Idris & Ors* [2000] 7 MLJ 651; *Teng Chua Huat v Government of Malaysia* [1998] 7 MLJ 615; *Bank Negara Malaysia v Mohd Ismail & Ors* supra at 53; *Sinodaya Industrial Gas Sdn. Bhd. v Astrol Hover Engineering Sdn. Bhd. & Anor Appeal* [2002] 3 MLJ 354; *Perwira Afin Merchant Bank Bhd v Dato' Soh Chee Wen* supra at 13

on whether the defendant could show a good defence to the claim by the plaintiff¹⁵², see *Teng Chua Huat v Government of Malaysia*¹⁵³.

The Court of Appeal in *Noh Hyoung Seok v Pewira Affin Bank Bhd*¹⁵⁴, observed that:

“It is not the function of the judge in an O14 application to delve into the merits of the case and decide whether the defendant is likely to succeed or fail. He is merely to scrutinize the defences of the defendant and test them inter alia, against the language of O14r4 to determine whether they come up to scratch as a plausible defence. He must also bear in mind that as long as the defendant raises even one issue for trial, the plaintiff's case will necessarily disintegrate. Thus it bears emphasis here that the language of O14 r4 is unequivocal in its imperative that the defendant is able to raise issues as defences even in the absence of a statement of defence of affidavit filed”.

It was pointed out by Vohra J in *Tong Lee Hua v Yong Kah Chin*¹⁵⁵ that it is commonplace that an application for summary judgment under O14 can be successfully resisted by a defendant if he manages to raise a bona fide triable issue, namely a defence on the merits. In other words, he must be able to raise a legal defence which, if it is believed, goes to the root of the claim. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. If there are triable issues in law and in fact,

¹⁵² *Teng Chua Huat v Government of Malaysia* [1998] 7 MLJ 615

¹⁵³ [1998] 7 MLJ 315

¹⁵⁴ [2004] 2 MLJ 203

¹⁵⁵ [1979] 1 MLJ 233 FC

the defendant should be entitled to defend the suit¹⁵⁶. This principle is sometimes expressed by the statement that a complete defence need not be shown.

11.5 Trial for Other Reasons

O14r3(1) provides a situation even where there may not be an issue or question which ought to be tried, yet the court may decide that for some other reason, there ought to be a trial of the plaintiff's claim. This part of the rule was considered in *Concentrate Engineering Pte Ltd v UMBC Bhd*¹⁵⁷. In that case, the plaintiff, a customer of the defendant, claimed that the defendant wrongly paid out on the cheques, which were purported to be issued by the plaintiff. On the facts it became evident that the cheques were duplicate copies fraudulently printed with the same serial numbers as the genuine and unused cheques supplied by the defendant. However, the signatures on the cheques were declared by expert evidence to have been traced from genuine signatures. The court held that the circumstances and audacity with which the fraud was carried out and the absence of an explanation by the directors of the plaintiff constitute 'some other reason' for a trial in terms of O14r3(1). Further, the court stated that the circumstances disclosed called for further investigation. O14r3(1) and O26Ar3(1) of SCR have conferred on the respective courts very wide powers and vested them with discretion to be exercised while dealing with the applications for summary judgment. The phrase "that there ought for some other reason to be a trial" has been peppered by the word "justice" in *Miles v Bull*¹⁵⁸. In *Miles v Bull*¹⁵⁹,

¹⁵⁶ *Hagemeyer Trading Co. (Malaysia) Sdn. Bhd. v Gibson Trading & Co. & Anor* [1978] 2 MLJ 101
¹⁵⁷ [1990] 3 MLJ 1
¹⁵⁸ [1969] 1 QB 258
¹⁵⁹ *supra* at 13

there were grounds for suspicion about the plaintiff's claim that constituted sufficient reason for there to be a trial of the action¹⁶⁰.

A defendant ought not to be shut out from defending unless it is very clear that he has no case in the action. A complete defence need not be shown. The defence set up need only show that there is a triable issue or question or that for some reason there ought to be a trial¹⁶¹. But this cannot be achieved by raising facts which do not constitute a defence to the claim¹⁶² nor by a mere general denial of indebtedness¹⁶³.

This should be the case so that by applying the summary judgment procedure, such defenceless case can be disposed off, avoiding delay in justice to the plaintiff and in the same time preserving the right to trial of the defendants who has meritorious defences.

11.6 Court to decide on question of law

It is to be noted that during an O14 application, the courts have in the past decided on question of law. In this regard since the case of *Cow v Casey*¹⁶⁴, the English Court of Appeal in *European Asian Bank AG v Punjab and Sind Bank*¹⁶⁵ has made it plain that it will not hesitate, in an appropriate case, to decide

¹⁶⁰ See also *Kiwi Brands (M) Sdn. Bhd. v Multiview Enterprises Sdn. Bhd.* supra at 2 and *Shorga Sdn. Bhd. v Amanah Raya Bhd. (as administrator of the Estate of Raja Nong Chik Bin Raja Ishak, deceased)* [2004] 1 MLJ 143

¹⁶¹ *Alloy Automotive Sdn. Bhd. v Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382; and *Bank Negara Malaysia v Mohd Ismail & Ors* supra at 53

¹⁶² *Hookam v Mayle* supra at 9

¹⁶³ *Huo Heng Oil Co. (E.M.) Sdn. Bhd. v Tang Tiew Yong* supra at 9

¹⁶⁴ [1949] 1 All ER 197

¹⁶⁵ [1983] 2 All ER 508

questions of law under O14, even if the question of law is at first blush of some complexity and therefore takes a little longer to understand. It may not offend the whole purpose of O14 not to decide a case which raises a clear-cut issue, when full arguments have been addressed to the court and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal. The policy of O14 is to prevent delay in case where there is no defence.

In the Supreme Court case of *Malayan Insurance (M) Sdn. Bhd. v Asia Hotel Sdn. Bhd.*¹⁶⁶, a case which arose out of an insurance policy, the High Court judge determined what he thought was a sole question of law concerning the non-disclosure of material facts by the insured and gave the summary judgment in favour of the respondent. On appeal, the Supreme Court held that:

"Where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the court after considering the argument is satisfied that it is really unarguable, then the court should grant summary judgment."

Further, the court stated that the court's hearing of an O14 application should work within the framework of O14 and not embark on an exercise under O33 r2.

¹⁶⁶ supra at 9; followed in *American Express Sdn. Bhd. v Dato Wong Kee Tat & Ors* [1990] 1 MLJ 91

The underlying philosophy in the O14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to case where there is no reasonable doubt that the plaintiff is entitled to judgment. O14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases¹⁶⁷.

Even where the questions of law on which the O14 application turned were not simples one, but if the answers to the questions posed were clear and inarguable, the application will be allowed. For instance, in *American Express Sdn. Bhd. v Dato Wong Kee Tat & Ors*¹⁶⁸, the facts were clear and undisputed and the only issue raised was a question of law, and therefore it was held to be proper to be dealt with by an O14 application. Similarly, in *Lembaga Penyelidikan dan Kemajuan Minyak Kepala Sawit v Premium Vegetable Oils Sdn. Bhd.*¹⁶⁹, the plaintiff's application for summary judgment for cess outstanding under the Palm Oil (Research Cess) Act 1979 was granted on an interpretation of various provisions of the above Act and the Order. There were no other triable issues.

In the Privy Council appeal case of *Syarikat Bunga Raya Timor Jauh Sdn. Bhd. & Anor v Tractors Malaysia Bhd*¹⁷⁰, Lord Fraser held that:

"The application for summary judgment was resisted on the ground inter alia that the agreements were in reality hire purchase agreements. In

¹⁶⁷ *Percetakan Solai Sdn. Bhd. v Kin Kwok Daily News Sdn. Bhd. & Anor* [1986] 1 MLJ 240
¹⁶⁸ *supra* at 59
¹⁶⁹ [2001] 5 MLJ 233
¹⁷⁰ [1983] 1 MLJ 121

support of that contention the first appellant (defendants) relied on a letter dated 21.8.1975 from the respondents to them. Koh Kim Chai, who is a director of both appellants, swore an affidavit dated 11.9.1978 in which he stated his belief that they had a good defence. The affidavit is somewhat lacking in particularity, and it unfortunately does not give a full explanation of the reasons for the various provisions in the agreements and the letter, but their Lordships are of the view that it gives just enough to show that a triable issue exists”.

The principles applicable in summary judgment applications are trite. The Courts do not have the room to delve into the truth of assertions in conflicting affidavits which raise conflicting evidence. This is because it is not within the scope of the Court to decide a case or matter outright through an application for summary judgment. The Courts must decide whether the defendants should be given leave to defend or not. However, the mere production of conflicting affidavits does not automatically raise a triable issue. Issues are not triable if they are irrelevant, unarguable, ineffective or do not require further investigation or they do not raise any difficult or arguable points or questions of law. In such circumstances, summary judgment should be allowed.

It is important here to reiterate the Federal Court case of *United Malayan Banking Bhd v Palm & Vegetable Oils (M) Sdn. Bhd.*¹⁷¹ where Raja Azlan Shah held that:

¹⁷¹ supra at 40

“We have not dealt in any detail with the facts and particulars of the several allegations made on both sides as it is not our province to touch on the merits of the issues involved. We only need to consider whether or not there are issues or questions in dispute which ought to be tried. Summary judgment is only given in a plain and obvious case. This is certainly not one. We find as we have indicated that there are in fact triable issues and this is substantiated by the necessity for applications for the admission for Queen’s Counsel in this appeal on the grounds of the complexity of the case which involves difficult questions of fact and law and also the voluminous affidavits and exhibits put in and the arguments presented before us over a period of two days.”

Therefore, it is safe to say that an application for summary judgment is not a method for a case or a matter to be decided and disposed off on affidavit evidence. It is a method to ascertain and determine whether a defendant in a particular claim ought to be given leave to defend that claim or not. In deciding that, the Courts must see whether there exist issues that ought to be tried, in other words, issues that can only be determined at full trial.

In *R.G. Carter Ltd v Clarke*¹⁷², the Court of Appeal held that an order for summary judgment in respect of the whole or part of a claim or the grant of leave to defend only upon conditions derogates from a defendant’s normal right to have his defence fully considered upon the trial of the action. Accordingly, summary judgment is never ordered if the defendant satisfied the court that:

¹⁷² [1990] 1 WLR 578

“there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, see O14 r3(1).”

By contrast, the dismissal of an application for summary judgment or, which is the same thing, the making of an order giving unconditional leave to defend leaves the rights of both parties wholly intact and the parties with everything to play for. All that has happened is that the court has inclined to take a short cut. In this respect it has much in common with a decision not to order the trial of a preliminary issue of fact or law, where a major consideration is whether the making of the order is likely to save costs or, on the contrary, is likely to add to them¹⁷³.

Against this background, it is not surprising that until relatively recently there was no right to appeal against the grant of unconditional leave to defence. The special character of such an appeal was considered and explained in *Lloyds Bank Ltd v Ellis-Fewster*¹⁷⁴, where the court said:

“This was essentially a matter for the judge’s discretion. He thought there was a triable issue. In a case where the triability of the issue depends upon evidence as opposed to law, then it is a very surprising situation if the Court of Appeal was prepared to disturb the judge’s view. If one judge thinks there is a triable issue, it would be surprising if two or three judges think there is not. It is quite different if you are dealing with a triable issue

¹⁷³ See The Supreme Court Practice 1988, p284, Note 18/11/2.
¹⁷⁴ [1983] 1 WLR 559

which arises as a matter of law. When it arises as a matter of evidence and fact, it is most unlikely that the Court of Appeal would interfere with the discretion of the judge below.”

Of course, it is only recently that it has been possible to appeal at all against the decision of the judge of first instance that there should be unconditional leave to defend. This aspect was considered, and the same conclusion reached in *European Asian Bank A.G. v Punjab & Sind Bank (No. 2)*¹⁷⁵, the reasoning of Robert Goff L.J being quoted and followed in *Israel Discount Bank of New York v Hadjipateras*¹⁷⁶.

If a judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide that issue one way or another. Even if the issue of law is complex and highly arguable, it is far better if he then and there decides it himself, entering judgment for the plaintiff or the defendant as the case may be on the basis of his decision. The parties are then free to take the matter straight to the court. This was the situation in the classic case of *Cow v Casey*¹⁷⁷. But it is quite different if the issue of law is not decisive of all the issues between the parties or, if decisive of part of the plaintiff's claim or of some of those issues, is of such a character as would not justify its being determined as a preliminary point, because little or no savings in costs would ensue. It is an a fortiori case if

¹⁷⁵ supra at 59

¹⁷⁶ [1984] 1 WLR 137

¹⁷⁷ supra at 58

the answer to the question of law is in any way dependent upon undecided issues of fact.

A qualification has also to be made for those case in which, in order to determine whether there is an issue of law capable of being resolved on O14, prolonged examination over a number of days of a vast quantity of documents or other evidence is required. As has been pointed out by Sir Nicolas Browne-Wilkinson V.C. in *British and Commonwealth Holdings Plc v Quadrex Holdings Inc*¹⁷⁸, the expense and delay which can result from seeking to determine the complex issues involved in those cases on a summons under O14, and in particular on an appeal from the decision of the judge, can make those cases not suitable subjects for O14 proceedings. In such cases, there will always be a real risk that in the end, leave to defend will be granted and if this happens the time and expense of the prolonged O14 proceedings will be wasted. The parties, and other litigants who otherwise might be kept waiting, are better served by seeking to have the action tried as soon as possible.

In light of the foregoing, going back to the root of justification of summary judgment procedure, it is suitable in clear cut cases, where there is minimal factual dispute.

12. ORDER 14A DISPOSAL OF CASE ON POINT OF LAW

This paper has discussed the applicability of O14. Focus will now be turned on the application of O14A, which deals with disposal of cases on point of law.

¹⁷⁸ supra at 11

O14A allows the court to decide at an interlocutory hearing, including an O14 Summons, 'any questions of law'. Points of construction of documents are also included¹⁷⁹. In *Bank Kerjasama Rakyat Bhd & Ors v Hj Mat Hj Ahmad*¹⁸⁰, there was an application by the plaintiffs to have the case heard under O14A of RHC on the ground that their claim for the repayment of money arising out of a settlement agreement entered into between the defendant and them could be properly disposed of in a summary manner under O14A of RHC. The plaintiffs' claim arose from a judgment obtained by the plaintiffs in the High Court against the defendant for the sum owed to them. The defendant did not pay the judgment sum; in consequence thereof, a settlement agreement was entered into between the parties as evidence by several exchanges of letters. Thereafter, the defendant paid RM2.1 million to the plaintiff, leaving an unpaid balance of RM1.7 million. The plaintiffs, in claiming the balance sum, had previously applied to enter final judgment under O14 of RHC which application had been dismissed by the Senior Assistant Registrar and confirmed by the judge in chambers. The defendant objected to the present application. It fell to the court to decide whether the plaintiffs, despite being unsuccessful in their earlier O14 application, could still succeed in the application under O14A of RHC.

The Court held that that was a fit and proper case to be disposed of under O14A of RHC notwithstanding that the plaintiffs had applied for and failed to obtain a summary judgment under O14 of RHC. An application for summary judgment under O14 is different in nature from an application under O14A. Whereas under

¹⁷⁹ *M.S. Fashions Ltd v Bank of Credit and Commerce International S.A.* [1993] Ch. 425 CA
¹⁸⁰ [2007] 2 CLJ 655

O14 of RHC, the scope of the enquiry is restricted to discovering whether there is a triable issue on the plaintiffs' case, under O14A of RHC, the scope of enquiry includes an examination of the affidavit evidence to discover whether the plaintiffs' claim ought to be granted in those cases where the court can justifiably dispose with oral evidence to arrive at a finding and a decision.

O14A is subject to the following restrictions:

- (a) such question is suitable for determination without a trial of the action;
and
- (b) such determination will finally determine the entire cause or matter or any claim or issue therein.

One view is that the words 'will finally determine' are restrictive in this manner: if victory for A or victory for B will, in either situation, preclude further litigation, the rule applies; whereas, the rule does not apply if the matter is ended only, if there is victory for one party, but not if there is victory for the other, see unreported judgment¹⁸¹. If it were felt expedient to adopt the more generous position, it is arguable that the wording would need to be amended to read: "might finally determine".

The new rule does not merely affect O14 proceedings but impinges upon other pre-trial proceedings. In particular, this jurisdiction will overlap with striking out on

¹⁸¹ *Millbury Homes North v Arthur Yong* [1993] 1 WLR 138

points of law¹⁸² and decisions on preliminary points of law¹⁸³. It appears that O14A enables the court, when hearing an application under O14, to consider complicated points of law, even ones which take days to argue.

13. PRACTICAL PROBLEMS ENCOUNTERED - UNDERLYING TENSIONS

13.1 Right to Trial Versus Summary Adjudication

This paper will now concentrate on the discussion on the tussle between the right to trial of litigants against the benefits arising from summary adjudication. Judges who now grant summary judgment so often may be in the midst of an ascendancy that could result in its ultimately replacing trial and settlement as the dominant form of resolving disputes¹⁸⁴. Aimed this movement toward an increasingly central role for summary judgment, there have been a few cautionary voices¹⁸⁵. Some fear that summary judgment, given as it is on paper evidence only, is intrinsically likely to be a less objectively accurate or just evaluation of the issues in dispute¹⁸⁶. Some wondered whether the intended improvements in efficiency would materialise¹⁸⁷ or whether the right to a jury trial was being unduly restricted. Again this backdrop, it makes sense that an article

¹⁸² *W.G. Clark Properties Ltd v Dupre Properties* [1992] Ch 297; and *Law Debenture Trust Corp v Ural Caspian Oil Corp Ltd* [1993] 1 WLR 138

¹⁸³ O33 r3 RHC

¹⁸⁴ See Gillian K. Hadfield, 'Where Have All The Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artefacts in the Changing Disposition of Federal Civil Cases, 1 J. Empirical Legal Stud. 705 (2004)

¹⁸⁵ See Martin H. Redish, Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix, 57 Stan. L. Rev 1329 (2005)

¹⁸⁶ See Zuckerman, 'The Case For Commuting Correct Judgments For Timely Judgments [1994] 14 O.J.L.S. 353

¹⁸⁷ See Samuel Issacharoff & George Loewenstein, Second Thoughts About Summary Judgment', 100 Yale LJ 73 (1990); see also Arthur R. Miller, 'The Pretrial Rush to Judgment: "Are the Litigation Explosion", "Liability Crises", and "Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?", 78 N.Y.U.L. Rev 982 (2003)

titled 'Why Summary Judgment is Unconstitutional' has received such intense interest and provoked such profound surprise¹⁸⁸. The argument is straightforward: "When we allow a judge to keep a plaintiff's lawsuit away from a jury on the ground that no "reasonable jury could find for" the plaintiff, we have violated the constitutional decree that in suits at common law... the right of trial by jury shall be preserved". In addition, it is suggested that there are wider interests involved in taking some cases to a full trial¹⁸⁹.

13.2 Right To Trial By Jury

The limitations on a right to a jury trial are intended to ensure that the correct balance is struck between the efficient administration of justice and a party's right to a jury trial¹⁹⁰. In the case of *Safeway Stores Plc v Tate*¹⁹¹, arose out of a boundary dispute in which the defendant alleged that the claimant deliberately encroached on his boundary when developing their land. The defendant displayed a sign that said "Safeway Where Fraud Ideas Come Naturally." The claimant brought a claim against the defendant for damages and an injunction for libel. On the day fixed for the hearing, due to an administrative error on the court's behalf, no jury panel had been arranged. The defendant applied for the trial to be adjourned on the ground of his ill health but, without any proper notice,

¹⁸⁸ See Suja A. Thomas, 'Why Summary Judgment is Unconstitutional', 93 Virginia Law Review (2007) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=886363

¹⁸⁹ "The importance of achieving justice between individual litigants is in no way diminished by recognition that the process of litigation, considered as a whole, serves at least two other ends, connected but distinct, and that their attainment should be included in the purposes of procedural law. First, civil proceedings serve to demonstrate the effectiveness of the law; secondly they provide the opportunity for the judges to perform their function of interpreting, clarifying, developing and, of course, applying the law" Jolowicz, "On the Nature and Purposes of Civil Procedure Law", in International Perspectives on Civil Justice: Essays in Honour of Sir Jack Jacob, (Sweet and Maxwell, 1990).

¹⁹⁰ *Goldsmith v Pressdram Ltd (Note)* [1988] 1 WLR 64; and *Beta Construction Ltd v Channel Four Television Co Ltd* [1990] 1 WLR 142

¹⁹¹ [2001] QB 1120

the claimant applied for summary judgment against the defendant on the ground that there was no defence of substance of the claim. The judge granted the claimant's application and entered judgment for the claimant for damages for libel to be assessed by a jury, and granted an injunction against the defendant to restrain publication of the words 'Safeway Where Fraud Ideas Come Naturally'. The Court of Appeal set aside the judge's decision and held that the question whether the words complained of were, as a matter of fact, defamatory of the claimant was one for a jury, and it was not open to the judge to rule that the words complained of were defamatory and to enter judgment for the claimant. The Court of Appeal remitted the case to the county court for a short jury trial, at which the issues of the meaning of the words and damage to the claimant could be decided by a jury.

3.3 The Monetary Cost of Summary Judgment

As pointed out by David M. Trubek¹⁹² that summary judgment is much more expensive than people think, and trial is much less expensive, because the main expense of litigating all the way to the end of a trial is incurred before the trial begins.

13.4 Reduces Fairness of the Civil Justice System

Trial imposes two things on judges that most people find unpleasant, extra work and social disapprobation¹⁹³. As observed by Judith Resnik¹⁹⁴, a case that settles

¹⁹² See David M. Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72 (1983)
¹⁹³ See John Bronsteen, Class Action Settlements: An Opt-In Proposal 2005 U.ILL. L Rev 903 (2005)

is gone forever, but a case that goes to trial drags on and requires the judge's constant attention. The judge is effectively chained to the bench, listening to testimony and ruling on objections. As this takes place, more and more cases pile up on the judge's docket, cases to which the judge cannot fully attend until the trial ends. A judge who is constantly in trial will suffer a double hardship: he will work more than other judges while simultaneously drawing their ire for diverting other cases to them and thus forcing them to work more as well. He will also risk ridicule from politicians and commentators who, often made aware of the issue by those who stand to gain by avoiding trials, emphasise the backlog of cases in the judicial system. To move their dockets along and achieve all of the benefits that come with doing so, judges engage in several practices that directly undermine the fairness of court system¹⁹⁵. They approve manifestly unfair settlements in class action litigation. Evan E. Seamone¹⁹⁶ opined that many judges surely are able to adjudicate fairly despite the pressures they face, but it would be naïve to assume that those pressures never affect any judge's decisions. But if a procedure skews the system in favour of one class of litigants and against another, that procedure would presumably need to be absolutely necessary (or at least enormously valuable) in order to justify its existence in light of the harm it causes. Summary judgment appears to saddle the system with overall monetary costs rather than benefits.

¹⁹⁴ See Judith Resnik, Managerial Judges, 96 Harvard Law Review 374 (1982)
¹⁹⁵ In the words of one judge, "I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it may be." Richard Arnold, Mr. Justice Brennan and the Little Case, 32 LOY.L.A.L. REV 663 (1999).

¹⁹⁶ See Evan E. Seamone, Judicial Mindfulness, 70 U.CIN.L. REV. 1023 (2002) Like all human beings, judges are influenced by personal routines and behaviors that have become second nature to them or have somehow dropped below the radar of their conscious control.

13.5 Accuracy versus Speed and Economy

It is axiomatic that the object of procedure is to render litigants their due; namely, to return judgments which correctly apply the law to the true facts. We are entitled to expect procedures which strive to provide a reasonable measure of protection commensurable with the resources that we can afford to spend on the administrative of justice¹⁹⁷. A legislature who cannot afford a limitless investment in the administration of justice, must achieve compromise whereby the level of accuracy that the administration of justice could produce will reflect the level of support that the state can reasonably be expected to give to legal services. It follows that, in devising a system of procedure, the legislature has considerable scope for choice between different ways of balancing accuracy against costs¹⁹⁸. Under such conditions, correct judgments may be obtained only through the investment of a good deal of time and resources. Justice bought cheaply and in haste and it could be suggested, may be so inferior as not be worth having.

There is a further dimension to the tension of justice, for, as we like to remind ourselves, justice delayed is justice denied. Delay may undermine the practical utility of judgements for the purpose of redressing rights and a judgment may come too late to be capable of putting things right. Yet, no system can be expected to invest limitless resources in achieving speedy justice. Indeed, as

¹⁹⁷ See R.Dworkin, *A Matter of Principle* (1985) Ch 3. For a purely economic approach, see R.Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399, and R.Posner, *Economic Analysis of the Law*, 3rd Edition, 1986.

¹⁹⁸ For an illuminating comparison of different approaches to adjudication, see J.Jaconelli, 'Solomonic Justice and the Common Law' (1992) 12 *Oxford J of Law and Society* 480

A.A.S. Zuckerman¹⁹⁹ rightly pointed out that where resources are limited, accuracy in judgments may have to be sacrificed to some extent not only for the sake of economy but also for the sake of obtaining timely judgments.

As a result, summary judgment procedure should arguably be continued to play the roll in delivering such early justice, despite the tensions enunciated above.

13.6 OVERLAPPING PROCEDURES

This heading intends to highlight the overlapping of the procedures provided for under O14 and O18r19.

Both O14 and O18r19 are meant to be used essentially to prevent abuse of the process of the court²⁰⁰. They involve summary processes which enable a party to an action to obtain judgment without a plenary trial that is, without oral evidence tested by cross-examination in the ordinary way.

There were line of cases whereby the courts permitting a plaintiff to apply for leave to enter judgment under O14, and alternatively, to strike out the defence under O18r19 and alternatively under O14. The cases in which such applications were made include the following: *Pera Showa Leasing (M) Sdn Bhd v Kin Shipping Line Sdn Bhd & Ors*²⁰¹; *Standard Chartered Bank v Kentland Sdn Bhd & Anor*²⁰²; *Shell Marketing Co of Borneo Ltd v Tan Sri Datuk Wee Boon Ping*²⁰³.

¹⁹⁹ See A.A.S. Zuckerman, A Reform of Civil Procedure-Rationing Procedure Rather Than Access to Justice, *Journal of Law and Society* Vol 22, No. 2 June 1995 p155
²⁰⁰ See Shamshiah Begum Syed Ismail, Order 14 and its Alternatives [1992] 1 MLJ ii
²⁰¹ [1988] 2 CLJ 544
²⁰² [1990] 2 MLJ 319

However, O18r19 overlaps with O14 in one aspect. An application may be made by the plaintiff as under O14 to obtain judgment without a trial on the ground that there is no real defence to the claim. To this extent they operate, on the initiative of the plaintiff, as methods of effectively terminating proceedings which, though procedurally regular, in the sense that they comply with the formal rules of the court and therefore are not in default of any procedural requirements, on closer scrutiny do not justify a full and complete investigation of the facts and law surrounding the dispute in question, as at a full-fledged trial. Both are drastic methods of obtaining redress and the courts, in keeping with the policy of exercising all punitive or coercive powers cautiously, exercise theirs under the two Orders only in the most obvious of cases.

O14 and O18r19 are in many other aspects regarding the mechanics of application, they are different. O14 provides a more structured and controlled process whereby O14 does not apply to actions begun by an originating process other than by writ²⁰⁴. O18r19 is not so limited²⁰⁵. While it may be true in an O14 application, it must normally be filed before the defence is delivered, however, in an O18 application, it would appear that there is no such constraint²⁰⁶.

It was pointed out by James Foong J In *Bank Utama (Malaysia) Bhd v Sistem BIS Komputer Sdn Bhd & Ors*²⁰⁷ that by nature an application under O18 of RHC differs from O14 of RHC. O18 of RHC is a regulation that enforces the rules of

²⁰³ [1990] 1 CLJ 564

²⁰⁴ See O14r1 RHC

²⁰⁵ See O18r19(3) RHC 1980

²⁰⁶ O18r19(1) RHC 1980

²⁰⁷ [1995] 4 MLJ 45

pleadings. If the pleadings, as in this case the defence, is found to contain no reasonable defence or is scandalous, frivolous or vexatious or prejudice, embarrass or delay the fair trial of the action, or otherwise an abuse of the process of the court, then it may be ordered to be struck off, and judgment entered accordingly. The test to be applied here centres upon the pleadings itself, and before it can be struck off, the above principles must be satisfied in line with established authorities. On the other hand, an O14 application, the test is so much centred on the pleadings, but on facts revealed from the testimonies affirmed on affidavits of the parties. Under a claim for summary judgment, the facts of the case rather than the pleadings are more essential. The concentration is on the facts and it must reveal a virtually uncontested or uncontestable case where the defence was filed simply for the purpose of delay. A comparison of two different principles to be applied will expose distinction between the two claims (under O14 and O18) making them not inconsistent. An O14 application should not prevent a separate application under O18 of RHC from being filed and vice versa. What is prohibited is that if one seeks both these reliefs in one application, then an election must be made to proceed on either one.

*In Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenajung Enterprise Sdn Bhd*²⁰⁸, Siti Norma Yaykob J said:

“At the outset, it is very important that the plaintiff should state categorically under which Order or Rule of the Rules of the High Court that it is proceeding with, so as to give the defendant due notice of the nature of the application to enable it to direct its mind as to the issues that

²⁰⁸ [1988] 2 CLJ 861

are really in dispute. The plaintiff should elect whether it wished to proceed under O18r19 or under O14, but it cannot proceed with both.”

This view was followed in *Asia Life Assurance Society Ltd v Kong Leong Aik*²⁰⁹.

14. PROPOSED REVAMP FOR MALAYSIA

The discussion will now be focussed on the proposed revamps that may be introduced to further improve summary judgment procedure.

Summary Judgment might be a wonderful procedure were it not inefficient or unfair. It is inefficient because it gives a defendant the incentive to impose the costly and time-consuming burden of discovery and motions practice upon the plaintiff, the court, and itself, rather than to settle early and avoid those costs. It is unfair because it requires a judge to decide the case in a context in which ruling for the defendant speeds along the judge’s docket, whereas ruling for the plaintiff potentially invites a trial that would backlog the docket and bring both criticism and an increased workload upon the judge. Summary judgment thus creates a systemic bias against one of the two categories of litigants (plaintiffs), arguably the most egregious problems that can plague a civil justice system.

Against the above backdrop, it is proposed that the following amendment ought to be considered to improve the summary judgment system in Malaysia:

²⁰⁹ [1992] 4 CLJ 2053

A more critical assessment of the relative merits of a party's case and the ability to determine discrete factual disputes in a summary judgment application requires a reassessment of the current time limits imposed for bringing applications for summary judgment. O14 r1(1) of RHC gives the power to the plaintiff to apply to the court for summary judgment against the defendant in an action to which the rule applies, when his statement of claim has been served on the defendant and that defendant has entered an appearance in the action. Those time limits have obvious relevance where the test for summary judgment is that there is no real question to be tried; a case with no possibility of success will more usually be apparent from the outset.

However, were the proposals formulated above implemented, it is more likely that the justice of a party's case, and their right to summary judgment, would only become clear at a later point in the proceedings. It may be, for example, that a party's entitlement to judgment becomes clear in light of material discovered by the other party or revealed by answers to interrogatories. It is therefore proposed that the time limits for bringing summary judgment applications be extended.

As Vinodh²¹⁰ has highlighted that in Singapore, with effect from 1.12.2002, a plaintiff who wishes to apply for summary judgment against a defendant is required by the corresponding O14 r1 to wait until that defendant has served a Defence to the Statement of Claim. Further, the new O14r14 provides that 'No Summons [for summary judgment] shall be filed more than 14 days after the (close of pleadings)'. However, the Rules of Court (Amendment No. 2) Rules

²¹⁰ See Vinodh, Order 14: A Limited Window of Opportunity (2004) Law Gazette Mac.30

2004 (S671/2004) which came into effect on 1.12.2004 has amended this time limit to 28 days after the close of pleadings in the action.

The purpose of this new summary judgment regime was presumably premised upon the following:

- (a) to compel the defence to commit itself formally by its pleadings to the defences it intends to raise;
- (b) to avoid the plaintiff being taken by surprise after an application for summary judgment has been filed, which will result in disrupting the timetable under O14 for the exchange of affidavits and delay the determination of the application;
- (c) to discourage a plaintiff from taking out a summary judgment application as a matter of course without reflection, which will in weak cases unnecessarily delay the trial timetable while the defendant does nothing more than confirm its right to defend; and
- (d) to prevent an action this is heading towards trial from having its timetable derailed by a late summary judgment application.

In a nutshell, the position is that the following procedural conditions must be fulfilled before an O14 application may be filed and heard:

- (a) the Statement of Claim must be filed and served on the Defendant;
- (b) the Defendant must have filed and served a Defence to the Statement of Claim;

- (c) The Plaintiff's Affidavit in support of the application must comply with the requirements of O14 r2; and
- (d) The O14 application must be filed not more than 28 days after the close of pleadings in the action.

If any of the above conditions are not satisfied, the Plaintiff's application will be dismissed. The Courts have no wider power than those conferred by the Rules of Court or any additional statutory power to act outside and beyond the Rules of Court. As held by the Court of Appeal in *Samsung Corporation v Chinese Chamber Realty & Ors*²¹¹, unless there is a compelling reason to do otherwise, in general where the Rules of Court have expressly provided what can or cannot be done in a certain circumstance, it is not for the court to override the clear provision in exercise of its inherent powers. As per Chao Hick Tin JA, "No court should arrogate unto itself a power to act contrary to the Rules".

In *United Engineers v Lee Lip Hiong*²¹², it was held by Tay Yong Kwang J that in order to achieve some measure of certainty for the Defendant, and even the Registrar managing the case, a purposive interpretation of O14 r14 made it necessary to conclude that the time bar for taking out a summary judgment was absolute and could not be extended by the court. It was further noted that O18r20(1) fixes the deemed closure of proceedings with certainty so that it may serve as a reference point as intended. As such, any amendments to pleadings do not postpone the deemed closure of pleadings.

²¹¹ (2003) SGCA 50
²¹² (2004) SGHC 190

The position in Malaysia appears to be that there is little discretion left in the court to allow early or late applications, unless there is very strong basis justifying the application. This appears to introduce an inflexibility into the summary judgment regime which undermines its usefulness as a tool to obtain a quick and relatively cheap judgment without trial in appropriate cases.

Dato' Vincent Ng J when delivering a speech²¹³ in the Conference of High Court Judges, held in Hotel Renaissance, Malacca on 24-27 October 2002 stated that his Lordship often encountered absurd situations which stall proceedings where parties, particularly defendants, for the obvious purpose of delay, have appealed to the Court of Appeal against his Lordship's decision allowing or not allowing the appeal from the SAR's decision concerning the use of an affidavit in an O14 application. If we are to go successfully into a fast track system this should never be allowed to happen. In order to deal with unnecessary appeals on clearly interlocutory judgments and orders or with a litigant whose conduct is evocative of the aphorism that justice delayed is justice denied, the Rules should debar any appeals on interlocutory judgments or orders to the Court of Appeal. In addition, the problem of delay often occurs in O14 application, the plaintiff in Suit 22-740-2000 moved to file an application for summary judgment after over a year, and yet failed to give any explanation for this delay.

²¹³ See Dato' Vincent Ng Kim Khoay, Suggestions For The Fast Track System [2003] 2 MLJ lxxxviii

To mark disapproval of such inordinate delay in filing of O14 application, Dato' Vincent Ng J opined that the courts should be more inclined to apply the ratio in *Krishnamurthy & Anor v Malayan Finance Corporation Bhd*²¹⁴ and *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongs*²¹⁵.

O14r1 also appears that an abridgment of time under O3r5 is not available because O14 r1 does not prescribe a period of time within which an act is to be done. Instead it specifies the sequence in which procedural steps are to be taken²¹⁶.

There is a further dimension to the tension between costs and accurate procedure, and a compromise must also be struck between accuracy and speed. We tend to think that the only requirement of justice is that a judgment should give the parties what is theirs by right. But time is also a dimension of justice, for, as we like to remind ourselves, justice delayed is justice denied. Delay may undermine the practical utility of judgment for the purpose of redressing rights and a judgment may come too late to be capable of putting things right, for example, by allowing evidence to disappear or deteriorate. Clearly, system of procedure which systematically allows delays to rob judgments of their practical usefulness cannot be said to be a just procedure. It follows that while a just procedure cannot be wholly indifferent to the need to establish the truth, it also cannot be altogether indifferent to delay, because a just procedure must aim to deliver judgment when they can still do some good. Yet, no system can be expected to invest limitless resources in

²¹⁴ supra at 44

²¹⁵ supra at 13

²¹⁶ *Re Pilcher* [1879] 11 ChD 905 ; and *Saunders v Pawley* [1884] 14 QBD 234

achieving speedy justice. Accordingly, where resources are limited, accuracy in judgments may have to be sacrificed to some extent not only for the sake of economy but also for the sake of obtaining timely judgments.

When we consider the reform of summary judgment, we must therefore not be deterred by arguments that the introduction of savings may lead to deterioration in the accuracy of judgments. What matters is not any particular level of accuracy but the correct balance between accuracy of justice and timeliness of justice, and between accuracy and affordability.

The Woolf Report, as part of its suggested reform of summary judgment, proposed an exceptional discretion in the Court to allow a case to continue if it were considered there was a public interest in the matter being tried.

At present, there is a general discretion in the Court to refuse summary judgment, at least on applications by plaintiffs, created by the words "there ought for some other reason to be a trial of the claim in O14r3(1)". This discretion has been described as confining O14 to being a good servant and prevent it from being a bad master' and has been used where there is some aspect of the transaction the subject of the action which requires close scrutiny. This was illustrated in the case of *Miles v Bull*²¹⁷.

The effect of the changes proposed above on summary judgment applications is also another justification for retaining some residual discretion in relation to summary judgment. For example, while it is suggested above

²¹⁷ *supra* at 13

that the risk of stifling the development of the law by determining questions of law summarily is overstated, there may well be occasions when the importance of a potential development in the law is such that it would not be in the public interest to determine the matter summarily. In such a case, a residual discretion could be called into aid. Accordingly, it is suggested that the party maintaining that there is a public interest in the matter proceeding should have the onus of establishing that that is so.

The potential for disputes to be resolved speedily and in a cost effective manner through summary judgment procedure should not be underestimated. In so far as the current rules of court and judicial authority provide for such a difficult test for summary judgment, it is suggested that potential is underutilised. The current approach to summary judgment applications reflects a view that, as a matter for principle, litigants should not be 'denied their day in court' and that to dispose of a matter summarily is to subvert that principle.

Both assumptions are open to question. Firstly, it may be questioned whether a prima facie right to have all civil disputes determined by trial in open court with oral evidence is a luxury that the civil justice system can continue to afford. Secondly, in any event, there is no reason to suppose that matters which are properly capable of being determined on affidavit material deny litigants an appropriate opportunity to properly and thoroughly present their case.

Zukerman²¹⁸ remarked that the existing civil justice system in general, and summary judgment procedures in particular, are already the product of a compromise between accuracy, on the one hand, and efficiency, on the other. Moreover, the existing balance between accuracy and efficiency achieved by the civil justice system is simply one of a number of possible ways of striking that balance. While persons operating within the civil justice system, particularly lawyers and judges, are more likely to be inclined to the view that the balance currently achieved is necessarily the optimum one, this is not necessarily so.

Even if it does turn out that summary adjudication provides inferior accuracy, the case for summary adjudication would not necessarily founder. For, we would then be presented with the question of principle of whether a loss in accuracy may be justified by the savings that will be made. This question cannot be answered in the abstract. Rather, it has to be considered in the context of the prevailing economic and social circumstances. A system which offers affordable justice to a multitude, albeit at some lower level of accuracy, is to be preferred to a system which restricts justice, albeit of a higher quality, to the few who can afford it and to that shrinking proportion of the poor whom the taxpayer can still bear to support.

The first way in which the use of the summary judgment procedure could be expanded is in relation to disputed questions of law. Where in a summary judgment application, the dispute between the parties can be reduced to a

²¹⁸ See Zukerman, *A Reform of Civil Procedure: Rationing Procedure rather than Access to Justice* (1995) 22 *Journal of Law and Society* 155

question of law, even a complex question it is appropriate that the court hearing the application should determine finally that question of law. As Lord Donalson MR remarked in the Court of Appeal case of *R. G. Carter Ltd v Clarke*²¹⁹:

“If a judge is satisfied that there are no issues of fact between the parties, it would be pointless for him to give leave to defend on the basis that there was a triable issue of law. The only result would be that another judge would have to consider the same arguments and decide the issue one way or another”.

The concern that a party's case on a point of law may not be as thoroughly or as competently argued in a summary judgment application would seem to be a self-fulfilling prophecy. Were the rules such that complex and arguable questions of law are routinely determined in summary proceedings, no doubt the approach of litigant's advisers would adapt accordingly. Moreover, the risk that by determining questions of law summarily the Court may stifle the development of law is in most cases illusory. Rather, the vast majority of questions of law arising in civil disputes ought to be able to be determined with sufficient certainty as they presently are in trials of actions.

By virtue of O56 r1(1) of RHC, an appeal will lie to a judge in chambers from any judgment, decision or order of the Registrar which, of course, would include those made on applications for summary judgment under O14 of the RHC.

²¹⁹ *supra* at 63

By virtue of Section 67 of the Courts of Judicature Act 1964, the Court of Appeal has been conferred with jurisdiction to hear and determine appeals from any judgment or order of any High Courts in any civil cause or matter including those made in the appellant jurisdiction by the latter.

By virtue of Sections 29 and 69 of the Court of Judicature Act 1964, an appeal to the High Court from the subordinate court and from the High Court will be by way of re-hearing. What has been declared by these sections has also been judicially reiterated in a number of decisions that an appeal from a decision in an O14 application is by way of re-hearing²²⁰. The judge hearing the appeal treats the matter as though it came before him for the first time²²¹.

In light of the foregoing, the rationale for summary judgment procedure will be defeated as early adjudication cannot be achieved because of the availability of avenues to appeal, relying on the above provisions. To balance the need for speedy disposition and dispute and the avoidance of injustice, it is submitted that the appeal for a summary judgment ought to be limited to one occasion at a higher court.

²²⁰ *Koh Siak Poo v Perkeyuan OKS Sdn. Bhd. & Ors* [1989] 3 MLJ 164; *American Express International Banking Corporation v Tan Loon Swan* [1992] 1 MLJ 727; *Niaga Tani Sdn. Bhd. v Samarez Holdings Berhad* [2005] 1 MLJ 239

²²¹ *Standard Chartered Bank v Kentland Sdn. Bhd. & Anor* [1990] 2 MLJ 319

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