

## 7. CIVIL PROCEDURE

Cavinder BULL SC

MA (Oxford), LLM (Harvard);

Barrister (Gray's Inn), Attorney-at-Law (New York State);

Advocate and Solicitor (Singapore).

Jeffrey PINSLER SC

LLB (Liverpool), LLM (Cambridge), LLD (Liverpool);

Barrister (Middle Temple), Advocate and Solicitor (Singapore);

Professor, Faculty of Law, National University of Singapore.

### Appeals

#### *Leave to appeal*

7.1 In *Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR 529, the Court of Appeal held that where the High Court has refused leave to appeal against a decision of the District Court, there can be no further recourse after the High Court has adjudicated on the matter. This case was an extension of the Court of Appeal's previous judgment in *SBS Transit Ltd v Koh Swee Ann* [2004] 3 SLR 365, which concerned an application for leave to appeal against the decision of a Magistrate's Court.

7.2 Andrew Phang JA reiterated the fundamental principle that where a legal decision cannot be appealed against as of right but requires express permission from a named authority before it can be appealed against, the decision of that authority as to whether or not to grant leave to appeal is final (*Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR 529 at [14]). It is clear from s 21(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) that the High Court is the authority with the final say as to whether to grant or refuse leave to appeal against a decision of the Subordinate Courts. Section 21(1) confers only two opportunities for an application for leave to appeal. First, before the relevant court of the Subordinate Courts, and secondly, before the High Court. There is no further court other than the High Court for an application for leave to appeal (*Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR 529 at [18]).

7.3 The appeal had been brought under s 34 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA"), and Andrew Phang JA explained that like s 21(1), s 34 of the SCJA is intended to restrict appeals to the Court of Appeal. He reiterated Judith Prakash J's

views in *SBS Transit Ltd v Koh Swee Ann* [2004] 3 SLR 365, that it would be inconsistent with the object of s 34 to allow it to detract from the operation of s 21(1), given that both were mechanisms restricting appeals to the High Court.

7.4 In addition, the learned judge held that s 34 of Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (“SCJA”) is premised on the High Court having decided on the substantive matters before it. Thus, it is clear that s 34 of the SCJA is not intended to apply to situations where the High Court has refused leave to appeal against the decision of the Subordinate Courts, and the High Court has therefore not ruled on the substantive matter or matters in respect of which leave to appeal is sought (*Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR 529 at [22]).

7.5 Finally, Andrew Phang JA restated the broader and more fundamental principle that the Court of Appeal, being a creature of statute, is only seised of the jurisdiction that has been conferred upon it by the legislation creating it. Thus, a jurisdiction-conferring provision is a “crucial prerequisite” that a would-be appellant must satisfy (*Blenwel Agencies Pte Ltd v Tan Lee King* [2008] 2 SLR 529 at [23]). Furthermore, since it is trite law that there is no inherent right to appeal from judicial determinations made by our courts, a right of appeal must have its source in legislative authority.

## Costs

7.6 In 2008, the High Court made two clear pronouncements that the successful litigant’s reproachable conduct would be taken into consideration to lessen the amount of costs awarded to him, if at all. In *VH v VI* [2008] 1 SLR 742, no costs were awarded, and in *Susilawati v American Express Bank Ltd* [2008] 1 SLR 237 costs were awarded on a standard, and not an indemnity, basis.

7.7 In *VH v VI* [2008] 1 SLR 742, the High Court held that the respondent did not deserve any costs in view of his conduct and refused to award costs to him (at [53]). The respondent had applied to the Swedish court to issue a divorce decree in spite of his full knowledge that there was a Singapore interim anti-suit injunction issued against him. Kan Ting Chiu J held that the respondent’s apology on affidavit to the Singapore Court for going against the interim injunction was hollow and insincere. The learned judge also observed that there appeared to be a real case for arguing that his conduct was in contempt of court, but left the issue to be decided if the occasion arose (at [52]). Thus, even though the appellant’s application for an anti-suit injunction was dismissed, no costs were awarded to the respondent.

7.8 In *Susilawati v American Express Bank Ltd* [2008] 1 SLR 237, the High Court awarded costs to the defendant on a standard, and not an indemnity, basis because its conduct was not beyond reproach. The plaintiff had executed a charge to secure her son-in-law's liabilities to the defendant, and had brought an action against the defendant when it executed the charge under the heads of undue influence and breach of fiduciary duty. The plaintiff's action failed. However, Lai Siu Chiu J observed that the defendant was aware of the potential conflict of interest between the plaintiff and her son-in-law. Also, the defendant's lack of vigilance contributed in no small measure to the dispute at hand, which could easily have been avoided by closer scrutiny and more comprehensive disclosure on the part of the defendant (at [76]). Thus, the learned judge held that even if the contractual provision entitling the defendant to indemnity costs applied, she would decline to exercise her discretion to award indemnity costs to the defendant (at [101]).

### ***Disbursements***

7.9 The term "disbursement" for the purposes of taxation was construed by the High Court in *Ong Jane Rebecca v Lim Lie Hoa* [2008] 3 SLR 189. Choo Han Teck J held that the general rule was that disbursements claimed should be expenses that had been paid. However, the word "disbursement" was also wide enough to include loans or debts properly incurred by a party for the purposes of litigation, provided that it was proven that such loans or debts were due and payable and would be paid after taxation. Evidence such as invoices or bills had to be tendered to prove this to the court's satisfaction. This construction was sensible, because if "disbursements" were strictly limited to only actual expenses paid out by a party, a poor but successful litigant could be denied recovery of his rightful amount of costs.

7.10 The successful litigant had failed to adduce any evidence such as invoices or bills to prove that the loans or debts in question were due and payable and would be paid after taxation. Also, no proof of debt had been filed in respect of the claim in the litigant's insolvency in the United Kingdom. Instead, it was only stated on affidavit that such a debt existed. This was insufficient, and the claims were disallowed (*Ong Jane Rebecca v Lim Lie Hoa* [2008] 3 SLR 189 at [3]).

7.11 The learned judge also held that in principle, air miles could be a proper disbursement that could be recovered in taxation (*Ong Jane Rebecca v Lim Lie Hoa* [2008] 3 SLR 189 at [7]). There was no reason why a plaintiff who paid for an airplane ticket should be better off in taxation than a plaintiff who had decided to redeem an airplane ticket using his or her miles for whatever reason. However, it transpired that the plaintiff had used air miles accumulated by another person, and not herself, to redeem the airplane ticket. Thus, the claim was not allowed.

### *Offers to settle*

7.12 In *Sie Choon Poh v Amara Hotel Properties Pte Ltd* [2008] 2 SLR 1076, the High Court held that even though the offer to settle was not in the form prescribed by O 22A r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), the court was not precluded from taking it into account.

7.13 In *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2008] SGHC 216, Chan Sek Keong CJ illuminated two significant points regarding offers to settle. First, the court's general discretion under O 22A r 12 could not apply where the trial judge had found that the requirements of O 22A r 9 had not been satisfied. Rule 12 merely provides the guidelines for the exercise of the court's discretion; it is not an empowering rule (at [27]). It cannot be used as a free-standing rule to impose costs because it does not vest any power in the court to order costs in relation to offers to settle. The only rules empowering the court to award costs in relation to offers to settle are found elsewhere in rr 9(1)(b), 9(2)(b) and 9(5). Thus, where r 9 does not apply to an offer to settle, r 12 cannot be applied to temper its rigours.

7.14 Secondly, Chan Sek Keong CJ clarified the relationship between O 22A and O 59. In the event that the plaintiff obtains a judgment which is more favourable than the terms of the offer, general principles of costs apply, and not the cost consequences under the offer to settle process. This is because O 59 applies to every case on costs in the absence of any other specific rule.

### **Default judgments**

7.15 In *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR 907, the plaintiff claimed (as landlord) rental arrears and possession of the premises which had been leased to the defendant. Judgment was entered in default of the defendant's appearance. Fifteen months later, the defendant applied to set aside the judgment. The judgment was irregular because it had been entered for an excessive sum (in respect of the rental arrears) and the plaintiff had failed to produce a certificate required by O 13 r 4(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (in respect of the claim for possession). The Court of Appeal determined that the defendant had provided acceptable reasons for not making an earlier application. It also concluded that as the irregularities did not result in egregious procedural injustice to the defendant, the default judgment should not be set aside *ex debito justitiae*.

7.16 The Court of Appeal revised the principles governing the setting aside of regular default judgments which had been established by the English Court of Appeal in *Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc* (“*The Saudi Eagle*”) [1986] 2 Lloyd’s Rep 221, and endorsed by the Court of Appeal in *Abdul Gaffer v Chua Kwang Yong* [1995] 1 SLR 484. According to the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR 907 (at [60]):

[I]n deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues. It is, in our view, rather illogical to hold that the test for setting aside a regular default judgment should be any stricter than that for obtaining leave to defend in an O 14 application. In both instances, there has been no hearing on the merits. This is not to say that the position in both instances is completely identical or symmetrical. When a regular default judgment has been entered, there would have been a prior default or lapse on the part of the defendant. There are, however, other means of dealing with such procedural default or lapses, including the imposition of adverse costs orders or the making of a setting-aside order which is conditional on appropriate terms being met ...

7.17 The court will also take other considerations into account (at [65]):

[T]he merits of the defence do not constitute the sole consideration that a court takes into account in deciding whether to set aside a regular default judgment. While this factor is certainly highly significant in its own right, it also has to be assessed against other relevant considerations – at the end of the day, a balancing exercise is involved. As this court recently reiterated in *Su Sh-Hsyu v Wee Yue Chew* [2007] 3 SLR 673 at [43]: ‘[T]he question of whether there is a defence on the merits is the dominant feature to be weighed against the applicant’s explanation both for the default and for any delay, as well as against prejudice to the other party ...’

7.18 The merits of the defence are the primary consideration for the court which must be taken into account together with other considerations (subsidiary though they may be) in determining whether it is just to set aside the judgment. These other considerations include the reasons why the default judgment was entered and the applicant’s explanation for this outcome, whether there was any delay (including its degree) in making the application and any other circumstances which should be assessed in reaching a just decision. If the applicant has deliberately withheld filing his application in order to obtain some advantage in the litigation, the application will, in the words of the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR 907, “*prima facie* be viewed uncharitably” (at [32]). With regard to delay, the Court of Appeal stated: “A long delay may not be

procedurally incurable or fatal to a setting aside application” (at [37]). Ultimately, it is a question of whether the delay is inexcusable (notwithstanding the explanation offered) on the facts presented to the court. The court will also consider the impact of the applicant’s conduct on the opposing party, particularly if the latter would suffer injustice if the judgment is set aside. In *Mercurine* itself, the defendant only applied to set aside a judgment in default of appearance 15 months after it had been entered. The Court of Appeal in *Mercurine* disagreed with the High Court’s conclusion that the application to set aside had been made too late to justify relief. On the facts, there was certainly no intention to delay the application in order to obtain some benefit in the case. There was also evidence that the defendant believed that it had negotiated a compromise with the plaintiff and that it intended to honour this agreement. Furthermore, the defendant satisfactorily explained that it was seeking to settle the case out of court in the interests of the ultimate shareholders which both parties had in common. The fact that the defendant had made its own application to the court for declarations regarding the parties’ settlement negotiations and related matters did not detract from this finding.

7.19 The Court of Appeal also made important pronouncements on the principles governing applications to set aside irregular default judgments. The starting point is for the court to assess whether the judgment should be set aside *ex debito justitiae* (pursuant to O 2 r 1(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). It will only be set aside *ex debito justitiae* if the defendant has suffered egregious procedural injustice. For this purpose, the Court of Appeal adopted *mutatis mutandis* the four sets of circumstances in r 13.2 of the English Civil Procedure Rules (“the CPR”) in which an irregular judgment is required to be set aside (*Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR 907 at [75]). The Court of Appeal referred to other primary factors which are to be taken into account (at [76]):

[T]he key question for the court, when it decides whether to adhere to or depart from the *ex debito justitiae* rule, is whether there has been such an egregious breach of the rules of procedural justice as to warrant the setting aside of the irregular default judgment as of right. In addressing this issue, the court should consider, *inter alia*:

- (a) the nature of the irregularity, in particular, whether it consists of: (i) entering a default judgment prematurely; or (ii) failing to give the defendant proper notice of the proceedings;
- (b) whether the defendant took a fresh step in the proceedings after becoming aware of the irregular default judgment;
- (c) whether there was any undue delay by the defendant in filing its setting-aside application; and
- (d) where a judgment is irregular because of the plaintiff’s breach of procedural rules (which would be the case for the majority

of irregular default judgments), whether the breach was committed in bad faith.

7.20 If the judgment is not to be set aside *ex debito justitiae*, the court will take into account the merits. The Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR 907 accepted the view of the English Court of Appeal in *Faircharm Investments Ltd v Citibank International Plc* [1998] EWCA Civ 171 (“*Faircharm*”) to the effect that if the defendant is “bound to lose” the case, the judgment should not be set aside. The reasoning here is that it would be pointless to set aside a judgment and permit the proceedings to continue despite the inevitable outcome against the defendant. However, the court will not allow the *Faircharm* principle to be abused. For example, the plaintiff would not succeed if he deliberately enters a default judgment in an irregular manner (for example, by entering it prematurely) in the expectation that it will be upheld on the basis of the defendant’s meritless case. The Court of Appeal also made certain observations on costs in relation to the setting aside of regular and irregular default judgments.

## Discovery

### *Amendment of list of documents*

7.21 In *Ser Kim Koi v Fulton William Merrell* [2008] 2 SLR 1063, the High Court held that where a party had mistakenly disclosed privileged documents, that party might apply to amend his list of documents by moving those documents from Pt 1 to Pt 2 of Sched 1 of the list of documents. Judith Prakash J also approved of the holding in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027, that even after inspection, if (a) inspection of the document had been procured by fraud or (b) it is clear that inspection of the document was given by mistake, the party who saw it may be enjoined from making use of the knowledge gained from that document (*Ser Kim Koi v Fulton William Merrell* [2008] 2 SLR 1063 at [13]).

7.22 In determining whether the documents were privileged, the High Court applied the test in *Balabel v Air India* [1988] Ch 317. Judith Prakash J held that an e-mail dealing with operational problems of the company was not privileged because no legal proceedings had been threatened as yet, and communications between the chief financial officer of the company and some of its directors (who were the defendants) should not be withheld from other directors (who were the plaintiffs). The learned judge also found that all the other documents were privileged as they had been created for the predominant purpose of the defendant’s evaluation and substantiation of its claim (*Ser Kim Koi v Fulton William Merrell* [2008] 2 SLR 1063 at [30]).

7.23 The High Court also held that where documents that are not privileged have been included in the list of documents by mistake, the listing party may not apply to have the documents entirely deleted from the list. Thus, the appellant's application to remove "irrelevant" documents from the list of documents failed. Judith Prakash J elaborated that the listing party's remedy is to object to producing those documents for inspection, and it will then be up to the court to decide whether the documents should be produced for inspection, depending on the relevancy of the documents to the issues in the action.

### ***Internet piracy***

7.24 In *Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR 18, the High Court held that an authorised agent of a copyright owner had no *locus standi* to make an application under the Rules of Court for pre-action discovery. Referring to the earlier case of *Alliance Entertainment Singapore Pte Ltd v Sim Kay Teck* [2007] 2 SLR 869, Woo Bih Li J affirmed that only the copyright owner and an exclusive licensee under s 123 of the Copyright Act (Cap 63, 2006 Rev Ed) had the right to take action against copyright infringers.

7.25 The learned judge also rejected the agent's argument that it was relying on the court's jurisdiction to allow discovery as expounded in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133 ("NP"). He held that such an inherent jurisdiction overlapped with O 24 r 6, and since the agent had no *locus standi* to make the application under O 24 r 6, it also had no *locus standi* to rely on the NP jurisdiction (*Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR 18 at [43]). Even if the extension of NP to criminal cases applied in Singapore, the agent was not a victim of wrongdoing as it had expressly disavowed making the application in its capacity as a licensee (*Odex Pte Ltd v Pacific Internet Ltd* [2008] 3 SLR 18 at [49]).

7.26 Woo Bih Li J further held that in the isolated situation where the appellant was held to be an exclusive licensee, the district judge had erred in concluding that the applicant had to demonstrate an "extremely strong *prima facie* case of wrongdoing". Instead, where the plaintiff asserted that he had a cause of action and was seeking discovery to ascertain the identity of the wrongdoer, the strength of his case was one of the factors to be considered in the totality of the facts. Any duty of confidentiality which the defendant may owe to other parties was another factor, but that should not in itself give rise to a higher standard of proof. Ultimately, the guide was still the interests of justice.

### ***Repeated applications for discovery***

7.27 In *Ting Kang Chung John v Teo Hee Lai Building Construction Pte Ltd* [2008] 3 SLR 377, the High Court dismissed an appeal on a discovery application where the applicant had previously taken out repeated discovery applications over the course of more than a year. Tay Yong Kwang J reiterated that the overriding principle was that the discovery sought must be necessary either for disposing fairly of the cause of matter or for saving costs and held that the application was “disingenuous”, since the applicant had already been given the opportunity to inspect the documents and had been given copies thereof.

7.28 The learned judge also noted that the case demonstrated how a litigant could severely hamper adjudication of the merits of a case by incessantly taking out interlocutory applications and appealing all the way each time, so long as he had the funds and the energy to do so. Indeed, there were concerns by some in the legal profession on the need to restrict the right of appeal to the Court of Appeal in interlocutory matters of such a nature. As a solution, Tay Yong Kwang J suggested that the modification of s 34 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) to curb such excesses could be studied (*Ting Kang Chung John v Teo Hee Lai Building Construction Pte Ltd* [2008] 3 SLR 377 at [18]).

### **Discontinuance**

7.29 A distinction needs to be made between ordinary (non-automatic) discontinuance and automatic discontinuance pursuant to O 21 r 2(6) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). In the case of ordinary discontinuance, the fact that an action is discontinued does not prevent the institution of new legal proceedings unless the terms on which the original action was discontinued prohibit a fresh action: *Tong Guan Food Products v Teo Cheow Ngoh* [2004] SGHC 261; *Hendrawan Setiadi v OCBC Securities* [2001] 4 SLR 503.

7.30 With regard to automatic discontinuance under O 21 rr 2(5) and 2(6), the question arises as to whether the provision for reinstatement of an automatically discontinued action pursuant to O 21 r 2(8) impliedly bars the re-commencement of the action (assuming that the limitation period has not expired). It is certainly an arguable point that as r 2(8) provides the court with a discretion to reinstate a discontinued action, the provision should be regarded as all-encompassing, even to the extent of excluding the possibility of fresh proceedings.

7.31 The issue was considered by the High Court in *Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43. The plaintiffs had obtained interlocutory judgments against the first defendant in May and September 1999 (two suits which were consolidated by the court). Subsequently, the plaintiff filed a summons directions for the purpose of the assessment of damages. Directions were given in February 2001. The High Court determined that the action was deemed to be discontinued pursuant to O 21 r 2(6) on 6 September 2004 (one year after the last step had been taken by another party to the consolidated suit). The plaintiffs commenced fresh proceedings on 31 March 2006. Chan Seng Onn J expressed the view that a plaintiff whose action has been discontinued has three choices (at [11]):

- (a) apply for reinstatement of the discontinued action and face the stringent criteria governing reinstatement;
- (b) avoid the stringent criteria for reinstatement and start a fresh action [if the limitation period has not expired]; or
- (c) take no further action and accept that his action has been discontinued under the Rules.

7.32 Having referred to the guidelines in *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR 429 (“*Moguntia*”), the court pointed out that the plaintiff would have to show “good reasons” before the discretion was exercised in his favour under r 2(8) (*Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43 at [17]).

7.33 According to His Honour, it is for a plaintiff to evaluate which course of action he is to take, and the court should not direct him to apply for reinstatement of the action before commencing fresh proceedings. An application for reinstatement may not always be appropriate as the conditions are stringent. Furthermore, an unsuccessful application for reinstatement would result in additional costs, wasted time, and may prevent a fresh action if the limitation period expires in the meantime. The learned judge also pointed out that the rules do not expressly require a plaintiff to apply for reinstatement prior to commencing a new action (*Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43 at [18]–[21]). Furthermore, the plaintiff has the right to commence a new action after discontinuance (even after an application for reinstatement has failed). The only question is whether the new action should be struck out for abuse of process pursuant to O 18 r 19 or the inherent jurisdiction of the court (*Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43 at [22]–[25]). His Honour considered that “it is more difficult” for a plaintiff to satisfy the guidelines for reinstatement (referring to *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR 429) than to be permitted to pursue fresh proceedings after his initial action has been discontinued

under O 21 r 6 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). The court rationalised that as the “plaintiff ha[d] paid the price so to speak and ha[d] been penalised for the defendant’s costs in the automatically-discontinued action, [there was no] need to impose on him those more stringent criteria (applicable for reinstatement) when he simply want[ed] to start afresh with a new action based on the same or substantially the same cause of action”. Furthermore, “in a reinstatement application, the burden falls on the plaintiff to show that he has satisfied the [reinstatement] guidelines, whereas in an application to strike out a recommenced action, the burden falls instead on the defendant to satisfy the requirements for striking out” (*Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43 at [27].)

7.34 The High Court applied O 18 r 19(1) and determined that the action should not be struck out. Grounds (a), (b) and (c) of r 19(1) were not satisfied because the plaintiff had obtained interlocutory judgments in the initial action. Accordingly, he had a reasonable basis on which to proceed with the second action. As for ground (d), which concerned the striking out of an action for abuse of process, the court determined that the commencement of a new action in the absence of a previous application for reinstatement is not an abuse of process (although it could be an abuse of process “if the plaintiff repeatedly allows the matter to be discontinued and repeatedly starts a fresh action”: *Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43 at [40]). This is because the rules do not preclude this practice and, furthermore (at [39]):

[A] recommencement after a deemed discontinuance is ... a part of the legal process ... The effect of the deemed discontinuance is that the action is merely deemed to have ceased, not dismissed. Hence, there is no *res judicata* and a fresh suit may be commenced on the same facts.

7.35 In the view of the court, the doctrine of *res judicata* could not apply as the plaintiff had already obtained interlocutory judgments and merely sought to affirm their standing, not to challenge them (*Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43, at [42]). Also see [45]–[56] concerning the application of the principles of *res judicata* to the facts of the case.

7.36 *Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43 raises the vital issue of whether O 21 r 2(8) impliedly bars fresh proceedings. In the view of the High Court, the absence of any express wording to this effect must mean that a party who has allowed his suit to be automatically discontinued under r 2(6) is generally entitled to recommence the same action if the limitation period is still current and subject to the interests of justice. In the respectful submission of the authors, r 2(8) should be given a purposive reading in order to achieve

its intention of expediting proceedings and avoiding wastage of the court's resources through the repeated adjudication of the same issues. Even though the plaintiff may be entitled to commence a fresh action (during the currency of the limitation period), he should not be permitted to evade r 2(8) with impunity. The phraseology of the rule does not restrict its operation according to the circumstances of a particular case but contemplates the reinstatement process for every action which a plaintiff intends to resuscitate.

7.37 In *Lai Swee Lin Linda v AG* [2008] 2 SLR 795, the High Court ruled that a party's letter to the court registry did not constitute a step or proceeding within the meaning of O 21 r 2(6) (which concerns the automatic discontinuance of proceedings). Furthermore, steps pursued in concurrent proceedings (for example, bankruptcy proceedings) are not taken into account for the purpose of the action which is subject to automatic discontinuance, *ie*, an action will be automatically discontinued if no step or proceeding has been taken in it even though steps were taken during this period in ancillary proceedings. The court applied the principle that the trigger date is the date of the last step in the action as it appears in the court records and the guillotine date is the day before the anniversary of the trigger date. Also see *Woon Tek Seng v V Jayaraman a/l V A Vellasamy* [2008] 3 SLR 43 at [13]–[16].)

## **Injunctions**

### ***Interim mandatory injunction***

7.38 In *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565, the Court of Appeal reiterated that an interim mandatory injunction was a very exceptional discretionary remedy, and would only be granted in clear cases where special circumstances exist. As compared to an ordinary prohibitive injunction, the threshold which had to be met in order to persuade the court to grant the interim mandatory injunction was much higher.

7.39 V K Rajah JA held that, on the facts of the case, there was no urgency or pressing need and no reason to grant the interim injunction. The appellant had applied to court for an interim mandatory injunction with the undertaking that it would commence arbitration expeditiously. However, the Court of Appeal hearing was approximately seven months after the dispute arose, and the appellant had not yet commenced arbitration. It could plainly be inferred from the appellant's inaction that it would not suffer inordinate prejudice by waiting for the arbitral tribunal to make a determination (*NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [76]).

### *Anti-suit injunctions*

7.40 In two separate cases, the High Court reaffirmed that the law on anti-suit injunctions was embodied in the four principles enunciated by the Privy Council in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. First, the jurisdiction was to be exercised when the ends of justice required it. Secondly, the order was directed not against the foreign court but against the parties so proceeding or threatening to proceed. Thirdly, the injunction would only be issued restraining a party who was amenable to the jurisdiction of the court. Fourthly, the jurisdiction would be exercised with caution since it indirectly affected the foreign court.

7.41 In the cases *VH v VI* [2008] 1 SLR 742 (“*VH v VI*”) and *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR 930, the applications for an anti-suit injunction failed on the first principle. In *VH v VI*, Kan Ting Chiu J reiterated that, in deciding whether an injunction would serve the ends of justice, the court should consider whether the foreign proceedings were vexatious or oppressive, as well as the injustice to either party which would result from the court’s decision.

7.42 The learned judge held that the action which the respondent had commenced in Sweden was not vexatious or oppressive. The appellant must have realised and accepted that divorce proceedings were likely to be brought in Swedish courts because the respondent was a Swedish national and domiciled in Sweden (*VH v VI* [2008] 1 SLR 742 at [36]). Furthermore, although the marriage would not be dissolved in Sweden on the basis preferred by the appellant, namely, adultery, the marriage would still be dissolved and the appellant could still advance and protect the interests of herself and her children in the Swedish courts (at [49]). On the other hand, the respondent would suffer real prejudice if he was prohibited from carrying on further with the Swedish proceedings which he had diligently prosecuted, not least because the appellant had allowed the situation to develop by not filing her application for an anti-suit injunction earlier (at [48]).

7.43 Similarly in *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR 930, Andrew Ang J held that the proceedings commenced in New York were not vexatious or oppressive. The fact that the remedies sought in the New York proceedings were not available in Singapore did not automatically mean that an anti-suit injunction ought to be granted. The courts should not automatically favour domestic law over foreign law (at [21]). The defendant’s commencement of the New York proceedings to obtain pre-judgment security was not unwarranted because there was a real likelihood that the plaintiff would not be able to

satisfy the Singapore arbitration award in the event that the defendant succeeded in arbitration.

7.44 The learned judge also held that the arbitration clause in *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] 3 SLR 930 related to proceedings which established liability, and did not extend to proceedings to enforce a judgment or award or to obtain security. Thus, in the absence of clear and unequivocal language in the arbitration, the retention of security *per se* in foreign proceedings was not inconsistent with the agreement to arbitrate in Singapore (at [16]).

### ***Mareva injunctions***

7.45 The Court of Appeal's recent pronouncement in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 ("*Swift-Fortune*") was applied in two instances in 2008.

7.46 In *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 ("*Petroval v Stainby*"), the High Court applied the holding in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629, that s 4(1) of the Civil Law Act (Cap 43, 1999 Rev Ed) did not confer any power on the court to grant a Mareva injunction against the assets of a defendant in Singapore unless the plaintiff had an accrued cause of action against the defendant that was justiciable in a Singapore court (*Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 at [13]). In other words, it was a necessary condition that the interlocutory injunction was ancillary to a claim for relief that would be granted by a Singapore court. It would be insufficient to have a cause of action that was potentially justiciable in Singapore if the adjudication was to take place elsewhere.

7.47 However, it was patently clear that the merits of the claim would be determined in the British Virgin Islands ("BVI"), and that there would be no Singapore judgment. The sole ground upon which the plaintiff had based its jurisdiction for the Singapore action was that the defendant had assets in Singapore. The plaintiff was merely securing in a form readily enforceable in Singapore the orders that had already been granted in its favour in the BVI action. Thus, Andrew Ang J held that the Singapore court had no jurisdiction to grant the interlocutory relief sought by the plaintiff.

7.48 Subsequently, the plaintiff's appeal in Civil Appeal No 48 of 2008 was allowed by the Court of Appeal on 16 July 2008. However, the judgment was unreported.

7.49 In a similar vein, the Court of Appeal in *Wu Yang Construction Group Ltd v Mao Yong Hui* [2008] 2 SLR 350 reaffirmed the holding in *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629 that, if no

substantive relief is claimed against a party, a freezing order cannot be issued against that party (*Wu Yang Construction Group Ltd v Mao Yong Hui* [2008] 2 SLR 350 at [28]). Since there was no dispute referable to arbitration, the freezing order granted by the court below was discharged.

## Judgments and enforcement

### *Consent order*

7.50 As a consent order represents a contract between the parties, the court treats it as such and will not alter its substantive content. However, the court may be entitled to exercise a peripheral jurisdiction. For example, it may clarify the terms pursuant to O 92 rr 4 and 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (*Yeo Boong Hua v Turf City Pte Ltd* [2008] 4 SLR 245 at [9] and [13]) and, exceptionally, extend time for the performance of obligations: at [10], citing *Fivecourts Ltd v JR Leisure Development Co Ltd* 2000 WL 1421246 (QBD) and *Ropac Ltd v Inntrepreneur Pub Co (CPC) Ltd* [2001] CP Rep 31. Even if the consent order includes a “liberty to apply” clause, this only entitles the court “to construe its own orders and provide clarification”: *Yeo Boong Hua v Turf City Pte Ltd* [2008] SGHC 93 at [15].

### *Time stipulation for performance of an act*

7.51 Order 42 r 6(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) states that a judgment or order which requires a person to perform an act must specify the time in which this act is to be done. Rule 6(2) qualifies this direction by providing that where the act concerns the payment of money, the giving of possession of immovable property or the delivery of movable property, the court need not state the time in which the act has to be done (although it clearly has a discretion to do so). In *QU v QV* [2008] 2 SLR 702, the appellant was ordered to surrender her child’s passport and birth certificate to the respondent (“the ancillary order”) pursuant to the court’s decision to grant the respondent sole custody, care and control of the child. No time for performing these acts was stated in the ancillary order and the appellant did not comply with it. The respondent succeeded in the committal proceedings before the District Court and on appeal before the High Court. However, the Court of Appeal concluded that it would be contrary to law and justice for a person to suffer the penal consequences of contempt (including the possibility of imprisonment and fine), unless the period for compliance is made clear in the order requiring the act to be done (at [19]). This interpretation is consistent with O 45 r 5(1)(a), which provides that only a person who fails to perform the act required “*within a time specified in the judgment or*

order” is liable to committal. Although O 45 r 5(1)(b) omits any time limit with regard to committal proceedings against a person who disobeys a judgment or order requiring him to desist from doing an act, this is justified by the immateriality of time in these circumstances: a commission of the act at any time would be a breach justifying an application for committal. Therefore, where a party has obtained a judgment or order of court requiring a person to perform an act, and no time for its performance is fixed by the judgment or order, a further application would be necessary to set a period of time if eventual committal proceedings are contemplated (see O 45 rr 6(2) and 6(3) concerning the further application).

### ***Enforcement of foreign judgments***

7.52 Section 5(2) of the Civil Law Act (Cap 43, 1999 Rev Ed), which restricts the initiation of proceedings based on gambling debts, does not apply to a foreign judgment on such a debt. In *Desert Palace Inc v Poh Soon Kiat* [2009] 1 SLR 71 (“*Desert Palace*”), an action was brought in Singapore on the basis of a foreign judgment which had been given in respect of a gambling debt incurred in a Las Vegas casino. The plaintiff applied for summary judgment. Chan Seng Onn J distinguished between a claim brought on the basis of a wagering or gaming contract, whether entered into or outside of Singapore (s 5(2) would apply in these instances: *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22), and a claim brought upon a valid, final and conclusive foreign judgment which was founded on a gambling debt. His Honour considered that it was implicit in the reasoning of the Court of Appeal in *Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690 – which concerned the issue of whether a foreign default judgment should be registered in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) (“the RECJA”) – that s 5(2) of the Civil Law Act does “not operate directly to preclude claims to enforce judgments entered in actions to recover monies pursuant to gaming contracts (*Desert Palace*, at [48]). His Honour did not believe that it would be in the interest of public policy and comity to make the enforceability of foreign judgments in Singapore dependent on whether the judgment was obtained in a commonwealth country, *ie*, a country which is recognised by the RECJA (*Desert Palace*, at [55]):

I did not think that the law would be seen to make much sense when a gambler would have to face, in Singapore, the consequences of having to repay a judgment debt arising out of his gambling debt just because he happened to gamble in a casino in a country forming a part of the Commonwealth; but he would simply be able to walk away completely free from those judgment debts if he fortuitously incurred his gambling debts in a casino in a non-Commonwealth state, because the casino there would never be able to enforce in Singapore any foreign court judgment entered on that gambling debt by way of an action in

Singapore upon the judgment debt since that non-registrable foreign judgment had been grounded on a gambling debt incurred in the non-Commonwealth state.

7.53 In *Desert Palace Inc v Poh Soon Kiat* [2009] 1 SLR 71 (“*Desert Palace*”), which also involved the issue of whether the action to enforce the foreign judgment was time-barred, Chan Seng Onn J expressed the view that the limitation period for bringing an action on a foreign judgment should be 12 years pursuant to s 6(3) of the Limitation Act (Cap 163, 1996 Rev Ed): at [82]. However, his Honour regarded himself bound by the determination of the Court of Appeal in *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR 565 that the period is six years pursuant to s 6(1)(a) of the Limitation Act: see *Desert Palace*, at [84].

### ***Judgment enforceable by execution***

7.54 If a bankruptcy petition is to be presented in respect of a debt incurred in a foreign jurisdiction, the petitioning creditor must have a judgment which is enforceable by execution: O 46 r 2(1)(d) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). If leave is required, then it must be obtained before the bankruptcy petition is presented. In *AmBank (M) Bhd v Raymond Yong Kim Yoong* [2008] 1 SLR 441, Tan Lee Meng J ruled that a Malaysian bank which had registered a judgment in Singapore almost 12 years before it sought to make the judgment debtor bankrupt, *ie*, beyond the six-year period mandated by O 46 r 2(1)(a), could not proceed with its bankruptcy application. The bank needed to obtain leave to execute the judgment under O 46 r 2(1)(a) in order to proceed.

### **Parties**

#### ***Third party***

7.55 An action against a third party is not valid if the third-party notice is served after the termination of the main proceedings. The third-party action is commenced once the notice is issued and becomes fully constituted after it is served. The distinction between issue and service is important because the third party action may only continue in its own right (independently of the main proceedings) once it is fully constituted, *ie*, by service during the course of the main proceedings. Accordingly, if the notice is issued and served before the main action terminates, it survives the main action (but not otherwise): see *Ng Kit Har v Yii Chee Ming* [2008] 2 SLR 587. The rationale of the court’s ruling is clear. Third-party proceedings have their root in the main action. It is because of the main action that the defendant initiates

proceedings against a third party (see O 16 r 1(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), which clearly indicates that the third party is a party to the main action: "... he shall as from the time of service be a party to the action ...").

7.56 In determining whether or not to stay proceedings on the basis that Singapore is not an appropriate forum, the court will take into account any potential third-party action which could be heard together with the main action (pursuant to O 16 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)). Such a consideration would have little or no significance where the intended third-party proceedings have a tenuous connection and would prejudice or embarrass the plaintiff: see *Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] 3 SLR 761 at [112]–[113].

### ***Undisclosed principal***

7.57 *Family Food Court v Seah Boon Lock* [2008] 4 SLR 272 involved a claim by an agent for damages suffered by his undisclosed principal, who was not involved in the proceedings. The Court of Appeal pointed out that if an undisclosed principal is identifiable, he should be made a party to the proceedings (as a co-plaintiff with the agent) so that he may be awarded the damages he is entitled to. The court may join the undisclosed principal pursuant to O 15 r 6(2)(b) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) even though the parties have not taken the initiative to involve him in the proceedings under O 15 r 4 (at [63]). (For the observations of the Court of Appeal on the cases decided under r 6(2)(b), see [64]–[65].) If the principal is joined and he and his agent succeed in their action, they would only be entitled to recover the damages due to the principal. If the defendant is successful, he would be entitled to recover costs against both co-plaintiffs (at [66]).

7.58 It was suggested in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*") that the court should stay the agent's action if an undisclosed principal wishes to intervene in the action, in order to allow the undisclosed principal to bring its own proceedings. In *Family Food Court v Seah Boon Lock* [2008] 4 SLR 272, the Court of Appeal did not consider the suggestion in *Panatown* to be necessary, considering the court's power to order joinder pursuant to O 15 r 6(2)(b) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed): see para 7.57.

7.59 Where the court is unaware of the undisclosed principal, the agent who sues on behalf of the principal would ordinarily be entitled to his remedy (if the cause of action is proved) as if he is the principal. In these circumstances, the principal would not be permitted to re-open the case at a subsequent time, although he would have a right of action

against the agent for the damages recovered by the latter: see *Family Food Court v Seah Boon Lock* [2008] 4 SLR 272 at [65] and [67]; *Wytcherley v Andrews* (1871) LR 2 P&D 327 at 328; *Sheriffa Zeinab v Syed Hood Al Joffree* (1910) 2 MC 12.

## Pleadings

### *Amendment*

7.60 In *Sunny Daisy Ltd v WBG Network (Singapore) Pte Ltd* [2008] 4 SLR 769, an application by the plaintiff company to change its identification number (after having obtained summary judgment) was granted. Judith Prakash J determined that the amendment sought to correct a *bona fide* error rather than to substitute one party for another and that the defendant would not suffer injustice as a result of the amendment (at [32]–[35]). A party is not estopped from amending his pleading where the issue in related proceedings before a foreign court is different from the one being adjudicated by a Singapore court: *Murakami Takako v Wiryadi Louise Maria* [2008] 3 SLR 198. For a case involving amendment of pleadings in the course of trial, see *Chip Hup Hup Kee Construction Pte Ltd v Lim Lian Choon* [2008] SGHC 227. Also see *Econ Corp Ltd v Econ-Ncc JV* [2008] SGHC 205 (concerning O 20 r 8 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)).

### *Failure to plead*

7.61 The rule that material facts must be pleaded was applied on several occasions in the course of the year. For example, in *Metalform Asia Pte Ltd v Ser Kim Koi* [2009] 1 SLR 369, the plaintiff's claim for specific damages was struck out because the underlying facts were omitted from the statement of claim. In *Lee Hsien Loong v The Singapore Democratic Party* [2008] SGHC 173 at [14], Belinda Ang Saw Ean J stated that if a defendant intends to raise mitigation or reduction of damages as part of his defence, “this point, together with the relevant supporting particulars, must be pleaded and proved like any other fact”.

### *Close of pleadings*

7.62 The Court of Appeal stated in *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR 540 at [13]:

The close of pleadings is an important juncture in a writ action. It indicates that the issues in dispute have been sufficiently crystallised by the process of allegation, denial, admission and deemed denial in that order. There is thus at the close of pleadings an implied joinder of issue on the pleading last served (see O 18 r 14(2)(a) of the Rules).

The close of pleadings also serves as the cut-off point for one-time amendments to the writ or other pleadings made without the leave of the court under O 20 r 1 and O 20 r 3 respectively of the Rules. Further, it signifies the commencement of the timeline under O 25 r 1 of the Rules for taking out a summons for directions as well as triggers in appropriate cases the operation of the automatic directions under O 25 r 8 of the Rules.

7.63 Also see under “Summary judgment” at paras 7.84–7.93.

### ***Traverse***

7.64 It is imperative that a defendant who seeks to challenge an allegation in the statement of claim properly traverses it in the defence pleading. A failure in this respect constitutes the deemed acceptance of the allegation: see *WBG Network (Singapore) Pte Ltd v Meridian Life International Pte Ltd* [2008] 4 SLR 727.

### **Security for costs**

#### ***Section 388 of the Companies Act***

7.65 In deciding whether or not to exercise its discretion to order security for costs pursuant to s 388 of the Companies Act (Cap 50, 2006 Rev Ed), a court should take into account the legislative and public policy considerations underlying the provision. This was the view of the High Court in *Frantonios Marine Services Pte Ltd v Kay Swee Tuan* [2008] 4 SLR 224 (“*Frantonios*”). In *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR 600, the Court of Appeal stated that a court must consider all the circumstances in determining whether it is just to award security to the defendant. While the strength or weakness of the plaintiff’s claim is a relevant factor, it is not the law that if a plaintiff is likely to be successful, the defendant would be refused his application for security for costs. It must be just to make the order. In *Frantonios*, Chan Seng Onn J also considered (at [31]) the policy on which s 388 is based to be a significant factor: “... where impecunious plaintiff corporations are concerned, the policy behind s 388 leans more in favour of protecting the defendant against an unsatisfied costs order” (at [55]). The overriding policy consideration is the plaintiff corporation’s ability to pay the costs of the defendant in the event that the plaintiff fails in his claim (at [63]; also see [52]–[66]). The following authorities may also be useful to the reader: *Ho Wing On Christopher v ECRC Land Pte Ltd* [2006] 4 SLR 817 at [71]–[72]; *Pearson v Naydler* [1977] 3 All ER 531; *Trident International Freight Services v Manchester Ship Canal Co* (1990) BCLC 263; and *National Bank of New Zealand Pte Ltd v Donald Export Trading Ltd* [1980] 1 NZLR 97.

### ***Role of court in application for security for costs***

7.66 It is not appropriate for a court hearing an interlocutory application for security for costs to investigate in depth the likelihood or otherwise of the success in the action (as a trial court would) unless the issues are entirely clear: see *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 at 423; *Frantonios Marine Services Pte Ltd v Kay Swee Tuan* [2008] 4 SLR 224 at [50]. “Interlocutory proceedings should not be allowed to develop into full-scale but prematurely litigated trials [except in the clearest possible cases]”: *Frantonios*, at [51], quoting from *Trident International Freight Services v Manchester Ship Canal Co* [1990] BCLC 263. If the complexity of the issues is such that the defendant would have to incur significantly higher costs in responding to the plaintiff’s claim, this is a factor to be taken into account in favour of the defendant. The rationale here is that the plaintiff would be subjecting the defendant to a higher financial risk of non-recovery of costs in the absence of security (*Frantonios*, at [47]). Although this proposition was made in the context of s 388 of the Companies Act (Cap 50, 2006 Rev Ed), there is no reason why this principle should not apply to ordinary applications under O 23 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

### ***Conduct of parties and security for costs***

7.67 A party’s conduct may be taken into account for the purpose of security for costs. In *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2008] SGHC 48, the High Court considered that the unreasonable conduct of the plaintiff in the course of a series of interlocutory proceedings justified an order against it to provide security. Furthermore, the court stated that “judging by its conduct ... it [was] likely that the plaintiff [would] place all kinds of obstacles in the recovery of costs should the defendant succeed at trial”: at [6].

### ***Stay of proceedings***

7.68 The well-established principles enunciated by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 were applied as the law on stay of proceedings on the ground of *forum non conveniens* in two High Court judgments.

7.69 In the first case, *VH v VI* [2008] 1 SLR 742, the respondent’s appeal against the dismissal of the stay application was rejected on the first basic principle, that stay would only be granted where the court was satisfied that there was some other available forum, having competent jurisdiction, which was the appropriate forum for the trial of the action.

7.70 The respondent had been content to proceed with the Singapore divorce proceedings for 13 months, until he realised that Singapore proceedings could not be concluded quickly and he decided to file the Swedish proceedings instead. Kan Ting Chiu J highlighted that the crucial question was not whether Sweden was an *appropriate* forum, but whether Sweden was the *more appropriate* forum than Singapore (at [29]). It was clear that Singapore was an appropriate forum because the parties and children were resident in Singapore, and the parties owned several properties in Singapore. Furthermore, the learned judge held that it could not be said that Sweden was a more appropriate forum than Singapore because it allowed easier fault-free divorces (at [31]). Thus, the respondent's appeal was dismissed.

7.71 The second case, *Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] 3 SLR 761, concerned two stay applications. The plaintiff had applied for a temporary stay of its own action pending final determination of a foreign proceeding, and the defendant had applied for a permanent stay on the ground of *forum non conveniens*.

7.72 Chan Seng Onn J held that the permanent stay application on the ground of *forum non conveniens* should be heard before the temporary stay application pending a final determination of related German proceedings. The *forum non conveniens* question should be accorded priority so that the action might properly be brought as soon as possible in the appropriate forum. The temporary stay question should then be heard by the appropriate forum (*Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] 3 SLR 761 at [5]).

7.73 With regard to the defendant's stay application on the ground of *forum non conveniens*, the High Court applied the *Spiliada* test (*Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 469) and reiterated that the ultimate question was where the case should suitably be tried, having regard to the interest of the parties and the ends of justice. The High Court held that the connecting factors pointed to Singapore as plainly the more natural and appropriate forum, and this decision was upheld by the Court of Appeal (reported as *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR 543).

7.74 In relation to the plaintiff's temporary stay application, the High Court held that the court had the discretionary power to grant a temporary stay of the plaintiff's action to await the outcome of some foreign proceedings, even though the application was brought by the plaintiff. The court would consider all relevant circumstances and weigh all the factors, including whether the defendant would be prejudiced by such a temporary stay and whether the action would be unnecessarily delayed. Furthermore, where appropriate, the court could attach whatever conditions it deemed fit, including staying certain parts of the

action, and allowing other parts to proceed (*Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] 3 SLR 761 at [148]). On the facts of the case, since some of the intended third-party claims were subject to a time bar which might set in before the temporary stay was lifted, the High Court ordered a temporary stay subject to the condition that allowed the defendant to bring any third-party actions it deemed fit. The defendants did not appeal against this part of the decision.

### ***Filing of a defence in a pending stay application***

7.75 Prior to the Court of Appeal's decision in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 ("*Carona Holdings v Go Go Delicacy*"), it was unclear as to what the procedure was where the defendant did not file the defence because of its pending application for stay in favour of arbitration.

7.76 The High Court in *Go Go Delicacy Pte Ltd v Carona Holdings Pte Ltd* [2008] 1 SLR 161 had earlier held that it was insufficient for the defendants to simply rely on the stay application as a basis for refusing to comply with the 48-hour notice for the defence to be filed. Instead, the defendants ought to have been more proactive, and alternatives open to the defendants included: (a) including an additional prayer in the stay application for an order that the defendants not be compelled to file any defence pending determination of the stay application; (b) applying to the duty registrar to bring forward the hearing date of the stay application; or (c) applying to postpone the hearing of the default judgment application until after the stay application had been heard.

7.77 On appeal, the Court of Appeal was satisfied that the defendants had proceeded diligently in filing their stay application, and set aside the default judgment which had been entered against the defendants. V K Rajah JA also elucidated the procedure to be adopted in such situations.

7.78 The learned judge held that it would be more reasonable and practical for the courts to hear the stay application and the default judgment application together. As between the two applications, the stay application should be heard first to save costs, to minimise duplicity in arguments, and to sift out the good cases from the bad. Furthermore, the filing of a stay application would not automatically bring all timelines in the Rules of Court to a standstill. Thus, a prudent defendant should also apply in the alternative for an extension of time to file his defence, and, in the event that the stay application is dismissed, the defendant could seek time to file its defence.

7.79 The Court of Appeal summarised the correct procedure in future as follows (*Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR 460 at [38]):

- (a) within the stipulated 14 days under the Rules for the filing of a defence or within any extended time obtained from the court, a stay application should be filed;
- (b) in the event that an application for a default judgment is filed, or even in anticipation of such an application, the application for a stay should include a prayer for the stay of the proceedings (including filing of a defence) until the court has ruled on the main stay application;
- (c) the Registry should endeavour to give early hearing dates to minimise attempts to abuse the process by either party, especially if the plaintiff insists on the filing of the defence; and
- (d) for parties and/or counsel that behave unreasonably and/or attempt to abuse the process, carefully calibrated costs sanctions may be appropriate.

### Service

7.80 In *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856, the High Court declined to set aside both leave to serve the writ of summons out of jurisdiction and leave for substituted service.

7.81 Tay Yong Kwang J held that while it was good practice to state the precise paragraphs of O 11 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) in an affidavit supporting an application under O 11, it was understandable if this was overlooked in urgent applications. Nevertheless, the party had to state to the court the paragraphs relied on and ensure that the facts supporting its statement were set out in the affidavits (*Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 at [22]). Although the plaintiff did not state in its supporting affidavits which particular ground in O 11 r 1 it was relying on, it did disclose the relevant ground clearly to the court at the first hearing. Thus, leave to serve the writ of summons out of jurisdiction was not set aside.

7.82 The learned judge also held that evidence that it would be impracticable to effect personal service of the writ of summons on the three defendants was sufficient to satisfy the requirement of impracticability of personal service prescribed by O 11 r 3(1) read with O 62 r 5 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed): *Petroval SA v Stainby Overseas Ltd* [2008] 3 SLR 856 at [26]. Since the mode of substituted service prayed for and ordered was effective in notifying

those defendants of the Singapore action and the Singapore order, there was no ground to set aside the order for substituted service.

7.83 Subsequently, the defendants' appeal in Civil Appeal No 50 of 2008 was dismissed by the Court of Appeal on 16 July 2008. However, the judgment was unreported.

### Summary judgment

#### *Application within time limit*

7.84 Until the decision of the Court of Appeal in *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR 540, the position was that the period of 28 days prescribed by O 14 r 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for making an application could not be extended, and amendments to pleadings could not postpone the deemed closure of pleadings: *United Engineers (Singapore) v Lee Lip Hiong* [2004] 4 SLR 305. A gloss had been added to this principle by Judith Prakash J in *Sumikin Bussan Corp v Hiew Teck Seng* [2005] 2 SLR 773. Her Honour concluded that where the time for service of a pleading has been extended by a court order or with the consent of the opposing party (pursuant to O 3 r 4(3)), an application for summary judgment may be made beyond the periods of time prescribed by the rules for the service of pleadings. This is because the deemed closure of pleadings is correspondingly extended, *ie*, O 14 r 14 is not offended in these circumstances as long as the application for summary judgment is made within 14 days of the end of the extended period for service of the pleading.

7.85 The position regarding extension of time has since been settled by the Court of Appeal in *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR 540 ("*Vestwin Trading Pte Ltd*"). The time limit laid down in O 14 r 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) is not an absolute rule and may be extended by the court pursuant to O 3 r 4(1); para 7 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (read with s 18(2) of that Act), and s 53 of the Interpretation Act (Cap 1, 2002 Rev Ed). The fact that neither r 14 nor any other rule in O 14 expressly empowers the court to extend time does not restrict the court's power to do so (at [29]–[34]). As the objective of O 14 r 14 is to ensure that applications for summary judgment are made as early as possible, a party who applies for an extension of time to file proceedings for summary judgment "must satisfactorily explain its delay so as to show persuasively why it should be allowed to potentially hold back the trial further (which would be the case if it is permitted to make its O 14 application out of time and that application is unsuccessful)":

at [37]. (*Vestwin Trading Pte Ltd* is also considered in the context of “Pleadings” at para 7.62.)

***Impact of close of pleadings on summary judgment applications where there are two or more defendants***

7.86 In *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR 540, the Court of Appeal determined that the singular noun “action” in O 18 r 20 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) did not conclusively indicate that there can only be one date for the deemed close of pleadings in a multi-party action. This is supported by the fact that O 14 r 1 does not preclude the application of different timelines to different defendants (at [17]). The Court of Appeal construed this rule purposively and determined that it had to contemplate separate timelines and directions being made in relation to each party in a multi-party action (at [19]–[20]):

The deadlines for a defendant to enter an appearance and to serve its defence depend wholly on when the writ is served on that particular defendant. These timelines can vary enormously for different defendants depending on whether the defendant concerned is served within or out of jurisdiction. Likewise, the deadline for each plaintiff in a multiparty suit to file its reply depends on when the plaintiff in question is served with the defence (see O 18 r 3(4) of the Rules, which provides that ‘[a] reply to any defence must be served by the plaintiff before the expiration of 14 days after the service on him of that defence’). Unrelated defendants in a multiparty suit may also raise substantively different defences at different times depending on when and where they are served with the writ. Indeed, some defendants, depending on the nature of the claim(s) mounted against them, may have defences and/or counterclaims which are incompatible with those of other defendants in the same suit. As such, it would be artificial, to say the least, to unthinkingly amalgamate the different timelines which may arise in a multiparty scenario and impose a single set of consolidated timelines across the board on all the defendants or, as the case may be, all the plaintiffs.

In addition, to hold that the pleadings in a multiparty action are deemed to be closed only 14 days after either the last defence (if O 18 r 20(1)(b) of the Rules applies) or the last reply (if O 18 r 20(1)(a) applies) is served may prejudice defendants who served their defences earlier. If pleadings remain open until 14 days after the last defence is served by a defendant in the action, the plaintiff could conceivably wield an undue strategic and timing advantage by controlling the progress of the proceedings. For instance, the plaintiff could deliberately refrain from serving the writ on one of the defendants so as to keep the pleadings open and thereby extend the time frame for making an O 14 application (see in this regard the time limit prescribed by O 14 r 14 as set out at [6] above). Clearly, in a multiparty scenario, the Rules do not intend to give the plaintiff the

right to subject some of the defendants to uncertain timelines based on when it actually serves the writ on the other defendants. It must logically follow that, in such a situation, as between a plaintiff and a defendant, the pleadings are deemed to be closed as between that plaintiff and that defendant – and those parties only – depending on when the former serves its reply (according to O 18 r 20(1)(a)) or when the latter serves its defence (according to O 18 r 20(1)(b)). As between these two parties, the date on which the pleadings are deemed to be closed does not depend on when the other defendants in the suit serve their respective defences or when the other plaintiffs serve their respective replies.

7.87 As to the discretion to extend time in cases involving two or more defendants, the plaintiff “must satisfactorily explain its delay so as to show persuasively why it should be allowed to potentially hold back the trial further (which would be the case if it is permitted to make its O 14 application out of time and that application is unsuccessful)” (*Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR 540 at [37]). The plaintiff may be able “to show good cause for granting an extension of time by pointing to the need to wait for the defences of all the defendants to be served before it can properly assess the *pros* and *cons* of invoking the O 14 procedure, as well as the greater inefficiencies of making separate summary judgment applications against the various defendants”. It may also be relevant if the plaintiff shows that “resolving the claims summarily as against some or all of the defendants may obviate the need for a trial altogether”. The plaintiff would have to show that it has “proceeded diligently in its conduct of the action” (at [37]).

7.88 The Court of Appeal also pointed out that the plaintiff should not assume that he can invariably obtain an extension of time to apply for summary judgment until after all the defendants have served their defences. If it were otherwise, “the outcome would be the same as that which would ensue if the pleadings in a multiparty action are deemed to be closed only 14 days after the last defence is served”. Such an outcome would be unjust because it would effectively confer on the plaintiff the same strategic advantage as that of serving the writ on different defendants at different times (*Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR 540 at [38]). The Court of Appeal added (also at [38]):

It goes without saying that even in a multi-defendant case, the court must exercise its discretion to extend the deadline laid down in O 14 r 14 by carefully assessing, on the one hand, the efficiencies and the desirability of sanctioning a consolidated summary judgment application against all the defendants and, on the other hand, any prejudice to any of the defendants in respect of which such an application (if it is permitted to be made) would be out of time. This will, of course, in the final analysis, involve a fact-sensitive exercise of discretion. Thus, a plaintiff seeking an extension of time to file its O 14 application would have to account for any undue lapses of time

between the various dates on which the writ was served on different defendants, while the defendants resisting the application for extension of time would have to show how they would be prejudiced if the plaintiff were to be allowed to make a late summary judgment application.

### ***Combination with striking-out application***

7.89 A party may combine an application for summary judgment with an application to strike out parts of a defence or its entirety in a single summons if a claim for alternative remedies is justified. Such an approach would not be appropriate where the applications are merely mirrors of each other; that is, where the objective is to eliminate the defence case entirely and there is no question of striking out one or more defences. Where the defence does consist of several parts, one or more of which may be struck out, striking out the respective part(s) may be the appropriate action for the court as opposed to giving summary judgment. However, the defendant must know the case he has to meet. The condition that an application for summary judgment may only be made after the service of the defence means that the defendant becomes entitled to bring alternative applications at the same point in time. See *Lee Hsien Loong v Review Publishing Co* [2009] 1 SLR 177 at [5]–[16] (“*Lee Hsien Loong*”), in which the High Court ruled that a combination of both applications was proper in the circumstances. Also see *Lim Eng Hock Peter v Lin Jian Wei* [2008] 4 SLR 444, in which the defendants applied under O 14 r 12 (for a determination of whether the words were defamatory) and O 18 r 19 (for the purpose of striking out the action on the basis that the words complained of could not bear any defamatory meaning).

### ***Amendments prior to filing an application***

7.90 The plaintiff must ensure that all necessary amendments to his statement of claim are made prior to filing his application for summary judgment. This principle was recently reiterated by Woo Bih Li J in *Lee Hsien Loong v Review Publishing Co* [2009] 1 SLR 177 (“*Lee Hsien Loong*”) at [26]. Woo J also endorsed *Chun Thong Ping v Soh Kok Hong* [2003] 3 SLR 204 (“*Chun Thong Ping*”) on the point that where the plaintiff makes an application to amend his statement of claim in the course of the summary judgment hearing prior to its conclusion, it will normally be permitted, if the defendant is provided with the opportunity to amend his defence (at [104]–[105]). Also note the observations of Woo J in *Lee Hsien Loong*, at [103]–[114], on *Chun Thong Ping* concerning the distinction between applications to amend prior and subsequent to the determination of the summary judgment proceedings.

### ***Pleading defences***

7.91 A respondent to an application for summary judgment must ensure that he pleads all the defences he intends to rely on in his pleading. If he fails to do so, he may not be able to raise a defence at the hearing of the application even if it is stated in his affidavit or other source. This principle, which was propounded by Judith Prakash J in *United States Trading Co Pte v Ting Boon Aun* [2008] 2 SLR 981 (“*United States Trading*”), reverses the previous practice which did not bind the defendant to the four corners of his pleading (see, for example, *Lin Securities (Pte) Ltd v Noone* [1989] 1 MLJ 321, which is cited in *United States Trading*, at [24]–[25]; and *Superbowl Jurong Pte Ltd v Sami’s Curry Restaurant Pte Ltd* [2007] SGDC 157). The binding effect of the defence pleading was also propounded in *Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd* [2008] 2 SLR 786 (decided within a week of *United States Trading*). Woo Bih Li J considered that the rule permitting the defendant to challenge an application for summary judgment “by affidavit or otherwise” (see O 14 r 2(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)) did not mean that he was entitled to omit defences from his pleading (*Lim Leong Huat v Chip Hup Hup Kee Construction Pte Ltd*, at [20]–[28]).

### ***Time of filing summons and affidavit***

7.92 Order 14 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) requires, *inter alia*, that the summons and affidavit supporting the application for summary judgment be served within three days after the filing of the documents. In *Mohamed Nizam s/o Mohamed Ismail v Sadique Marican Bin Ibrahim Marican* [2008] SGHC 189, the defendant raised the preliminary objection that this condition had not been complied with (service was effected on the fourth day after the filing of the summons). Judith Prakash J rejected the defendant’s argument that the court had no power to extend time under this rule. Although r 2(2) includes the obligatory word “must”, it did not prevent the court from rectifying the error pursuant to O 2 r 1(1) (read with O 2 r 1(2)). Also see O 14 r 2(7), which contemplates that an affidavit may be served beyond the prescribed period and empowers the court to order costs against the defaulting party in these circumstances: *Mohamed Nizam s/o Mohamed Ismail v Sadique Marican Bin Ibrahim Marican* [2008] SGHC 189 at [10]–[16]. In any event, the defendant had waived the plaintiff’s default pursuant to O 2 r 2(1) by taking further steps in the proceedings (at [17]–[19], applying *Regenthill Properties Pte Ltd v Management Corp Strata Title Plan No 2192* [2002] 3 SLR 445).

### ***Application to determine whether words are defamatory***

7.93 In *Lee Hsien Loong v Review Publishing Co* [2009] 1 SLR 177, the court also applied the principle that an application may be made pursuant to O 14 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to determine the meaning of the words complained of in a defamation action (at [26]). However, the determination of whether words are defamatory is not always appropriate for summary decision under O 14 r 12. In *Lim Eng Hock Peter v Lin Jian Wei* [2008] 4 SLR 444, an application was made approximately one month before the date fixed for trial. Tan Lee Meng J considered that “it would be far better to allow [the] action to proceed to trial than to have the parties bog themselves down with an appeal as to whether there should be a trial in the first place”: *Lim Eng Hock Peter v Lin Jian Wei* [2008] 4 SLR 444 at [42]. A hearing of the application in this case would not have saved time. Furthermore, as a primary issue was whether the defamation had been committed by innuendo, it would be necessary for the plaintiff to prove extrinsic facts. Proceedings under O 14 r 12 are not appropriate if the facts underlying the matter to be determined are or could be the subject of dispute. It has also been reiterated that while a court is entitled to determine complex or novel points of law under O 14 r 12, such an exercise should not be undertaken when the facts remain uncertain: *Sin Yong Contractor Pte Ltd v United Engineers (Singapore) Ltd* [2008] SGHC 43 at [28].

### **Striking out**

7.94 In 2008, the High Court applied its discretion to strike out an action or a defence in two cases with opposing results. In *Alliance Management SA v Pendleton Lane P* [2008] 4 SLR 1 (“*Alliance Management*”), the High Court struck out the defence for failure to comply with a requirement of discovery under O 24 r 16(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). In comparison, in *Lim Eng Hock Peter v Lin Jian Wei* [2008] 4 SLR 444 (“*Peter Lim*”), the High Court declined to strike out the plaintiff’s action under O 18 r 19 of the Rules of Court.

7.95 In the first case of *Alliance Management*, the High Court identified two principles which it had to consider in exercising its discretion to strike out pleadings. First, the Rules of Court or orders of court had to be observed for the proper administration of justice. The public interest in the administration of justice included the dispatch of litigation as expeditiously as justice allowed. Secondly, a party should not ordinarily be denied adjudication of his claim or defence on its merits because of procedural defaults such as non-compliance with the Rules of Court or orders of court, unless the default causes prejudice to

his opponents for which an award of costs cannot compensate. This was reflected in the court's discretion to extend time under O 3 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

7.96 However, where there was a total disregard of the rules or orders of court so as to amount to contumelious conduct or an abuse of process, a striking out order was appropriate regardless of whether a fair trial was possible or whether prejudice to the other party was shown (*Alliance Management SA v Pendleton Lane P* [2008] 4 SLR 1 at [14]). Since the defendants deliberately and persistently disregarded the order to produce the hard disk, Belinda Ang J held that striking out their defence was justified.

7.97 In contrast, in the second case of *Lim Eng Hock Peter v Lin Jian Wei* [2008] 4 SLR 444, the High Court applied the Court of Appeal's decision in *Gabriel Peter & Partners v Wee Chong Jin* [1998] 1 SLR 374 that, as a general rule, courts are rather reluctant to strike out an action. The power to strike out an action is a draconian one, and should not be exercised too readily unless the plaintiff's case is wholly devoid of merit. The practice of the court is that if the application for striking out involved a lengthy and serious argument, the court would decline to proceed with the argument unless it has doubts as to the soundness of the pleading and, in addition, it is satisfied that striking out would obviate the necessity for a trial or reduce the burden of preparing for a trial.

7.98 Tan Lee Meng J held that for the purposes of the striking-out application pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), it was not for the court to decide whether there was any merit in the plaintiff's assertion. What was relevant was that the plaintiff's case was not so hopelessly devoid of merit (*Lim Eng Hock Peter v Lin Jian Wei* [2008] 4 SLR 444 at [34]). Furthermore, a "reasonable cause of action" under O 18 r 19(1)(a) connoted a cause of action that had some chance of success when only the allegations in the pleading were considered. The learned judge held that since the plaintiff was alleging that he had been defamed by way of innuendo, he should especially be allowed to prove his allegations at a trial. Thus, there was no basis for striking out the plaintiff's action on the ground that it disclosed no reasonable cause of action.

7.99 In relation to an "abuse of process" under O 18 r 19(1)(d) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), Tan Lee Meng J approved of Scarman LJ's decision in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478, that strong evidence that the plaintiff was, in fact, seeking something beyond the protection and vindication of his reputation was required before the court could stay his defamation action as an abuse of process. Without such strong evidence, the learned judge held that he was in no

position to conclude that the action was an abuse of process (*Lim Eng Hock Peter v Lin Jian Wei* [2008] 4 SLR 444 at [37]).