

6. CIVIL PROCEDURE

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Appeals

6.1 A number of cases reported in 2004 dealt with appeals. Firstly, a number of these cases dealt with the rule in *Ladd v Marshall* [1954] 1 WLR 1489 on the admission of further evidence on appeal. Secondly, some cases dealt with the requirement of leave to appeal to the Court of Appeal under s 34(2) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) (“SCJA”). Thirdly, there were cases dealing with various aspects of Notices of Appeal. Two other cases dealt with other miscellaneous points.

The rule in Ladd v Marshall

6.2 Three cases dealt with the rule in *Ladd v Marshall* (*supra* para 6.1) on the admission of further evidence on appeal. *Ladd v Marshall* lays down three conditions that must be fulfilled before further evidence can be admitted on appeal:

- (a) it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial;
- (b) the evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive; and
- (c) the evidence must be apparently credible, though it need not be incontrovertible.

6.3 It was held in *Jurong Town Corp v Wishing Star Ltd* [2004] 2 SLR 427 that the *Ladd v Marshall* principles do not apply in an interlocutory appeal. The plaintiff, Wishing Star Ltd (“WSL”), had commenced legal proceedings against Jurong Town Corporation (“JTC”) for wrongful termination of

contract. After the matter had been set down for trial, JTC applied for security for costs. The assistant registrar dismissed JTC's application. This was affirmed by the High Court on appeal. In the meantime, trial had commenced. JTC appealed against the High Court's decision not to order security for costs. At that time, the trial was part heard and some witnesses had been examined. JTC sought to admit as evidence transcripts of the cross-examination of WSL's managing director.

6.4 The Court of Appeal held that the strict principles in *Ladd v Marshall* did not apply to an interlocutory appeal. The restriction in O 57 r 13(2) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) only applied to an appeal against "a judgment after trial or hearing of any cause or matter on the merits". Nevertheless, the court retained a discretion in the matter and should guard against attempts by a party to "retrieve lost ground" by relying on evidence which he could or should have put before the court below (at [27]). The court therefore dismissed the appeal and denied the motion to adduce the transcripts as the examination of WSL's managing director had not been completed and it would have been inappropriate for the court to reach any conclusion on such partial evidence.

6.5 The two cases of *Ang Leng Hock v Leo Ee Ah* [2004] 2 SLR 361 and *Lassiter Ann Masters v To Keng Lam* [2004] 2 SLR 392 dealt with the applicability of the *Ladd v Marshall* principles in the context of an appeal from a registrar's assessment of damages to a judge in chambers.

6.6 The High Court's decision in *Lassiter Ann Masters v To Keng Lam* [2003] 3 SLR 666 held that the principles of *Ladd v Marshall* applied to Registrar's appeals and found that the Court of Appeal decision in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 2 SLR 233 was not determinative of the issue.

6.7 The High Court in *Ang Leng Hock v Leo Ee Ah* (*supra* para 6.5) followed the High Court in *Lassiter Ann Masters v To Keng Lam* (*supra* para 6.6), holding that the *Ladd v Marshall* principles applied to appeals from a registrar's assessment of damages. The court found that the assessment hearing had all the characteristics of a trial and there was no fundamental difference with the hearing of a trial before a judge. On that basis, the High Court found no reason not to apply the *Ladd v Marshall* test to the adduction of fresh evidence on an appeal to the judge in chambers from an assessment of damages hearing before a registrar.

6.8 In *Lassiter Ann Masters v To Keng Lam* (*supra* para 6.5), the Court of Appeal dismissed an appeal from the decision of the High Court as there was no basis to overturn the judge in chambers' exercise of discretion in affirming the assistant registrar's decision. However, the Court of Appeal considered both the decisions of the High Court in *Lassiter Ann Masters v To Keng Lam* (*supra* para 6.6) and *Ang Leng Hock v Leo Ee Ah* (*supra* para 6.5) and reversed the position, holding that not all the conditions in *Ladd v Marshall* would apply to a Registrar's Appeal.

6.9 The Court of Appeal recognised that the objective of having an assessment of damages by a registrar was for administrative convenience to save the judges' time. This objective would not be met if parties were entitled to freely adduce new evidence on appeal to a judge in chambers. As a rule, parties should present their entire evidence at the assessment.

6.10 The Court of Appeal held, however, that a Registrar's Appeal should not be treated in the same way as an appeal from the judge in chambers to the Court of Appeal. A judge in chambers exercised confirmatory, not appellate jurisdiction. Therefore, not all the conditions in *Ladd v Marshall* should apply. The first condition would not apply as this was a very stringent requirement and would not be appropriate for a Registrar's Appeal.

6.11 However, parties should not assume that they were entitled to freely bring in fresh evidence. The discretion to admit fresh evidence rested with the judge and reasonable conditions must be set. In the premises, the second and third conditions of *Ladd v Marshall* would apply.

6.12 With respect, the Court of Appeal's decision strikes an appropriate balance. Parties must still make every effort to present all relevant evidence at the assessment. However, they are not prevented from bringing additional credible evidence on appeal to the judge in chambers if they have a good reason why this was not done before the Registrar.

Leave to appeal

6.13 In *Hailisen Shipping Co Ltd v Pan-United Shipyard Pte Ltd* [2004] 1 SLR 148, the Court of Appeal dismissed a motion by an intervener to have the plaintiff's appeal struck out on the ground that the plaintiff failed to apply for leave under s 34(2)(a) of the SCJA.

6.14 In that case, Pan-United Shipyard Pte Ltd ("PUS") had commenced an *in rem* action for the sum of \$170,000 due from Castle Shipping Company

and arrested the vessel *Dilmun Fulmar*. At this time, Castle had already sold the vessel to Hailisen Shipping Co Ltd (“Hailisen”). Hailisen applied as an intervener to set aside the warrant of arrest and sought damages for the wrongful arrest. The assistant registrar set aside the warrant of arrest, but did not award damages. On appeal, Belinda Ang Saw Ean J affirmed the assistant registrar’s decision, and ordered that Hailisen was entitled to damages to be assessed. PUS appealed against Ang J’s decision without seeking leave. Hailisen sought to strike out PUS’s appeal on the ground that s 34(2)(a) of the SCJA requires leave to be obtained for any appeal where the amount or value of the subject matter at the trial is \$250,000 or less, but the amount in dispute in the *in rem* action was only \$170,000.

6.15 The Court of Appeal held that the relevant question to be asked was what was the “subject matter” before Ang J (at [15]). The Court of Appeal found that the subject matter was “not the claim of \$170,000 of PUS but the questions of whether the warrant of arrest of the vessel should be set aside, and if so, whether there should be an order for an assessment of damages”. (at [15]). Neither of these bore any specific value. Thus, the matter did not fall within s 34(2) of the SCJA and no leave was required.

6.16 The other reported decision on the requirement of leave to appeal is *The Melati (No 2)* [2004] 2 SLR 555. In this case, the respondents took out a writ *in rem* against the appellants. However, the appellants did not take any steps in the proceedings until over a year later when they filed and served a statement of claim out of time.

6.17 The appellant objected to the late service of the statement of claim in breach of O 18 r 1 of the Rules of Court. The respondent applied to court seeking leave to extend time for filing of the statement of claim and a declaration that the statement of claim filed and served be deemed regular and in accordance with the Rules of Court. The assistant registrar dismissed the application and ordered the statement of claim to be struck out. On appeal, the judge in chambers allowed the appeal and extended time for the filing of the statement of claim and retrospectively validated the service of the statement of claim. After the judge certified that no further arguments were required, the appellant filed a Notice of Appeal. Eight days after the appellant’s case was filed, the respondent sought to strike out the appeal on the ground that s 34(2)(d) of the SCJA required leave to be obtained for any appeal against an order refusing to strike out an action or a pleading or a part of a pleading.

6.18 The Court of Appeal held that the fundamental question related to the true nature of the orders made by the judge. The judge below had exercised her discretion to grant an extension of time for the respondents to file the statement of claim out of time. That was not a refusal to strike out the statement of claim.

6.19 The nature or effect of the orders made by the judge should be apparent from the orders themselves. But if the orders were at all unclear, reference should be made to the prayers in the application. It was incorrect to refer to the orders made by the assistant registrar as these had been set aside by the judge in exercise of her confirmatory jurisdiction.

6.20 In any event, the judge was not dealing with any arguments that the statement of claim be struck out. The Court of Appeal pointed out that while s 34(2)(d) of the SCJA did not elaborate on what would amount to a refusal to strike out a statement of claim, O 18 r 19(1) of the Rules of Court made it clear that the process of striking out was meant to enable a defendant to have a wholly unmeritorious claim disposed of quickly. However, the judge did not deal with any arguments on the merits of the claim. Therefore, the judge's orders were really interlocutory orders which would come under s 34(1)(c) of the SCJA.

6.21 In *Essar Steel Ltd v Bayerische Landesbank* [2004] 3 SLR 25 the High Court dealt with the principles governing the court's discretion to grant leave to appeal to the Court of Appeal under s 34(2) of the SCJA. In this case, the plaintiff appealed to the High Court against the order of costs made by the assistant registrar and further applied for leave to appeal to the Court of Appeal in the event the judge was to dismiss the appeal.

6.22 The High Court first dismissed the appeal against the order of costs. Citing *Hoddle v CCF Construction* [1992] 2 All ER 550, the High Court pointed out that a judge in chambers generally would not allow an appeal from the registrar's costs order unless it was unreasonable or the registrar had erred in law. In the present case, it could not be said that the assistant registrar had acted without basis in awarding indemnity costs against the plaintiffs.

6.23 The High Court further dismissed the application for leave to appeal to the Court of Appeal as the present case failed the tests for granting leave. The High Court held that leave to appeal to the Court of Appeal might be granted where the applicant was able to show:

- (a) a *prima facie* case of error of law or fact that had a bearing on the decision of the trial court; or
- (b) that the decision touched on a general principle decided for the first time; or
- (c) that the decision touched on a question of importance on which further argument and the decision of the Court of Appeal would be to the public advantage.

6.24 The High Court clarified the uncertainty as to whether a *prima facie* case of error is sufficient for granting leave, as suggested in the case of *Anthony s/o Savarimiuthu v Soh Chuan Tin* [1989] SLR 607, or whether that should be limited to errors of law as stated in *Abdul Rahman bin Shariff v Abdul Salim bin Syed* [1999] 4 SLR 716. The High Court's decision struck a balance, holding that only where an aggrieved party could demonstrate that a clear error of fact had contributed or led to a judgment should he be allowed to rely on the error to seek leave to appeal. Other complaints would not be considered.

6.25 The High Court's decision to deny leave to appeal against the costs order made by the Magistrate's Court is final and conclusive. In *SBS Transit Ltd v Koh Swee Ann* [2004] 3 SLR 365, the appellant had applied to the Magistrate's Court for leave to appeal against the order made by the district judge for the appellant to pay the respondent damages and costs. The district judge refused to grant the appellant leave to appeal. The appellant then filed an originating summons in the High Court for leave to appeal, under s 21(1) of the SCJA read with O 55D r 4(3) of the Rules of Court. The High Court affirmed the district judge's refusal to grant leave. The appellant then filed a summons in chambers in the High Court for leave to appeal to the Court of Appeal pursuant to s 34(2)(b) of the SCJA read with O 56 r 3(1) of the Rules of Court, purporting to further appeal against the High Court's decision. The judge granted the appellant leave and the matter went before the Court of Appeal. The respondent objected to the application.

6.26 The Court of Appeal found that the respondent's preliminary objection was well founded and dismissed the appeal with costs. Citing a line of English authorities, the Court of Appeal held that it was an established common law principle that wherever an appeal against a decision could only be made with the leave of a particular authority, the decision of that authority was final and conclusive, unless an appeal from it was expressly given.

6.27 Since s 21(1) of the SCJA read with O 55D r 4(3) had appointed the High Court as the authority with the final jurisdiction to grant or refuse leave to appeal against a magistrate's decision, there was no further recourse once the High Court had decided on the matter. The fact that the appellant made an application for leave under s 34(2) of the SCJA did not confer jurisdiction on the judge to grant the appellant leave to appeal against his decision. The objective of s 34 of the SCJA was to restrict appeals to the Court of Appeal and therefore could not be used as a mechanism to override the common law principle.

6.28 The Court of Appeal further held that it would be inappropriate to allow an appeal to be brought under a provision designed to restrict appeals. An appeal against the refusal of leave would involve the higher court examining the merits of the decision appealed against. This was the very thing that the provision was designed to prevent.

6.29 In *RBG Resources plc v Banque Cantonale Vaudoise (No 2)* [2004] 4 SLR 211, the plaintiff ("RBG") had obtained judgment against the second defendant ("CL") but was awarded only 70% of the costs as it did not succeed on an issue it had raised ("the Sale of Goods issue"). CL appealed against the entire decision of the court.

6.30 RBG then filed an application for leave to appeal against the costs order, seeking full costs as it had effectively succeeded in the action. RBG also argued that it should be granted leave to appeal as it intended to file a respondent's notice in CL's appeal against the court's decision on the Sale of Goods issue. RBG argued that it would be deprived of a chance to seek variation of the costs order if the Sale of Goods issue was decided in its favour on appeal as prior leave was required under s 34(2)(b) of the SCJA to do so.

6.31 The High Court dismissed the application, holding that it was usual for a party to be denied the full costs of his claim because he had failed on an issue raised by him.

6.32 Further, since the concept of a respondent's notice had been done away with, RBG would have to raise the Sale of Goods issue in its respondent's case instead, under O 57 r 9A(5) of the Rules of Court. Moreover, if RBG were to be granted leave to appeal, RBG could carry on with the appeal even if CL were to withdraw its appeal. That would be contrary to a respondent's case. On the other hand, if an order were to be made that RBG's appeal should be withdrawn upon the withdrawal of CL's

appeal, that would make RBG's appeal effectively a respondent's case. Thus, the correct procedure was for RBG to seek a variation of the costs order in its respondent's case filed pursuant to CL's appeal.

Notice of appeal

6.33 A number of cases reported in 2004 dealt with various aspects relating to notices of appeal. In *Tan Soo Giem v Yeo Ching Chua* [2004] 1 SLR 408, the High Court affirmed the district judge's decision that a Subordinate Court had jurisdiction to extend time for the filing of an application for leave to appeal to itself under O 55D rr 4(2) and 4(3). The High Court distinguished the case of *Chen Chien Wen Edwin v Pearson* [1991] SLR 578 on the basis that there was no equivalent provision of the present s 21(1) of the SCJA nor O 55D rr 4(2) and 4(3) when that case was decided.

6.34 When a judge agrees to hear further arguments, only decisions relating to that request would be put on hold. It follows that a notice of appeal against the whole decision must be filed within one month from the date of the judgment: *Lim Kok Koon v Tan JinHwee Eunice & Lim ChooEng* [2004] 2 SLR 322.

6.35 In *AD v AE* [2004] 2 SLR 505, the respondent wife served a notice of appeal 49 days out of time and took a further 23 days to apply for an extension of time to serve the notice of appeal. The district judge viewed the lapse of the clerk of the respondent's solicitors as a poor excuse but allowed the application for an extension of time because the issue in the substantive appeal concerned the custody and welfare of a child, which was of paramount importance.

6.36 The Court of Appeal allowed the appeal against the district judge's decision, holding that an application to extend time to serve a notice of appeal was no different in nature from an application to extend time to file a notice of appeal out of time and would be treated on the same basis. The Court of Appeal also held that it was settled law that four factors were considered in determining whether an extension of time should be granted to a party to either file or serve a notice of appeal out of time: the length of the delay, the reason for the delay, the chances of the appeal succeeding if the time for appealing was extended, and the degree of prejudice to the would-be respondent if the application was granted. In the present case, there was no basis for the court to exercise its discretion to extend time.

6.37 The court further held that the Rules of Court did not differentiate, based on the nature of the proceedings, as to how the discretionary power to extend time under O 3 r 4 would be exercised. It was no less important that the matter in dispute should be brought to an end as soon as possible in custody proceedings.

6.38 The case of *Teo Chee Yeow Aloysius v Tan Harry* [2004] 3 SLR 588 highlighted the importance of parties setting out the specific grounds of appeal in their notices of appeal. In this case, the appellants appealed to a judge in chambers against different aspects of the damages awarded by the assistant registrar. The judge in chambers ruled in favour of each of the appellants. It was only at this stage that counsel for the appellants submitted that each appellant should be entitled to the benefit of the other's successful appeal. The judge rejected this submission.

6.39 The Court of Appeal dismissed the appeal, stressing that the onus was on the parties to raise the issues. The appellants were not entitled to the benefits of the appeal of a co-appellant without raising the relevant issues on appeal and bearing all the attendant risks. It was a basic tenet of the administration of civil justice that a party who was dissatisfied with an order of the court should appeal against that order. The parties should have indicated to the judge in chambers that they would like to enlarge their notices of appeal, and the judge would have had the discretion to allow the oral amendments.

6.40 That an appeal to the judge in chambers operates by way of a rehearing did not assist the appellants. The principle of rehearing only means that the judge is entitled, where an issue is raised before him on appeal, to determine the matter unfettered by the discretion exercised by the registrar.

6.41 Further, while the damages which joint tortfeasors are liable to pay will ordinarily be the same, it does not follow that the amount to be paid by each tortfeasor must be the same. The principle of joint liability only means that a tortfeasor may be able to ask a joint tortfeasor to contribute in relation to a head of damages which both are held to be liable for.

6.42 In *Projector SA v Marubeni International Petroleum (S) Pte Ltd (No 2)* [2005] 2 SLR 1, the Court of Appeal clarified the principles applicable to the issue of amending a notice of appeal. The defendant appealed against the decision of Woo Bih Li J reported in *Projector SA v Marubeni International Petroleum (S) Pte Ltd* [2004] 4 SLR 241. The defendant had applied for leave to amend the notice of appeal. Woo J dismissed the

application and held that the fact that a respondent could be compensated by costs was only a factor leaning in favour of allowing the amendment.

6.43 Citing *Leong Mei Chuan v Chan Teck Hock David* [2001] 2 SLR 17 and the English decision of *Costellow v Somerset County Council* [1993] 1 All ER 952, the Court of Appeal held that the court should generally be inclined to grant the amendment unless the circumstances were such that the opposing party would sustain grave prejudice or hardship that could not be compensated by costs. If the prejudice sustained by reason of the amendment could be addressed by an order as to costs, then the order permitting the amendment should be granted. The defendant was allowed to amend its notice of appeal.

Miscellaneous

6.44 In the unreported decision of *Wee Soon Kim Anthony v UBS AG (No 4)* [2004] SGCA 33, the Court of Appeal set aside the trial judge's finding that there was misrepresentation by the respondent bank's officers. The Court of Appeal was mindful that this was a finding of fact. However, the Court of Appeal noted that the trial judge had not found the bank officers to have been unreliable witnesses and held that it was in as good a position as the court below to come to a determination on the factual issue, following the decision in *Teknikal dan Kejuruteraan Pte Ltd v Resources Development Corp (Pte) Ltd* [1994] 3 SLR 743.

6.45 The Court of Appeal further dismissed the appellant's appeal against a finding of fact of the trial judge as there was no basis to interfere with that finding. Following the principle in *Peh Eng Leng v Pek Eng Leong* [1996] 2 SLR 305 and *Seah Ting Soon v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR 521, it held that an appellate court would not upset a finding of fact which was based on the evidence of witnesses, unless the appellant satisfied the appellate court that this determination of the trial judge was plainly wrong. On the facts, the decision of the court below was plainly correct.

6.46 In *Banque Cantonale Vaudoise v RBG Resources plc* [2004] 4 SLR 856, the High Court dealt with a discovery application filed before an appeal against a summary judgment was heard.

6.47 In this case, the second defendant ("Fujitrans") appealed against summary judgment granted by an assistant registrar. Before the appeal was heard, Fujitrans filed a discovery application for documents from the plaintiff ("BCV"). The appeal was then held in abeyance. An assistant

registrar heard the discovery application and dismissed it save for one category. Fujitrans then filed an appeal against the assistant registrar's decision.

6.48 On appeal, Fujitrans argued that it had filed the discovery application before the appeal was heard as it wanted to show the court with certainty the information and documents which would be referred to by its banking expert in his affidavit for the appeal. Fujitrans claimed that its application for leave to adduce additional evidence on appeal would be speculative without knowing the outcome of the discovery application.

6.49 The court held, *obiter*, that Fujitrans' discovery application to the assistant registrar and its appeal against that decision was premature. As summary judgment had already been granted to BCV by an assistant registrar, the office of the assistant registrar was *functus officio* save for claims which were not the subject of the summary judgment. The discovery application should not have been made to the assistant registrar.

6.50 The discovery application should have been made by way of a preliminary application to a judge in chambers in the summary judgment appeal. However, the question of whether Fujitrans should be granted leave to adduce further evidence had to be decided first before the discovery application. The discovery application would or might affect the outcome of the leave application. It was for the judge hearing the leave application to decide whether to grant leave or not, and if so, leave could be granted subject to a successful discovery application.

Costs

6.51 Where the plaintiff reasonably assumes that the damages which he may recover would exceed the District Court limit, he may commence proceedings in the High Court without fear of being penalised in costs: see *Cheong Ghim Fah v Murugian s/o Rangasamy (No 2)* [2004] 3 SLR 193 (applying s 39(6) of the Subordinate Courts Act (Cap 321, 1999 Rev Ed)). The court stated that the test for applying s 39(6) "is not one of hindsight but of reasonableness refracted through the factual prism existing when the proceedings were initiated" (at [14]). If, in the course of High Court proceedings, it is clear that upper limit of the claim is within the jurisdiction of the Subordinate Courts "steps ought to be taken immediately to transfer the proceedings to the appropriate forum" (*ibid*).

6.52 The general principle that the successful party is entitled to his costs applies even though costs have been “thrown away” by the unsuccessful party in the latter’s preparation for the cross-examination of witnesses as a result of the successful party’s election not to adduce evidence. However, the successful party may be liable for part of the hearing fees if he could have reasonably informed the unsuccessful party in advance, thereby saving the latter from incurring the costs incurred: see *Afro-Asia Shipping Co (Pte) Ltd v Da Zhong Investment Pte Ltd (No 2)* [2004] 3 SLR 274 at [12].

6.53 The effect of the issue-based approach (developed in *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020 at [27]) is that where a case involves more than one issue the court will determine costs on an issue by issue basis. Accordingly, where a party has won on a particular issue and has not acted unreasonably in conducting his case in respect of that issue, he will obtain costs arising out of that issue. In *Khng Thian Huat v Riduan bin Yusof* [2005] 1 SLR 130, at [20], the High Court observed that *Summit Property Ltd v Pitmans* “was inspired by the new English Civil Procedure Rules, which effectively redefined the legal costs landscape in England” and that the issue by issue approach should not be adopted as a usual costs order in Singapore (at [21]).

6.54 In *Afro-Asia Shipping Co (Pte) Ltd v Da Zhong Investment Pte Ltd (No 2)* (*supra* para 6.52), the court ruled that an unsuccessful plaintiff was not entitled to the costs incurred in preparing for the cross-examination of witnesses merely because the defendant subsequently elected not to call the witnesses (so that those costs are “thrown away”). As this right of election was made available by the rules so that costs would not be incurred unnecessarily and the case would be expedited, the policy would be undermined if the defendant were to be penalised by having to pay the plaintiff’s costs in these circumstances (at [9]). However, the defendant was ordered to pay 85% of the hearing fees as, in the circumstances of the case, it could have reasonably indicated its intended election to the plaintiff before the latter incurred the costs (at [12]).

Discontinuance

6.55 In *The Melati* [2004] 4 SLR 7 at [17], the Court of Appeal ruled that the filing of a statement of claim with the Registry, even if it was filed out of time, was “a ‘step’ as it is clearly an act to move the action forward towards resolution”. This was because the combined effect of the rules (O 2 rr 1(1) and 1(2) of the Rules of Court) was that “a step or proceeding, though taken out of time, is to be treated as regular until unless set aside” (at [20]). It was

for the other party to take initiative to set aside an irregular step and, until he did so, that step continued to be irregular (*ibid*). The Court of Appeal agreed with the observation of Judith Prakash J in *Moguntia-Est Epices SA v Sea-Hawk Freight Pte Ltd* [2003] 4 SLR 429 that as O 21 r 2(6) required the “step” to be one which appeared from the records maintained by the court, the act of filing, but not service, constituted a step (at [24]). The Court of Appeal pointed out that if the plaintiff abused the rule by filing a statement of claim to stop the one-year period running without any intention to pursue his action, the court would act by refusing leave to serve the pleading and by striking it out. It admonished (*ibid*):

The court has sufficient arsenal to deal with a party who abuses its process. We seriously doubt there would be many litigants who would deliberately take such a risk and put the court’s patience to the test.

See also the decision of the High Court in *The Melati* [2003] 4 SLR 575 at [9].

6.56 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 Pte Ltd v Teo Cheow Ngoh* [2004] SGHC 261.

Discovery and production of documents

6.57 In *Bayerische Hypo- und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39 (“*Bayerische*”), the High Court allowed an appeal from an application for pre-action discovery under O 24 r 6(3) of the Rules of Court.

6.58 Following the decision in *Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169, the court held that an application for pre-action discovery must be supported by an affidavit setting out the grounds for the application, the material facts pertaining to the intended action, and whether the person against whom the order was sought was likely to be a party to subsequent proceedings. Material facts did not mean all the facts sufficient to constitute the elements of the cause of action, but facts sufficient to explain why the pre-action discovery was necessary. The tests of “possession, custody or power” and “relevance” remained applicable for the purposes of pre-action discovery. The court should ensure that the application was not frivolous or speculative and that the applicant was not on a fishing expedition.

6.59 The court in *Bayerische* held that the respondent banks had failed to establish a reasonable basis for pre-action discovery. A disbelief in the appellant's position itself could not be a sufficient reason.

6.60 It is important for the applicant to state in his affidavits or submissions that the applicant would be unable to plead a case without pre-action discovery, as this is the purpose behind pre-action discovery. The High Court in *Bayerische* thus held that the respondents were not constrained from starting proceedings without pre-action discovery. In the circumstances, it was inappropriate to order pre-action discovery and the respondents would have to seek discovery in the normal course after the commencement of proceedings.

6.61 The applicant must also address the necessity of disclosure. The court must be satisfied that discovery is necessary either for disposing fairly of the cause or matter or for saving costs under the overriding principle in O 24 r 7 of the Rules of Court. The respondents had focused only on the relevancy of the documents but did not address their necessity. An assertion that the documents were necessary because they were relevant would not suffice. Documents could be relevant to a case without being necessary to it. The court held that as necessity for disclosure under O 24 r 7 was not demonstrated, the application would not be upheld.

6.62 *Bayerische* was followed in *Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd* [2005] 1 SLR 266. The High Court upheld the assistant registrar's order granting the plaintiff pre-action discovery and commented obiter on "pre-arbitration discovery".

6.63 The plaintiff had initially intended to refer the disputes to arbitration under an arbitration clause in the contract between the parties. The plaintiff later changed its mind and indicated an intention to institute legal proceedings instead as the arbitration clause might not cover all its claims against the defendants. The plaintiff then obtained pre-action discovery.

6.64 The plaintiff argued that the court had an inherent jurisdiction to grant pre-arbitration discovery, based on O 24 r 6(1) of the Rules of Court, read with para 12 of the First Schedule of the SCJA. The plaintiff argued that the court must have power to grant discovery where arbitration proceedings were contemplated. Otherwise, the plaintiff would have no recourse as the arbitral tribunal would not have been constituted. As a matter of policy, the

court's inherent powers and jurisdiction could not be ousted by a private agreement to arbitrate, based on O 92 r 4.

6.65 The defendant, on the other hand, argued that while s 18 of the SCJA referred to powers vested in the High Court by written law, there was no provision vesting power to order pre-arbitration discovery in the First Schedule of the SCJA. Further, s 31 of the Arbitration Act (Cap 10, 2002 Rev Ed) provided powers to the court in support of arbitration proceedings which had *already commenced*. O 69 of the Rules of Court, which provided the procedure for arbitration proceedings, equally made no reference to pre-arbitration discovery. The reference to “any proceedings” in para 12 of the First Schedule could only be a reference to court proceedings, not arbitration proceedings.

6.66 The court did not decide the point as the plaintiff confirmed its intention to commence a suit. However, the court said that the defendant's arguments had cast some doubt on whether the court's inherent jurisdiction would extend to ordering pre-arbitration discovery.

6.67 It may be prudent to obtain an express undertaking from the opposing party along the line of the *Riddick* principle when disclosing sensitive documents in discovery (see *Riddick v Thames Board Mills Ltd* [1977] QB 881). In the unreported case of *Mopi Pte Ltd v Central Mercantile Corporation (S) Ltd* [2004] SGHC 41, the applicant sought leave to use documents disclosed by the respondent in proceedings against third parties.

6.68 The respondent was aware that the documents sought by the applicant might implicate third parties. The respondent was suspicious of the applicant's motives and highlighted these suspicions to the judge in chambers on appeal from the assistant registrar's discovery order. Taking into account the respondent's reservations, the judge ordered the applicant to provide an express undertaking not to use or disclose the documents to a third parties without leave of court, although there was already the implied undertaking under the *Riddick* principle. Further, the applicant was ordered to undertake to return all the documents and not to make copies of the same.

6.69 The High Court held that the orders made by the judge were telling and to grant leave to the applicant to use the documents for another action against third parties would negate the effect of the express undertakings given by the applicant. Further, the court should exercise the discretion to release or modify the implied undertaking only in very exceptional cases, following *Microsoft Corp v SM Summit Holdings Ltd (No 2)* [2000] 1 SLR 343.

6.70 In *Banque Cantonale Vaudoise v RBG Resources plc* (*supra* para 6.46), the High Court dismissed an appeal against a decision by an assistant registrar refusing to grant specific discovery. The court pointed out that the main issue was the relevancy of the documents sought. On the facts, the court held that the application was a fishing expedition. The appellant had filed the discovery application before its appeal against the summary judgment ordered against it was heard. The court found that the discovery application was an attempt to support its appeal against the summary judgment.

6.71 In the unreported decision of *Soh Lup Chee v Seow Boon Cheng* [2004] SGHC 8, the High Court dealt with an application to strike out the defence for contumelious breach of discovery orders. The court had ordered that the application be heard as part of the issues at trial, instead of at the interlocutory stage, as the same issues were likely to arise during trial. The court pointed out that it was difficult to order production of documents at the interlocutory stage when the party in question had sworn that he did not possess the documents sought.

6.72 However, at the end of the trial, the court was satisfied that the plaintiffs' case failed because of the inherent inadequacy of their own primary evidence and not because of non-disclosure of the documents sought. The documents had, at best, only corroborative value. The court was satisfied that the defendants had complied substantially with the discovery orders and accordingly there was no breach of the discovery orders sufficient to warrant a striking out of the defence.

6.73 *Royal Global Exports Pte Ltd v Good Stream Co Ltd* [2004] 4 SLR 247, the second defendant ("Trustrade") sought to vary the Mareva order obtained by the plaintiff so as to enable the first defendant ("Good Stream") to pay its debts to Trustrade. The plaintiffs objected to the variation, arguing that the *bona fides* of the payment was in issue because of alleged close links in the common ownership of both the defendants. The plaintiffs applied for, *inter alia*, production of documents to elicit evidence of the relationship between the two defendants, as well as the persons behind the companies. They argued that the "eye of equity" should look behind the corporate veil in order to do justice.

6.74 The High Court held that production of documents was unnecessary. The "eye of equity" would look behind the corporate veil to do justice if the character of a company or the nature of the person controlling it was relevant. However, on the facts in this case, it did not matter even if the

same people were behind both the defendants. It was undisputed that Trustrade was the ship manager of the vessel, while Good Stream owned the vessel. It was not the plaintiffs' case that Good Stream was a mere nominee.

6.75 In *Ong Jane Rebecca v Lim Lie Hoa (No 5)* [2004] 4 SLR 301, the High Court dealt with an application by the respondents to expunge certain documents from the index of the record of appeal filed by the appellant on the basis that the documents were not before the assistant registrar below in an inquiry ordered under an originating summons or before the judge on appeal.

6.76 The judge in the originating summons had ordered that the documents of the appellant's former father-in-law's estate ("the Estate") "shall be evidence of the matters contained therein with liberty to the parties to take such objections as they think fit" ("the judge's order") ([1996] SGHC 140 at [4]). The appellant argued that the documents were part of the record of appeal based on: (a) the judge's order, and (b) pursuant to para 53 of the Supreme Court Practice Directions (1997 Ed) ("the PD"), as the documents had been brought into chambers and were therefore produced before the assistant registrar and subsequently the judge on appeal.

6.77 The High Court held that the judge's order did not make a predetermined inclusion of the documents. Whether the document could be relied upon was a matter to be argued before the court at the inquiry. Further, under para 53 cll (1)(a)(iv) and (v) of the PD, the only documents to be included in the record of appeal would be those that had been admitted as agreed bundles, or referred to but not included in any exhibit. Since the documents were not admitted, and no formal application was made to the assistant registrar to admit them, the document had to be excluded from the record of appeal. Even if the documents were brought physically into chambers, the High Court hearing a Registrar's Appeal could only rely on the papers filed and/or admitted before the Registrar unless the additional documents were identified and admitted.

Injunctions

6.78 In *Royal Global Exports Pte Ltd v Good Stream Co Ltd* (*supra* para 6.73), a Mareva injunction was varied to allow the defendant to pay its debts. The court pointed out that a variation would normally be permitted if it did not conflict with the policy underlying the Mareva jurisdiction. As a matter of principle, the plaintiff who has obtained a Mareva injunction does

not by the acquisition of this relief attain a preferential standing over other creditors which he would not otherwise have.

6.79 The court has a discretion in deciding when to enforce an undertaking in damages. It may do so when the interim injunction is discharged or at trial. In *Marubeni International Petroleum (S) Pte Ltd v Projector SA* [2004] 4 SLR 233 at [15], the court decided to reserve this matter for the trial judge after adjudication of the merits. The court pointed out that whether it should be enforced depended upon the circumstances in which the order was obtained and whether the plaintiff was successful at trial. If the court determined that the defendant was entitled to damages, it must decide on quantum (applying *Financiera Avenida SA v Shiblaq* [1991] TLR 21).

6.80 The court will order a deponent to be cross-examined on his affidavit of assets relating to a Mareva injunction if, in all the circumstances, it is just and convenient to do so. The court is likely to exercise this power, which is necessary to the efficacy of Mareva relief, when real doubts are raised as to whether the deponent has disclosed all his assets. The court has applied the Mareva injunction to all assets of the party against whom the injunction operates, including his salary: see *OCM Opportunities Fund II, LP v Burhan Uray* [2004] 4 SLR 74. Also see *Royal Global Exports Pte Ltd v Good Stream Co Ltd* (*supra* para 6.73, at [8]) where cross-examination was not necessary in the circumstances of the case.

6.81 In *OCM Opportunities Fund II, LP v Burhan Uray* [2004] SGHC 115, the defendant sought to set aside an *ex parte* worldwide Mareva injunction on the ground that the plaintiffs did not have a “good arguable case”, there was no risk of dissipation and there had been material non-disclosure. The High Court ruled that none of these grounds had been made out and dismissed the application for a discharge.

Interrogatories

6.82 A court may be more prepared to allow interrogatories to be put to a party rather than to accede to an application for specific discovery against him. This is particularly the case where the application for specific discovery is intended to “fish” for information and to “harass” or “embarrass” the party and the discovered documents might not even be relevant to the issues. This was the observation of the High Court in *XACCT Technologies Ltd v Orient Telecommunication Networks Pte Ltd* [2004] SGHC 144, when it set aside the assistant registrar’s order for specific discovery and permitted the plaintiff to

put specific interrogatories to the defendant (as this process would be “more direct ... and less intrusive”: at [4]).

Judgments

6.83 The High Court in *Godfrey Gerald QC v UBS AG* [2004] 4 SLR 411 emphasised that draft orders need not be submitted to an unrepresented party for approval under O 42 r 8(5) of the Rules of Court. The represented parties are only required to submit the draft order to the Registrar. The fact that one of the unrepresented parties is legally qualified does not alter the literal purport of the rule dispensing service on unrepresented parties. The criterion is the fact of legal representation, not the identity of the party. An unrepresented party’s interests are safeguarded by the Registrar who is required under O 42 r 8(5) to supervise the process of extracting an order of court.

6.84 In *Burswood Nominees Ltd v Liao Eng Kiat* [2004] 2 SLR 436, the applicants (“BN”) had sued the respondent (“Liao”) in the Supreme Court of Western Australia for a dishonoured cheque that Liao gave BN in exchange for a credit slip. Liao had exchanged the credit slip for gaming chips at a casino owned by BN. BN obtained judgment in default of appearance and registered the judgment in Singapore pursuant to O 67 of the Rules of Court read with ss 3 and 5 of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) (“RECJA”).

6.85 On appeal from the Registrar, the High Court held that it was not against the public policy in Singapore to allow recovery of money lent for the purposes of gambling abroad, so long as the transaction was a genuine loan which was valid and enforceable according to that foreign law. Further, the doctrine of comity of nations was not to be taken lightly and it was not within the purview of a Singapore court to question the legality of a judgment obtained in a court of competent jurisdiction. BN was allowed to register the default judgment in Singapore.

6.86 On appeal (*Liao Eng Kiat v Burswood Nominees Ltd* [2004] 4 SLR 690), the Court of Appeal ruled that in determining whether s 3(2)(f) of the RECJA should apply to preclude the registration of a foreign judgment a court was entitled to re-characterise the cause of action pursued in the foreign proceedings. The Court of Appeal found that the claim was for money won upon a wager, not an action upon a loan. It also held that the non-justiciability of an action in Singapore did not mean that a judgment obtained in such an action in a foreign court could not be enforced pursuant

to s 3(2)(f) of the RECJA. Accordingly, although s 5(2) of the Civil Law Act (Cap 43, 1999 Rev Ed), which precluded domestic actions based on wagering contracts, would have prevented such an action in the Singapore courts, the judgment could be enforced in Singapore. Another significant point made by the Court of Appeal concerns the application of s 3(1) of the RECJA whenever the grounds of s 3(2) are being considered. It must be just and convenient for the judgment to be enforced in Singapore.

6.87 In *Cheong Ghim Fah v Murugian s/o Rangasamy (No 2)* (*supra* para 6.51) (“*Cheong Ghim Fah*”), the court faced the question of whether a suit may be commenced in the High Court, irrespective of the amount of the claim, for the sole purpose of ensuring that any judgment which may be obtained can be enforced in a foreign jurisdiction. As a general rule, common law jurisdictions only enforce the foreign judgments of superior courts, *ie*, the judgments of the High Court, not the subordinate courts. This principle is formulated in the RECJA, s 3(1) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), s 3(1). In *Cheong Ghim Fah*, the court endorsed the argument that a claim below the subordinate courts’ pecuniary limit could be pursued in the High Court for the purpose of enforcement of a possible judgment in a foreign jurisdiction: compare *Sunlink Engineering Pte Ltd v Koru Bena Sdn Bhd* [2003] 2 SLR 452, in which the High Court emphasised that a transfer to the High Court for the purpose of enforcement must be considered in the administrative context so that the High Court’s resources would not be misallocated.

6.88 In *The MMM Diana ex Able Director* [2004] 3 SLR 611, the High Court held that the correct procedure for setting aside a default judgment obtained pursuant to an “unless order” was to file an application to be heard by the Registrar for an extension of time to comply with the order and to set aside the default judgment. It was incorrect for the defendants to have appealed against the default judgment.

6.89 For a case involving an application for an order of *certiorari* to quash a doctor’s certification that the applicant was fit to be caned, see *Tan Eng Chye v The Director of Prisons (No 2)* [2004] 4 SLR 521. The High Court ruled that the application was misconceived. The doctor’s report could not be challenged by judicial review as the doctor had discharged a “non-decision making” duty (at [8]).

Jurisdiction

6.90 In *The MMM Diana ex Able Director* (*supra* para 6.88), the High Court held that a registrar, including an assistant or deputy registrar had the jurisdiction to hear an application for extending a deadline imposed by an earlier order made by an assistant registrar and to set aside the default judgment or unless order. It was only after a decision was made thereon that an appeal might be made to a judge against that decision.

6.91 Woo Bih Li J referred to the decision in *Changhe International Investments Pte Ltd v Banque Internationale A Luxembourg BIL (Asia) Ltd* [2000] 4 SLR 449 (“*Changhe International*”) where it was held at [4] that:

Procedurally, the assistant registrar could not entertain the plaintiffs’ application and could not normally vary another assistant registrar’s order. He lacked jurisdiction to do so.

6.92 The High Court held that the decision in *Changhe International* only applied in a situation where the assistant registrar was effectively being asked to give a different ruling on a point which had already been argued before and decided by another assistant registrar.

6.93 The court has an inherent jurisdiction to clarify a court order by making a consequential order (for example, in relation to costs): see *Godfrey Gerald, QC v UBS AG* [2004] 4 SLR 411.

Offer to settle

6.94 In the case of *Man B&W Diesel SE Asia Pte Ltd v PT Bumi International Tankers (No 2)* [2004] 3 SLR 267, the Court of Appeal dismissed the appellants’ request for indemnity costs under O 22A r 9 of the Rules of Court.

6.95 In the original action, the appellants were the successful parties and were awarded costs. At the trial below, the appellants made an offer to settle for US\$1.5m and the offer was open for 14 days. The respondent rejected the offer. In view of the respondent’s rejection of the offer, the appellants sought indemnity costs.

6.96 The Court of Appeal pointed out that under O 22A r 9(5) and O 2A r 12 of the Rules of Court, the court retained a discretion and was not obliged to award indemnity costs. Further, the appellants would be entitled to indemnity costs only if the offer was on the table up to the disposal of the

claim. Since the appellants' offer to settle was valid for only 14 days, the appellants were not entitled to indemnity costs.

6.97 The court also rejected the respondent's arguments resisting indemnity costs. It did not matter that the offer was made rather late, after trial had started, as the scheme in O 22A of the Rules of Court allowed an offer to settle to be made at any time. Moreover, the fact that the respondent managed to establish two out of three elements was irrelevant. The respondent failed in the action and must therefore bear the costs of the whole action.

6.98 With regards to offers to settle in general, the Court of Appeal held that the element of compromise should be present in an offer to settle and the offer must be serious and genuine. What would constitute a serious and genuine offer was dependent on the circumstances of the case.

6.99 This decision was followed in the unreported case of *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd (No 2)* [2004] SGCA 28, where the defendant was awarded indemnity costs pursuant to O 22A r 9 as the offer was genuine and still on the table as at the date of judgment.

6.100 In *SBS Transit Ltd v Koh Swee Ann* (*supra* para 6.25), the Court of Appeal dealt with the relationship between statutory offers to settle and Calderbank letters, *ie*, letters marked "without prejudice save as to costs".

6.101 In that case, the appellant had offered to settle the respondent's claim for \$6,322 through a Calderbank letter. The respondent rejected the offer. The appellant then served on the respondent a formal offer to settle for \$3,161 pursuant to O 22A r 1, which was also not accepted. The district judge found the appellant 80% liable and ordered to pay the respondent \$6,065.85 as damages and costs of \$3,500 plus reasonable disbursements. While the Court of Appeal dismissed the appeal on the ground that it had no jurisdiction, the court took the opportunity to make some observations on the issue.

6.102 The Court of Appeal held that a Calderbank letter was not a valid offer to settle within the statutory offer to settle scheme in O 22A. A formal, valid offer to settle must be in Form 38A, as required by O 22A. Since the Calderbank letter was not a formal offer to settle, normal contractual principles of offer and acceptance would apply. The offer in the letter had been terminated by the respondent's rejection. Further, while Calderbank

letters were recognised in Singapore and might influence the exercise of a court's discretion as to costs, they did not *govern* the court's discretion in the same way as a valid offer to settle.

6.103 Two unreported decisions dealt with the issue of whether an offer to settle served after the commencement of proceedings was a serious and genuine offer. Both decisions cited the unreported judgment of the Court of Appeal in *Neo Hock Pheng v Teo Siew Pheng* [1999] SGCA 100 ("*Neo Hock Pheng*") which held that "the lesser time the party receiving the offer is given to consider whether to accept it or not is a material factor in deciding whether the offer was a genuine offer to settle" (at [24]).

6.104 In *RBG Resources plc v Banque Cantonale Vaudoise* [2004] SGHC 167, the High Court clarified that *Neo Hock Pheng* did not lay down a general rule that an offer to settle made before or even after the commencement of trial would be considered as one which was not genuine. It would depend instead on all the circumstances of the case. In the present case, while the High Court was of the view that the offer was made to put pressure on the offeree, the pressure was legitimate and the offeree had adequate time to consider the simple terms of the offer. The High Court agreed with the decision in *LK Ang Construction Pte Ltd v Chubb Singapore Pte Ltd* [2004] 1 SLR 134 that in the context of the costs regime, an earlier offer should not be deemed withdrawn so as to deprive the offeror of the advantage of the earlier offer.

6.105 In the other unreported case of *Track-Truss Technologies Pte Ltd v UTi Worldwide (Singapore) Pte Ltd* [2004] SGDC 42, the district judge cited *Neo Hock Pheng* and held that each case would still have to be decided on its own facts. Nevertheless, on the facts, the offer to settle was found not to be a genuine offer.

Pleadings

6.106 In *Asia Business Forum v Long Ai Sin* [2004] 2 SLR 173, the applicant ("ABF") applied for leave to amend its further and better particulars after the conclusion of the proceedings before the High Court and pending an appeal to the Court of Appeal. The applicant sought leave pursuant to O 20 r 5(1) to switch the headings of two lists in the Further and Better Particulars entitled "Confidential Information" and "Trade Secrets". This effectively meant that ABF's database and contact information would be reclassified as "Trade Secrets". The Court of Appeal concluded that the amendments would have altered the basis of ABF's claim (it was on that basis that evidence had been

adduced and parties cross-examined at trial). The application was dismissed because the amendments would have resulted in prejudice and would have given the applicant “a second bite at the cherry”. The Court of Appeal indicated that these were two key factors (without excluding other factors) which had to be taken into account in determining whether leave should be granted to amend in such circumstances. The essential principle was one of justice and was based on all the circumstances of the case. The Court of Appeal also emphasised the efficient conduct of litigation in the interest of the administration of justice. There is less of a chance of succeeding on an application for an amendment if the applicant could have reasonably avoided delay by making his application for an amendment at an earlier stage of the proceedings. Indeed, in some instances, the applicant’s conduct may even be regarded as a vital factor against permitting an amendment. Also see *Joshua Steven v Joshua Deborah Steven (No 2)* [2004] 4 SLR 403 and *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR 258.

6.107 In *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594, the defendant was allowed to amend its pleadings after closing submissions to bring them in line with points that had already been raised and developed by the defendant and addressed by the plaintiffs. There was no prejudice in the circumstances. The fundamental issue with which the court was concerned in this situation was whether the amendment would lead to irremediable prejudice or militate against policy considerations. More specifically, the High Court said at [87]:

The essence is not so much in the nature of the amendment but rather in the consequences flowing from any amendment to the pleadings.

The decision to permit the amendment was endorsed by the Court of Appeal ([2005] 1 SLR 502). Referring to O 20 r 5(1), the Court of Appeal stated at [101]:

[T]he court may grant leave to amend a pleading at any stage of the proceedings. This can be before or during the trial, or after judgment or on appeal.

Both the High Court and the Court of Appeal referred to Lord Griffiths’ admonition in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220:

[T]o allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.

6.108 An amendment will not be permitted through the improper use of pleadings. In *Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd* [2004] 4 SLR 574, the respondent pleaded in his statement of claim that a deed was vitiated by the appellant's misrepresentations. On the first day of trial, the respondent obtained leave from the High Court to amend its reply (eight months after the reply was filed) to include a new plea that the deed was not effective. The High Court relied on this new plea in coming to its decision. The Court of Appeal reiterated the principle that delay alone could not prevent an application for an amendment from succeeding (at [36]) and that the court had a discretion to amend a pleading at any time in the course of proceedings (including the trial and appeal). However, the Court of Appeal observed that as the amendment had prejudiced the appellant (because the latter was not in a position to respond to the new plea made by the respondent), and the delay was unjustifiable (all the material facts were already known and could have been pleaded much earlier in the proceedings as an alternative plea in the statement of claim), it should not have been permitted by the High Court. Furthermore, the new plea was in breach of O 18 r 10 of the Rules of Court, which required consistency between pleadings. The Court of Appeal allowed the appeal on the substantive issues but indicated that it would have come to the same decision on the basis of the improper amendment alone.

Summary judgment

6.109 In *Chong Hon Kuan Ivan v Levy Maurice (No 2)* [2004] 4 SLR 801, the court decided to summarily resolve a complex point of law (on an application to strike out part of a statement of claim) pursuant to O 14 r 12 of the Rules of Court. It dismissed the argument that it would be premature for a court to embark on such a deliberation at that point in time and ruled that *Pacific Internet Ltd v Catcha.com Pte Ltd* [2000] 3 SLR 26 ("the *Pacific Internet* case") "was not authority for a general proposition that a court should not decide on a point of law which was difficult or important at the stage of a striking-out application" (at [39]). Also see *Johannes Budisutrisno Kotjo v Ng Wei Teck Michael* [2001] 4 SLR 232, in which the judge was similarly not deterred (by the *Pacific Internet* case) from deciding a clear point of law in relation to a striking-out claim.

6.110 Order 14 r 14, which states that: "[n]o summons under this Order shall be filed more than 28 days after the pleadings in the action are deemed to be closed", is an absolute rule. The prescribed period cannot be extended and amendments to pleadings do not postpone the deemed closure of

pleadings: see *United Engineers (Singapore) Pte Ltd v Lee Lip Hiong* [2004] 4 SLR 305.)

Time and irregularity

6.111 In *The Melati* (*supra* para 6.55), the Court of Appeal ruled that the judge below had been correct to retrospectively extend time in respect of the filing and service of the statement of claim. Even though it had been served almost 11 and a half months late, there was no apparent intention on the part of the plaintiffs to delay the proceedings. They and the defendants had been “actively involved” in arbitration proceedings in London. Although the plaintiffs ought to have applied for an extension of time prior to the expiry of the time for filing and service, their failure to do so did not justify the termination of their action. In the circumstances, it was just to allow the extension. Chao Hick Tin JA considered the competing priorities of expedition in the administration of justice and the right of a litigant to the adjudication of his claim. Essentially, “[t]he facts must be sufficient to persuade the court that granting indulgence in favour of the party in default would not be out of place” (at [34]). His Honour distinguished between the discretion to extend time in respect of pleadings and a notice of appeal (at [37]):

Where a notice of appeal is involved, there is already an adjudication by the court and if a losing party is dissatisfied, he should file his notice of appeal within the prescribed time. The paramount consideration there is the need for finality.

6.112 In *Altvater Jakob Pte Ltd v Toh Eng Peng* [2004] SGHC 269, at [26], the High Court (applying the principles in *Syed Mohamed Abdul Muthaliff v Arjan Bisham Chotrani* [1999] 1 SLR 750), did not enforce the consequences of an “unless order” because the defendants had not acted contumaciously in the circumstances (although they “were tardy on a number of occasions in complying with orders of court”). For a case in which a court held that the failure to comply with an “unless order” was intentional and contumelious, see *Re CEP Instruments Pte Ltd* [2004] SGHC 206.

6.113 Where a party has failed to comply with an unless order made by the Registrar and the other party has filed the necessary papers to give effect to that order, the defaulting party should, if he wishes to resist it, apply to the Registrar for an extension of time in which to comply with that order. He should not, in these circumstances, appeal to a High Court judge in chambers against that order. In *The MMM Diana ex Able Director* (*supra* para 6.88), the defendant was directed to exchange the affidavits of the

evidence-in-chief of his witnesses within ten days failing which his defence and counterclaim would be struck out and judgment entered against him. As the defendant failed to act within the period, the plaintiff filed the necessary documents in the Registry and obtained judgment in default against the defendant. Woo Bih Li J made no order on the defendant's appeal as the proper procedure was for the defendant to apply to the Registrar to set aside the judgment in default and for an extension of time in which to exchange the affidavits. An appeal would only lie once the Registrar decided not to grant the extension of time and not to set aside the judgment in default (also see *Fuji Xerox Singapore Pte Ltd v Creative Circle Pte Ltd* [2004] SGDC 137 to this effect). This procedure applies to ordinary orders as well as unless orders (*The MMM Diana ex Able Director*, at [10]) and it also applies to orders made by a judge in chambers (*id* at [11]).

6.114 The court distinguished *Changhe International Investments Pte Ltd v Banque Internationale A Luxembourg BIL (Asia) Ltd* (*supra* para 6.91), in which an order had already been made by the Registrar upholding the consequences of the unless order. In that case, the party in default was right to appeal because a decision had been made. (He could not have applied to the Registrar in these circumstances because this would have amounted to an application to overturn the decision of another registrar. There is no jurisdictional basis for such an outcome.)

6.115 An appeal may be brought against the unless order *itself* but this must be done within the prescribed time. It was too late for the defaulting party to do so in *The MMM Diana ex Able Director*.

6.116 A party who appeals against the decision of the Registrar must set out all the grounds of appeal which he intends to rely on. The court will not allow him to rely on a ground not included in his notice of appeal even though it is included in the notice of appeal of another party. The approach of the English Court of Appeal in *Europa Property & Finance Services Ltd v Stubbert*, *The Times*, 25 November 1991 – that if the defendant is given conditional leave to defend and he appeals against this order, the court may dismiss the appeal and give summary judgment to the plaintiff even though the latter has not filed any notice of cross-appeal – does not apply in Singapore. The plaintiff must file and serve his own notice of appeal if he is to benefit from the appeal. In *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR 513, Woo Bih Li J ruled that a co-defendant could not rely on the grounds raised by the other co-defendant as these had not been included in his own notice of appeal. This position was affirmed by the Court of Appeal (see *Teo Chee Yeow Aloysius v Tan Harry* [2004] 3 SLR 588).