

8. CIVIL PROCEDURE

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Appeals

Appeal on assessment of damages

8.1 In *Tan Boon Heng v Lau Pang Cheng David* [2013] 4 SLR 718, the appellant appealed against the decision of a High Court judge in chambers dismissing his appeal against the assistant registrar's assessment of damages. The Court of Appeal dismissed the appeal and held that there were no grounds warranting appellate intervention in this case as the High Court judge, in affirming the assistant registrar's assessment of damages, had not applied the wrong principles, misapprehended the facts, or made a wholly erroneous estimate of the damages.

8.2 The Court of Appeal explained the applicable principles governing a High Court judge's review, on appeal, of a decision made by the registrar, the deputy registrar or an assistant registrar of the Supreme Court in an assessment of damages. In such situations, the court held that the judge's discretion was unfettered by the exercise of the assistant registrar's discretion below, although due weight should be given to the latter's decision.

8.3 In respect of the standard of review of the registrar's findings of fact, the Court of Appeal stated that there is a difference between the situation where the registrar's findings of fact were based solely on affidavit or documentary evidence, and where his findings were based partly or wholly on the oral evidence taken by him. In the former instance, a judge in chambers was in just as good a position as the registrar to make his own findings on the same, and he was also entitled to draw the appropriate inferences from this evidence and the registrar's notes of hearing. However, where the registrar's findings of fact were based wholly on the oral evidence, a judge in chambers could overturn the registrar's findings only if they were plainly wrong or against the

weight of the evidence. Where the registrar's finding of fact was based partly on the oral evidence and partly on the affidavit or documentary evidence, a judge in chambers could overturn such a finding only where there was sufficient evidence to show that, more likely than not, the finding was not warranted.

Leave to appeal

8.4 The Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") was amended in 2010 pursuant to the Supreme Court of Judicature (Amendment) Act 2010 (Act 30 of 2010) ("the 2010 amendment"). The 2010 amendment took the form of a reworded s 34 and the newly enacted Fourth and Fifth Schedules to the SCJA which set out the matters that are non-appealable to the Court of Appeal and the matters which are appealable only with leave of a High Court judge (collectively, "the 2010 SCJA amendments"). The scope and application of these amendments were examined for the first time in *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* [2013] 2 SLR 880 ("*OpenNet*").

8.5 In *OpenNet*, the Court of Appeal considered the issue of whether leave of court was required to appeal against an order made by a High Court judge refusing to grant leave to commence judicial review. This turned on whether the application for leave to commence judicial review was an "interlocutory application" under para (e) of the Fifth Schedule to the SCJA. Preferring a purposive interpretation of "interlocutory application", the court held that the purpose of the 2010 SCJA amendments was that an appeal to the Court of Appeal would generally be as of right for orders made at interlocutory applications which had the effect of finally disposing of the substantive rights of the parties, while an appeal to the Court of Appeal would ordinarily be denied for orders made at interlocutory applications which did not finally dispose of the substantive rights of the parties, and which were deemed to involve established principles of law.

8.6 On this approach, the Court of Appeal held that because the High Court judge had, by refusing to grant leave to commence judicial review, effectively determined the substantive issue and the substantive rights of the parties, the appellant's application for leave to commence judicial review did not come within the meaning of "interlocutory application" under para (e) of the Fifth Schedule to the SCJA. Accordingly, no leave of court was required by the appellant to file an appeal against the decision of the High Court refusing leave to commence judicial review.

8.7 Shortly after the *OpenNet* decision, the 2010 SCJA amendments were re-examined by the Court of Appeal in *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 (“*Dorsey*”).

8.8 The respondent in *Dorsey* argued that pre-action interrogatories were “interrogatories” within the meaning of para (i) of the Fourth Sched to the SCJA and thus an order giving such interrogatories was non-appealable. The Court of Appeal held that this turned on the anterior question of whether an application to serve pre-action interrogatories was an “interlocutory application” for the purposes of the SCJA.

8.9 Applying the purposive approach advocated in *OpenNet*, the Court of Appeal held that it was manifestly clear that the legislative scheme introduced by the 2010 SCJA amendments, in so far as it curtailed the rights of appeal, was only intended to apply to orders made at the hearing of interlocutory applications: *OpenNet* at [51]–[52]. Thus, the reference to “interrogatories” in para (i) of the Fourth Sched to the SCJA referred to an order giving or refusing interrogatories that was made at the hearing of an interlocutory application for interrogatories, and did not include pre-action interrogatories. Since an appeal against an order giving or refusing pre-action interrogatories did not come within any of the limitations prescribed by s 34 of the SCJA or the Fourth and Fifth Scheds to the SCJA, the Court of Appeal held that the appellant had a right of appeal to the Court of Appeal against the order of the High Court judge.

8.10 The Court of Appeal in *The Nasco Gem* [2014] 2 SLR 63 (“*Nasco Gem*”) dealt with the issue of whether leave of court was required to appeal against the High Court judge’s order dismissing the applicant’s application to set aside the warrant of arrest and service of the admiralty writ, in the light of s 34(2)(d) of the SCJA read with para (e) of the Fifth Sched to the SCJA.

8.11 The court affirmed the decisions in *OpenNet* and *Dorsey*, but observed that the applications in question in those cases were very different from the present order in *Nasco Gem*. While the former involved pre-action proceedings, the latter concerned a warrant of arrest obtained after the issuance of an originating process. The court held that an application for a warrant of arrest, whether allowed or denied, did not determine the substantive rights of the parties or the relief claimed in the originating process. Thus, it was clearly an interlocutory application in the admiralty suit which falls within the scope of para (e) of the Fifth Sched as an “order at the hearing of any interlocutory application”. Accordingly, leave was required to appeal against the High Court judge’s order refusing to set aside the warrant of arrest.

Costs

Costs not awarded to successful appellant

8.12 The case of *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 offered an example of a situation in which a party who succeeds on appeal is not awarded his costs. The appeal concerned an alleged breach by the appellant of an interim sealing order made by the assistant registrar. Upon the application of the respondent for an order of committal against the appellant for contempt of court, the appellant was found guilty by the High Court and sentenced to five days' imprisonment. The appeal before the Court of Appeal, which concerned, *inter alia*, the appellant's conviction and sentence, was allowed on the basis of imprecise terminology in the interim sealing order. However, the Court of Appeal found (at [102]) that the appellant:

... had clearly undermined the purpose of the interim sealing order in so far as the summons itself was concerned, though ... this was a 'technical' violation.

The Court of Appeal took into account the conduct of the appellant in the course of the proceedings in deciding that he should bear his own costs (at [105]):

It seems to us that [the appellant's] conduct ... [is] deserving of this court's opprobrium. [The appellant] revealed a reprehensible disregard for the court and a manifest willingness to undermine a litigant's right to avail itself of the court's processes.

The Court of Appeal added (at [115]): "[W]e register our disapproval of his conduct by not awarding him the costs of the appeal." Nor was the High Court's order for costs in favour of the respondent disturbed.

8.13 Also see *Terrestrial Pte Ltd v Allgo Marine Pte Ltd* [2013] SGHC 57 in which the High Court refused to award costs to the defendants, who succeeded in the first and second appeals, because of their conduct in the course of the litigation.

Non-aggregation of joint plaintiffs' individual awards for damages and time of taxation

8.14 The case of *Koh Sin Chong Freddie v Chan Cheng Wah Bernard* [2013] 4 SLR 629 ("*Koh Sin Chong Freddie*") raised two important issues: (a) whether individual judgment amounts should be aggregated for the purpose of costs and (b) taxation of costs after the assessment of unliquidated damages. The case involved cross-appeals from an award made at an assessment of damages by the High Court judge (in *Chan Cheng Wah Bernard v Koh Sin Chong Freddie* [2012] SGHC 193). The

judge awarded a total sum of \$420,000 to the four plaintiffs as damages for defamation (each plaintiff being awarded \$70,000 in general damages and \$35,000 in aggravated damages). The Court of Appeal concluded that the judge wrongly estimated the damages due to the plaintiffs and decided to award \$50,000 to each of them (comprising \$35,000 as general damages and \$15,000 as aggravated damages). As the sum recovered by each plaintiff was within the pecuniary limit of the Subordinate Courts, the question arose as to whether the Subordinate Courts scale of costs ought to apply or whether the individual amounts should be aggregated so that the High Court scale of costs would operate. The Court of Appeal considered *Gallivan v Warman* [1930] WN 96, in which the individual amounts obtained by the joint plaintiffs were not aggregated (*Gallivan v Warman* was followed by the Supreme Court of Victoria in *Brien v Watts* [1964] VR 673). The Court of Appeal in *Koh Sin Chong Freddie* also considered *Haile v West* [1940] 1 KB 250, in which the English Court of Appeal decided against aggregation because each of the plaintiffs had a separate cause of action. Scrutton LJ ruled that the costs scale should be based “upon the footing that each individual ha[d] brought a separate action”: *Haile v West* at 256. The co-plaintiffs’ contention that an action by the co-plaintiffs was a single action resulting in one judgment (so that there should be one order as to costs) was rejected. These authorities were relied upon by the Court of Appeal in *Koh Sin Chong Freddie*, which applied the principle that “a party should not have to incur costs other than what is warranted by the substance or magnitude of the claim”. Therefore, the plaintiffs were only entitled to costs on the Subordinate Courts scale: at [87]–[89].

8.15 A further issue arose in this case concerning the plaintiffs’ decision to draw up their bills of costs for taxation following the judgment on the merits and for costs before the Court of Appeal ([2012] 1 SLR 506). In *Koh Sin Chong Freddie*, the Court of Appeal admonished that they ought to have waited for the assessment of damages before proceeding to taxation pursuant to V K Rajah JA’s pronouncement in *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 that trial costs in claims for unliquidated damages should ordinarily not be assessed before damages have been agreed or determined. The Court of Appeal reiterated the rationale of this approach in *Koh Sin Chong Freddie* (at [90]):

The rationale for this practice is apparent from Appendix 1 to O 59 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which provides that the taxing registrar in determining the proper amount to be allowed as costs ‘shall have regard to the principle of proportionality’ as well as, *inter alia*, ‘where money or property is involved, its amount or value’. This provision clearly suggests that there is an incontrovertible link between the costs to be awarded and the judgment amount.

(Also see *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [76].) The Court of Appeal had to consider whether it should allow the taxed costs for the liability stage (which had already been paid by the defendants to the plaintiffs) to remain in view of the amount of damages finally awarded to each of the plaintiffs and the consequential application of the Subordinate Courts scale. The Court of Appeal concluded that it could set aside the taxed bills of costs pursuant to the powers conferred by s 37(5) of the SCJA, which provides that the Court of Appeal may “give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires”. As the bills were taxed on a wholly improper basis, it was necessary for the Court of Appeal to intervene: at [101]. The Court of Appeal did not think it appropriate to order the bills to be retaxed and preferred to decide on quantum after hearing the parties: at [103].

Security for costs

8.16 The question of whether an order for security for costs should be made against a department of the Government of a sovereign state arose in *Ministry of Rural Development, Fishery, Craft Industry and Environment of the Union of Comoros v Chan Leng Leng* [2013] 3 SLR 214. The plaintiff was a government department of the Union of Comoros, which had obtained a judgment for a sum of money against the second defendant in the Union of Comoros and lodged a proof of debt in the liquidation. The first defendant was the liquidator of the second defendant, a company which was undergoing a voluntary members' liquidation. The proof of debt was rejected by the liquidator. The plaintiff initiated proceedings to reverse the liquidator's decision pursuant to r 93 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed). The defendants applied for security for the costs of the action from the plaintiff. The assistant registrar granted the application and the plaintiff appealed on the basis that the court had no power to award security for costs under s 15(2)(b) of the State Immunity Act (Cap 313, 1985 Rev Ed), and in the alternative, that it was not just in the circumstances to make such an order. The High Court took the view that the words “any process for the enforcement of a judgment” in s 15(2)(b) refer to a legal procedure of execution or attachment against property in satisfaction of a judgment that has already been rendered. Those words do not, on the face of the language used, cover pre-judgment measures such as security for costs, which is not a process of levying execution against state property as envisaged by the Explanatory Statement: at [5].

8.17 Having determined that there was no legal impediment to the award of security for costs, the court considered whether it was just to make the order. As the plaintiff was not ordinarily resident in Singapore, and there was no evidence that the plaintiff had any assets in Singapore,

and that it might be difficult for the defendants to enforce any judgment for the payment of costs (in the absence of any reciprocal enforcement arrangements between Singapore and the Union of Comoros), the court decided that the plaintiff should be ordered to provide security. It observed (at [8]) that as the court's discretion to order security is "a flexible one" ... there should not be any general presumption against making an order for security when the plaintiff is a foreign state". The court also took into account the potential cost and delay of having to subsequently enforce any judgment in the Union of Comoros as well as the absence of any contention by the plaintiff that it would suffer significant harm: at [8]. The court did not consider the merits of the case to be a vital issue for the purpose of this application: at [7].

Taxation

8.18 In *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2013] 2 SLR 524 ("*Lam Hwa*"), the respondent, a foreign worker, had commenced a personal injury suit against the appellant, which was settled on the first day of the trial in the Subordinate Courts. Final judgment was entered against the appellant by consent. The respondent filed a bill of costs to be taxed by a deputy registrar on a standard basis. The deputy registrar disallowed section 3 of the bill of costs which included travel expenses amounting to \$1,208. The respondent then applied for a review concerning the travel expenses before a District Judge. The District Judge reversed the deputy registrar's decision and ruled that the travel expenses were recoverable as they were incurred for the purpose of attending the trial in Singapore. The District Judge concluded that the Court of Appeal in *Rajabali Jumabhoy v Ameerli R Jumabhoy* [1998] 2 SLR(R) 576 ("*Rajabali*") did not deal with the specific issue of whether travel expenses to attend court in Singapore are claimable. In his view the travel expenses were "reasonably incurred" pursuant to O 59 r 27(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) because they were the natural consequences of the appellant's negligence. The appellant appealed to the High Court and relied on O 35 r 1, O 38 r 22, the case of *Rajabali* and Commonwealth authorities for the proposition that the travel expenses were not recoverable.

8.19 The High Court rejected the appellant's argument that O 35 r 1 makes it mandatory for a litigant to attend court *in person* (since he may appear by counsel). It added that the fact that a litigant-in-person would have to appear in court does not mean that his travel expenses are therefore non-recoverable: *Lam Hwa* at [19]. With regard to O 38 r 22 (which sets out the rights of a witness *with regard to the party who subpoenas him or her to attend court*), it is not a provision stipulating who amongst the parties in a courtroom are entitled to claim disbursements. The party who subpoenas the witness would be *obliged*,

under O 38 r 22, to compensate the witness's travel expenses. However, the issue of whether that party is entitled to claim for and recover such expenses in a standard bill of costs is a separate matter which is not governed by O 38 r 22: *Lam Hwa* at [20]. The High Court also disagreed with the appellant's interpretation of *Rajabali*. It observed that (*Lam Hwa* at [22]):

... the position taken in *Jumabhoy* at [5] can be explained by the undisputed, general rule that only a solicitor is entitled to claim for his *professional costs* for time spent in attending court proceedings (see *The London Scottish Benefit Society v Chorley, Crawford and Chester* (1884) 13 QBD 872). [emphasis in original]

The court in *Rajabali* was not faced with the issue of disbursements, let alone the even more specific issue of whether a litigant is entitled to claim his travel expenses as part of disbursements: *Lam Hwa* at [22]. More importantly, the court was not persuaded by the appellant's attempt "to lump a litigant's claim for 'costs for attendance in court' and that for 'travel expenses' in the same category. This is because, strictly speaking, the former is not even a *disbursement* to begin with": see *Ong Jane Rebecca v Lim Lie Hoa* [2008] 3 SLR(R) 189 at [11] to the effect that disbursements refer to "expenses actually incurred and paid out". The High Court in *Lam Hwa* observed that the costs of attendance of a litigant who is not a solicitor are a measure of the litigant's *opportunity costs* for the time spent attending court. Such costs of attendance are therefore not "disbursements", unlike travel expenses; and, thus, the fact that a claim for "costs for attendance" is generally not allowed (for litigants who are not solicitors) does not dictate the same result for *all* claims for "travel expenses": *Lam Hwa* at [23]. The High Court concluded that there is no *general prohibition* in the law in Singapore that prevents a litigant's travel expenses from being recovered as one of the various items of "costs reasonably incurred" under O 59 r 27(2). With regard to the question of whether travel expenses for *all purposes* by a litigant are recoverable, the High Court considered the positions in England, Australia and Canada (which it considered to be similar to each other) and concluded that a litigant is entitled to recover travel expenses which are necessarily incurred for the purposes of attending court as a witness: *Lam Hwa* at [45]. As the respondent in *Lam Hwa* was a necessary witness (being the plaintiff), he was entitled to claim his travel expenses as disbursements pursuant to O 59 r 24(1)(c). Accordingly, the sum of \$1,208 was recoverable under O 59 r 27(2). The court pointed out that to deny the plaintiff the recovery of his travel expenses might deny him access to justice. In this case, the respondent was compelled to leave Singapore because he could no longer work (as a consequence of his injuries). To pursue his rights as a plaintiff, he had no choice but to incur travel expenses to attend the trial: *Lam Hwa* at [47].

Discovery

8.20 In *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573 (“*Teo Wai Cheong*”), the Court of Appeal made important observations about the discovery obligations of litigants, which have implications for lawyers as well as in-house counsel.

8.21 In an earlier appeal, the Court of Appeal directed *Crédit Industriel et Commercial* (“Bank”) to disclose further documents as the Bank had not properly fulfilled its discovery obligations, and ordered a retrial so that the trial judge could consider the new documents. At the retrial, the trial judge held in favour of the Bank. The appellant appealed against the retrial decision.

8.22 The Court of Appeal found in favour of the appellant and provided guidance to lawyers on the extent of their duties, and their role in the discovery process. First, a solicitor owed a special duty to the court to properly explain to his client what the applicable discovery obligations were. The solicitor also owed a duty of involvement in and supervision of the disclosure process, and was duty bound to review the documents disclosed by the client to consider whether relevant documents might have been omitted. Where he had reasonable grounds to believe that there were more documents yet to be disclosed, he ought to investigate the matter. Finally, in the context of advising a corporation, the Court of Appeal stated that a solicitor’s duty extended to ensuring that knowledge and appreciation of the scope of the discovery obligations were passed on to any in the corporation who might have been affected.

Electronic discovery

8.23 The High Court in *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2013] 3 SLR 758 (“*Yellow Pages*”) examined and provided useful guidance on the use of technology to facilitate discovery of electronic documents. The case involved a claim for copyright infringement of electronic directories containing lists of companies and businesses and their contact details, and the issue before the High Court was an appeal against an order that certain keywords be used in the conduct of electronic discovery.

8.24 Dismissing the appeals, the High Court in *Yellow Pages* began by acknowledging the practical difficulties with electronic discovery. It also observed that given the pace of technological advancement today, the ends of justice that discovery was meant to serve may well be defeated by oppressive disclosure where large numbers of electronic documents are involved. Thus, the High Court pointed out that the issue is one of proportionality, and “[t]he Holy Grail is to arrive at a set of documents

of the right size containing all relevant documents without expenditure of disproportionate costs”: *Yellow Pages* at [34].

8.25 With these concerns in mind, the High Court went on to discuss how keyword searches could be used to streamline electronic documents into a more manageable subset for discovery. The court emphasised that the concept of “accuracy”, namely, maximising the number of relevant documents and minimising the number of irrelevant documents within the subset, would be a critical consideration before the courts when determining the keywords to be used: *Yellow Pages* at [53] and [54]. In this regard, the court affirmed the court’s recommendation in *Breezeway Overseas Ltd v UBS AG* [2012] SGHC 41 at [28]–[31] and held that “accuracy” could be increased by the use of unique reference numbers, names of specific projects, keywords which identify the key witnesses, significant events and locations, product names or unique phrases as keywords, depending on the facts and issues of each case: *Yellow Pages* at [55] and [56]. The court further held that the size of the subset produced by a keyword search would be another relevant factor, and that the key to unlocking the full potential of keyword searches is to adopt an iterative process which involved, *inter alia*, running preliminary searches using the proposed keywords as well as co-operation and collaboration between the parties.

8.26 Finally, in the event of a dispute as to whether keywords proposed by the party seeking discovery should be used, the High Court held that it would endeavour to give more weight to his proposed keywords. This was because if the party giving discovery complied with the court order for discovery by using the particular keywords, that would discharge his discovery obligations notwithstanding that some relevant documents may not have been caught by the search: *Yellow Pages* at [63] and [64].

8.27 In *Dirak Asia Pte Ltd v Chew Hua Kok* [2013] SGHCR 1 (“*Dirak Asia*”), the High Court examined the extent in which an e-mail user could be said to have “power” over e-mails in the possession and custody of a third-party e-mail service provider under O 24 of the Rules of Court. The case involved an application for the discovery of e-mails, and the issue before the court was whether the defendants had possession, custody and power over the e-mails in their e-mail accounts with a third-party service provider.

8.28 The High Court held that the question of whether a producing party has “power” over documents in the possession and custody of a third party was a fact-sensitive inquiry which required the courts to examine the contextual relationship between the two parties. In this regard, the court observed that proof of an enforceable legal right to obtain possession of documents would not be the only way to show that

a party has “power” over the documents. Evidence of a practical ability to assess or obtain documents held by the third party may well be sufficient to constitute “power” over the documents as contemplated under O 24 of the Rules of Court, although the court cautioned that this should not be the automatic conclusion in all cases. The court reiterated that it is important to have regard to the context in which that practical ability is found, as well as the relationship between the producing party and the third party.

8.29 Based on the evidence in *Dirak Asia*, the High Court found that each defendant had been provided with a work e-mail account in which they had ready and easy access to their e-mails, as and when their work required in the course of their employment. As this indicated that the defendants had a strong degree of control over the e-mails, and that their ability to access these documents could readily translate into actual possession, the court held that the defendants had “power” over the e-mails under O 24 of the Rules of Court.

Further and better particulars

8.30 Particulars of pleadings serve to inform the other side of the nature of the case that has to be met, so as to prevent the other side from being taken by surprise at trial, and also to enable the other side to know what evidence it ought to prepare for trial. If the opposing party believes that the pleading is not sufficiently particularised, he may apply for further and better particulars under O 18 r 12(3) of the Rules of Court. In addition to the usual particulars given under O 18 r 12, for patent infringement claims, O 87A r 2(2) requires that “particulars of the infringement relied on” must be given.

8.31 Traditionally, a patentee is not ordered to give particulars of the construction which the patentee proposes to put on the patent claims. However, the High Court in *AstraZeneca AB (SE) v Sanofi-Aventis Singapore Pte Ltd* [2013] SGHCR 7 (“*AstraZeneca*”), affirming the principles laid down in *Novartis AG, Ciba Vision AB v Johnson & Johnson Medical Ltd* [2008] EWHC 293 (“*Novartis*”), held that the particulars of infringement to be given by the patentee may extend to claim construction depending on the facts of the case.

8.32 The assistant registrar observed that the approach in *Novartis* should be applied only in exceptional circumstances: *AstraZeneca* at [47]. This would include claims involving a pharmaceutical patent since it is often the case in such claims that the precise patent infringements may not be easily observable without the conduct of experiments. Other pertinent considerations include: (a) the spectre of immense costs of misdirected and inadequate experiments in the

absence of particularisation at an early stage; and (b) where it would not be burdensome for the plaintiffs to answer some of the requests for further and better particulars.

Garnishee orders

8.33 The discretionary nature of garnishee relief under O 49 of the Rules of Court was emphasised by the High Court in *Ong Han Ling v Low Ai Ming Sally* [2013] 2 SLR 421. The plaintiff brought an action against the defendant for fraudulent misrepresentation. Final judgment was entered against the defendant as she failed to comply with an order of court requiring her to exchange her affidavit of evidence-in-chief by a certain date. The plaintiff applied for a garnishee order in respect of all debts due or accruing from a law practice to the defendant. The application to show cause was contested by the defendant's former lawyers, Y, for outstanding fees and disbursements. The plaintiff also applied for, and obtained, a Mareva injunction against the defendant. Y commenced proceedings against the defendant for outstanding legal fees and disbursements and obtained a final judgment for the same. Y then applied for a garnishee order to show cause by attaching all debts due or accruing from a bank to the defendant. The plaintiff applied for leave to intervene in Y's action and to seek various orders. Various applications were heard by the court. Ultimately, the court dismissed both Y's and the plaintiff's applications for garnishee orders as the circumstances of the case did not make it just for the court to grant this discretionary remedy to either party. The court advised that if and when a receiving and adjudication order is made against the defendant, and if the Official Assignee is appointed, he could look into the quantum of Y's legal costs and other related matters. It would also be for the Official Assignee to take such steps as are appropriate to recover the defendant's assets and distribute them to creditors.

Injunctions

8.34 The decision of the Court of Appeal in *Maldives Airports Co Ltd v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 dealt with the issue of whether Singapore courts have jurisdiction to grant an injunction against the Government of a foreign sovereign state. In setting aside the injunction, the court considered the relevant provisions of the State Immunity Act (Cap 313, 1985 Rev Ed) and the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). In particular, the operation of s 12A(4) of the IAA which governs the court's power to grant an injunction in a case of urgency if it is "necessary for the purpose of preserving evidence or assets" was called into question.

8.35 It was held that the meaning of “assets” under s 12A(4) of the IAA included contractual rights which, if lost, would not adequately be remediable by an award of damages. While the respondent did not have any contractual rights which could be protected under s 12A(4), the respondent did nonetheless have an interest in the land as conferred by the agreement between the parties, and this was an asset capable of being preserved under s 12A(4) of the IAA. Accordingly, the Singapore court did have the power to grant the injunction: at [36]–[52].

8.36 However, the Court of Appeal declined to exercise its discretion to grant the injunction as the balance of convenience test was not satisfied (see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396). This was because damages would be an adequate remedy, and there were practical problems with the compliance and enforcement of the injunction. The width of the injunction would have made it difficult for the parties to have any certainty as to what was required of them in order to ensure that they were acting in compliance with the terms of the injunction. It would also require an unacceptable degree of supervision in a foreign land, given the vague terms and the width of the injunction: at [55]–[71].

Judgments and orders

Amendment of consent judgment

8.37 The amendment of a consent judgment arose for consideration in *Ng Kiam Bee v Ng Bee Eng* [2013] 2 SLR 442. The parties had settled their dispute concerning the ownership of property and the terms were recorded in a consent judgment. The consent judgment provided, *inter alia*, for the property to be sold on the open market and the gross sale proceeds to be used to repay the plaintiff’s Central Provident Fund (“CPF”) principal sum exclusive of interest. Subsequently, the plaintiff applied for an amendment of the interest provision under O 20 r 11 of the Rules of Court. In response, the defendant applied for an order that the original terms of the consent judgment be maintained and that the plaintiff be made responsible for any late completion interest in relation to the sale of the property. The plaintiff’s position was that the settlement included a refund to the parties’ respective CPF accounts of the principal sums withdrawn *inclusive* of all interest. During the course of oral submissions, counsel for the plaintiff argued that the plaintiff had agreed to the interest provision because he was advised by his previous lawyer that the interest provision would result in the defendant receiving about \$27,000 under the consent judgment. However, as the property was sold at a significantly higher price, the defendant insisted on receiving a larger sum than the sum which the plaintiff was told that the defendant would receive.

8.38 The High Court concluded that a consent order can be set aside if there is fraud or other vitiating factors. Furthermore, the court does not have the power to amend a consent judgment unless both parties mutually agree to the variation: at [15]. The fact that a party has been wrongly advised by his lawyer is not a basis for challenging a consent order. The court stated (at [16]):

The rationale for this is that it does not matter that the party acted under a mistaken view of the settlement; that is not a reason in itself to disapply the natural consequence of the choice which the party made, albeit under negligent advice.

This was not a simple case of amending an error on the face of the consent judgment by way of an application under O 20 r 11. The court also observed (at [18]) that, given the relatively small amount of money at stake, mediation would assist the parties in resolving the case “in the most time and cost efficient manner, as opposed to engaging in expensive litigation”.

Enforcement of judgments

8.39 The main issue before the Court of Appeal in *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership* [2013] 4 SLR 1116 (“*PT Bakrie Investindo*”) was whether proceedings to examine a judgment debtor (“EJD”) comes within the meaning of the word “execution” for the purposes of O 67 r 10(2) of the Rules of Court (*ie*, the rule that if an application is made to set aside the registration of a judgment, execution of the judgment will be stayed until after such application is finally determined).

8.40 In this case, the respondent obtained judgment against the appellant in the Commercial Court of England and Wales (“the UK judgment”). The UK judgment was registered as a judgment of the High Court of Singapore (“the Registration Order”) pursuant to s 3 of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed). Subsequently, the respondent obtained an order to examine the assets of the appellant, the judgment debtor (“the EJD Order”). The appellant applied to set aside both the Registration Order and the EJD Order (“the Setting Aside proceedings”). The appeal in *PT Bakrie Investindo* was brought by the appellant in respect of a separate application to adjourn the execution of the EJD Order until the Setting Aside proceedings were finally disposed of by the Court of Appeal.

8.41 The Court of Appeal accepted the respondent’s submission on a preliminary procedural point that the appellant was required to seek leave of the High Court in bringing the present appeal, since it related to an order made in respect of an interlocutory application. The appellant’s failure to obtain leave was therefore fatal to its appeal at the outset:

at [13]. Although the Court of Appeal's finding on this point was sufficient to dispose of the matter, the court went on to consider the main issue in the interest of completeness.

8.42 The Court of Appeal held that EJD proceedings do not constitute an execution of a judgment for the purposes of O 67 r 10(2) of the Rules of Court. The court reasoned that the function of an EJD order was to aid the judgment creditor in garnering additional information which may or may not result in the implementation of actual execution of the judgment. In the words of the court, "an EJD order does not *effect* the judgment of the court but it may render that judgment more *effective*" [emphasis in original]: at [14].

8.43 Further, practical considerations militate against the stay of an EJD order pending the determination of a setting aside application. The Court of Appeal expressed concern that staying an EJD order runs the risk of judicial time and court resources being wasted if the examination reveals that the judgment debtor is, in the court's words, "a man of straw". Conversely, if the judgment creditor is permitted to examine the judgment debtor pending the setting aside proceedings, the former might elect not to contest those proceedings if it becomes apparent that there are no worthwhile assets for execution in Singapore: at [27].

Unless orders

8.44 The potentially draconian consequences of non-compliance with unless orders have prompted the courts to exercise their discretionary powers to enforce such orders judiciously and cautiously.

8.45 In *Giorgio Ferrari Pte Ltd v Lifebrandz Ltd* [2013] 1 SLR 358 ("*Giorgio Ferrari*"), the High Court affirmed the principle that non-compliance with an unless order would *prima facie* result in the action being dismissed or the defence being struck out: at [21].

8.46 Andrew Ang J endorsed the proposition stated in *Tang Liang Hong v Lee Kuan Yew* [1997] 3 SLR(R) 576 that "unless there are good reasons for non-compliance, disobedience of a peremptory order will be considered contumelious conduct justifying a striking out": at [22]. Ang J further cautioned (at [23]) that the onus lies on the offending party to demonstrate that he had in fact made positive efforts to comply and that he was not intentionally ignoring or flouting the order, but was constrained by extraneous circumstances.

8.47 The appellant in *Giorgio Ferrari* failed to comply with a series of court orders for specific discovery, which prompted the court to issue an unless order against it. The appellant appealed against the first unless order, and obtained a final extension of time for compliance with the

specific discovery orders. Upon the appellant's failure to comply with the varied unless order, the respondents successfully applied for the appellant's claim to be struck out. The appellant subsequently appealed to the High Court against the assistant registrar's decision to strike out its claim and to enter judgment against it.

8.48 The High Court rejected the appellant's argument that it complied with the varied unless order by virtue of the fact that it had submitted its documents within the stipulated deadline. Ang J held (at [28]) that the mere submission of documents was not sufficient to constitute compliance with the order; the substance of the documents must address the specific omissions and discrepancies described by the respondent. Further, the appellant failed to provide any good reasons for its failure to comply, or show extenuating circumstances demonstrating that it did not intentionally flout the varied unless order. In these circumstances, the court held that the appellant's conduct was sufficiently contumelious to warrant a striking out of its claim.

8.49 In *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*"), the Court of Appeal undertook an extensive review of judicial practice in enforcing unless orders, and advocated a greater exercise of judicial restraint in this respect.

8.50 While the court accepted that breach of an unless order would *prima facie* justify striking out the offending party's claim, it also emphasised that the judicial inquiry does not end once it is established that there was an intentional and contumelious breach. Instead, the courts retain residual discretion to determine the appropriate sanction, which must be commensurate with the breach and the prejudice suffered by the other party: at [37]. In the final analysis, the courts must be guided by considerations of proportionality: at [39].

8.51 The Court of Appeal clarified (at [45]) that the juridical function of unless orders was "not to punish misconduct but to secure a fair trial in accordance with due process of law". To achieve a more scrupulous use of unless orders, the Court of Appeal proposed that the courts refrain from making such orders as a matter of course, tailor the conditions of the orders to the prejudice likely to be suffered should there be non-compliance, and contemplate alternative penalties to striking out: at [45(a)]–[45(c)]. Notwithstanding this general approach, the court definitively stated (at [48]) that in exceptional circumstances, an action may be struck out even where there might still be a reasonable prospect of a fair trial. Contumacious conduct such as the deliberate destruction or suppression of a document or the persistent disregard of an order for production would constitute exceptional circumstances.

8.52 On the facts in *Mitora*, the Court of Appeal found that although the appellant's repeated non-compliance with its discovery orders militated against the exercise of judicial leniency, it was a fact of the matter that all the documents for which discovery had been sought had been fully disclosed at the time of the appeal. In addition, as the respondent did not suffer from any irremediable prejudice due to the delay in the disclosure of documents, the court did not consider it proportionate to strike out the appellant's claim for its earlier breaches of unless orders.

8.53 In *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd* [2014] 1 SLR 78 ("*Kraze Entertainment*"), the High Court had occasion to consider the application of the general principles governing the enforcement of unless orders where multiple actions are involved. The plaintiff brought a second action against the defendant after its first action was struck out for its failure to comply with an unless order. The defendant applied to strike out the second action as an abuse of process given that the cause of action was the same as the first action and involved the same parties.

8.54 The High Court in *Kraze Entertainment* followed the Court of Appeal's decision in *Changhe International Investments Pte Ltd v Dexia BIL Asia Singapore Ltd* [2005] 3 SLR(R) 344 ("*Changhe*"), recognising that contumelious conduct often varies in degree. Accordingly, the courts must examine with care the plaintiff's conduct in both sets of proceedings in deciding whether there has been an abuse of process. The more serious the breach of the unless order, the more critical the court in the second action will be in deciding whether (a) a satisfactory explanation has been given for the breach; and (b) whether it should exercise its discretion to strike out the second claim: *Kraze Entertainment* at [43].

8.55 Reading the Court of Appeal decisions in *Changhe* and *Mitora* together, George Wei JC held that the court retains the discretion not to strike out the second action even if the plaintiff is unable to provide a proper explanation for its failure to comply with the unless order in the first action. Relevant factors the court may take into account in this highly fact-specific analysis include the apparent strength of the litigant's case and the degree of confidence the court has that breaches will not occur in the fresh suit: *Kraze Entertainment* at [54].

8.56 Applying the principles above to the facts in *Kraze Entertainment*, the High Court found that the plaintiff had committed a serious breach of the unless order in the first action which was not attributable to extraneous circumstances. The plaintiff had a history of slow payment of costs in the first action, to the point where the defendant sent in a statutory demand threatening to wind up the plaintiff in satisfaction of

payment. In addition, the court considered the plaintiff's failure to file affidavits in a timely manner in the first action "dilatatory conduct". The plaintiff proffered its apologies to the court for its past failure to comply with the court orders, paid up all the outstanding costs from the first action and made arrangements to secure funding for litigating the second action. Notwithstanding these measures, the plaintiff failed to satisfy the court that no further breaches would occur in the second action: *Kraze Entertainment* at [67]–[69] and [72]. Accordingly, the second action was struck out.

Jurisdiction

8.57 In *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258, the Court of Appeal held that it did not have the requisite jurisdiction to entertain an appeal from a decision made under s 82(5) of the Legal Profession Act (Cap 161, 2009 Rev Ed). The existence, nature and scope of the court's inherent jurisdiction and powers were clarified in the process. As a general rule, a court's jurisdiction and powers, which are two different and distinct concepts, are both circumscribed by statute. Jurisdiction was defined (at [13]) as the court's authority to "hear and determine a dispute that is brought before it" and power (at [31]) as its "capacity to give effect to its determination by making or granting the orders or reliefs sought by the successful party to the dispute".

8.58 The court then discussed its inherent jurisdiction and powers, as distinct from its statute-based jurisdiction and powers. It proceeded to adopt a narrow definition equating "inherent jurisdiction" and "inherent powers" (at [40]), stating (at [34]) that the so-called inherent jurisdiction of the court is:

... in fact no more than the exercise by the court of its fund of powers conferred on it by virtue of its institutional role to dispense justice, rather than an inherent 'authority' to hear and determine a matter.

Thus, while the court may possess such residual powers, they should only be invoked in exceptional circumstances where there is a clear need for it and the justice of the case so demands. Since the appellant did not raise any arguments on the "inherent jurisdiction" of the court, the court did not proceed further on this issue.

Offer to settle

Discretion under O 22A r 12 of the Rules of Court

8.59 The circumstances which the court takes into account in exercising its discretion to award costs under O 22A r 12 came up for

consideration in *Ong Derrick v Sim Chong Nam* [2013] SGHC 171 (“*Ong Derrick*”). The plaintiff had obtained interlocutory judgment against the defendant for damages to be assessed. The judgment was based on the defendant’s admission of liability for causing the accident involving the plaintiff’s car. The defendant made an offer to settle in the sum of \$23,078.26. The plaintiff, who rejected the offer to settle and proceeded to assessment of damages, was awarded \$8,000 by the deputy registrar for his whiplash injury. On appeal, the District Court increased the amount to \$10,000. The plaintiff, who considered that the damages for whiplash were inadequate, failed in his appeal to the High Court. The total amount awarded to the plaintiff was \$22,853.02, just over \$200 less than the offer to settle. The plaintiff argued that even though the rules prescribe that the defendant may recover indemnity costs from the date of the service of the offer to settle (see O 22A r 9(3)), the court had discretion to determine the appropriate amount pursuant to O 22A r 12. The court considered the decision of the Court of Appeal in *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439, in which it awarded nominal costs of \$1,000 in respect of the period after the date of the service of the offer to settle. One of the reasons for this was that as the final judgment was only slightly higher than the amount of the offer to settle, the court’s intervention could be justified in the circumstances of the case. This was also the position in *Ong Derrick*. There was also the additional fact that the plaintiff’s wife (who was also involved in the accident) was offered \$37,000 more than the plaintiff for the same injury sustained by the latter. Therefore, it was not unreasonable for the plaintiff to reject the much lower amount offered, particularly as the defendant did not offer any explanation for the distinction between the sums. Accordingly, the court intervened and awarded \$1,000 costs to the defendant in respect of the period after the date of the service of the offer to settle (indemnity costs were denied).

Period during which an offer to settle may be accepted

8.60 The more specific issue of the time for acceptance of an offer to settle arose in *Tanner Sheridan Wayne v NRG Engineering Pte Ltd* [2014] 1 SLR 475. The dispute concerned an employment contract. The detailed facts are important to an understanding of the principle underlying the case. On 30 April 2013, the defendant served an offer to settle in the prescribed Form 33 of the Rules of Court proposing a settlement of the plaintiff’s claim at a sum of \$45,000. The offer did not include a stipulation limiting the time that it was open for acceptance: see O 22A r 3(2) of the Rules of Court. On 5 June 2013, the plaintiff’s solicitors spoke to the defendant’s solicitors by telephone, suggesting that the offer should be increased. This conversation was confirmed and referred to in a letter sent to the defendant’s solicitors on the same day. On 18 June 2013 at 8.11am, the defendant’s solicitors sent a letter to the plaintiff’s solicitors by facsimile transmission informing them that the

defendant had rejected the proposal of 5 June 2013, and that they had instructions to withdraw the offer to settle. On the same day at 11.37am, the plaintiff purported to accept the defendant's offer to settle by way of a letter via facsimile transmission. However, the purported acceptance was not in the form prescribed by O 22A r 6(1) of the Rules of Court, which provides that the acceptance shall be in Form 35 and served on the offeror. Further, the defendant's solicitors did not accept service by facsimile transmission. The next day, on 19 June 2013, at 9.39am, the defendant's solicitors served a "Notice of Withdrawal of Offer" in Form 34 (through the Electronic Filing System withdrawing the offer). The defendant's solicitors also served a hard copy of the "Notice of Withdrawal of Offer" by hand at the offices of the plaintiff's solicitors at 2.30pm. On 20 June 2013 at 8.56am (23 and a half hours after the defendant had served Form 34 on the plaintiff electronically), the plaintiff's solicitors served an "Acceptance of Offer" of the 30 April 2013 offer in Form 35 on the defendant at the offices of its solicitors. On 1 July 2013, the plaintiff filed his application for judgment to be entered against the defendant in terms of his 20 June 2013 "Acceptance" of the defendant's 30 April 2013 offer to settle.

8.61 The defendant contended that its offer had already been withdrawn. The plaintiff argued that his acceptance in the prescribed form served on 20 June 2013 at 8.56am was valid despite being 23 and a half hours after the defendant had served the "Notice of Withdrawal of Offer" electronically on 19 June at 9.39am. He argued on the basis of his interpretation of O 22A r 3(2) and his view of the case of *Chia Kim Huay v Saw Shu Mawa Min Min* [2012] 4 SLR 1096 that after a "Notice of Withdrawal of Offer" is filed and served, there is a statutorily implied minimum period of one day (24 hours) during which the offer to settle can still be accepted. The High Court disagreed with the plaintiff's arguments and confirmed that provided the notice period stipulated in O 22A r 3(2) is complied with, an offer to settle is effectively withdrawn upon the service of the "Notice of Withdrawal of Offer" in Form 34. Therefore, on the facts, the offer to settle was validly withdrawn by the defendant on 19 June 2013 at 9.39am and was no longer open for acceptance after that time.

8.62 For a case in which the deceased plaintiff's personal representative effectively accepted an offer to settle very shortly before it was withdrawn, see *Teo Gim Tiong v Krishnasamy Pushpavathi* [2013] SGHC 178.

Originating processes

8.63 The following observations were made by the High Court in *Ong Kim Yeng v Forte Development Pte Ltd* [2013] 1 SLR 695 concerning

the appropriateness of the originating summons and when proceedings should be commenced by writ. The court stated (at [5]) that “a contract claim should generally be commenced by writ action unless the parties agree that the facts are not in dispute and where the court is only required to interpret a clause in a written contract, without oral evidence”. The court pointed out that a claim for specific performance does not in itself justify commencement of proceedings by originating summons. There is an important distinction between the originating summons (which is a court document setting out the remedy sought by the plaintiff on the basis of the facts set out in the affidavit in support) and a writ/statement of claim, which must set out the facts that establish a cause of action for the plaintiff and give the defendant the opportunity to respond in the course of the pleading process. An originating summons would only be appropriate when there is clearly no dispute of fact: at [3].

Representative proceedings

8.64 The inquiry engaged under O 15 r 12(1) of the Rules of Court is two-tiered. At the first (jurisdictional) stage, the threshold requirement that the claimants must have the same interest in the proceedings (*ie*, the “same interest” requirement) must be met. It was only after the “same interest” requirement had been met and the representative action properly commenced that the second (discretionary) stage was reached. At the second stage, the court could exercise its discretion to discontinue the proceedings in question as a representative action where the overall circumstances of the case so justified.

8.65 The scope and application of O 15 r 12(1) was considered in *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204 (“*Koh Chong Chiah*”). The appellants were representative plaintiffs who had commenced a representative action on behalf of themselves and 202 other members of Sijori Resort Club. In allowing the respondent’s application to discontinue the suit as a representative action, the High Court judge held that “same interest” required each member of the class to have suffered “the same loss” or “an identical loss to the same extent”. On appeal, the High Court judge’s order was set aside and the suit was reinstated as a representative action.

8.66 The Court of Appeal clarified that the claimants in a representative action need not be identically situated *vis-à-vis* the defendant. Hence, the jurisdictional requirement was met where there were one or more significant issues of fact or law common to all the claimants for determination by the court. As a general guideline, where the legal and factual inquiry required for the determination of an issue in a claim in a representative action was also relevant to the

determination of the same issue in the other claims in the representative action, it was highly probable that the issue was common to all the claimants. However, a representative action could not be maintained if there were divided views between the members of the class of represented persons as to what outcome they hoped to achieve in the litigation or as to the desirability of seeking a particular remedy: *Koh Chong Chiah* at [57]–[59] and [71].

8.67 The court also highlighted that in each representative action, the significance of the common issues between the claimants must be compared with the significance of the issues which differ as between them. Where the latter clearly outweighed the former, the “same interest” requirement would not be met. In the same vein, the mere fact that the defendant had separate defences against different claimants ought not to necessarily suffice for the court to hold that the “same interest” requirement was not met. However, this was a factor to be considered by the court in determining whether to exercise its discretion to discontinue the action as a representative action. The court further pointed out that a practical and realistic approach ought to be adopted when considering whether separate defences could be raised against different claimants and not indulge in speculation on hypothetical possibilities: *Koh Chong Chiah* at [67]–[70].

8.68 Where the second (discretionary) stage is concerned, it was held that the standard of “plain and obvious case” did not apply to the court’s exercise of its discretion to discontinue an action as a representative action. Rather, much hinged on the “suitability” of the representative. In other words, the action ought to be discontinued as a representative action where it would not provide an efficient or effective means of dealing with the claims in question, or where it was otherwise inappropriate in the circumstances. In this regard, the court ought to consider, *inter alia*, the real possibility that the defendant could raise separate defences against different claimants, the cost of the representative action and the procedural limitations (as weighed against the procedural convenience) of a representative action: *Koh Chong Chiah* at [80]–[86].

Service

8.69 If the conditions of O 62 r 5 of the Rules of Court are satisfied, substituted service may be permitted on the law practice representing a defendant as a *conduit* (on the basis that the former has access) to the latter. This was emphasised in *Seráfica Rogelio T v Transocean Offshore Ventures Ltd* [2013] 3 SLR 1040. The case involved an appeal against an assistant registrar’s order dismissing an application to set aside an order which enabled the respondent to arrange substituted service of

examination of judgment debtor orders (pursuant to O 48) on the appellants (the directors of a corporation). In dismissing the appeal, the High Court judge ruled that substituted service on the appellants was justified in the circumstances of the case. The respondent attempted to effect personal service of the examination of judgment debtor orders in the Philippines, where the appellants were ordinarily resident. After four unsuccessful attempts at personal service, the respondent applied for and was granted an order for substituted service by way of service on the lawyers acting for the corporation (of which the appellants were directors) in the main proceedings. In response, the appellants filed a summons to set aside the order for substituted service.

8.70 The appellants raised several arguments. First, that service could not be effected on solicitors who were not acting for the directors personally. Second, that substituted service was not justified as leave had not been obtained under O 11 for service out of jurisdiction of the examination of judgment debtor orders. With regard to the first argument, the governing principle of substituted service is that the method “should bring the document to the notice of the person to be served”: at [14]. The court rejected the appellants’ argument that substituted service on the law practice was defective because the latter did not represent the appellants (the law practice represented the corporation). As the law practice was a “conduit” to the appellants (*ie*, the appellants were likely to be notified), the governing principle was satisfied. Furthermore, the appellants did not contest the efficacy of the mode of substituted service: at [15]. The second argument was also dismissed as the examination of judgment debtor orders could be served out of Singapore without leave pursuant to O 11 r 8(1), which states that “service out of Singapore of any summons, notice or order issued, given or made in any proceedings is permissible only with the leave of the Court *but leave shall not be required in any proceedings in which leave for service of the originating process has already been granted*” [emphasis added by the High Court]. The appellants also submitted that as an order for the examination of a judgment debtor made under O 48 r 1 was analogous to an originating process, the circumstances came within O 11 r 1 and, consequently, leave should have been obtained. This argument was rejected on the basis that an order under O 48 does not constitute an independent cause of action or claim for substantive relief against the defendant. It merely provides the process for the examination of a judgment debtor concerning his financial means: at [22]. Also note the court’s observations on O 11 r 8: at [23]–[26].

8.71 The appellants were also unsuccessful in arguing that O 38 r 18 precludes the service out of jurisdiction of an order for the examination of a judgment debtor. This rule states: (a) unless the court otherwise orders, a subpoena must be served personally and the service shall not be valid unless effected within 12 weeks after the date of issue of the

subpoena and (b) *a subpoena shall not be served on any person outside the jurisdiction*. The court considered that the processes relating to a witness (under O 38) and an order for the examination of an officer of a judgment debtor (under O 48) were independent of each other and that “[e]ven if some conceptual parallel could plausibly be drawn between a witness subpoena and an order for the examination of an officer of a judgment debtor, the Rules have drawn a sharp distinction between both Orders”: at [29]–[30]. After the dismissal of the appeal, the appellants applied for a stay of the examination of judgment debtor proceedings pending the hearing of their appeal. For the first time, they raised the case of *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90, in which the House of Lords concluded that under Pt 71 of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) (the English equivalent of O 48 of the Rules of Court) the court could not assume extraterritorial jurisdiction to make an order for the examination of an officer of a judgment debtor who was ordinarily resident abroad. The High Court granted a stay on the basis that there was a potentially arguable case that the enforcement of judgment orders granted under O 48 should be set aside on the ground that the court had no jurisdiction to make them. However, it pointed out that it was not expressing an opinion on the legal merits of the new point (which had not been raised in the appeal as a basis for setting aside the orders under O 48): at [32]–[33].

8.72 The issue of substituted service was less complex in *Terrestrial Pte Ltd v Allgo Marine Pte Ltd* [2013] SGHC 57. The order was for substituted service on the second defendant by way of both registered post and certificate of posting, as well as by way of posting on the notice board of the Supreme Court. Service by certificate of posting was not successful. However, the process server had deposed that he had mailed the writ and the order of court for substituted service to both the first and second defendants. As the second defendant had not complained about non-service and had not denied in any of his affidavits that he or the first defendant had received the registered letters, it could reasonably be inferred that service by registered post on the two defendants was successful. The court’s conclusion was reinforced by the second defendant’s approach to the plaintiff to negotiate a settlement.

Stay of proceedings

8.73 The test enunciated in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 was applied in the context of a matrimonial dispute in *AZS v AZR* [2013] 3 SLR 700 (“AZS”), where the husband applied for a stay of the divorce proceedings in Singapore on the ground of *forum non conveniens*. The appellant husband and the respondent wife were married in France. Prior to their marriage, the parties signed a pre-

nuptial agreement in France that made numerous references to the French Civil Code. The parties were residents in Singapore. They had no immovable property in Singapore and only possessed immovable property in France and China. The husband commenced divorce proceedings in France in April 2012, while the wife filed for divorce in Singapore just two months later. The High Court allowed the appellant's appeal and ordered that the divorce proceedings in Singapore be stayed.

8.74 Andrew Ang J reasoned that the dispute really revolved around the pre-nuptial agreement: *AZS* at [17]. Accordingly, France was clearly the more appropriate forum. Although the parties' residence in Singapore favoured the hearing of custody and maintenance matters in Singapore, the other factors in favour of France as the appropriate forum were overwhelming. Adjudication of the parties' pre-nuptial agreement would likely require proof of French law, and witnesses in France would also need to be called. While Singapore courts could deal with the division of worldwide assets in ancillary hearings, the fact that the parties had immovable property in France but not Singapore was a supporting factor for a stay of the Singapore proceedings. The doctrine of *lis alibi pendens* also came into play as another factor in favour of a stay. The wife had apparently submitted to the jurisdiction of the French court and its application of French law to the divorce in the proceedings, and thus appeared to be pursuing concurrent divorce proceedings in both France and Singapore: *AZS* at [20]–[23].

Striking out

8.75 A defendant who has counterclaimed in an action and then initiates new proceedings based on the same or essentially the same claim takes the risk that his new action will be struck out for abuse of process. In *Terrestrial Pte Ltd v Allgo Marine Pte Ltd* [2013] 3 SLR 527 (*“Terrestrial Pte Ltd”*), the High Court referred (at [17]) to *Syed Ahmad Jamal Alsagoff v Harun bin Syed Hussain Aljunied* [2011] 2 SLR 661 at [42] and [47] for the qualifying principle that the court has a discretionary power to permit the new action to proceed if there is a “good reason to justify it in the circumstances of the case”. The burden would be on the party bringing the action to show that the new proceedings were the more appropriate course for the just, expeditious and economical disposal of the matters in dispute. The established principles governing the striking out of a claim or defence under O 18 r 19 of the Rules of Court were applied in a series of cases in 2013. For example, in *Terrestrial Pte Ltd*, the court did not exercise its discretion in favour of the defendant, as to have done so would not have achieved this objective. Also see *Park Regis Hospitality Management Sdn Bhd v British Malayan Trustees Ltd* [2014] 1 SLR 1175 at [38]–[42] (for the court's observations on the case law); *Chan Kin Foo v City Developments Ltd*

[2013] 2 SLR 895 (in which a property claim was struck out for being baseless and an abuse of process); *Bosch Corp (Japan) v Wiedson International (S) Pte Ltd* [2013] 2 SLR 700 (in which, *inter alia*, the defence was struck out because of pleas of guilty to criminal charges and acceptance of facts of offence); *Low Heng Leon Andy v Low Kian Beng Lawrence* [2013] 3 SLR 710 (in which the defendant failed in an application to strike out the claim on the basis that the plaintiff was an ineligible person (under the conditions set by the Housing and Development Board (“HDB”)) for the purposes of owning an HDB flat); *Yan Jun v Attorney-General* [2014] 1 SLR 793 (claims struck out because of expiry of limitation period); *JR Marine Systems Pte Ltd v Rankine Bernadette Adeline* [2013] SGHC 277 (the claims were an abuse of process as the rights of the first respondent had already been determined in previous proceedings); and *Ling Mang Khong Stanley v Teo Chee Siong* [2013] SGHC 58 (late application to strike out may be justified by the circumstances of the case).

Summary judgment

8.76 The principles governing the standard which must be achieved in obtaining judgment under O 14 of the Rules of Court (as stated in *Associated Development Pte Ltd v Loong Sie Kiong Gerald* [2009] 4 SLR(R) 389 at [22]) were applied in *Terrestrial Pte Ltd v Allgo Marine Pte Ltd* [2014] 1 SLR 985 at [8]:

Suffice it to say that in order to obtain judgment, a plaintiff has first to show that he has a *prima facie* case for judgment. Once he has done that, the burden shifts to the defendant who, in order to obtain leave to defend, must establish that there is a fair or reasonable probability that he has a real or *bona fide* defence.

The defendants failed to show that they had a fair or reasonable probability of raising the defence of equitable set-off.

8.77 In *Ling Yew Kong v Teo Vin Li Richard* [2014] 2 SLR 123 (“*Ling Yew Kong*”), the High Court endorsed the proposition that “the purpose of a summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim”: *Ling Yew Kong* at [30]. In keeping with O 14 r 3(1) of the Rules of Court, the court reiterated that summary judgment should not be granted where the defendant satisfies the court that there is an issue or question in dispute which ought to be tried: *Ling Yew Kong* at [31].

8.78 In addition, the court made observations on the scope of the alternative ground under O 14 r 3(1) of the Rules of Court for leave to defend. On this ground, summary judgment will not be granted if the defendant satisfies the court that there is “some other reason” for a trial.

While the phrase “some other reason” is broadly drafted, George Wei JC held that as a general rule, there should be a nexus between the “other reason” and the substantive merits of the plaintiff’s claim. Accordingly, where it is clear that there is no defence, the fact that the court disapproves of the plaintiff’s general behaviour is not sufficient to constitute “some other reason” to deny summary judgment. In contrast, the position may be different if the plaintiff’s unconscionable conduct opens the door to a possible defence: *Ling Yew Kong* at [33].