Case Note

MITORA: THE MANTRA ON "UNLESS ORDERS"?

Mitora Pte Ltd v Agritrade International (Pte) Ltd [2013] 3 SLR 1179

The Court of Appeal in *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 ("*Mitora*") laid down clear pointers as to when an "unless order" may be made. Though the crux of the judgment mainly considered whether the appellant's statement of claim, which was struck out in default of compliance of "unless orders", should be restored, the court also provided useful guidance on alternative means of penalising persistent breaches including raising adverse inferences against the defaulting party at trial and striking out only the relevant portions of the pleading rather than the whole. In addition, the judgment in *Mitora* reiterates the Court of Appeal's penchant for the merits of the case to be adjudicated instead of having parties' substantive rights summarily disposed due to procedural irregularities. Will *Mitora* be the mantra for the making of "unless orders"?

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I. Introduction

1 An "unless order" (otherwise known as a "peremptory order") is a legal parlance to describe an order which typically compels a party to do something, usually within a time frame, and, unless he complies, very serious consequences will follow.[1] A litigant in default of compliance with an "unless order" typically runs the risk of either having its action struck out or judgment entered in default. It is a judicial creation which has earned an infamous name for itself over the decades. Indeed, it has struck fear in the hearts of recalcitrant litigants. Moore-Bick LJ paints "unless orders" as "one of the most powerful weapons in the court's case

* The views expressed are entirely the author's and do not represent the views of the organisations that the author serves in.

1 *The MMM Diana ex Able Director* [2004] 3 SLR(R) 611 at [1].

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management armoury".[2] Ward LJ hails "unless orders" as a "necessary forensic weapon which the broader interests of the administration of justice require".[3] Closer to home, the Singapore Court of Appeal cautions[4] that the routine use of "unless orders" would be the forensic equivalent of using a sledgehammer to crack a walnut. Whatever titles "unless orders" have been crowned with, one thing is certain – due to its draconian nature, it is meant to be an order of last resort[5] and not the first salvo the moment there is a default. In addition, it has been frequently noted that an "unless order" will not be made provided there is a history of failure to comply with *other* orders.[6]

2 Over the decades, "unless orders" have also proven to be extremely vital as a case management tool. The 1989 judgment in *Manilal and Sons (Pte) Ltd v Bhupendra K J Shan*[7] ("*Manilal and Sons*") is a useful illustration. The plaintiffs claimed the sum of $892,611.77 (a noticeably large claim in the early 1980s) being the balance due for goods sold and delivered. The plaintiffs' action was eventually dismissed eight years after the action commenced for a failure to comply with an "unless order" to provide a further and better list of documents.[8] The court held that disobedience to an "unless order" is *likely* to be held to be contumelious[9] behaviour resulting in the dismissal of the action or striking out of the defence.

3 It is rather alarming to note that in *Manilal and Sons*, though the action had commenced for a period of eight years, the parties were still contesting discovery orders – something quite unheard of these days. Indeed, those were the bygone years when the Judiciary was saddled with a huge backlog of trials waiting to be heard. Anecdotally, a civil action then could even take up to ten years or more to conclude. However, for the dismissal of the claim pursuant to an "unless order", it would likely have gone past the ten-year period. It is widely known that the massive backlogs in the courts had been cleared since the mid-1990s.

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2 *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864 at [36].

3 *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at 1674.

4 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [44].

5 *Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd* [2009] 3 SLR(R) 1017 at [24]. See also *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [15].

6 *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666.

7 [1989] 2 SLR(R) 603.

8 The court noted that though the appellant had filed two supplementary lists pursuant to the order, the appellant had not made the necessary full and fair discovery of certain documents and was therefore in breach of the "unless order": *Manilal and Sons (Pte) Ltd v Bhupendra K J Shan* [1989] 2 SLR(R) 603 at [64].

9 In *Re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 at 1206–1207; [1993] 1 All ER 630 at 641, Sir John Megaw drew a distinction between the noun "contumely", which he understood to mean "insolent reproach or abuse", and "contumacy", which means "perverse and obstinate resistance to authority".

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The use of "unless orders" must have facilitated, to a certain degree, the elimination of the backlog. Fast forward to the present, some 20 years after the backlogs had been cleared and the courts are on top of its case management with healthy disposal rates and timelines: what are the prevailing attitudes of the judiciary towards the use of "unless orders"?

II. The undisputed facts and holding in *Mitora*

4 The plaintiff and appellant, Mitora Pte Ltd ("Mitora"), was a company incorporated in Singapore providing business and management consultancy services. The defendant and respondent, Agritrade International (Pte) Ltd, is incorporated in Singapore and engaged in the business of, *inter alia*, coal trading. Senamas Far East Inc ("Senamas"), incorporated in Japan and operating out of Tokyo, was set up primarily to provide consulting services to the respondent in respect of the latter's coal mines in the Republic of Indonesia. Senamas was also to act as the respondent's exclusive agent to develop and market the respondent's coal to Japan and Korea. These arrangements were made pursuant to a consultancy agreement signed by Senamas and the respondent with the following terms: the respondent agreed to pay Senamas: (a) a commitment fee of US$50,000 per year starting 1 April 2005 up to April 2009; and (b) a monthly consultancy fee of US$12,500 on the first of each month starting from April 2005.

5 It was agreed that Senamas would assign its debt against the respondent to the appellant. In this connection, a deed of assignment was entered into on 9 April 2010 in consideration of US$100,000. The appellant's main action was founded on a sum of US$625,000 which purportedly remained unpaid to Senamas under the consultancy agreement. The respondent denied that the Consultancy Agreement consisted of any commitment fee, and further argued that the consultancy agreement had been terminated in or around September 2008. A counterclaim was also advanced by the respondent on the basis that Senamas had breached its obligations as the respondent's exclusive agent in Japan by providing consultancy services to other companies. The appellant issued the writ of summons on 22 July 2010.

6 On 26 May 2011, the respondent successfully applied for the discovery of eight categories of documents principally relevant to the respondent's counterclaim. As Senemas was initially reluctant to release certain classes of documents, the respondent managed to secure two successive "unless orders" against the appellant to compel compliance with the 26 May 2011 order. The appellant's failure to comply fully with these orders resulted in its statement of claim ("SOC") being struck out by the assistant registrar.

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7 At the hearing of the appeal against the assistant registrar's order, the High Court judge granted two further adjournments for the appellant to fully comply with its discovery obligations. By 18 May 2012, the appellant had substantively complied with the 26 May 2011 order. However, at the final hearing before the judge on 23 May 2012, the respondent raised a fresh objection alleging that the order requiring disclosure of one of the categories of documents had not been complied with. The judge agreed with the objection and dismissed the appeal on the basis that there were no extraneous circumstances which prevented the appellant from complying with the court orders. Ancillary to this was the appellant's application to seek an extension of time to file its third and fourth supplementary list of documents. This application was also dismissed. In fact, if the "ancillary" order of extension of time were granted, the SOC would not have been struck out and the action would have subsisted.

8 Being dissatisfied with the High Court dismissing the appeals, the appellant appealed to the Court of Appeal. The Court of Appeal allowed both appeals with the net result of restoring the SOC and the appellant's action. The Court of Appeal found on the record that the appellant did substantively comply with all its discovery obligations and that the SOC should not have been struck out.[10] Even if there had been an intentional and contumelious breach of an "unless order", the Court of Appeal held that the court, in imposing the sanction, must be guided by considerations of proportionality after taking all the circumstances of the case into account. On the facts of *Mitora*, the Court of Appeal did not think that the striking out of the appellant's SOC owing to its previous breaches of "unless orders" was proportionate.[11] The Court of Appeal further stressed the following on the making of "unless orders": (a) they are to be scrupulously employed and not to be given as a matter of course; (b) the conditions must be tailored to the prejudice which would be suffered should there be non-compliance; and (c) the court must contemplate other means of penalising contumelious or persistent process breaches. The Court of Appeal, however, cautioned that litigants would always remain vulnerable to the ultimate sanction of a striking-out order in cases which involve an inexcusable breach of a significant procedural obligation.[12] With these principles in mind, the Court of Appeal laid down a set of guidelines[13] on the making of "unless orders" which will be discussed below.[14]

10 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [25].
11 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [39] and [41].
12 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [45] and [47].
13 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [45].
14 See paras 9–19 below.

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III. A timely mantra on the making of "unless orders"?

9 What was particularly helpful in *Mitora* was the Court of Appeal's guidance that if an "unless order" were to be made, the conditions appended to the "unless order" should as far as possible be tailored to the prejudice which would be suffered in the event of non-compliance. The typical consequences of a breach of an "unless order" are either the dismissal of the action (if the party in default is the plaintiff) or judgment entered (if the party in default is the defendant). The clarion call to dovetail the consequences of an "unless order" could not have been more timely. While the call to "dovetail" sounds logical, there are inherent limitations that would prevent a "dovetailing" of the consequences of every "unless order" by the very nature of the circumstances that necessitate "unless orders" to move civil litigation along. The Court of Appeal was visibly aware of this limitation when it observed that: "The court's power to strike out an action may be properly invoked in cases involving an inexcusable breach of a significant procedural obligation."[15] Indeed, this judgment repays careful study as it provides exceptional guidance on the making of an "unless order" and reiterates the importance of substantive justice and a fair trial over mere procedural defaults.

A. The circumstances in which the court should make an "unless order"

10 As stated above, due to its draconian consequences, "unless orders" are only intended to be "weapons" of last resort.[16] Unfortunately, the practice on the ground for many years is not quite the same. Solicitors often seek, and are normally granted, these "unless orders" at the first instance of a breach. Occasionally, "unless orders" have been granted at the first instance *even* before there is a breach. The case below is on point.

11 In *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani*[17] ("*Syed Mohamed*"), the respondent requested the appellants to furnish further and better particulars of the counterclaim. The respondent later made an application to the court and the deputy registrar ordered the appellants to file and serve the required further and better particulars on the respondent within ten days, in default thereof, the counterclaim was to be struck out without further order ("the unless order"). The deadline for filing expired on 15 August 1997. On the morning of 16 August 1997, the respondent obtained an order striking out the

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15 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [47].

16 *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864 at [36], *per* Moore-Bick LJ.

17 [1999] 1 SLR(R) 361.

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appellants' counterclaim with costs at 9.52am. Unknown to the respondent, the appellants had earlier on the same day attempted to file the required further and better particulars after having them stamped at 9.31am but were unable to do so as they were out of time. The appellants appealed against the striking-out order and applied for the reinstatement of their counterclaim as well as an extension of time to file and serve the required further and better particulars. The appeal was dismissed by the district judge as well as the High Court on appeal. On further appeal, the Court of Appeal accepted that the appellants did try to comply with the unless order and their default was not intentional and contumelious or contumacious.[18] In the light of the appellants' clean record, the very thin margin of default and the absence of uncompensatable damage or prejudice to the respondent, the Court of Appeal fortunately held that the appellants' default did not warrant the striking out of their counterclaim.[19]

12 What is noteworthy in *Syed Mohamed* is the fact that the "unless order" was issued even before there was an actual breach – it was in fact an "unless order" made in anticipation of a breach. The above should be distinguished from a situation of non-compliance of an order whereupon the aggrieved party sought an "unless order" against the party in default. The "unless order" is typically granted after giving another timeline to the party in default to comply. While the Court of Appeal took the view that the appellants' default was not intentional and contumelious or contumacious, it did not express an opinion as to whether the "unless order" made was inappropriate. Interestingly, the appellants' counsel had submitted that the unless order was inappropriate because the appellants had no history of procedural defaults. However, the Court of Appeal disposed of that submission by stating that when dealing with the consequences of non-compliance with an "unless order", the court was not concerned with whether or not the order should have been made, but rather with why it was not complied with.[20]

13 The approach taken by the courts in the case above could be understood in the context of the 1990s where our courts were then actively clearing the backlog and conscientiously working at reducing the time taken to dispose a civil action commenced by a writ of summons. It is with this backdrop in mind that one can better appreciate the force of an "unless order". Interestingly, the not

18 *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [21].
19 *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [24].
20 *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [20].

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infrequent use of "unless orders" continued for more than a decade[21] prior to the Court of Appeal's decision in *Mitora*. The courts neither were slow nor appeared to loathe making "unless orders". A survey of the judgments, whether in the 1990s or post-2000, will reveal that the courts granted "unless orders" fairly readily to compel the party in default to move the case along.

14 One of the first judicial pronouncements locally on the need to ensure *proportionality* in the consequence of "unless orders" is evident in *Syed Mohamed*.[22] The Court of Appeal, in *Syed Mohamed*'s case, indicated that the nature of the relief sought against the party in default and whether or not the penalty imposed is proportionate to the default in question are relevant factors for the court to take into consideration when making an "unless order". It was not until a decade later that the factor of proportionality was re-visited in *Teeni Enterprise Pte Ltd v Singco Pte Ltd*[23] ("*Teeni Enterprise*"). In that case, the defendant applied to enter judgment against the plaintiff on the defendant's counterclaim and for the plaintiff's claim against the defendant to be dismissed due to the plaintiff's failure to serve all documents contained in the plaintiff's supplementary list of documents within the timeline stipulated by the court pursuant to an "unless order". An assistant registrar heard the summons, dismissed the plaintiff's claim and entered judgment against the plaintiff on the defendant's counterclaim since the plaintiff had breached the "unless order". The plaintiff appealed against the decision of the assistant registrar and Chan Seng Onn J allowed the appeal. Chan J observed that the enforcement of the "unless order" was clearly disproportionate, inappropriate and harsh in the light of all the facts and circumstances of this case and would not be in the interests of justice. Chan J was of the view that the proper course of action was to *allow the plaintiff to amend the supplementary list to remedy the discrepancies and errors* instead of applying the draconian measures reserved for contumacious disobedience of court orders.[24]

15 The decision in *Teeni Enterprise* had created a *renewed* awareness that the courts must balance the importance of ensuring compliance with court orders with the need to ensure that a party would not be summarily deprived of its legal rights without any hearing of the merits especially when the non-compliance or breach was not so

21 See generally *Lee Chang-Rung v Leonard Loo LLP* [2012] SGHC 174 at [6] (failure to furnish a document leading to an "unless order), *The MMM Diana ex Able Director* [2004] 3 SLR(R) 611 at [1] and *Vijayalakshmi Sivaprakasapillai v Mrinalini Ponnambalam* [2009] SGHC 183 at [37] (both cases for failure to exchange affidavits of evidence-in-chief leading to an "unless order").

22 *Syed Mohamed Abdul Muthaliff v Arjan Bhisham Chotrani* [1999] 1 SLR(R) 361 at [15].

23 [2008] SGHC 115.

24 *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 at [63] and [65].

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serious or aggravating as to warrant such a severe consequence.[25] The court in *Teeni Enterprise* agreed with the party who breached the "unless order" that it was a draconian punishment to allow the "massive" counterclaim of over $1.2m and that the dismissal of the whole of the plaintiff's claim was disproportionate, taking into account the relatively trivial breach by the plaintiff which did not occasion any real prejudice to the defendant.[26] The Court of Appeal in *Mitora* was in agreement[27] with the approach taken in *Teeni Enterprise* with regard to the consequences of a breach of "unless orders". The Court of Appeal found that the clearest expression[28] of the judicial approach[29] to be guided by considerations of proportionality in assessing breaches of "unless orders" was probably to be found in *Teeni Enterprise*. Building on the analysis adopted in *Teeni Enterprise*, it must *have* paved the way for the Court of Appeal in *Mitora* to provide a set of guidelines for the more "scrupulous" use of "unless orders". The guidelines are as follows:[30]

> (a) 'unless orders' stipulating the consequence of dismissal should not be given as a matter of course but as a *last resort* when the defaulter's conduct is inexcusable;
>
> (b) the conditions appended to 'unless orders' should as far as possible be *tailored to the prejudice* which would be suffered should there be non-compliance; and
>
> (c) *other means of penalising* contumelious or persistent breaches are available, *including but not limited to*:
>
> > (i) awarding costs on an *indemnity basis*;
> >
> > (ii) ordering the *payment of the plaintiff's claim or part thereof into court* where the defaulting party is a defendant;[31]
> >
> > (iii) *striking out relevant portions* of the defaulting party's Statement of Claim or Defence *rather than the whole*;
> >
> > (iv) *barring* the defaulting party from adducing *certain classes of evidence* or calling related witnesses; and

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25 *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 at [64].
26 *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 at [63].
27 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [40].
28 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [39].
29 The Court of Appeal in *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 also noted (at [40]) that the observations made in *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 at [64] were in line with the guidance of Auld LJ in *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 WLR 1666 at 1677.
30 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [45].
31 See *Husband's of Marchwood Ltd v Drummond Walker Developments Ltd* [1975] 1 WLR 603 at 605.

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> (v) *raising adverse inferences* against the defaulting party at trial.
>
> [emphasis added]

16 These guidelines are not only very timely but necessary considering the pervasive use of "unless orders" in civil litigation. It is particularly useful that the Court of Appeal stressed that the use of "unless orders" as a last resort, tailored to meet the prejudice and that the court must consider other means of penalising the party in default. If the above guidelines are given serious consideration by lawyers and judges, it is highly likely that the instances of "unless orders" will be significantly reduced. As to whether an "unless order" should be imposed in all the circumstances of the case, a single word could be used to gauge its appropriateness – "proportionality". Indeed, the Court of Appeal noted in the judgment that all things considered, the court did not think that it was proportionate for the appellant's SOC to be struck out owing to its earlier breaches of "unless orders".[32] This raises the question as to whether it is "'proportionate' to impose an 'unless order' with the resulting consequence for a default of that nature".[33] As mentioned above, the Court of Appeal in *Mitora* had unequivocally endorsed Chan J's point on the importance of *proportionality* of the sanction.[34]

17 It must be pointed out that there could be situations where tailoring the prejudice to the breach could prove challenging. In some instances, it is possible. In other instances, short of dismissing the claim or judgment entered, the grievance suffered by the innocent party cannot be adequately remedied. The fact of the matter remains that the consequences of "unless orders" need not always be so draconian so as to move the action along. Take the case of a repeated failure to provide further and better particulars. The consequence could be limited to striking out the offending paragraphs of the pleadings instead of the whole. The action can continue even without the material particulars in selected paragraphs of the pleadings. Similarly, if it is a case of a repeated failure to answer interrogatories, the consequence could be a prohibition at trial to adduce certain points of evidence that may benefit the party in default rather than summarily terminate the action. Then again, would such tailoring of the prejudice to the nature of the breach unwittingly encourage unscrupulous parties to "game" the system?

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32 See *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [41] and [26], that it may be "disproportionate" to have the statement of claim struck out in the circumstances.

33 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [35]–[41].

34 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [39] and [40].

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18 In contrast, what if it is a case where the plaintiff repeatedly fails to furnish security for costs as ordered? Apart from dismissing the action, there can be no relief that any defendant would want to accept. In fact, the longer the plaintiff drags his feet, the greater the risks of irrecoverable costs borne by the defendant in the event the plaintiff fails in the action. Will this offend the "proportionality" principle as enunciated by the Court of Appeal?[35] The legal analysis is by no means easy in such a circumstance. Considering that it is a civil proceeding, if the plaintiff is unable to secure the defendant's costs should the defence succeed, the "unless order" could well be legitimate. In determining whether security for costs should be ordered in all the circumstances of the case, the court would have considered, amongst others, whether an order for security for costs would stifle a genuine claim.[36] As the latter is a fairly robust exercise, if the plaintiff is unable to furnish security for costs as ordered especially if it is only a fractional amount of the total costs up to a particular stage of the litigation, then it is entirely justifiable for the action to be dismissed. If this analysis is correct, an "unless order" with a consequence of dismissing the action is arguably not a disproportionate[37] order to make. For instance, in *Kraze Entertainment (S) Pte Ltd v Marina Bay Sands Pte Ltd*,[38] the plaintiff's action was dismissed pursuant to an "unless order" for failing to furnish security for costs as ordered. Since the claim was not time barred, the plaintiff decided to bring the second action based on the same cause of action and against the same defendant. Consequently, the defendant successfully applied to strike out the second action on the basis that it would be an abuse of process to recommence an identical action. As mentioned earlier, the Court of Appeal is alert to the fact that litigants would always remain vulnerable to the ultimate sanction of a striking-out order in cases which involve an inexcusable breach of a significant procedural obligation.[39] Failure to furnish security for costs is but only one such instance.

19 The Court of Appeal also expressly acknowledges that there are other options to penalise contumelious or persistent breaches apart from those enumerated in *Mitora*,[40] *ie*, the categories are not closed. The Court of Appeal used the following phrase "other means of penalising contumelious or persistent breaches are available, *including but not*

35 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [26] and [41].
36 *Creative Elegance (M) Sdn Bhd v Puay Kim Seng and another* [1999] 1 SLR(R) 112 at [31], [32] and [33].
37 The author has deliberately chosen to use a double negative expression as assessing "proportionality" is really a balancing exercise involving a nuanced approach.
38 [2013] SGHC 207 at [6].
39 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [45] and [47].
40 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [45].

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limited to" [emphasis added].[41] The possibilities are innumerable. What will be relevant in each case as a penalty will obviously depend on the facts and circumstances and the impact of the non-compliance of an order of court. Other options could conceivably include the denial of part of the costs that the party in default would have been entitled to, a reduction of the claim amount even if the whole sum is eventually proved by the party in default and limiting the rights of the party in default to further and better particulars/discovery/interrogatories.

B. Reiterating the importance of substantive justice and a fair trial over procedural defaults

20 The judgment in *Mitora* restoring the SOC reiterates the Court of Appeal's penchant for the *merits* of the case to be adjudicated as far as possible instead of having parties' *substantive* rights summarily disposed due to procedural irregularities. This policy is evidently documented in both the parliamentary debates[42] on the 2010 amendments to s 34 of the Supreme Court of Judicature Act[43] ("SCJA") that took effect from 1 January 2011 to restrict appeals to the Court of Appeal from the interlocutory orders and recent Court of Appeal pronouncements in *OpenNet Pte Ltd v Info-communications Development Authority of Singapore*[44] ("*OpenNet*") and *Dorsey James Michael v World Sport Group Pte Ltd*[45] ("*Dorsey James*"). More importantly, in the recent years, the same judicial approach has also been consistently applied by the courts in cases beyond issues pertaining to "the right to appeal". Another illustration is the Court of Appeal's decision in *Mercurine Pte Ltd v Canberra Development Pte Ltd*[46] ("*Mercurine*"). When assessing whether a regular default judgment should be set aside, the Court of Appeal held in *Mercurine* that the appropriate test was that which was laid down in *Evans v Bartlam*,[47] *ie*, whether the defendant could establish a *prima facie* defence in the sense of showing that there were triable or arguable issues, and not the "real prospect of success" test enunciated in *The Saudi Eagle*.[48] The Court of Appeal's decision in *Mercurine* reverses

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41 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [45(c)].

42 See the *Singapore Parliament Reports (Hansard)* (18 October 2010) "Supreme Court of Judicature (Amendment) Bill" vol 87 at cols 1367–1395) (Assoc Prof Ho Peng Kee, Senior Minister of State for Law), which eventually brought into being s 34(2)(*d*) and the Fifth Sched of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) through the enactment of the Supreme Court of Judicature (Amendment) Act 2010 (Act 30 of 2010).

43 Cap 322, 2007 Rev Ed.

44 [2013] 2 SLR 880 at [18].

45 [2013] 3 SLR 354 at [84].

46 [2008] 4 SLR(R) 907 at [50] and [60].

47 [1937] AC 473.

48 [1986] 2 Lloyd's Rep 221.

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its previous decision in *Abdul Gaffer bin Fathil v Chua Kwang Yong*[49] which preferred the more stringent test in *The Saudi Eagle*. Whether it is in the making of an "unless order", a right to appeal to the Court of Appeal or setting aside a regular judgment entered in default, the message is unmistakable – where the merits of the parties' substantive dispute have yet to be heard, the Court of Appeal is slow to terminate the action for mere inconsequent procedural irregularities.

21 In *OpenNet*, it was spelt out that an appeal to the Court of Appeal will generally be as of right for orders made at interlocutory applications which have the effect of finally disposing of the *substantive rights of the parties*; while an appeal to the Court of Appeal will ordinarily be denied for orders made at interlocutory applications which do not finally dispose of the substantive rights of the parties, and which are deemed to involve established principles of law. The category consisting of orders made at interlocutory applications which lie in the middle of these two extreme situations may be appealed to the Court of Appeal only with leave of court.[50] In *Dorsey James*, the Court of Appeal laid down the twin considerations arising from the 2010 amendments to the SCJA: (a) the objective of restricting appeals to the Court of Appeal from interlocutory orders; and (b) that it is evident that Parliament had intended that an appeal to the Court of Appeal ought to remain as of right where a final order which disposes of the *substantive* rights of the parties is made by a High Court judge, even if this was done at the hearing of an interlocutory application.[51] Increasingly, we can expect more Court of Appeal judgments, like *Mitora*, that will incline towards having the *substantive merits*[52] of the case to be considered rather than prematurely terminated for one procedural reason or another.

22 Returning to *Mitora*, the appellant had strictly speaking failed to comply with the orders of discovery dated 26 May 2011 and the first and second "unless orders" notwithstanding that the documents required were produced at the end of the day, *albeit* out of time. To deny the appellant his day in court would definitely be too draconian. In any event, the non-compliance was not such that the respondent could not be fairly and adequately compensated by costs. It therefore did not come as a surprise that the Court of Appeal was convinced that "a fair trial was eminently possible and that the Respondent's initial failings did not

49 [1994] 3 SLR(R) 1056.

50 *OpenNet Pte Ltd v Info-communications Development Authority of Singapore* [2013] 2 SLR 880 at [18].

51 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [84]. The Court of Appeal also added that each of the orders expressly stipulated by the Fourth and Fifth Scheds to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) as being non-appealable or appealable only with leave are interlocutory as opposed to final in nature.

52 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [39].

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suffice to justify the striking out of Statement of Claim".[53] It bears repeating that in *Teeni Enterprise*,[54] Chan J was very alert to the importance that the court must weigh the need to ensure compliance with court orders against the need to ensure that the party in default[55] would not be summarily deprived of its legal right *without* any hearing of the merits.

23 This is not to say that in every situation the parties' substantive rights will automatically and invariably take precedence over procedural non-compliance. In this regard, long before the 2010 amendments to s 34 of the SCJA, the very eloquent speech of Andrew Phang Boon Leong JC (as he then was) in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd*[56] highlighted the tension between the need for procedural justice on the one hand, and substantive justice on the other. His Honour aptly stressed that:[57]

> The obsession with achieving a substantively fair and just outcome does not justify the utilisation of any and every means to achieve that objective. There must be fairness in the procedure or manner in which the final outcome is achieved.

An illustration on point is in the case of *Giorgio Ferrari Pte Ltd v Lifebrandz Ltd*.[58] The assistant registrar struck out the SOC pursuant to a varied "unless order" for the appellant's failure to provide specific discovery. On appeal, the High Court judge found that the appellant failed to give any good reason or show extenuating circumstances for its failure to comply. The appellant's persistent assertion that the documents given were sufficient for the purposes of complying with the specific discovery orders were bare assertions. They simply could not mask the fact that the documents and letters of clarifications submitted by the appellant patently did not fully comply with the varied "unless order". The court was therefore not persuaded that the assistant registrar's decision to strike out the SOC was wrong.

24 There will be cases of contumelious breaches that deserve to be struck out or judgments entered without a hearing on the merits as a consequence of an "unless order". It is with these cases in mind that the Court of Appeal in *Mitora* was very astute to lay a caveat that the court is nonetheless entitled to look at all the circumstances in its assessment of whether a striking-out application should be granted and stressed

53 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [50].
54 [2008] SGHC 115 at [64].
55 This is especially so when the breach was not so aggravating as to warrant the usual severe consequences.
56 [2005] 2 SLR(R) 425 at [4]–[9].
57 *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [5].
58 [2013] 1 SLR 358 at [45]–[46].

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that exceptionally, an action may be struck out even where there might still be a reasonable prospect of a fair trial.[59] It will be interesting to see how the courts will plot the boundaries of the *dicta* in *Ng Huat Foundations* over time in subsequent cases. In the final analysis, even with the guidelines laid down in *Mitora*, each case of a breach of an "unless order" must be decided on its own facts.[60]

IV. In closing

25 The Court of Appeal's judgment in *Mitora* is to be welcomed. It is a timely reminder that "unless orders" should not be ordered as a matter of course. Where the default is not so serious to warrant an "unless order" that terminates a legal right, it is for the party in default to persuade the court that it would not be *proportionate* in all the circumstances to make such an order. In this regard, the Court of Appeal has very helpfully provided guidance in the judgment on various alternatives that could be considered to penalise the party in default instead of making an "unless order". Solicitors should, of course, assist the court to explore, as far as possible, ways for the conditions appended to "unless orders" to be tailored to the prejudice which would be suffered should there be non-compliance. It is axiomatic to state that this is easier said than done. Both the courts and practitioners have been so accustomed to applying the standard draconian consequences such as judgment to be entered or a dismissal of the action in the event of non-compliance. In light of *Mitora*, such a reflex action must clearly change. With the ingenuity, resourcefulness and determination of the legal profession, the guidelines in *Mitora* can be meaningfully put to the test. Only time will tell if *Mitora* will be the mantra for the making of "unless orders".

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59 *Mitora Pte Ltd v Agritrade International (Pte) Ltd* [2013] 3 SLR 1179 at [48], quoting from *Singapore Civil Procedure 2013* vol 1 (G P Selvam ed) (Sweet & Maxwell Asia, 2013) at para 24/16/1 that:

> … *the deliberate destruction or suppression of a document or the persistent disregard of an order of production* would engage the court's jurisdiction and justify a striking out order even where a fair trial was still possible [emphasis added].

60 *Teeni Enterprise Pte Ltd v Singco Pte Ltd* [2008] SGHC 115 at [63].

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