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# INTERLOCUTORY APPEALS TO THE COURT OF APPEAL

## Towards a clearer understanding of para 1(*h*) (formerly para (*e*)) of the Fifth Schedule to the Supreme Court of Judicature Act

[2019] SAL Prac 6

*One of the most litigated areas of civil procedure in recent years is whether leave is required to appeal against an order on an interlocutory application which is not specified in the Fifth Schedule to the Supreme Court of Judicature Act ("SCJA"). The Court of Appeal has, in the course of a series of judgments between 2013 and 2018, sought to clarify the meaning of the phrase "an order at the hearing of any interlocutory application" in para 1(*h*) of the Fifth Schedule to the SCJA (at the time of these cases, para (*e*) of the Fifth Schedule to the SCJA). This article examines these developments and the current state of the law.*

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1 In 2010, the Supreme Court of Judicature Act[1] ("SCJA") was amended by the Supreme Court of Judicature (Amendment) Act[2] ("the 2010 amendments"). The 2010 amendments included the reformulation of s 34 of the SCJA and the introduction of the Fourth and Fifth Schedules to this statute. The Fourth Schedule enumerates proceedings which are not appealable. The Fifth Schedule (which consists of para 1(*a*) to (*i*)) provides for matters in respect of which leave to appeal is necessary. It states that subject to certain qualifications (which do not concern this article):

1 Cap 322, 2007 Rev Ed.
2 No 30 of 2010.

> ... an appeal may be brought to the Court of Appeal only with the leave of the High Court or the Court of Appeal, in any of the following cases:
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> ...
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> (*h*) [w]here a Judge makes an order at the hearing of any interlocutory application other than an application for any of the following matters:
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> (i) for summary judgment;
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> (ii) to set aside a default judgment;
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> (iii) to strike out an action or a matter commenced by a writ of summons or by any other originating process, a pleading or a part of a pleading;
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> (iv) to dismiss an action or a matter commenced by a writ of summons or by any other originating process;
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> (v) for further and better particulars;
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> (vi) for leave to amend a pleading;
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> (vii) for security for costs;
>
> (viii) for discovery or inspection of documents;
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> (ix) for interrogatories to be varied or withdrawn, or for leave to serve interrogatories;
>
> (x) for a stay of proceedings.

2 Paragraph 1(*h*)(i)–(x) (which replicates the former para (*e*)(i)–(x))[3] contains ten categories of interlocutory applications in respect of which leave to appeal is not required. As for applications that are not within para 1(*h*)(i)–(x), the question of whether leave is necessary depends on the proper interpretation of the wording "an order at the hearing of any interlocutory application". The Court of Appeal explained the scope of the former para (*e*) (now para 1(*h*)) in a series of judgments including

3 This amendment resulted from the Supreme Court of Judicature (Amendment No 2) Act 2018 (Act 46 of 2018), which came into force on 1 January 2019.

*OpenNet Pte Ltd v Info-Communications Development Authority of Singapore*[4] ("*OpenNet*"), *Dorsey James Michael v World Sport Group Pte Ltd*[5] ("*Dorsey*"), *The Nasco Gem*[6] and, most recently, in *Telecom Credit Inc v Midas United Group Ltd*[7] ("*Telecom Credit*"). For convenience, the cases will be grouped under three headings: applications before the commencement of proceedings; applications in the course of proceedings; and applications after judgment. As will be seen, para 1(*h*) contemplates interlocutory orders, not final orders. It is well established in Singapore that a judgment or order is not interlocutory but final if it finally disposes of the rights of the parties ("the *Bozson* test").[8] It will also be shown that although an "interlocutory application" is normally made in the course of proceedings, para 1(*h*) also contemplates interlocutory applications after judgment.

## I. Applications before the commencement of proceedings

3 The case of *Dorsey* concerned an application by the respondent to strike out an appeal from the decision of the High Court permitting the respondent to serve pre-action interrogatories on the appellant. The Court of Appeal considered that the legislative purpose of the 2010 amendments was to restrict the right of appeal from orders made at the hearing of interlocutory applications and 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

4 [2013] 2 SLR 880.

5 [2013] 3 SLR 354.

6 [2014] 2 SLR 63.

7 [2019] 1 SLR 131.

8 *Bozson v Altrincham Urban District Council* [1903] 1 KB 547 at 548. This test was reaffirmed by the Court of Appeal in *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525 at [10]; *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880; *The Nasco Gem* [2014] 2 SLR 63 and *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [14].

interlocutory application".[9] It ruled that as the reference to "interrogatories" in para (*i*) of the Fourth Schedule (now para 1(*k*) of the Fourth Schedule) does not include pre-action interrogatories, the appellant had a right of appeal. The pre-action application was a free-standing one and would be fully determined at the hearing.

4 The Court of Appeal also considered the former para (*e*) of the Fifth Schedule and observed that the Fourth and Fifth Schedules must be understood contextually in the light of that paragraph "which establishes the default requirement that leave of the High Court judge is required before an appeal can be brought to the Court of Appeal from orders made at the hearing of interlocutory applications".[10] Applying the legislative purpose of the 2010 amendments, the Court of Appeal observed that the term "order" in the former para (*e*) is an interlocutory order that does not extend to an order that finally disposes of the substantive rights of the parties.[11] In *Dorsey*, the Court of Appeal had summarised the principles as follows:[12]

> (a) Ordinarily, pursuant to s 29A of the SCJA, any judgment or order of the High Court is appealable as of right to the Court of Appeal. This, however, is subject to any provision in the SCJA or any other written law to the contrary.
>
> (b) Where interlocutory applications are concerned, ss 34(1)(*a*) and 34(2)(*d*) of the SCJA, read with the Fourth and Fifth Schedules respectively, are examples of such provisions to the contrary. These provisions prescribe that particular orders

9 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [81] and [84].

10 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [53].

11 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 ("*Dorsey*") at [98]. The Court of Appeal agreed with its own observations in *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [21] that the 2010 amendments to s 34 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and the Fourth and Fifth Schedules were intended to address orders made at the hearing of interlocutory application. Also see *Dorsey* at [98(d)] concerning the interpretation of "order" in para (*e*) of the Fifth Schedule as an "interlocutory order".

12 *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [98].

are either non-appealable or appealable to the Court of Appeal only with leave.

(c) Where specific provision has been made in s 34 of the SCJA and in the Fourth and Fifth Schedules, that will apply on its terms, save that para (*i*) of the Fourth Schedule and para (*c*) of the Fifth Schedule apply only to orders made upon interlocutory applications.

(d) In relation to the opening words of para (*e*) of the Fifth Schedule to the SCJA, the reference to 'order' is to be read as a reference to an interlocutory order.

(e) Where an order is not stipulated as being *non-appealable* or *appealable only with leave*, an appeal to the Court of Appeal will lie as of right.

5 Prior to its judgment in *Dorsey*, the Court of Appeal had the opportunity to consider the former para (*e*) of the Fifth Schedule in *OpenNet*, a case involving an application for leave to commence proceedings for judicial review. Quite clearly, this was not an interlocutory application because a denial of leave would mean the full determination of the substantive rights of the applicant. Although an interlocutory application normally means an application in the course of proceedings for the purpose of preparing the case for the trial or final hearing, this is not inevitably the case. For example, an application for summary judgment or striking out an action is interlocutory in the sense that it occurs prior to trial. However, it is not a preparatory application but an application for the purpose of determining the case altogether. Therefore, an order granting summary judgment is appealable as of right (see para 1(*h*)(i)), while an order granting leave to defend is not appealable (see para 1(*c*) and (*d*) of the Fourth Schedule). Similarly, while a decision on an application to amend a pleading is not appealable (para 1(*i*) of the Fourth Schedule) because it does not determine substantive rights, an order refusing leave is appealable with

leave (para 1(*d*) of the Fifth Schedule) because it does affect substantive rights.[13]

## II. Applications in the course of proceedings

6 The former para (*e*) (now para 1(*h*)) of the Fifth Schedule was considered in *The Nasco Gem*, which concerned an application for extension of time to file a notice of appeal against the decision of the High Court dismissing an application to set aside a warrant of arrest and the service of an admiralty writ. The applicant contended that he did not need leave to appeal as a result of the judgments in *OpenNet* and *Dorsey* and that the only issue was whether time should be extended. The Court of Appeal disagreed, distinguishing *OpenNet* and *Dorsey* on the basis that those cases concerned self-standing (not interlocutory) applications which fully determined the proceedings.[14] In *The Nasco Gem*, the application was not free-standing but ancillary to the main proceedings. Furthermore, the decision of the court, one way or the other, would not decide the substantive rights of the parties or the relief claimed in the originating process.[15] The appellant argued that in determining whether an application is interlocutory, emphasis should be placed on the relief that is sought. The Court of Appeal responded that in order to determine whether an order on an interlocutory application is final, the matter "must be viewed in the context of the cause in the pending action. … it is the cause of the pending *proceedings* in which the application is being brought which is significant, not the specific purpose of the *application*" [emphasis in original].[16] Therefore, the circumstances came within para (*e*) of the Fifth Schedule because the case involved an interlocutory order in the course of an interlocutory application.[17] As the applicant failed to obtain leave to appeal, it was not in a position to apply

13 *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [20].

14 *The Nasco Gem* [2014] 2 SLR 63, at [9], [10] and [15].

15 *The Nasco Gem* [2014] 2 SLR 63 at [15] and [16].

16 *The Nasco Gem* [2014] 2 SLR 63 at [16].

17 *The Nasco Gem* [2014] 2 SLR 63 at [16].

for an extension of time.[18] The Court of Appeal made the following observations on whether an order is appealable as of right, non-appealable or appealable only with leave:[19]

> (a) There shall be no right of appeal in respect of an order made by a High Court judge which falls within the Fourth Schedule, s 34(1)(*d*) or s 34(1)(*e*).
>
> (b) Where an application would in the normal sense be regarded as 'interlocutory' (that is, where the application is peripheral to the main hearing determining the outcome of the case, or occurs during the course of proceedings between the initiation of the action and the final determination), one will have to apply the tests in *OpenNet* … and *Dorsey* … (informed by the object and purpose of the 2010 amendments) to determine if the order made in that application is 'interlocutory' in nature within the meaning of the SCJA.
>
> (c) If so, then pursuant to ss 34(1)(a) and 34(2)(d) of the SCJA, read with the Fourth and Fifth Schedules to the SCJA respectively, such orders are either appealable only with leave of court or are non-appealable.
>
> (i) The orders that are non-appealable are stated in the Fourth Schedule to the SCJA.
>
> (ii) The orders that are appealable only with leave of court are stated in the Fifth Schedule to the SCJA.
>
> (iii) Where no explicit reference is made to the order in question in the Fourth and Fifth Schedules to the SCJA, then the catch-all provision in para (*e*) of the Fifth Schedule to the SCJA applies such that leave to appeal is required.
>
> (d) If not, then the order made by the High Court in that application is appealable as of right pursuant to s 29A(1) of the SCJA.

7 The above observations of the Court of Appeal in *Dorsey* and *The Nasco Gem* may be combined for a comprehensive understanding of the scheme under s 34 of the SCJA and the

18 *The Nasco Gem* [2014] 2 SLR 63 at [28].

19 *The Nasco Gem* [2014] 2 SLR 63 at [14].

Fourth and Fifth Schedules.[20] In *The Nasco Gem*, the Court of Appeal also observed that although "in practice, the difficulties lie in ascertaining whether orders made at the hearing of particular applications are 'interlocutory' in nature. The approach in *Dorsey* (effectively endorsing and applying the test in *Bozson and Wellmix Organics*) provides a workable test".[21]

## III. Applications after judgment

8 The leading case on the operation of para (*e*) of the Fifth Schedule regarding applications after judgment at trial is *Telecom Credit*. The appeal to the Court of Appeal arose from a decision by a High Court judge to order a trial to determine a garnishee's liability to pay a debt claimed to be due to the judgment debtor. The judge decided against making the provisional garnishee order absolute because of the equivocal state of the evidence. The appellant (the judgment creditor) appealed against the order for a trial. Judith Prakash JA, having considered the rationale of the Fourth and Fifth Schedules to the SCJA[22] and *OpenNet*, *Dorsey* and *The Nasco Gem*, summarised the law concerning the meaning of the words "order" and "interlocutory application" in para (*e*) of the Fifth Schedule as follows:[23]

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20 As will be explained in para 8 below.

21 *The Nasco Gem* [2014] 2 SLR 63 at [14]. Also see *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership* [2013] 4 SLR 1116, in which the Court of Appeal (applying *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525, *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 and *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354) held that an application to adjourn an examination of judgment debtor order under O 48 was interlocutory in nature because it did not finally determine any of the appellant's claims in the proceedings. Note, however, that the High Court in *Chen Chun Kang v Zhao Meirong* [2012] 1 SLR 817 at [33] believed that leave was not necessary for an appeal against a decision to adjourn a hearing of an application to enforce a default judgment. Also see *The Chem Orchid* [2016] 2 SLR 50 at [54] concerning the need for leave to appeal in respect of setting aside applications which are interlocutory in nature.

22 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [6]–[8].

23 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [19].

(a) An 'order' in para (*e*) means 'interlocutory order': *Dorsey* at [85]; *The Nasco Gem* at [14(b)].

(b) An order is interlocutory if it does not finally dispose of the rights of the parties: *Dorsey* at [28]; *The Nasco Gem* at [14].

(c) An 'interlocutory application' is one where:

(i) the application is peripheral to the main hearing determining the outcome of the case: *Dorsey* at [58]–[59]; *The Nasco Gem* at [14(b)]; or

(ii) the application occurs during the course of proceedings between the initiation of the action and the final determination: *Dorsey* at [58]–[59]; *The Nasco Gem* at [14(b)].

9 The word "order" in the former para (*e*) (now para 1(*h*)) of the Fifth Schedule is interpreted as an "interlocutory order" because "it promotes Parliament's intention that a party should not be denied a right of appeal against an order that affects the substantive outcome of the case".[24] The exact meaning of "interlocutory application" gives rise to more difficulty, as indicated by the two potentially different meanings in sub-paras (*c*)(i) and (ii) immediately above. As Prakash JA pointed out in *Telecom Credit*:[25] "It is possible for an application to fit one definition and not the other, and in such a case, it is not clear whether the application would still be an 'interlocutory application' within the meaning of para (*e*). For example, an application to enforce judgment would be peripheral to the main hearing, but it would not be an application that occurs between the initiation of an action and trial." Prakash JA ruled:[26]

> ... an 'interlocutory application' is simply an application whose determination may or may not finally determine the parties' rights 'in the cause of the pending proceedings in which the application is being brought': see *The Nasco Gem* ... at [16]. That

24 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [20], citing *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 525 at [14]; *The Nasco Gem* [2014] 2 SLR 63 at [11] and [14(b)] and *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354.

25 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [22].

26 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [26].

> is why it is necessary to look at whether the order which is made on such an application determines the parties' rights on the *Bozson* test. If it does, then leave to appeal will not be required, and if it does not, it will be an interlocutory order caught by para (*e*) and leave to appeal will be required. An interlocutory application may be peripheral to the main hearing, or it may occur between the initiation of an action and trial, or it may occur after judgment has been given.

10 The impact of this conclusion is that the High Court's decision in *Chen Chun Kang v Zhao Meirong*[27] that an application to enforce a judgment is not an interlocutory judgment because it occurs after final judgment is overruled.[28] The ruling of the Court of Appeal in *Telecom Credit* is consistent with its approach in *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership*[29] ("*PT Bakrie*"). The respondent had obtained an order registering an English judgment in Singapore and sought to enforce the judgment against the appellant. The respondent then obtained an order to examine the appellant's assets. The appellant applied unsuccessfully before the High Court to adjourn the execution of the examination order. The appellant then appealed without leave to the Court of Appeal. The court dismissed the appeal on the basis that the order refusing the adjournment was an order made at the hearing of an interlocutory application within the meaning of para (*e*) of the Fifth Schedule of the SCJA[30] so that the appellant required leave to appeal. In *Telecom Credit*,[31] Prakash JA saw "no reason why the same conclusion would not be reached if the respondent in *PT Bakrie* had been seeking to enforce a judgment obtained in Singapore". This is because "applications in the course of enforcement proceedings, although occurring after the main hearing, may properly be regarded as interlocutory".

27 [2012] 1 SLR 817 at [33].

28 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [24].

29 [2013] 4 SLR 1116.

30 *PT Bakrie Investindo v Global Distressed Alpha Fund 1 Ltd Partnership* [2013] 4 SLR 1116 at [13].

31 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [24].

11 The focal point here is that whether an application for an adjournment is made before or after judgment does not affect the parties' substantive rights – this being the underlying principle of the statutory scheme for leave to appeal. As Prakash JA stated:[32] "[I]t seems arbitrary that an adjournment application made before judgment should be considered interlocutory whereas an adjournment application made after judgment is given should not." Her Honour explained:[33]

> Such an approach is consistent with the purpose of the Act, which places the focus on whether the application in question is one that has an effect on the final outcome of the case. It will be recalled that para (*e*) is a general provision that deals with matters not stated in the Fourth and Fifth Schedules. In occupying this role, para (*e*) promotes the purpose of the Act in this regard by requiring leave to appeal based on the effect of the application in question on the substantive rights of the parties. It seems to us that para (*e*) does this best through the definition of 'interlocutory application' set out in the preceding paragraph and in combination with a consequence-focused definition of 'order', which para (*e*) already has by virtue of *Dorsey*'s interpretation of that word to mean 'interlocutory order' in the *Bozson* sense.

12 The learned judge reiterated[34] that the definitions are "'merely factors or indicia to be considered rather than tests' for the purpose of determining whether an application is interlocutory within the meaning of para (*e*) of the Fifth Schedule".[35] Applying these principles, the Court of Appeal in *Telecom Credit* ruled that an order made under O 49 r 5 of the Rules of Court[36] that a garnishee's liability to the judgment debtor be determined at trial is an order made at the hearing of an interlocutory application within the meaning of para (*e*) of the Fifth Schedule of the SCJA.[37] The order did not finally determine

32 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [24].
33 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [27].
34 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [26].
35 Also see *The Nasco Gem* [2014] 2 SLR 63 at [14(b)].
36 Cap 322, R 5, 2014 Rev Ed.
37 *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [31] and [37].

the appellant's and the respondent's rights (applying the *Bozson* test). Those rights would only be finally determined at trial. As the appellant failed to obtain leave to appeal, the appeal was dismissed.

## IV. Concluding observations and whether an appeal against the decision on a substantive issue in a multi-issue application requires leave

13 The effect of the judgments in *OpenNet*, *Dorsey*, *The Nasco Gem* and *Telecom Credit* is that the phrase "an order at the hearing of any interlocutory application" in para 1(*h*) requires leave to appeal against an order that does not finally dispose of the rights of the parties and which was obtained on an application made at any time during proceedings, including post-judgment applications. Such an application (and the order made on it) is incidental to, rather than determinative of, the substantive issues in the case. The purposes underlying the 2010 amendments were expressed by the then Senior Minister of State for Law as follows:[38]

> Interlocutory applications will now be categorised based on their *importance to the substantive outcome of the case*. With this calibrated approach, some interlocutory orders will not be allowed to go to the Court of Appeal, whilst others can only go to the Court of Appeal with the permission of the High Court. The decision of the High Court whether to grant permission is final. The right to appeal all the way to the Court of Appeal will … remain for interlocutory applications that could affect the final outcome of the case. [emphasis added]

14 Whether an appeal as of right lies against an order which determines a substantive right but does not fully determine the action may need to be confirmed by the Court of Appeal. For example, O 14 r 12 states that the court may determine any question of law or construction of any document if it is appropriate to resolve the matter without a full trial and the

38 *Parliamentary Debates, Official Report* (18 October 2010) vol 87 at cols 1369–1370 (Assoc Prof Ho Peng Kee, Senior Minister of State for Law).

determination would "fully determine ... the entire cause or matter or any claim or issue ...".[39] There is no question that if the court makes an order under O 14 r 12 which entirely disposes of the case, an appeal lies as of right.[40] It is submitted that a summary determination of a point of law or construction which affects a substantive right is a final order in respect of such a right even though there are remaining issues to be determined. This was the view of the High Court in *Aries Telecoms (M) Bhd v ViewQwest Pte Ltd*,[41] in which Woo Bih Li J stated:

> The question then is whether a distinction is to be drawn between an order made under O 14 r 12 which determines the entire action and one which determines a substantive issue in the action. In my view, both constitute final orders. A decision that finally disposes of the substantive rights of the parties on an issue in the action need not be one that affects the entire action.

15 This approach is justified by the expressed legislative purpose of the 2010 amendments, namely that appeals concerning substantive rights should lie as of right.[42] The determination of a claim or issue under O 14 r 12 would affect the "final outcome of the case"[43] even though there is an outstanding issue or claim to be decided.

39 See O 14 r 12(1)(*a*) and O 14 r 12(1)(*b*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

40 Also see *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [81] and *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 at [14] where this outcome is clearly assumed.

41 [2017] 4 SLR 728 at [47].

42 See para 13 above.

43 This phrase was used by the then Senior Minister of State for Law. See para 13 above.