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EXCLUDING EVIDENCE ON A CASE MANAGEMENT BASIS

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The new civil procedure regime ushered in by the Rules of Court 2021 encourages a cost-effective approach towards litigation. To this end, there is an argument to be made for excluding evidence, that would otherwise be admissible, on a case-management basis. This article explores the viability of such arguments, and concludes that if the Ideals of the Rules of Court 2021 are to be fully realised, amendments may have to be made to the Evidence Act 1893 (2020 Rev Ed).

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I. Introduction

1 Under the Rules of Court 2021 ("ROC 2021"), parties are required to file a Single Application Pending Trial ("SAPT") which deals with all matters necessary for the trial to proceed.[3] These include matters such as discovery and whether expert

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2 The author was holding these positions at the time of writing.

3 The Single Application Pending Trial is typically heard by the Registrar, though, the Registrar may, at any time, refer any matter to the judge assigned to the action or if there is no assigned judge, to any judge: Supreme Court Practice Directions 2021 para 55. See also para 56 of the Supreme Court

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evidence should be allowed.[4] One other matter that could, and should, be considered at this stage is whether the court may exclude evidence which would otherwise be admissible on a case management basis. This was an issue which was recently considered by Sir Nigel Teare (sitting as a High Court Judge) in the UK case of *Primafacio Ltd v Tres Canopia Ltd*[5] ("*Primafacio*"). The claimant ("PF") in that case was a Cypriot company which was part of the Jasper Group of companies that was involved in the renewable energy sector in Greece. The first and second defendants ("TC" and "EIC" respectively) were companies forming part of the EuroEnergy Group which carried out activities in the renewable energy sector and was part of the Libra Group. PF had sued TC for €2,165,000 which they said was due to them, but unpaid, under a share purchase agreement between PF and TC dated 6 February 2017 (hereinafter the "SPA").

2 TC mounted a counterclaim which was based on the allegation that PF had, through one Mr Matthew Jamurtas ("MJ") dishonestly assisted one Mr Bitzios (Chief Executive Officer of the Libra Group for Greece and the Southeast Mediterranean region) in acting in breach of fiduciary duties owed to TC by causing TC to enter into the SPA for the shares at a sum which was more than their true or market value. This sum was said to be €7m.

3 PF sought to strike out part of the Reply to the Defence to the Counterclaim. The Reply had sought to rely on similar fact evidence, in particular, by alleging that certain other transactions in which MJ and Mr Bitzios had been involved in had taken place at an inflated price. Counsel for TC argued that the defendant sought to rely on those transactions as similar fact evidence in support of their case that MJ and Mr Bitzios were not acting honestly in respect of the disputed SPA and that the contract price of the shares as set out in the SPA was not set by reference to their actual value.

Practice Directions 2021 for a list of documents that have to be filed prior to the case conference.

4 Rules of Court 2021 O 9 r 9(3) and O 9 r 9(4).

5 [2023] EWHC 430 (Comm).

4 In deciding whether the similar fact evidence should be admitted, Sir Nigel Teare applied the two-stage test as set out in *O'Brien v Chief Constable of South Wales Police*[6] ("*O'Brien*"). At Stage 1, the court had to consider whether the proposed similar fact evidence was logically probative – if it was, then the evidence would be admissible. At Stage 2, the court had to consider whether there were good grounds on which the court should decline to admit the evidence in the exercise of its case management powers. Sir Nigel Teare found that the evidence in this case was logically probative of the counterclaim – it thus passed Stage 1 of the *O'Brien* test. As to Stage 2, which required balancing probative value against case management issues, Sir Nigel Teare found that the ends of justice required and permitted the similar fact evidence to be admitted.[7] In arriving at this conclusion, he took into account the fact that the trial would be lengthened[8] and that the cost of the trial would go up as well. Initial estimates had projected a seven-to-eight-day trial costing some £2.5m. If the similar fact evidence were admitted, the trial would take 10–12 days at a cost of £3.2m. The increased cost and lengthened trial, however, did not justify excluding the evidence. Promoting the ends of justice had to be borne in mind and in that connection, the admission of similar fact evidence might enable the court to reach the right and just answer. Finally, there was minimal risk that the admission of similar fact evidence would distract parties from the main issues in the suit.[9] PF's application to strike out was therefore dismissed. Sir Nigel Teare did, however, point out that the trial judge still had the final say in deciding whether to admit the similar fact evidence – PF could renew its application to exclude the evidence either at or before trial.[10]

6 [2005] 2 AC 534.
7 *Primafacio Ltd v Tres Canopia Ltd* [2023] EWHC 430 (Comm) at [28].
8 *Primafacio Ltd v Tres Canopia Ltd* [2023] EWHC 430 (Comm) at [22].
9 *Primafacio Ltd v Tres Canopia Ltd* [2023] EWHC 430 (Comm) at [26].
10 *Primafacio Ltd v Tres Canopia Ltd* [2023] EWHC 430 (Comm) at [28].

II. Would a similar argument work in the Singapore context?

5 One would note that in *Primafacio*, Sir Nigel Teare had considered the fact that trial cost would go up and the trial would be lengthened if the evidence were to be admitted, but still decided that the evidence should be admitted on the basis that it would enable the court to reach the right and just answer. The question which we are more interested in, however, is whether, as a matter of law, the court *can* exclude evidence on a case management basis. As to whether the court *should* do so, that much is best left in the hands of the trial judge who is best placed to decide such matters.[11] There is, one might add, an intuitive appeal to being able to exclude evidence on a case management basis. Trials can be a costly affair – even more so in a case with voluminous evidence. Certain pieces of evidence, if adduced, may distract parties from the core issues[12] and bog down proceedings. As a matter of civil procedure, one might observe that excluding such evidence would be consistent with the Ideals of the ROC 2021 as well as O 3 r 2(2) which states:[13]

> **Ideals (O. 3, r. 1)**
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> **1.**—(1) These Rules are to be given a purposive interpretation.
>
> (2) These Rules seek to achieve the following Ideals in civil procedure:
>
> (*a*) fair access to justice;
>
> (*b*) expeditious proceedings;
>
> (*c*) cost-effective work proportionate to —
>
> (i) the nature and importance of the action;

11 Care, however, should be taken in deciding to exclude evidence which would otherwise be admissible. Getting it wrong would result in a retrial: see *Nata Lee Ltd v Abid* [2015] 2 P&CR 3.

12 See *BGC Brokers LP v Tradition (UK) Ltd* [2019] EWHC 3588 (QB) at [64] and *Habibur Rahman v Azizur Rahman, Icon College of Technology and Management Ltd, Icon Technology (UK) Ltd* [2020] EWHC 2392 (Ch) at [120]–[126].

13 Rules of Court 2021 O 3 r 1. See also *Singapore Rules of Court: A Practice Guide (2023 Edition)* (Chua Lee Ming & Paul Quan eds) (Academy Publishing, 2023) at para 3.002.

(ii) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and

(iii) the amount or value of the claim;

(*d*) efficient use of court resources;

(*e*) fair and practical results suited to the needs of the parties.

(3) The Court must seek to achieve the Ideals in all its orders or directions.

(4) All parties have the duty to assist the Court and to conduct their cases in a manner which will help to achieve the Ideals.

General powers of Court (O. 3, r. 2)

…

(2) Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court, so long as it is not prohibited by law and is consistent with the Ideals.

6 We turn now to consider the basis on which the court may exclude evidence which would otherwise be admissible pursuant to the Evidence Act 1893.[14]

A. Hearsay and expert evidence

7 Where hearsay and expert evidence are concerned, the court does have the power to exclude such evidence. The Evidence (Amendment) Act 2012[15] have expressly provided, in identically worded provisions (*ie*, ss 32(3) and 47(4) of the Evidence Act 1893), that the court has the power to exclude hearsay or expert opinion evidence if it is in the interest of justice to do so (the "IOJ exclusion").[16] In *Gimpex Ltd v Unity Holdings*

14 2020 Rev Ed.
15 Act 4 of 2012.
16 See Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 3rd Ed, 2022) at para 2.104.

Business Ltd ("*Gimpex*"),[17] the Court of Appeal ("CA") took the view that the "issue in applying s 32(3) [was] whether admissible evidence should be excluded because other countervailing factors outweigh[ed] the benefit of having the evidence admitted".[18] As to the factors which should be considered in deciding whether to invoke the IOJ exclusion pursuant to s 32(3), the CA cited Prof Jeffrey Pinsler's suggestions with approval:[19]

> Ideally, the court would balance the significance of the evidence (its probative value or importance to one or more of the issues) against any factors that militate against its admission. That is, the admissible evidence may be excluded if it does not justify the disadvantages that would result from its admission. Such disadvantage would include the danger of unreliability or other harm which might compromise fair adjudication, *additional costs (as when a hearsay statement is not necessary because it essentially duplicates other evidence in the case), delay in the proceedings (where additional time is needed to adduce the evidence or the proceedings have to be postponed), the distraction of the court and/or the parties (where the evidence raises collateral issues that require undue attention)*, its tendency to confuse or its misleading effect (as when there are doubts about authenticity and good faith), lack of reliability (where the circumstances of the author of a statement or in which the statement was made raise concerns about its truthfulness) and prejudice (in the sense of evidence that would have the effect of being substantively unjust or procedurally oppressive). It seems to be clear that the less significant or probative the statement, the less forceful the countervailing factors would need to be to justify exclusion. Nevertheless, as the evidence is declared to be admissible by s 32(1) of the [Evidence Act 1893], the court should not normally exercise its discretion to exclude the statement unless the countervailing factors clearly outweigh the benefit that would be gained by its admission. [emphasis added]

8 From the above, it does appear that a credible argument for excluding hearsay or expert opinion evidence on case management grounds, pursuant to either s 32(3) or 47(4) of the Evidence Act 1893 (as the case may be) may be made. The IOJ

17 [2015] 2 SLR 686.

18 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [105].

19 *Gimpex Ltd v Unity Holdings Business Ltd* [2015] 2 SLR 686 at [106], citing Jeffrey Pinsler, *Evidence and the Litigation Process* (LexisNexis, 4th Ed, 2013) at para 6.052.

exclusion does take into account the disadvantages arising from the admission of such evidence – such as additional costs, delay in proceedings as well as the risk of distracting parties from the main issues. Excluding hearsay or expert opinion evidence on a case management basis in such cases would therefore not only be permitted by the Evidence Act 1893, but also entirely consistent with the Ideals of the ROC 2021.

B. Other types of evidence

9 While it does not seem objectionable for the court to exclude either hearsay evidence or expert evidence on the grounds we have set out above, what is perhaps more unclear is whether case management can be a ground of exclusion for all *other* types of evidence that would otherwise be admissible pursuant to the Evidence Act 1893, apart from hearsay and expert evidence. Such evidence could also result in the discussion of collateral issues resulting in unnecessarily protracted proceedings and increased costs.[20] As one of the present authors has argued elsewhere, that might arise in a situation where similar fact evidence is adduced as proof that a doctor was negligent.[21] Adducing evidence of a doctor's past mistakes may well provoke a response by the doctor to defend his professional reputation.[22] This could distract from the main issues at trial and delay proceedings.[23]

10 What then is the basis on which the court may do so? There is no express provision in the Evidence Act 1893 conferring a *general* discretion to exclude evidence. There is also no

20 See *Imerman v Tchenguiz* [2011] Fam 116 at [177] (in relation to unlawfully obtained evidence) and Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 3rd Ed, 2022) at para 5.007 (in relation to similar fact evidence).

21 Soh Kian Peng, "Evidential Issues in Medical Litigation" (2022) 38(2) Journal of Professional Negligence 67 at 98.

22 See Lord Denning's observations in *Hucks v Cole* (1968) 118 New LJ 469 where he said:

> A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation.

23 Soh Kian Peng, "Evidential Issues in Medical Litigation" (2022) 38(2) Journal of Professional Negligence 67 at 98.

equivalent provision in the ROC 2021 to r 32.1 of the UK Civil Procedure Rules 1998[24] ("UK CPR") which expressly gives the court the power to exclude evidence which would otherwise be admissible. Notwithstanding this, it is arguable that a case can be made for excluding such evidence pursuant to O 3 r 2 of the ROC 2021 which states:[25]

> Where there is no express provision in these Rules or any other written law on any matter, the Court may do whatever the Court considers necessary on the facts of the case before it to ensure that justice is done or to prevent an abuse of the process of the Court, so long as it is not prohibited by law and is consistent with the Ideals.

11 It does not, however, appear arguable that the court has any such residual discretion, outside of that provided for in the Evidence Act 1893, to exclude evidence on a case management basis. After all, the admissibility paradigm under the Evidence Act 1893 is that all evidence which is relevant (as defined by the relevant relevancy provisions) are admissible.[26] And, on a plain reading of the Evidence Act 1893, apart from the exclusionary discretion provided in ss 32(3) and 47(4),[27] there is no express provision granting such a discretion to exclude evidence generally. In other words, apart "from the confines of the [Evidence Act], there is no residual discretion to exclude evidence which is rendered legally relevant by the [Evidence Act].[28]

12 Set against this proposition, however, are cases such as *Muhammad bin Kadar v Public Prosecutor*[29] ("*Kadar*"), which state that the court does indeed have a residual discretion to exclude

24 SI 1998 No 3132 (UK).

25 Rules of Court 2021 O 3 r 2. See also Jeffrey Pinsler, "The Court's Discretion to Exclude Evidence in Civil Cases and Emerging Implications in the Civil Sphere" (2016) 28 SAcLJ 89 at para 16. We examine the viability of such an argument in the paragraphs that follow.

26 Chen Siyuan, "Redefining Relevancy and Exclusionary Discretion in Sir James Fitzjames Stephen's Indian Evidence Act of 1872: The Singapore Experiment and Lessons for Other Indian Evidence Act Jurisdictions" (2012) 10(1) International Commentary on Evidence 1.

27 See paras 7 and 8 above on the IOJ exclusion found in ss 32(3) and 47(4).

28 *Lee Chez Kee v Public Prosecutor* [2008] 3 SLR(R) 447 at [106]; *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [126].

29 [2011] 3 SLR 1205.

improperly obtained evidence on the basis that the probative value of such evidence is not greater than the prejudicial value. This discretion, however, differs from the IOJ exclusion expounded above.[30] The formulation of the test requires a weighing of the prejudicial effect of the evidence against the probative value (the "*Kadar* formulation").[31] While *Kadar* did not attempt to lay down a general definition of "prejudicial effect", this appears to be equated with a lack of reliability.[32] As was noted in *Sulaiman bin Jumari v Public Prosecutor*:[33] "in its exercise of its residual discretion to exclude evidence, the court is concerned essentially with the reliability".[34]

13 While this discretion as set out in *Kadar* and other cases of its ilk arose in the context of criminal law, it also applies in the civil context – though there is, according to remarks made *obiter* in *ANB v ANC*[35] ("*ANB*"), the question as to how robustly this discretion should be exercised.[36]

14 The question is whether one can seek to *expand* and *modify* the scope of the *Kadar* formulation to argue that: (a) the court not only has a residual discretion to exclude improperly obtained evidence but also extend this discretion to exclude evidence which would otherwise be admissible on a case management basis; and

30 See paras 7 and 8 above and *ANB v ANC* [2015] 5 SLR 522 at [31]. See also Chen Siyuan, "Improperly Obtained Evidence in Criminal Proceedings: An Updated Framework" [2022] SAL Prac 2 at para 11.

31 *Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 at [53] and [147]; most recently affirmed in *Law Society of Singapore v Shanmugam Manohar* [2021] SGHC 201 at [116].

32 Chen Siyuan, "Improperly Obtained Evidence in Criminal Proceedings: An Updated Framework" [2022] SAL Prac 2 at para 9.

33 [2021] 1 SLR 557.

34 *Sulaiman bin Jumari v Public Prosecutor* [2021] 1 SLR 557 at [46]; see Chen Siyuan, "Improperly Obtained Evidence in Criminal Proceedings: An Updated Framework" [2022] SAL Prac 2 at para 16.

35 *ANB v ANC* [2015] 5 SLR 522 at [29].

36 *ANB v ANC* [2015] 5 SLR 522 at [30] and [31], where the Court of Appeal noted (but did not express a conclusive view) that:

> … there are good reasons why the inherent discretion to exclude evidence may also be needed to be exercised more robustly – or at least more vigorously than what the Judge envisaged in his decision below – in *civil* proceedings in the light of the very different countervailing factors that arise from the need to protect potential proprietary interests and the public interest in promoting the obtaining of evidence by way of legally prescribed methods. [emphasis in original]

(b) that the test for exercising such a discretion is assessing whether the probative value outweighs its prejudicial value, where the concept of prejudicial value could extend to include considerations independent of the reliability of the evidence. Here, one might point to passages from *ANB* and argue that such a "discretion exists here as a consequence of the court's inherent power".[37] This is, on its face, an attractive argument. The court's inherent power, which now finds expression in O 3 r 2 of the ROC 2021,[38] has been described as a "virile and necessary one that a court is invested with to dispense procedural justice as a means of achieving substantive justice between parties in a matter".[39] But there are limits to the court's inherent powers. For instance, where there is Parliamentary intent, express or implied, to exclude the exercise of the court's inherent powers.[40] One *could* argue that the court's inherent power to exclude evidence which is otherwise admissible is excluded by virtue of s 2(2) of the Evidence Act 1893, or by the various admissibility provisions under the Evidence Act 1893. In essence, as we have alluded to above,[41] for such an argument to get off the ground, one must surmount the effect of s 2(2) of the Evidence Act 1893 and explain how such an exclusionary discretion can be consistent with the admissibility paradigm instantiated in the Act.

III. Conclusion

15 We have sought to briefly sketch out various arguments which may be made by a party seeking to exclude evidence which would otherwise be admissible on a case management basis. In so far as expert and hearsay evidence are concerned, such an

37 Jeffrey Pinsler, "The Court's Discretion to Exclude Evidence in Civil Cases and Emerging Implications in the Civil Sphere" (2016) 28 SAcLJ 89 at para 16. See also Goh Yihan, "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise" [2011] Sing JLS 178 where the learned author argues that there is a difference between the term "inherent power" and "inherent jurisdiction".

38 Previously, O 92 r 4 of the Rules of Court (2014 Rev Ed).

39 *Godfrey Gerald QC v UBS AG* [2004] 4 SLR(R) 411 at [19].

40 Goh Yihan, "The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise" [2011] Sing JLS 178 at 201–202.

41 See para 11 above.

argument appears possible – here, parties would seek to invoke the IOJ exclusion pursuant to ss 32(3) and 47(4) (as the case may be) and argue that doing so is also consistent with the Ideals of the ROC 2021.

16 A similar argument, however, does not appear to be sustainable in relation to other types of evidence such as similar fact evidence. Here, the stumbling block lies in the Evidence Act 1893 itself – it does not appear that such an exclusionary discretion would be compatible with the rules, principles and structure of the Act.[42] In that vein, if we accept that, as a matter of the new civil procedure regime, excluding evidence in certain cases will promote the Ideals of the ROC 2021, and we are not prepared to do violence to the statutory wording of the Evidence Act 1893 in order to accomplish this, then perhaps the time has come to make the necessary amendments to the Act itself.[43]

42 Chen Siyuan & Lionel Leo, *The Law of Evidence in Singapore* (Sweet & Maxwell, 3rd Ed, 2022) at para 2.086.

43 See Jeffrey Pinsler, "The Court's Discretion to Exclude Evidence in Civil Cases and Emerging Implications in the Civil Sphere" (2016) 28 SAcLJ 89 at para 11.