8. CIVIL PROCEDURE

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Adduction of affidavit of evidence-in-chief in the absence of the deponent

8.1 The court will not permit an affidavit of evidence-in-chief ("AEIC") to be adduced in the absence of the deponent if this would not be in the interests of justice. In *Wan Lai Ting v Kea Kah Kim* [2014] 4 SLR 795, the High Court declined to admit two AEICs (sought to be adduced by the plaintiff) pursuant to O 38 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) because they raised issues which were "highly contentious": at [22]. It would not have been fair to deprive the other party of the opportunity for cross-examination in such circumstances. Furthermore, the reliability of the AEICs had been put into doubt by evidence of the deponent's admitted cognitive impairment. The court also dismissed the plaintiff's argument that the affidavits ought to be admissible pursuant to s 32(1)(*j*) of the Evidence Act (Cap 97, 1997 Rev Ed). The court pointed out that the conditions for admissibility under that section had not been complied with. Furthermore, even if that section had been satisfied, the court would have exercised its discretion to exclude the affidavits pursuant to s 32(3) on the basis that their prejudicial effect outweighed their probative value.

Admissions

8.2 In *Mycitydeal Ltd v Villas International Property Pte Ltd* [2014] 4 SLR 1077 ("*Mycitydeal*") at [69], it was restated that for the purposes of invoking O 27 r 3 of the Rules of Court, the admission sought to be relied on must be "a clear admission of *all* the facts necessary to establish the cause of action and not merely evidence of some of the facts" [emphasis in original]: see also *Hasrat Usaha Sdn Bhd v Pati Sdn Bhd* [2011] 3 MLJ 343 at [37], cited in *Mycitydeal* at [69]. A party needs to be careful before relying on an admission under O 27 r 3 because if a

statement of fact is not regarded by the court as an admission and is not pleaded, evidence of that fact would not normally be accepted by the court. For example, where the plaintiff fails to plead a fact based on information, it would not be entitled to rely on that information at trial if it would take the opposing party by surprise: *Mycitydeal* at [73]–[74], where the High Court applied O 8 r 8(1)(*b*).

Appeals

Extension of time

8.3 In *Au Wai Pang v Attorney-General* [2014] 3 SLR 357 ("*Au Wai Pang*"), the Court of Appeal dealt with the issue of whether the duty judge had the power to sit as the Court of Appeal and grant an extension of time. In this case, the appellant had been refused leave by the High Court to commence contempt proceedings for an article published by the respondent. Dissatisfied, the appellant invoked O 57 r 16(3) of the Rules of Court and re-applied for a similar purpose (this time, to the Court of Appeal) for leave to commence contempt proceedings against the respondent ("the CA application"). The CA application was rejected due to an error in the title and was subsequently refiled out of time. The appellant then appeared before the duty judge, who granted an extension of time to file the application. The respondent objected to this on the basis that the duty judge had no power to grant an extension of time.

8.4 The appellant's case was that the duty judge had such a power under s 36(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") which allows a judge, in any proceedings *pending* before the Court of Appeal, to make any direction incidental to an appeal, any interim order to prevent prejudice to the parties or any order furnishing security of costs. The issue turned on the meaning of "pending" and whether this provision furnished the duty judge with such a power when proceedings had not commenced. The Court of Appeal held that the test for whether proceedings are "pending" is whether the court concerned has the power to make an order on the matters in issue therein. Since the originating summons had not been filed in time, proceedings had not commenced and there were no proceedings pending before the Court of Appeal. Consequently, the court did not have the power to grant the extension pursuant to s 36(1) of the SCJA. Adopting a purposive approach, the Court of Appeal observed that the purpose of s 36(1) was to allow a single judge to make interim orders to prevent prejudice or preserve the status quo in order to achieve administrative efficiency. Interim orders therefore cannot be dispositive of the substantive appeal. Accordingly, denying an extension of time to file an originating summons would be dispositive of the

appeal; therefore, the appellant could not avail itself of the provision to seek an extension of time.

8.5 In *BLQ v BLR* [2014] 1 SLR 1453, the Court of Appeal dealt with the issue of whether applications under Pt X of the Women's Charter (Cap 353, 2009 Rev Ed) fell under s 34 of the SCJA on leave to appeal. Pursuant to a matrimonial dispute in which ancillary orders for division of assets were made by the District Court, the husband appealed to the High Court. This appeal was dismissed by the High Court, and the husband then sought to appeal against this dismissal. As the High Court had been exercising its appellate jurisdiction, para 6(2) of the Supreme Court of Judicature (Transfer of Matrimonial, Divorce and Guardianship of Infants Proceedings to District Court) Order 2007 (S 672/2007) mandated that leave had to be obtained to appeal to the Court of Appeal but did not stipulate any time frame. However, O 56 r 3(1) of the Rules of Court imposed a time limit of seven days to seek leave to appeal. The husband applied for an extension of time under s 34 of the SCJA.

8.6 The Court of Appeal held that s 34 of the SCJA did not apply to Pt X of the Women's Charter. However, the law had to be interpreted harmoniously and cases pertaining to Pt X of the Women's Charter should be treated the same as all other civil cases. The prescribed time limit of seven days in O 56 r 3(1) should likewise apply. In considering whether the extension of time should be granted, the court applied the four factors highlighted in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196, namely: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of a successful appeal if the time were extended; and (d) the degree of prejudice to the would-be respondent if the extension of time were granted. This case turned on factor (c), which was the possibility of a successful appeal. The court referred to *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 which laid out three considerations in considering the chances of an appeal: (a) whether there was a *prima facie* case of error; (b) whether there was a question of general principle decided for the first time; or (c) whether there was a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

8.7 The husband submitted that there was a *prima facie* case of error as the judge had erroneously drawn adverse inferences from unaccounted withdrawals that the husband had made from family assets. The High Court reiterated that the error in question had to be one of *law*, a requirement which was not satisfied by the husband's contention that the wrong conclusion had been reached. On the facts, there was no *prima facie* case of error in law as the court found that the District Judge was correct in drawing an adverse inference. Accordingly, leave to appeal was refused. (Note: this decision is currently on appeal.)

8.8 The four considerations for the court to grant an extension of time were likewise applied in *Falmac Ltd v Cheng Ji Lai Charlie* [2014] 4 SLR 202 ("*Falmac*"). In *Falmac*, the plaintiff filed a notice of appeal almost five months after the High Court judgment was issued and applied for an extension of time to file the notice of appeal. The plaintiff relied on two favourable judgments issued in Tianjin five months after the High Court judgment. The court opined that an assessment of the four considerations required an integrated and holistic approach which took into account the finality of judgments.

8.9 The Court of Appeal found that the first three factors were not satisfied. First, the length of the delay of close to five months was not considered ordinary. Secondly, the plaintiff had made a conscious decision to commence parallel proceedings in Tianjin to "hedge its bets" by garnering as many procedural advantages as possible. Whilst it relied on a favourable Tianjin judgment to bolster its appeal should the High Court decide against it, as it turned out, procedural timelines were not in its favour as the favourable judgment was issued much earlier than the High Court judgment. The Court of Appeal held that the plaintiff took no immediate steps to file a notice of appeal or extend the timeline for appeal either because it was "unaccountably tardy" or because it had engaged in "a hedging exercise": at [30]. The plaintiff's disregard for procedural rules suggested that it considered those rules subordinate to the foreign proceedings. The plaintiff therefore could not expect an extension of time to appeal. Thirdly, it was evident that an appeal was futile as the defendant was not a party to the foreign proceedings and therefore no issue estoppel could arise from the foreign proceedings. Further, under the *Ladd v Marshall* principles, no new evidence could be submitted on appeal as it was evident that the plaintiff was in possession of all the relevant evidence before the conclusion of the High Court trial. However, as regards the last factor to be taken into account when deciding whether to grant an extension of time, the court found that no material prejudice would be caused to the defendant by granting an extension that could not be compensated for by an appropriate costs order.

8.10 Reviewing the factors in a holistic manner, the court dismissed the application to extend time to file an appeal notice.

Whether leave should be granted

8.11 The 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 Scheds 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 Court of Appeal in *Nim Minimaart v Management Corporation Strata Title Plan No 1079* [2014] 1 SLR 108 clarified the ambit of the 2010 SCJA amendments. The case concerned a breach of a licence agreement. The High Court had dismissed the plaintiff's appeal against the District Court's judgment. Subsequently, after a series of failed attempts to appeal against this dismissal, the plaintiff was out of time under O 56 r 3 to file for leave to appeal and sought an extension of time. This application for leave was likewise dismissed. The plaintiff then filed an originating summons to appeal against the refusal to extend time. The issue was whether leave was required to file an appeal against the High Court's refusal to grant an extension of time.

8.12 The plaintiff's initial claim amount was less than $250,000, which meant that the plaintiff required leave under s 34(2)(*a*) of the SCJA before filing an appeal. However, for the purposes of securing the right to appeal without leave, the plaintiff argued that the claim amount should be higher since there were accrued continuing losses by the time of the appeal. This argument failed. The court observed that if that were so, the plaintiff could not have commenced the action in the District Court in the first place. There was therefore no doubt that s 34(2)(*a*) mandated that the plaintiff first apply for leave to appeal.

8.13 The plaintiff also argued that leave was not required since the refusal to grant an extension of time was not cited explicitly in the Fourth Sched to the SCJA as a non-appealable order. The Court of Appeal observed that this had to be read together with s 34(2)(*a*) of the SCJA. The 2010 SCJA amendments sought to limit and regulate the scope of appeals against interlocutory orders and certain final orders. It would be incongruous for the plaintiff to be able to appeal to the Court of Appeal against the High Court's refusal to grant an extension of time without leave, since leave was required based on its substantive claim which was less than $250,000. Further, the plaintiff had already had two bites of the cherry, since his substantive claim had already been heard both at the District Court at trial and at the High Court on appeal.

8.14 The plaintiff also argued that O 3 r 4 of the Rules of Court allowed the Court of Appeal to hear afresh its application to extend time. However, the court rejected this argument, as O 3 r 4 could not allow the Court of Appeal to manage the timelines in relation to a matter that was entirely within the High Court's jurisdiction.

8.15 The case of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall*") raises interesting issues on the court's jurisdiction regarding challenges to an adjudication determination ("AD") by the Singapore Mediation Centre. The respondent had earlier

successfully appealed to set aside the AD. The appellant appealed against this setting aside. The respondent then applied to strike out the appeal on the basis that prior leave had not been sought under s 34(2)(*a*) of the SCJA, given that the claim sum was less than $250,000. However, the appellant contended that no leave was required as it came within the exception in s 34(2A) of the SCJA, which provided that s 34(2)(*a*) would not apply if the case was heard by the High Court in its original jurisdiction. Notably, the relevant statutory provisions – the enforcement of an AD as a judgment under s 27 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") and O 95 r 3(1) of the Rules of Court on applications to set aside an AD – were silent on the relevant court in which the case should be heard. Whether the exception applied (and thus whether leave was required) turned on whether the respondent's application to set aside the AD was made pursuant to the High Court's original or supervisory jurisdiction.

8.16 The Court of Appeal held that the High Court had been exercising its supervisory jurisdiction when setting aside the AD. The Court of Appeal adopted the definition of supervisory jurisdiction cited in *Ng Chye Huey v Public Prosecutor* [2007] 2 SLR(R) 106 at [48], which is "the inherent power of the superior courts to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions". In setting aside an AD, the High Court was not reviewing the merits of the decision but was exercising a supervisory function, akin to judicial review proceedings, over an inferior tribunal, which includes adjudication tribunals. The purpose was to resolve issues of jurisdiction, any breaches of rules of natural justice or non-compliance with the SOPA. This was also (*Citiwall* at [48]):

> … consistent with the purpose of the SOPA, which is to facilitate cash flow in the building and construction industry, that the court, in hearing such applications, does not review the merits of the AD in question.

8.17 Further, an application to set aside an AD and/or a s 27 SOPA judgment must be heard and determined only by the High Court, since ss 19(3) and 52 of the State Courts Act (Cap 321, 2007 Rev Ed) preclude the District and Magistrates' Courts from exercising any supervisory jurisdiction.

8.18 The High Court's supervisory jurisdiction stemmed from a form of extraordinary original jurisdiction to ensure inferior tribunals stayed within bounds. There was no provision which stated that original and supervisory jurisdictions were mutually exclusive. Accordingly, the High Court was exercising its supervisory jurisdiction. The exception in s 34(2A)(*c*) of the SCJA applied and no leave was required.

8.19 In *Eqita Insurance Bhd v Lim Teong Thye David* [2014] 4 SLR 1345, the appellant sought to appeal to the High Court against costs orders made against it by the District Court pursuant to a negligence suit. The appellant did not obtain leave to appeal to the High Court. The issue was whether leave was required for the appellant to appeal to the High Court. This in turn depended on whether the case fell within s 21(1)(*a*) of the SCJA (applicable to cases where "the amount in dispute, or the value of the subject-matter" at the hearing before the lower court exceeded $50,000) in which case an appeal would lie as of right. If, however, the amount in dispute were less than or equal to $50,000, s 21(1)(*b*) of the SCJA would require leave to appeal.

8.20 The High Court opined that costs orders were conceptually distinct from the main claim as costs orders were meant to compensate the successful party for legal expenses incurred. Since the appellant had only chosen to appeal on the costs orders, the value of the main claim was distinct from the costs orders, which was the amount in dispute for the purposes of the appeal. The court also observed that in such instances, the exclusion of interest and costs meant that any subsequent costs awarded by the court as a result of the parties' dispute on the earlier costs orders would be excluded from the amount in dispute under the appeal.

8.21 Since the amount of costs ordered by the deputy registrar was $11,000, which was under the monetary threshold set out in s 21(1) of the SCJA, leave to appeal was required under s 21(1)(*b*). The appellant had not obtained leave to appeal from the District Judge or the High Court; as such, the notice to appeal was defective and the appeal was not properly brought before the High Court.

8.22 The case of *Fong Khim Ling v Tan Teck Ann* [2014] 2 SLR 659 considered the issue of the meaning of "amount in dispute" in s 34(2)(*a*) of the SCJA when a claim originates in the State Courts (then Subordinate Courts) but is then heard by the High Court in its appellate capacity. The appellant's dependency claim had been reduced by the District Court to below $205,000, but it had appealed against this decision, repeating its claim of over $354,756.48 at the High Court. This appeal was dismissed. The appellant appealed to the Court of Appeal, but the respondent applied to strike the claim out on the basis that the monetary threshold in s 34(2)(*a*) had not been met.

8.23 The Court of Appeal held that the operative words in s 34(2)(*a*) of the SCJA had to be read as referring to the amount that was claimed before the High Court. Whether a claim originated from the State Court or the High Court, the proper amount to be considered was the maximum amount sought before the High Court for the item or items of claim which were still in dispute, without any allowance being made

for any sums that may already have been awarded by the court below. On the facts, the monetary threshold had been crossed as the appellant's claim in the High Court was for $337,018.66. Leave to appeal was therefore not required.

Committal proceedings

8.24 In *BMP v BMQ* [2014] 1 SLR 1140, the plaintiff had brought an *ex parte* application for leave to apply for an order of committal under O 52 r 2 of the Rules of Court against the defendant for failing to comply with a Mareva injunction. Following the defendant's appeal, the District Judge set aside the order granting leave to the plaintiff to apply for an order of committal against the defendant as regards the matrimonial property, but granted leave to the plaintiff to apply for a committal order in respect of shares and insurance proceeds. The defendant appealed against the District Judge's order granting leave for committal in respect of the insurance proceeds and shares whereas the plaintiff cross-appealed against the order setting aside the leave granted for committal in respect of the matrimonial property. The High Court had to consider the question of the threshold required to grant leave for committal.

8.25 The court concluded that the threshold for granting leave to apply for a committal order under O 52 r 2 was that there had to be a *prima facie* case of contempt. However, at the leave stage, the court should not look into the merits of the substantive committal application. The respondent should be allowed the full opportunity at the committal hearing to respond to the allegations by filing a reply affidavit denying the allegations or providing explanations for non-compliance with the judgment or order of court.

8.26 In addition, O 52 r 2 mandated a statement setting out details of the applicant and the person sought to be committed, as well as the grounds on which committal was sought. The test was whether the O 52 r 2(2) statement was of sufficient particularity to give the alleged contemnor enough information to enable him to meet the charges against him, from the perspective of a reasonable person in his position. Any deficiencies could not be cured by references to other documents or by written or oral explanations from counsel. This test was to be enforced at the leave stage and a faulty statement would prevent the matter from proceeding. It was also good practice to set out how service was effected on the contemnor. Such information should be included in the affidavit supporting the application for leave.

8.27 The court held that the District Judge should have applied a *prima facie* test (instead of a balance of probabilities test) to assess whether the defendant had been given adequate notice of the order for

committal. However, the District Judge had, nevertheless, rightly struck out the application as the plaintiff's statement filed in support of her application was insufficiently particularised.

Costs

Contractual clauses affecting costs

8.28 In *Abani Trading Pte Ltd v BNP Paribas* [2014] 3 SLR 909, George Wei JC observed that the courts have long recognised the bank's entitlement to rely on contractual indemnity clauses found in loan documentation governing the relationship between the bank and its customer. Therefore, "the banks are said to have a legitimate commercial interest in relying on such contractual indemnities so as to minimise any potential exposure to legal costs in the event of litigation": at [91]. Nevertheless, as a general principle, the courts do have the power to override the parties' agreement concerning costs. As the learned judge put it, the court must have the power to override the parties' agreement as to costs in order to preserve the integrity of the administration of justice. Therefore, in situations where the claim for costs on the basis of a contractual provision is "manifestly unjust" (at [93]), the court can and should intervene to disallow the claim in the exercise of its discretion. There is a rider to such an approach. The court's intervention should be limited to deserving cases and the court must exercise its discretion judiciously in order not to unduly unravel the commercial arrangement entered into by both parties. In the absence of manifest injustice, the court will tend towards upholding the contractual agreement between parties.

Indemnity costs payable by lawyers

8.29 The Honourable Chief Justice has admonished that lawyers who conduct cases improperly may be penalised in costs. In *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2014] 2 SLR 191 (CA), Sundaresh Menon CJ expressed the views of the Court of Appeal on what it considered to be the inappropriate conduct of the case by the appellant's lawyers. It ordered the law practice which represented the appellant to pay indemnity costs to the respondent in respect of the proceedings before the Court of Appeal and the High Court. The Chief Justice concluded "with a reminder to members of the legal profession of their solemn duty to discharge their professional obligations to their clients and to the court conscientiously": at [44].

Proportionality of costs

8.30 The principle of proportionality was re-emphasised by the High Court and Court of Appeal in *Lam Hwa Engineering & Trading Pte Ltd v Yang Qiang* [2013] 2 SLR 524 (HC) and [2014] 2 SLR 191 (CA). In this case, 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 then 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 s 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 High Court rejected the appellant's argument that O 35 r 1 of the Rules of Court 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. The Court of Appeal agreed with the High Court that the travel expenses were recoverable. These costs were proportionate and reasonable because the injured respondent could not remain in Singapore. He had to return to China, and subsequently to Singapore again for the trial where he was both the plaintiff and a key witness. The Court of Appeal further observed that the recovery of costs for travel expenses was a straightforward matter which could be determined on the basis of the guidelines concerning proportionality and reasonableness provided by the Court of Appeal in *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [56].

Discovery

Electronic discovery

8.31 As stated in *Wartsila Ship Design Singapore Pte Ltd v Liu Jiachun* [2014] SGHCR 13 ("*Wartsila*") at [10], the framework for the supply of copies of electronic documents (see paras 52(1) and 52(2) of the Supreme Court Practice Directions) is for copies of discoverable electronic documents to be supplied in their native format with internally stored metadata intact:

> (1) Copies of discoverable electronically stored documents shall generally be supplied in the native format in which the requested electronic documents are ordinarily maintained …

> (2) Metadata information internally stored in the native format of discoverable electronically stored documents shall not be intentionally deleted, removed or altered without the agreement of the parties or an order of Court. …

This is the first stage of the process.

8.32 Under para 52(3):

> A request for copies of discoverable electronically stored documents may specify the format and manner in which such copies are to be supplied. If the party giving discovery does not agree with the specified format or manner or both, he may either:
>
> > (a) propose a reasonably usable format and/or storage medium and/or a reasonable manner in which he intends to supply copies of the requested electronic documents; or
> >
> > (b) in default of agreement, supply copies of the request electronic document in accordance with sub-paragraph (1) [that is, in the native format in which the requested electronic documents are ordinarily maintained].

8.33 Therefore, the framework (which provides a degree of party autonomy but defaults to the native format if parties are not able to come to an agreement) allows the party entitled to discovery a choice – he may specify the file format that he wishes to receive the electronic documents. The party giving discovery can either propose a reasonably usable format if he does not agree to supply the electronic documents in the format that had been requested. A list of reasonably usable formats is provided to enable parties to reach a consensus. If parties are unable to come to an agreement, then the party giving discovery can supply copies in native format: at [11]–[12].

8.34 In *Wartsila*, the plaintiff (a company engaged in the ship design business) applied for the re-tender of copies of ship drawings in their native AutoCAD format with internal metadata intact which the fifth defendant (a provider of naval architectural services, particularly ship and marine structure design) had already disclosed in PDF format (in compliance with previous discovery orders). The application was not for discovery but for supply of copies of electronic documents that had previously been ordered to be disclosed. The High Court found that the plaintiff had failed to meet its obligation to communicate to the fifth defendant its requirement for copies of the drawings to be supplied in their native AutoCAD format. This was referred to by the court as the "first wrong": at [13]. As for the fifth defendant, he ought to have sought an agreement with the plaintiff before supplying copies of the drawings in PDF format. The High Court stated (at [13]):

> The list of reasonably usable formats is intended to provide a list of common file formats that can be used as a neutral list to assist parties in reaching an agreement. It is not intended to provide a safe harbour in the sense that the party supplying copies cannot be said to have discharged his obligations by providing copies in one of these reasonably usable formats. It is clear from the [practice direction] that the default disclosure format where no consensus is achieved is the native format.

Therefore, the fifth defendant erred by unilaterally deciding to supply copies in PDF format. This was referred to by the court as the "second wrong": at [13].

8.35 The High Court considered para 52(4) of the Supreme Court Practice Directions, which states: "The party giving discovery shall not be required to supply copies of electronically stored documents in more than one format." According to the High Court, the purpose of para 52(4) is intended to prevent abuse by limiting the supply of copies to one format. It implicitly assumes that there ought to be only a single tender. Paragraph 52(4) would have operated in this precise factual scenario to prevent a party, having agreed to accept electronic documents in one format, from thereafter putting the party giving discovery at a procedural disadvantage by requiring him to re-tender these documents again in a different format. This would be prejudicial to the party giving discovery: at [15] and [17]. See also *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2012] SGHCR 19 at [14], cited in *Wartsila* at [16].

8.36 As the plaintiff had delayed for two and a half months before objecting to the file format, and, therefore, had effectively accepted the PDF versions without protest, a re-tender of so many (almost 2,000 drawings) in their native format would be prejudicial to the fifth defendant. As indicated above, the fifth defendant had also acted in error. In the view of the court, procedural fairness justified an order requiring the fifth defendant to re-tender the drawings in their native AutoCAD format. This would ensure the achievement of the objectives of the e-discovery practice directions, including the promotion of the exchange of electronically stored documents in a text searchable electronic form: see *Sanae Achar v Sci-Gen Ltd* [2011] 3 SLR 967 at [11]. As for the prejudice that would be suffered by the fifth defendant in *Wartsila*, this could be compensated for by the appropriate order as to costs. The court ordered the plaintiff to cover the costs of compliance with the order for a re-tender of the drawings and granted the fifth defendant the costs of the application.

Pre-action discovery

8.37 In *Haywood Management Ltd v Eagle Aero Technology Pte Ltd* [2014] 4 SLR 478, the High Court did not think that objections on the basis of confidentiality ought to be accorded more weight in pre-action applications for discovery, as compared to interlocutory applications or applications at trial. Furthermore, the court did not accept that a higher standard of proof should be imposed in situations where the respondent has an obligation to maintain the confidentiality of the information. The pre-eminent consideration is whether it would be in the interests of justice to allow an application for discovery when a confidentiality issue arises. If a party has an obligation of confidentiality (normally as a result of a confidentiality clause), he is entitled to raise it in response to an application for documents or information which would compel him to offend that clause. Nevertheless, the existence of such a clause does not inevitably mean that the application for pre-action discovery would not succeed. The rationale here is that if a contractual obligation of confidentiality is regarded as being a sufficient basis for denying discovery, there may be abuse (for example, a party to the contract may insist on a confidentiality clause or require a confidentiality agreement for the ulterior purpose of avoiding discovery in the litigation).

8.38 The approach of the court when deciding whether to permit pre-action discovery when a confidentiality obligation is raised is to balance the interests of the applicant and respondent. The applicant may have a legitimate interest in requiring access to the documents in order to ascertain the viability of his intended cause of action. The court would be concerned about not allowing "legitimate claims to be stifled by indiscriminate objections on the ground of confidentiality": at [56]. As for the respondent, he may have a legitimate interest in maintaining his duty of confidentiality to other persons. The concern here is that the reasonable expectations of contracting parties ought not to be defeated by "fishing expeditions hinged on frivolous or speculative claims": at [56]. The parties' needs and circumstances have to be considered so that the court is able to determine whether the interests of justice necessitate disclosure of the document or information despite the respondent's confidentiality obligation. In making its determination, the court may take into account the consideration that the applicant would be legally prevented from using any disclosed document pursuant to the implied undertaking by the applicant not to use it for any purpose other than the proceedings before the court. A further point is that the court will not supplement discovery with an order for interrogatories if discovery is sufficient for the applicant's needs.

8.39 The judgment of the High Court in *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832 ("*Manuchar*") extends the recent series of cases concerning the principles governing pre-action

discovery. It ruled that the applicant had sufficient information relating to the status of certain companies in order to formulate a pleading against the respondent. Discovery must be absolutely necessary to the formulation of the claim. It would not be permitted where the information merely reinforces the applicant's position. The court also emphasised (at [59]) the point made by the Court of Appeal in *Dorsey James Michael v World Sport Group Pte Ltd* [2014] 2 SLR 208 ("*Dorsey*") that in order to succeed the applicant ought to satisfy the court that "it was neither convenient nor just for the information to be sought *after* proceedings had been commenced" [emphasis in original].

8.40 In *Dorsey*, the Court of Appeal provided a comprehensive set of considerations for the court to take into account before exercising its discretion in granting pre-action interrogatories. The suit against the appellant arose in the wake of allegations of bribery and corruption which had a grave impact on certain international football organisations and harmed the global footballing community. The appellant (a journalist and an expert on international affairs including the sports world) had covered this news in various blog posts on his blog. The respondent (an international sports marketing, media and event management company) sought leave to serve on the appellant pre-action interrogatories (pursuant to O 26A r 1 of the Rules of Court) to ascertain the sources of his information which he was alleged to have relied on for the purpose of his comments on his blog. The respondent also applied for pre-action discovery of documents under O 24 r 6. The learned assistant registrar allowed the application for interrogatories but rejected the application for discovery of documents. The appellant appealed against the order giving leave to the respondent to serve the interrogatories (there was no cross-appeal by the respondent concerning the rejection of the discovery application). The High Court confirmed the order to serve interrogatories but limited the scope of the questions to be asked of the appellant. The appellant then appealed to the Court of Appeal. (The appeal was permitted as the application for pre-action interrogatories, not being interlocutory in nature, did not come within the scope of exclusion pursuant to s 34(1)(*a*) of the SCJA and para (*i*) of the Fourth Sched to the SCJA: see *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354.)

8.41 The Court of Appeal considered the conditions governing O 26A r 1(5), which enables a person to obtain information concerning the identity of a potential defendant. First, the respondent must have facilitated the wrongdoing through his involvement in some manner (even though he acted innocently). The Court of Appeal noted that later cases showed that the respondent need not have caused the wrongdoing, or even have had knowledge of the wrongdoing. Therefore, although the involvement of the person (from whom the information is needed concerning the identity of the alleged wrongdoer) in the wrongdoing

usually has a significant bearing on whether an order should be made against him, it is not an essential requirement under O 26A rr 1(5) and 6(5). Secondly, the applicant must have a "real interest" (in the sense that he has a "real grievance") in bringing proceedings against the source and this must be weighed in the balance against other countervailing interests: *Dorsey* at [40]–[42]. The applicant's "real interest" or "real grievance" must continue to operate against the source after suing the person with the information concerning that source. Although the applicant does not have to establish that there has in fact been a wrong, he must at least have a "good arguable case" and "at least some reasonable basis" for stating that a wrong has been committed: *Dorsey* at [43]; citing, *inter alia*, *United Co Rusal plc v HSBC Bank plc* [2011] EWHC 404 at [50]–[52].

8.42 Thirdly, it must be "just and convenient" for the order to be made under O 26A r 1. The information concerning the source must be necessary to enable the claimant to pursue his legal entitlement: *Dorsey* at [45]; citing, *inter alia*, *President of the State of Equatorial Guinea v RBS International* [2006] UKPC 7. An important consideration in this respect is whether there exists an "alternative and more appropriate method to obtain the information sought": *Dorsey* at [45]. According to the Court of Appeal, "*necessity* (as set out in O 26A r 2) remains the main cornerstone in determining whether pre-action interrogatories will be ordered" [emphasis in original]: *Dorsey* at [47]. An important consideration against the making of an order is that the applicant can, at the time of the making of the application, immediately commence proceedings against an identified party in relation to the controversy at hand without the disclosure sought. If the applicant already has a complete cause of action against an identified party, pre-action disclosure is certainly not necessary.

8.43 The leading case of *Ching Mun Fong v Standard Chartered Bank* [2012] 4 SLR 185 concerning pre-action discovery was considered by the High Court in *Manuchar* (above, para 8.39). The High Court stated that the Court of Appeal's observations on *Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 1 WLR 586 had effectively developed the law by emphasising the condition that pre-action discovery must be critical to the formulation of the claim and that it would not be justified where the information merely reinforces the applicant's position. The court also reiterated the point made by the Court of Appeal in *Dorsey* (above, para 8.39) at [49], that in order to succeed the applicant ought to satisfy the court that "it was neither convenient nor just for the information to be sought *after* proceedings had been commenced" [emphasis in original]: *Manuchar* at [59].

Inherent powers of the court

8.44 In *Indian Overseas Bank v Svil Agro Pte Ltd* [2014] 3 SLR 892, the High Court held that, despite the defendants' failure to enter an appearance, the court could exercise its inherent power to make a judgment on the full merits of the case instead of merely granting a default judgment. Only a judgment on the merits, and not a judgment in default of appearance, could be enforced against the defendants overseas. As such, the court determined that it would be unjust to refuse to grant the plaintiff a judgment on the merits simply because the defendants were absent.

8.45 The court held that O 13 r 1 of the Rules of Court read with O 92 r 4 showed that the court's inherent power was not circumscribed by the default judgment mechanism. The ability to obtain judgment in default of appearance is an avenue open to the plaintiff, but it is not a path that the plaintiff must tread.

8.46 In contrast, in *Tan Poh Beng v Choo Lee Mei* [2014] 4 SLR 462, the High Court held that the court's inherent powers could not be used to fill a lacuna in the law that had deliberately been left there by the Legislature. This case concerned a Malaysian ancillary court order for the sale of a Singapore property owned partly by the Malaysian defendant. Despite the Malaysian court order, the defendant had refused to sign the transfer instrument for the sale. Because the transfer instrument could only be registered in Singapore if it had been signed on behalf of the defendant by a Singapore court officer, the plaintiff applied for an order in the Singapore courts that the Registrar of the Supreme Court of Singapore be empowered to execute the transfer instrument on behalf of the defendant. The plaintiff submitted that the court had the inherent jurisdiction to make the order sought, despite the fact that the Malaysian court order was not a money judgment and therefore was not registrable under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed).

8.47 Although the court was sympathetic to the plaintiff's position, it found that Parliament had deliberately chosen not to pass laws to enable the enforcement of foreign ancillary orders for the division of property in Singapore. The court therefore held that it had no discretion to make the order prayed for, and that to hold otherwise would be to allow the court to use its inherent powers to circumvent the statutory regime enacted by Parliament.

Injunctions

8.48 In *Solvadis Commodity Chemicals GmbH v Affert Resources Pte Ltd* [2014] 1 SLR 174, the defendant company applied to discharge a Mareva injunction. Andrew Ang J noted that the defendant's "seeming lack of commercial morality lent credence to the plaintiff's contention that there was a real risk of dissipation of assets": at [23]. First, the defendant failed to provide a letter of credit as required by the contract. Secondly, the defendant should not have agreed to the avalisation of the bill of exchange suggested by the plaintiff when it knew its credit lines were exhausted and that its bankers would not agree to do so. Thirdly, the defendant then sought to blame the plaintiff in alleging that the cargo supplied was of inferior quality and counterclaimed for US$22.4m (four times the purchase price) in damages. The defendant had also offered to settle the dispute with the plaintiff for 60% of the purchase price even though its counterclaim for damages far exceeded the purchase price. All these factors led to Ang J's conclusion that there was a lack of probity, which in turn established a real risk of dissipation of the defendant's assets.

8.49 The defendant argued that the plaintiff had not elaborated on the arrangement of avalisation and had therefore not made full and frank disclosure. Ang J rejected this argument, saying that any suppression of facts was not deliberate and that discharging the injunction would be a disproportionate measure, especially since not every suggestion of inaccuracy would result in the discharge of an injunction. Ang J cited the Court of Appeal's statements in *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 that parties should not meticulously attempt to dissect the factual matrix to invent missing facts and should adopt a commonsensical approach. Accordingly, the defendant's application to discharge the injunction was dismissed. The Court of Appeal also subsequently dismissed the defendant's appeal on 25 November 2013, although no written grounds of decision were rendered.

Judgments and orders

8.50 In *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381, the Court of Appeal held that it was within the court's power to issue orders for examination of a judgment debtor against foreign company officers. However, the court clarified that, where the basis for exercising extraterritorial jurisdiction over a non-party has yet to be established, O 11 r 8(1) of the Rules of Court cannot be read to dispense with the need for leave to serve a summons, notice or order on such a non-party out of jurisdiction.

8.51 Hence, in the absence of evidence that a foreign company officer was in fact the *alter ego* of the company, or had instigated, controlled and financed the litigation brought in the name of the company, the officer in question could not be characterised as a party to the proceedings. As such, he remained a non-party, and leave to serve him out of jurisdiction could not be dispensed with.

8.52 The Court of Appeal also stressed that an order for examination of a judgment debtor is an intrusive order because it generally requires personal attendance at court. Hence, in considering whether to grant leave for service of an examination of judgment debtor order out of jurisdiction, the fundamental question the court had to ask was whether the foreign company officer was so closely connected to the substantive claim that the Singapore court was justified in taking jurisdiction over him.

8.53 In this regard, the court made two points. First, since an examination of judgment debtor order is meant primarily to obtain information about the judgment debtor's finances, the extent of the foreign company officer's knowledge of his company's financial affairs will be an important threshold consideration. Secondly, even if the foreign company officer possesses relevant information, the court would generally require something more to subpoena him; for example, the court might wish to consider the extent of his involvement in the matters relating to the claim.

8.54 *Sarawak Timber Industry Development Corp v Asia Pulp & Paper Co Ltd* [2014] 1 SLR 776 ("*Sarawak Timber*") concerned a Malaysian court order assigning to the appellants the rights of enforcement to a sum payable by the respondent. On the basis of certain foreign statutes which it contended were relevant, the respondent had argued that the Malaysian court order was not a money judgment and therefore not registrable under the Reciprocal Enforcement of Commonwealth Judgments Act.

8.55 The court rejected the respondent's argument, stating that the role of the Singapore court is not to construe foreign statutes which may or may not be applicable; rather, the Singapore court is simply meant to construe the judgment and what the foreign court intended. On that basis, the court held that the Malaysian court order was a money judgment; this was because the Malaysian court had clearly intended that the appellant be entitled to claim the moneys in question from the respondent. The court also held that compelling reasons should be present before a Singapore court should construe a judgment of a friendly foreign nation as being a nullity.

8.56 The approach adopted by the court in *Sarawak Timber* should, however, be contrasted with the decision in *Tan Poh Beng v Choo Lee Mei* (above, para 8.46), where the High Court declined to give effect to a Malaysian ancillary order for the division of property in Singapore on the grounds that Parliament had deliberately chosen not to pass laws to enable the enforcement of such orders in Singapore, and that the court should not use its inherent powers to fill a lacuna in the law that the Legislature had purposely left in place.

Jurisdiction

8.57 Important observations were made for the first time by the Court of Appeal in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 on whether a foreign defendant should be inferred to have submitted to the Singapore courts' jurisdiction if the application for a stay of proceedings was an alternative position to the primary application of setting aside an order granting the plaintiff leave to serve the originating process on a foreign defendant. The foreign defendant, based in India, sought to set aside an order granting the plaintiff leave to serve the originating process on the defendant abroad ("the overseas service leave order"); and in the alternative, the defendant sought a stay of proceedings on the ground that Singapore was not the proper forum for the trial of the action against him. It was argued by the plaintiff that the defendant, in doing so, had submitted to the Singapore courts' jurisdiction, as the stay application was predicated on the defendant having submitted to the jurisdiction of Singapore courts.

8.58 The Court of Appeal held that it was a question of fact in each case whether there had been a submission to the Singapore courts' jurisdiction. Where a foreign defendant puts forward an application for a stay of proceedings on the ground of improper forum as a fallback to an application for an overseas service leave order to be set aside, it would generally not be appropriate to infer that he has submitted to the jurisdiction of the local court. So long as the foreign defendant has not done anything which is meaningful only if he has waived any objection to the existence of the local court's jurisdiction, he should not be treated as having submitted to jurisdiction.

8.59 The Court of Appeal clarified the scope of the two tests set out in *Williams & Glyn's Bank plc v Astro Dinamico Compania Naviera SA* [1984] 1 WLR 438 and *In re Dulles' Settlement (No 2)* [1951] Ch 842 in deciding whether a particular step taken by a foreign defendant necessarily involved a waiver of any objection to the existence of the local court's jurisdiction. Reviewing both cases, the Court of Appeal summarised the following principles of law: an application for a stay of proceedings will amount to a submission to the local court's jurisdiction

where it is only *necessary* or only useful if the foreign defendant has waived any objection to the existence of the local court's jurisdiction or has never entertained any such objection at all. Further, there must be unequivocal conduct evidencing a waiver.

8.60 Accordingly, as the application for a stay of proceedings was a fallback position to the primary application challenging the existence of the Singapore courts' jurisdiction, the appellant had not submitted to the jurisdiction of Singapore courts. However, the Court of Appeal noted that a stay application which is the foreign defendant's only and primary application without also contesting the existence of the Singapore courts' jurisdiction will ordinarily be taken to mean that the applicant has submitted to the Singapore courts' jurisdiction. The appellant had muddied its position by presenting arguments for a stay first in the hearings below, but this was only because of convenience; it had, at all times, maintained its objection to the existence of the Singapore courts' jurisdiction.

8.61 The Court of Appeal in *Au Wai Pang* (above, para 8.3) also dealt with the issue of whether it had the jurisdiction to grant leave to commence committal proceedings under O 57 r 16(3) of the Rules of Court. The court held that O 57 r 16(3) presupposes that the court has already been validly seised of jurisdiction. Since the SCJA did not confer upon it any original jurisdiction, the Rules of Court, being subsidiary legislation, could not be read as conferring upon the Court of Appeal original jurisdiction by a side wind. Further, since O 52 r 1(3) provides that an order of committal may only be made by the High Court, it would be anomalous if, assuming the Court of Appeal had the original jurisdiction to grant leave to commence committal proceedings, the Court of Appeal were to then remit the committal application to the High Court.

8.62 Alternatively, the appellant argued that O 57 r 1(3) actually invoked the Court of Appeal's appellate jurisdiction. It relied on the Privy Council case of *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1 ("*Kemper Reinsurance*"). In *Kemper Reinsurance*, the Privy Council held that the Court of Appeal of Bermuda had the requisite jurisdiction to hear appeals for refusal of leave to apply for *certiorari*. This was because appeals under O 59 r 14(3) of the UK Rules of the Supreme Court 2009 (SI 2009 No 1603) – the English equivalent to O 57 r 16(3) – were procedural in nature, and an application under the provision was characterised as a true appeal.

8.63 The Court of Appeal noted that the Privy Council's judgment had presupposed that jurisdiction existed out of expediency given the past practice of the courts in treating such appeals. It observed that *Kemper Reinsurance* was unsupported by case authorities. Further, the

UK Supreme Court Act 1981 (c 54) provides for the English Court of Appeal to exercise "all such other" jurisdiction that it used to historically exercise, whereas the SCJA clearly states that the Court of Appeal only exercises an appellate jurisdiction. Since an appeal entails the examination of a decision made by an inferior court, there was nothing to examine if an application under O 57 r 16(3) "for a similar purpose" was made to the Court of Appeal. Such an application would require the Court of Appeal to examine the matter *de novo* without having the benefit of the reasoned grounds of the High Court's judgment.

8.64 Further, O 57 r 3(1) states that an appeal to the Court of Appeal "shall be by way of rehearing and must be brought by notice of appeal in Form 112". As such, the avenue provided for in O 57 r 3(1), *viz*, the notice of appeal, must be the only means of commencing an appeal. If an O 57 r 16(3) application were construed as an appeal, it would be repugnant to the wording of O 57 r 3(1). Accordingly, the Court of Appeal did not have jurisdiction to grant leave under O 57 r 16(3).

Offer to settle

8.65 Order 22A rr 3 and 6(2) of the Rules of Court clearly show that contractual principles governing offer and acceptance are not to be applied to the O 22A regime. In confirming the decision of the High Court in *Ong & Ong Pte Ltd v Fairview Developments Pte Ltd* [2014] 2 SLR 1285, the Court of Appeal (in [2015] 2 SLR 470) considered the distinction between general contractual principles and the rules under O 22A. Under general contractual principles, an offer may be withdrawn before it is accepted. However, under O 22A, the freedom to contract is restricted. The offeror does not have the liberty to withdraw an offer within the time limited for acceptance (where one is specified) without the leave of court. Where no time limit has been specified, the offer to settle cannot be withdrawn within 14 days of being made and, thereafter, the offer may only be withdrawn after at least one day's prior notice is given to the offeree. Furthermore, under general law, an offer lapses once it is rejected, and will not be available for acceptance by the offeree. Yet O 22A r 6(2) provides that, after rejection, the offer still remains on the table and may be accepted by the offeree so long as the offer to settle has not been withdrawn and the court has not disposed of the matter in respect of which the offer to settle was made. These rules clearly modify some of the most basic principles governing the formation of a contract. The court added ([2015] 2 SLR 470 at [47]):

> What these rules encapsulate is a *sui generis* arrangement which departs significantly from the manner in which a contract comes into being under normal contractual principles. The O 22A regime is a regime which seeks to promote certainty and encourage settlement of

> the action between the parties so that they will not face the uncertain costs consequences that litigation entails.

Originals and copies of documents

8.66 In *Mycitydeal* (above, para 8.2), Steven Chong J repeated the principle of ss 66 and 67 of the Evidence Act, which is that documents *must* be proved by primary evidence except where the circumstances in s 67, which permit proof by way of secondary evidence, are applicable. His Honour also pointed out that while the Court of Appeal in *Jet Holding v Cooper Cameron (Singapore)* [2005] 4 SLR(R) 417 did also go on to observe at [50] and [57]–[62] that an "overly punctilious insistence" on compliance with provisions in the Evidence Act for its own sake was "undesirable", and that the "modern approach" in other jurisdictions was generally to admit all evidence and focus on issues of weight instead, these comments were made as a preliminary observation and were not intended to diminish the evidential rule in ss 66 and 67. Chong J also referred (at [57]–[58]) to *State of Meghalaya v Joinmanick Nosmel Giri* (1995) 2 GLR 174 as an illustrative case on the operation of ss 66 and 67 of the Evidence Act.

Pleadings

Amendment of pleadings

8.67 In *Sheagar s/o T M Veloo v Belfield International (Hong Kong) Ltd* [2014] 3 SLR 524 ("*Sheagar*"), the Court of Appeal considered whether it should permit a pleading to be amended so that the appellant could include a defence (that a guarantee was not enforceable under the Business Registration Act (Cap 32, 2004 Rev Ed)). In dismissing the oral application for an amendment, the Court of Appeal pointed out that although a court has a broad power to allow amendments to pleadings at any stage of the proceedings, including on appeal (citing *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 at [6]), it would be exercised where it achieves the aims of justice and does not result in prejudice. As Sundaresh Menon CJ stated (at [117]):

> In deciding whether to allow an amendment, there are two primary considerations which tend to pull in opposite directions. The first is whether the amendment sought would allow the real issues in the proceedings to be determined, thereby ensuring that the ends of substantive justice are met. The second requires that procedural fairness to the opposing party is maintained. Pertinently, in such cases, a just outcome requires that neither consideration be made clearly subordinate to the other.

8.68 Although delay alone would not prevent the amendment being allowed (*Sheagar* at [118]):

> … where such an application is made late in the day, especially after the trial of the matter has been concluded, it will usually be the case that the prejudice to the other party would be greater. This is because he may have been deprived of the opportunity to seek discovery, adduce evidence, or cross-examine, on the unpleaded issues.

It is also necessary for the court to ensure that the party applying to amend his pleading "is not being given a second bite of the cherry: *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [113]": *Sheagar* at [119]. This approach is consistent with the role of an appellate court, which is to correct errors made at first instance and not to permit parties a rehearing of their dispute on new grounds. The appellant's application to amend her pleading was dismissed as the introduction of new critical factual allegations at the stage of the appeal would have caused injustice to the respondent. Moreover, the appellant would have effectively been given a second bite at the cherry by allowing her to raise an entirely new defence. The Court of Appeal also emphasised the importance of the interest of the administration of justice in the expedition and finality of proceedings. If the amendment had been allowed, the introduction of the new facts would have necessitated a retrial.

Condition precedent

8.69 In *Mycitydeal* (above, para 8.2), the High Court agreed with the defendant that it had pleaded non-compliance with a condition precedent in compliance with O 18 r 7(4) of the Rules of Court.

Omission to plead and the effect of non-objection

8.70 The mere fact that a party has not objected to the other party's failure to plead a material allegation does not mean that the latter would be permitted to rely on that allegation at trial or on appeal. Sundaresh Menon CJ stated in *Sheagar* (at [112]): "As a matter of policy, it would be undesirable to treat one party's delay in objecting to a breach of the Rules as an absolute bar to him raising an objection at a later stage." In *Sheagar*, the appellant sought to rely on a defence which had not been pleaded (that a guarantee was not enforceable under the Business Registration Act). The respondent did not object to the failure to plead this defence. In the course of the appeal (before the Court of Appeal), it was pointed out by the court that the appellant was relying on facts which had not been pleaded. The appellant argued that the failure to plead would not prejudice the respondent and that, even so, the latter had waived the right to object to the non-plea. The respondent

contended that it had not been aware of the failure to plead the facts constituting the defence and consequently objected. The appellant also orally applied to amend her pleadings.

8.71 The Court of Appeal ruled that in exercising its discretion in such circumstances, it may take into account all relevant factors including the failure to object (particularly where it indicates a lack of good faith), potential prejudice to the party not in breach and the circumstances of the parties as a whole. As Sundaresh Menon CJ put it (at [113]):

> Put simply, the court's discretion under O 2 r 1 should be exercised in light of all the circumstances of the case. These would include, the prejudice suffered by the party not in default, any delay by the party making an objection and the reasons for that delay.

In the circumstances of the case, the respondent's counsel was entitled to object (not doing so in the High Court) because he was not aware that the facts had not been pleaded. Furthermore, it is possible that the respondent could not object earlier on because the facts had not been referred to. The appellant's application for an amendment was also rejected. In *Sheagar*, the appellant was not entitled to rely on the defence of illegality as it had not been pleaded. Sundaresh Menon CJ stated (at [94]):

> In an adversarial system such as ours, the general rule is that the parties, and for that matter the court, are bound by the pleadings: *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 at 233.

His Honour pointed out that the pleadings serve the important function of upholding the rules of natural justice.

Representation of companies

8.72 In determining whether to grant leave to an officer of a company to represent the latter, the court would take into account various considerations. In *Bulk Trading SA v Pevensey Pte Ltd* [2015] 1 SLR 538 ("*Bulk Trading SA*"), which concerned an application by a company director to represent the first defendant under O 1 r 9(2) of the Rules of Court, the High Court opined that too liberal an approach towards representation by a person other than a lawyer would not be consistent with O 5 r 1(2) and O 12 r 1(2), which are essentially prohibitory in nature. An overly restrictive approach would also be inappropriate given that O 1 r 9(2) "does not appear to be a mere statutory crystallisation of the position which existed in Singapore prior to [the amendments in 2011]": at [78]. In the absence of explicit terms of restriction, the discretion of the court to grant leave under O 1 r 9(2) is not limited to exceptional circumstances. Rather, the court is to

exercise its discretion judicially and according to the requirements of justice: at [80] and [44(c)]. See also *Tanamerah Estates Pty Ltd v Tibra Capital Pty Ltd* (2013) 272 FLR 365 ("*Tanamerah Estates*"), cited with approval by the High Court in *Bulk Trading SA* at [79].

8.73 As for the class of people who might apply to represent a company, the person must be an "officer" of the company which, according to O 1 r 9(6)(*a*), "in relation to a company, means any director or secretary of the company, or a person employed in an executive capacity by the company." In *Bulk Trading SA*, Steven Chong J explained (at [81]):

> This makes it clear that it is not merely any 'officer' of a company, in the loose and ordinary sense of the word, who can be conferred with standing to represent a company. This term has been restrictively defined to encompass only a specific class of persons and it may further be observed from the statutory use of the word 'means' (as opposed to 'includes') that such definition is intended to be exhaustive in nature. Potential applicants should be careful to note this.

8.74 His Honour also admonished that as the term "officer" has been expressly defined by O 1 r 9(6), it would not be appropriate to expand or restrict the permissible class of corporate representatives by reference to foreign statutory provisions which may include different terms. As for the factors which the court is to take into account, there are two policy concerns which operate in tension with each other. The first is to permit self-representation in the interest of access to justice. For example, smaller companies and business entities might not be willing to engage in litigation if they had to incur the expenditure necessary to appoint a lawyer. The countervailing but less important policy is to ensure that the administration of justice is not compromised by allowing legally unqualified individuals to conduct court proceedings in a representative capacity. The following statement of principle by Hallen J in *Tanamerah Estates* at [151] was endorsed in *Bulk Trading SA* (at [86]):

> The court should take into account not just the interests of the party seeking dispensation [that is, the applicant], but also the interests of the other party or parties, as well as the proper and efficient administration of justice.

8.75 The first consideration in determining whether leave ought to be given is that the application complies with the procedure prescribed by O 1 r 9(4). The court must also examine the financial position of the company and its shareholders (in the case of an unincorporated association, its financial position and that of its members). In *Bulk Trading SA*, the High Court concluded that the company had the financial means to engage a solicitor. It also determined (at [98]) that the *bona fides* of the application (a third factor to be considered by the court in determining whether leave is to be granted) was "at the very

least questionable". The High Court rejected the application for leave on the basis of these factors.

8.76 The High Court went on to consider other factors which the court may take into account in future cases. These include the (a) role of the company in the proceedings; (b) structure of the company; (c) complexity of the factual and legal issues; (d) merits of the company's case (it would be necessary for the applicant to satisfy the court that his case is arguable); (e) amount of the claim (to the extent that it is relevant in relation to the role of the company in the proceedings, its financial position and the complexity of the issues); (f) competence and credibility of the proposed representative; and (g) stage at which the application is made (the fact that an action has proceeded to an advanced stage may be a material factor in granting leave if the applicant has become overly burdened by the costs of the litigation).

8.77 The court may impose terms when granting leave on the basis that it has the inherent power to ensure that its orders operate justly in the interest of the administration of justice. In *Bulk Trading SA*, the High Court indicated as much by stating (at [123]) that if the court gives leave, it must take into account "the proper and efficient administration of justice". Terms could include the communication of the personal and professional details of the applicant so that he is always contactable and available for service of court papers, the provision by the applicant of an undertaking to be responsible for costs which might be payable by the company he represents, and the disclosure of his assets in Singapore sufficient to meet any liability for costs. As a provisional measure, the court could limit representation until a certain stage of the proceedings for the purpose of determining whether the applicant is up to the task of representing the company and able to conduct the proceedings effectively. As a matter of principle, the court should be entitled to impose any conditions which it considers to be just in the circumstances of the case, and which would be consistent with the interests of the administration of justice.

Role of executors

8.78 In *ADP v ADT* [2014] 3 SLR 904, an application was made by the executors of an estate under s 56 of the Trustees Act (Cap 337, 2005 Rev Ed) and O 80 of the Rules of Court for directions concerning the distribution of assets. Counsel for the executors faced real difficulties in advising his clients because of the particular circumstances of the case. The court pointed out that while it could determine questions concerning the duties of the executors or the rights and interests of involved persons in the assets, it could not put itself in the role of the executors. However difficult the decision of the executors

regarding the distribution of assets, they only had to act reasonably to avoid liability.

Sealing orders

8.79 If previous related proceedings have been sealed on the application of all the parties, a subsequent proceeding may be sealed in the interest of consistency at the discretion of the court. In *ADP v ADT*, Choo Han Teck J pointed out that the mere fact that a party is "well-known in society and would not want details of the originating summons to be made public" is not generally a sufficient reason: "I am of the view that sealing a court file on account of a party's wealth or fame is unjustifiable. Court proceedings are public proceedings and not secret trials. Court files should only be sealed on deserving grounds such as security, for example, of the State. Embarrassment to the rich and famous alone is not a good reason": at [11] and [12]. His Honour reluctantly granted the application "to respect the decisions by the judges in the previous proceedings": at [12]. The High Court also pointed out that the mere fact that an application is made under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) (as in this case) is not in itself sufficient to justify the sealing of the court file. In its view, where the Act requires anonymity, the solution is to redact the judgment, not to seal the entire file: at [13].

Security for costs

8.80 The "overriding policy consideration" in an application for security for costs is the defendant's entitlement to costs should the plaintiff corporation fail in its claim. Once a court finds that the corporation is impecunious, the court ought to grant security for costs unless there are "special circumstances" indicating the contrary: see *Elbow Holdings Pte Ltd v Marina Bay Sands Pte Ltd* [2014] SGHC 219 ("*Elbow Holdings*") at [13]. The court in *Elbow Holdings* also pointed out, *inter alia*, that although the relative strengths and weaknesses of the parties' respective cases constitute a relevant consideration (see *Creative Elegance (M) Sdn Bhd v Puay Kim Seng* [1999] 1 SLR(R) 112 at [13]), this has no application where it is unclear on the facts which party has the stronger case, as is often the case when the facts are unclear.

8.81 In *Nordic International Ltd v Morten Innhaug* [2014] SGHCR 20 ("*Nordic*"), which involved a derivative action, the defendant applied for security for costs from the plaintiff (a company) on the basis that the plaintiff was a nominal plaintiff. The defendant submitted that as the suit was initiated by the non-party as a derivative action in the plaintiff's name and as the non-party was the main party who had conduct of the

action, the plaintiff should be regarded as a nominal plaintiff. The court concluded that while it is clear that a derivative action is commenced by a shareholder who has conduct of the proceedings, it is the plaintiff company which, if successful, would receive the fruit of the judgment. It followed that the plaintiff was not litigating for the benefit of some other person and, therefore, was not a nominal plaintiff within the meaning of O 23 r 1(1)(*b*) of the Rules of Court: at [28].

8.82 In *Nordic*, the High Court stated (at [10]) that the terms of O 23 r 1(3)(*b*) indicate that this provision "is aimed at non-parties whose only interest in the proceedings is to make a commercial profit, i.e. litigation funders". The learned assistant registrar pointed out that although the non-party in this case had an interest, it was not a litigation funder. Therefore, it was not ordered to provide security for costs. The assistant registrar pointed out that if a non-party is a litigation funder, the court has to consider whether it is just to make an order in the circumstances of the case. For this purpose, it would be appropriate to consider the principles governing the discretion to award costs to non-parties. For the corporate issues which arise where non-parties are the shareholders of a company, see *Raffles Town Club Pte Ltd v Lim Eng Hock Peter* [2011] 1 SLR 582 at [26] and *Nanyang Law LLC v Alphomega Research Group Ltd* [2012] 4 SLR 1153: cited in *Nordic* at [15]–[22]. In the circumstances of *Nordic*, it would not have been just to make the order against the non-party even if it had been a litigation-funder.

Service

8.83 The High Court in *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 reiterated the three major considerations adopted by the Court of Appeal in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 which govern the grant of leave for service out of jurisdiction. First, the claim must come within the scope of one or more of the paragraphs of O 11 r 1 of the Rules of Court. Secondly, the claim must have a sufficient degree of merit. Thirdly, Singapore must be the *forum conveniens*.

8.84 The court then emphasised that, in order for an applicant making an *ex parte* application for leave to serve out of jurisdiction to discharge his duty of full and frank disclosure, he must identify all material facts that may potentially have an impact on the court's decision. In particular, the applicant must state the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents.

8.85 Further, the court highlighted the principle espoused in the English High Court decision of *Network Telecom (Europe) Ltd v*

Telephone Systems International Inc [2004] 1 All ER (Comm) 418; namely, that there is a continuing obligation on an applicant who had been granted leave to serve out of jurisdiction to inform the court of any new circumstances that might have occurred between the time when leave was granted and when process was served.

8.86 *SRS Commerce Ltd v Yuji Imabeppu* [2015] 1 SLR 1 concerned the improper service of a writ in Japan. Under Japanese law, the writ and related documents had to be served through Japan's Ministry of Foreign Affairs and subsequently through court clerks. The documents were not served by an authorised court clerk. Despite this non-compliance, the High Court decided that, as the defendants were aware of the proceedings in Singapore, and the documents had been properly explained to them by their own (previous) lawyers, the impropriety in service did not prejudice the defendants. Accordingly, the High Court allowed the plaintiffs' appeal against the learned assistant registrar's decision to set aside the service.

Stay of proceedings

8.87 In *Ram Parshotam Mittal v Portcullis Trustnet (Singapore) Pte Ltd* [2014] 3 SLR 1337 ("*Ram Parshotam*"), the High Court referred to the Court of Appeal's decision in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 and clarified that there is no need to apply the principles of *forum non conveniens* strictly when deciding whether to grant a limited stay. The High Court held that the court should take a practical and commonsensical approach to deciding whether to grant a limited stay, bearing in mind the non-exhaustive list of factors set out by Lockhart J in the Federal Court of Australia decision of *Sterling Pharmaceuticals Pty Ltd v The Boots Co (Australia) Pty Ltd* (1992) 34 FCR 287 ("*Sterling*"). These factors are (*Ram Parshotam* at [53]):

- Which proceeding was commenced first.
- Whether the termination of one proceeding is likely to have a material effect on the other.
- The public interest.
- The undesirability of two courts competing to see which of them determines common facts first.
- [The] circumstances relating to witnesses.
- Whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted.
- The undesirability of substantial wastage of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues.

- How far advanced the proceedings are in each court.
- [The undesirability of] permitting a multiplicity of proceedings in relation to similar issues.
- Generally balancing the advantages and disadvantages to each party.
- The court cautioned (at [53]), however, that these factors are not to be applied mechanically; the case should not turn on how many of the factors in *Sterling* are present in a 'tick the boxes' approach. Instead, the emphasis should be on a practical approach.

8.88 In *Amoe Pte Ltd v Otto Marine Ltd* [2014] 1 SLR 724 the High Court allowed an appeal against a decision that a notice to produce is a "step in the proceedings" within the meaning of s 6(1) of the Arbitration Act (Cap 10, 2002 Rev Ed). In so holding, the court applied the principle in *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 that a party takes a "step in the proceedings" if by its conduct it evinces an intention to submit to the court's jurisdiction rather than seek recourse by way of arbitration. This is a question that must be determined in a practical and commonsensical way, in light of the circumstances surrounding the act.

8.89 Counsel for the plaintiff argued that filing a notice to produce was equivalent to requiring disclosure of documents, which should be deemed a significant act amounting to a step in the proceedings. The court disagreed with this submission. The court found that the defendant had filed the notice to produce before pleadings had closed, with the intention of ascertaining the nature of the claim in order that the defendant might consider whether arbitration was an option. As such, the court held that this act by itself did not amount to a submission to jurisdiction. It was therefore not a step in the proceedings, even without an express reservation of the right to seek a stay. As a result, the court ordered a stay of proceedings in favour of arbitration.

Striking out

8.90 In *Tey Tsun Hang v Attorney-General* [2015] 1 SLR 856 ("*Tey Tsun Hang*"), the High Court heard cross applications for (a) striking out; and (b) leave to apply for judicial review, on the basis that there was an overlap between the two applications: the former seeks to weed out cases that are legally or factually unsustainable or are improper uses of the court's machinery, whilst the latter serves to sieve out hopeless or frivolous public law claims. Both are concerned with preventing wastage of judicial time and resources.

8.91 Whilst emphasising that the threshold for striking out is high, and that the mere fact that a case is weak is no ground for striking it out, the court decided to strike out the applicant's originating summons as an abuse of the court's process. The court found the following guidelines useful in identifying what constitutes an abuse of process: first, proceedings are an abuse of process when they are manifestly groundless or without foundation or serve no useful purpose: *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [34]. Secondly, judicial review proceedings will be an abuse of process if they are allowed to supplant the normal statutory appeal procedure: *In re Preston* [1985] 1 AC 835 at 862. Thirdly, a delay in bringing proceedings may constitute an abuse of process: *Chua Choon Lim Robert v MN Swani* [2000] 2 SLR(R) 589 at [42], citing *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398.

8.92 In *Tey Tsun Hang*, the court reasoned that s 39A of the Immigration Act (Cap 133, 2008 Rev Ed) operated to oust the court's jurisdiction in considering the matters brought by the applicant. The court also found that the applicant had delayed in filing his application, failed to exhaust alternative remedies by neglecting to appeal to the Minister, and attempted to circumvent the appellate process prescribed by statute. The court found these to be relevant factors in its decision to strike out the applicant's originating summons as an abuse of process.

8.93 *Chandra Winata Lie v Citibank NA* [2015] 1 SLR 875 is another case which explored what amounts to an abuse of process. The court held that it is an abuse of process for a plaintiff to commence suit when he cannot plead, particularise and point to proof of the essential elements of his cause of action. This is so even if he does not know those elements and has never known them, or had once known the essential elements but can no longer recall them. The court further held that the rules of pleadings set a high bar for the plaintiff to plead, particularise and point to the necessary proof from the very outset of his suit. This serves three essential purposes: first, to deter speculative litigation and to suppress litigiousness; secondly, to prevent a plaintiff from circumventing the allocation of the burden of proof by pleading allegations which cannot be falsified; and thirdly, to require a plaintiff to state his case by a series of falsifiable assertions of essential fact so as to ensure he has an incentive to take the necessary care to be accurate in his assertions.

8.94 The court further held that a plaintiff may defend a striking-out application in three ways: first, by demonstrating that he has pleaded every essential element of a known cause of action; secondly, by showing that he has furnished sufficient particulars for the defendant to have reasonable notice of the case he has to meet and not thereby to be

embarrassed at trial; and thirdly, by pointing to proof for each element of his cause of action.

8.95 The proof which the plaintiff points to in a striking out application can be nothing more than his own uncorroborated and self-serving testimony as to facts within his personal knowledge. Whether it is sufficient evidence for the plaintiff to ultimately succeed is a matter to be determined at trial after weighing all the evidence, but a plaintiff cannot get past the striking-out stage if either (a) he fails properly to plead a cause of action; or (b) the proof he points to in support of an essential element of his cause of action has no rational connection to it.

8.96 In accordance with the preceding principles, the court held that the plaintiff's pleading was defective for (a) failing to set out the essential element in his cause of action (that is, that the plaintiff had not authorised the defendant to enter into the transactions in question); and (b) relying on a total *non sequitur*. The plaintiff had asserted that the court could infer from three sets of surrounding circumstances that he had not authorised the transactions in question. However, the court ruled that these surrounding circumstances could not have any rational connection to the issue of authority, and hence granted the striking out.

Summary judgment

Burden of proof

8.97 In *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] 2 SLR 1342 ("*Ritzland*"), Vinodh Coomaraswamy J considered the operation of the burden of proof by stating (at [45]) that:

> … the burden which shifts to the defendant upon a *prima facie* case being shown is the burden on the application or a tactical burden, not the legal or even an evidential burden of proof. It would be anomalous for a defendant to bear the legal burden of proof on a summary judgment application when at trial, that burden explicitly rests on the plaintiff. And the fact that it is for the plaintiff first to show a *prima facie* case *with knowledge of and in light of the defences raised* makes clear that no evidential burden rests on the defendant. It is no part of the policy underlying summary judgment to reverse a plaintiff's burden of proof. [emphasis in original]

The court grants summary judgment "if the plaintiff shows after all the evidence is in that there is no fair or reasonable probability that the defendant has a real or *bona fide* defence and (only if the defendant raises this point) that there is no other reason why there ought to be a trial": at [47]. The observations in *Ritzland* do not change the law but

merely seek to characterise the nature of the burden of proof involved in an application for summary judgment. The burden is referred to in *Ritzland* as the "tactical burden" because the defendant must, as a matter of strategy or "tactics", "show cause against the plantiff's application" (as it is put by O 14 r 3(1) of the Rules of Court) in order to avoid judgment. *Ritzland* was referred to in *M2B World Asia Pacific Pte Ltd v Matsumura Akihiko* [2015] 1 SLR 325 at [17]–[18] ("*M2B*").

Equitable set-off

8.98 It is well established that the defence of equitable set-off may be expressly excluded by contract. This principle was reconfirmed in *Terrestrial Pte Ltd v Allgo Marine Pte Ltd* [2014] 1 SLR 985 ("*Terrestrial*"). *Terrestrial* also stands for the proposition that it is sufficient if the contract includes clear words which expressly or impliedly exclude the right of set-off. Furthermore, s 4(13) of the Civil Law Act (Cap 43, 1999 Rev Ed) (which addresses the relationship between the rules of common law and equity) does not prohibit the contractual exclusion of the defence of equitable set-off. For another case in which the principles of equitable set-off were considered, see *Australian and New Zealand Banking Group Ltd v Joseph Shihara* [2015] 1 SLR 625.

Oral contract

8.99 Although it may be more difficult to obtain summary judgment in relation to an oral contract (because of the absence of written evidence), such an application is within the scope of O 14 of the Rules of Court. In *M2B*, Judith Prakash J cited *Merchantbridge and Co Ltd v Safron General Partner I Ltd* [2005] EWCA Civ 158 and *ED & F Man Commodity Advisers Ltd v Fluxo-Crane Overseas Ltd* [2009] EWCA Civ 406, concluding that "the court should generally not grant summary judgment where an oral contract is sued on and the terms thereof or the contract's very existence is disputed. However, the court is not precluded from doing so in an appropriate case": *M2B* at [24]. Summary judgment may be granted where the plaintiff can satisfy the court that (a) even on the defendant's version, he is entitled to judgment; or (b) the defendant's version is not truthful or capable of belief.

Whether unpleaded defence may be considered in summary judgment proceedings

8.100 In *Olivine Capital Pte Ltd v Chia Chin Yan* [2014] 2 SLR 1371, the Court of Appeal resolved pre-existing uncertainty concerning the effect of new defences raised in proceedings under O 14 of the Rules of Court. It concluded that a fresh defence that has not been pleaded

cannot be relied on by the defendant in O 14 proceedings *unless* the defence is amended *or* the case is an exceptional one in which the court is of the view that there are good reasons to permit reliance on such a fresh defence, for example, where "the fresh defence strikes at the heart of the court's powers": at [43]. If the defendant is not bound by his pleadings in proceedings under O 14, it could lead to the irrational situation of a defendant successfully challenging the application for summary judgment on the basis of an unpleaded defence. The Court of Appeal explained (at [41]):

> If an amendment to the defence was subsequently disallowed, the defendant would not be able to rely on it, with *the* paradoxical result that he would have no arguable defence and that summary judgment should have been entered in the plaintiff's favour in the first place. This would undermine the *raison d'être* of O 14, which was precisely the expeditious resolution of cases which did not require a full-blown trial.

Time of commencement of action against party joined in the proceedings

8.101 Prior to the recent amendment of O 15 r 8(1) of the Rules of Court by the Rules of Court (Amendment No 6) Rules (S 850/2014) ("the rule amendments"), there was uncertainty concerning the time when a person added as a defendant to a pending action was regarded as having been proceeded against for the purpose of the limitation period. In *Management Corporation Strata Title Plan No 2827 v GBI Realty Pte Ltd* [2014] 3 SLR 229, which was decided prior to the rule amendments, Woo Bih Li J endorsed the views of Lord Denning in *Seabridge v H Cox & Sons (Plant Hire) Ltd* [1968] 2 QB 46 to the effect that the person added as a defendant should be treated as having been proceeded against when the amendment to the writ takes effect. This is now the position under O 15 r 8(1)(*c*).

Warrant to act

8.102 The issue of a request for a warrant to act arose in *Goh Eileen née Chia v Goh Mei Ling Yvonne* [2014] SGHC 3. On the penultimate day of the trial, upon certain answers being given by a witness under cross-examination, the defendants' counsel requested the plaintiffs' counsel to produce warrants to act. The request was rejected by the plaintiffs' counsel. On the authority of *Tung Hui Mannequin Industries v Tenet Insurance* [2005] 3 SLR(R) 184 – that a lawyer who receives a request to disclose his warrant to act should do so as a matter of course – the High Court ordered the production of the warrants to act. A single warrant was then produced but it had been signed by a non-party. There

were no warrants to act signed by the actual plaintiffs. The court permitted "a redacted form of the warrant to act" to be admitted into evidence: *Goh Eileen née Chia v Goh Mei Ling Yvonne* at [4].